

## Transcript of the Sheku Bayoh Inquiry

Tuesday, 30 April 2024

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(10.04 am)

LORD BRACADALE: Good morning, Mr Wolffe.

A. Good morning.

LORD BRACADALE: Before your evidence begins, may I remind you that the terms of reference of the Inquiry exclude the prosecutorial decision and review and at the beginning of this hearing, I set out my interpretation of how the Inquiry should approach that exclusion. The Inquiry will not examine your prosecutorial decision and reasoning, the prosecutorial decision and reasoning of Crown Counsel, and the recommendations and advice given by the Procurator Fiscal in reporting the case to Crown Counsel. In addition, the Inquiry will not examine in detail which particular potential crimes you, Crown Counsel and members of the Crown Office and Procurator Fiscal Service considered could be relevant.

Subject to these exclusions, the Inquiry will examine the post-incident management process and investigation conducted by the crown. As the vehicle for the crown's investigation was a criminal precognition, that examination will include the work carried out in preparation of the precognition.

So perhaps you could bear that approach in mind as you give your evidence.

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1 THE WITNESS: Yes, thank you.

2 LORD BRACADALE: Would you now take the oath.

3 THE WITNESS: May I affirm?

4 LORD BRACADALE: Certainly.

5 FORMER LORD ADVOCATE JAMES WOLFFE KC (affirmed)

6 Examination-in-chief by MS GRAHAME

7 LORD BRACADALE: Ms Grahame.

8 MS GRAHAME: Good morning.

9 A. Good morning.

10 Q. You are James Wolffe?

11 A. I am.

12 Q. And what age are you? That wasn't designed to be a  
13 trick question.

14 A. Sorry. Born in December 1962 so 61.

15 Q. Thank you. You are a barrister?

16 A. Yes.

17 Q. You're a member of faculty and you're Kings Counsel?

18 A. I am.

19 Q. And you were Lord Advocate from June 2016 to June 2021?

20 A. I was.

21 Q. So a period of around five years?

22 A. Yes.

23 Q. And in that capacity you were involved with the  
24 investigation into the death of Mr Sheku Bayoh and you  
25 had involvement with the family of Mr Bayoh?

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- 1 A. Indeed.
- 2 Q. Have you had any opportunity to watch any of the  
3 evidence that we've taken?
- 4 A. I'm afraid I haven't. I've had a chance to look briefly  
5 a lot some of the transcripts, but not to actually  
6 observe the proceedings.
- 7 Q. Thank you. Well, I only ask because there is a blue  
8 folder sitting in front of you on the desk which will  
9 contain a hard copy of your statement.
- 10 A. Thank you.
- 11 Q. And, please feel free to use that or refer to it at any  
12 time. Some people do prefer a hard copy.
- 13 Now, as I go through some of the questions today,  
14 there will also be perhaps paragraphs put up on the  
15 screen in front of you. If you're happy to simply use  
16 those, we'll proceed that way, but at anytime if you  
17 wish, please use the hard copy.
- 18 A. Thank you.
- 19 Q. And if there's a section in your statement that you  
20 would like to refer to which I've not got on the screen,  
21 please let me know and we'll arrange to have that put  
22 on.
- 23 A. Thank you.
- 24 Q. Equally, occasionally witnesses may recall a document  
25 that they would find helpful and if you let me know, we

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1           can look for that over the break if we don't have it on  
2           the list for today.

3           A. Thank you.

4           Q. Let's look at the first document which is SBPI 00438.

5           Now, you were sent a request by the Inquiry team called  
6           a Rule 8 request to -- with a series of questions which  
7           you were asked to consider and reply to.

8           A. Yes.

9           Q. And this is the document we see on the screen. It was  
10          sent to you in January of this year and as we move down  
11          the page we will see that a series of questions appear.  
12          That's the covering letter and then there's the  
13          questions start with your role and experience.

14          A. Yes.

15          Q. And in response to that, you prepared a response to that  
16          Rule 8 request which is SBPI 00529. Do you see that on  
17          the screen? That is your response to the request from  
18          the Inquiry team.

19          A. It is.

20          Q. I will probably refer to that as your statement, if I  
21          may. And this -- if we look at the final page, first of  
22          all, we'll see it's dated 14 April 2024 and it's 66  
23          pages long and the last paragraph that we see on the  
24          screen is 157. It reads:

25                 "I believe the facts stated in this witness

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1 statement are true. I understand that this statement  
2 may form part of the evidence before the Inquiry and be  
3 published on the Inquiry's website."

4 And you understood that to be the case?

5 A. I did, yes.

6 Q. And you signed your statement?

7 A. I did.

8 Q. Thank you. We don't have your signature on the screen.  
9 And were you doing your best in the statement to give a  
10 true and accurate account of your recollections of the  
11 events?

12 A. I was and, sorry, I should just be clear, I signed it in  
13 just by typing my name because of the logistics of  
14 returning the statement.

15 Q. That's fine, thank you. But that was appended as your  
16 signature in any event?

17 A. Indeed, absolutely.

18 Q. Thank you. Can we talk about your role for a moment as  
19 Lord Advocate. You became Lord Advocate on 1 June 2016  
20 and that was we've heard shortly prior to the final PIRC  
21 report being received by Crown Office in relation to  
22 Mr Bayoh's death?

23 A. Yes.

24 Q. We've heard that that arrived in Crown Office in around  
25 August 2016?

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1 A. Yes.

2 Q. You were asked some questions about whether there was  
3 some sort of handover from the previous Lord Advocate  
4 and I would like to begin with that.

5 Could we look at your statement and look at  
6 paragraph 22, please. And you explain that you were  
7 responsible for the investigation into Mr Bayoh's death  
8 in terms of your role as Lord Advocate. You say:

9 "I did not receive any briefing or induction on this  
10 or any other matter from the previous Lord Advocate,  
11 such as a handover on the appointment of a new  
12 Lord Advocate from the previous incumbent would not  
13 I believe be usual."

14 You then mention this earliest involvement you had.  
15 You mention an email from PC Paton's wife. You mention  
16 your weekly law officers' briefing, and you mention  
17 maybe an oral briefing from senior staff. So you became  
18 aware of the investigation into the death of Mr Bayoh  
19 through those means, through that contact?

20 A. As far as I recall, I mean I think I was probably aware  
21 of the case simply from the fact that it had been in the  
22 media at some point previously. On taking office, those  
23 are the -- as far as I can now remember, so far as I  
24 have been able to identify from the documents that the  
25 Inquiry has given me, the introduction that I had to the

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1 case.

2 Q. Thank you. We have an Inquiry statement from  
3 Frank Mulholland who was the Lord Advocate prior to you  
4 taking on the role.

5 A. Yes.

6 Q. And he has indicated, and we don't need this on the  
7 screen, but it is SBPI 00466124:

8 "I spoke to James Wolffe by telephone and reiterated  
9 the importance of this Inquiry, including the need to  
10 maintain good and regular liaison with the family."

11 Do you remember having a conversation with  
12 Frank Mulholland in connection with the family of  
13 Mr Bayoh?

14 A. I'm afraid I have no memory of that, but if he says it  
15 happened, then I have no reason to contradict that.  
16 It's fair to say my, as it were, active memory is -- of  
17 the events is limited and I have relied to quite a large  
18 extent on documents, so I absolutely wouldn't dispute  
19 his evidence.

20 Q. Thank you. Can we look at some comments you make in  
21 your statement, let's start with 153, because I think  
22 it's fair to say that you've reflected on the issue of a  
23 handover or the lack of a handover and you had some  
24 thoughts that you wished to share with the Chair, so  
25 let's begin with 153. You say:

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1           "With hindsight and with the benefit of the  
2           reflection which responding to the Inquiry's questions  
3           has provoked, it seems to me that it would have been  
4           helpful if at the outset I had been given or had  
5           proactively asked for a full, clear and detailed written  
6           briefing setting out in particular the way that my  
7           predecessor had approached the case, identifying any  
8           commitments which he had given, any understandings and  
9           expectations to which his approach had given rise, and  
10          any other relevant considerations, with a view to  
11          formatting a strategy for this case going forward.  
12          Whilst I of course inherited responsibility for very  
13          many significant cases, and it would likely have been  
14          impractical to expect briefing of this sort for all such  
15          cases, the previous level of law officer involvement in  
16          this case, as well as the substantive considerations  
17          which had prompted that law officer involvement, would  
18          have justified treating this case differently."

19                I'm interested in your reflections here on what the  
20                important factors were and why you think this case  
21                should have been treated differently, was it just simply  
22                the law officer involvement?

23          A. Well, I suppose it's, as I say there, the underlying  
24          substantive features of the case which had led to my  
25          predecessor's involvement in the case. That included



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1 the -- well, first of all, we have an individual who  
2 died in contact with the police; secondly, there was the  
3 issue of race which was an aspect of this case, and  
4 thirdly, there was, as I understood it and I think I did  
5 understand this at the time, that the family had been  
6 bad -- if I put it this way, not well treated at the  
7 outset of events immediately after the death of their  
8 loved one and my understanding was that that was --  
9 these were part of the considerations that had led my  
10 predecessor to take quite an active role at an early  
11 stage.

12 I can't now recall precisely what I knew about that  
13 role and that's part of what's invited this or led me,  
14 you know, inevitably one reflects back on events and  
15 goes through the material, something which could have  
16 made a difference to the way the case would have been  
17 handled thereafter.

18 Q. And so you've said a full, clear and detailed written  
19 briefing setting out your predecessor's approach would  
20 have been assistance to you in developing a strategy, as  
21 you say, for the case going forward?

22 A. Yes, it would have highlighted this case because, as I  
23 say in that paragraph, when I took up the role, of  
24 course I inherited responsibility for a large number of  
25 cases. I took on responsibility for a wide range of

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1 functions. There were many issues, many cases, that  
2 were clamouring for attention and I think the reality  
3 was that at the outset one is reacting to the material  
4 that's brought to one in terms of the focus that one is  
5 bringing to any particular -- particular issue and I  
6 suppose one of the benefits of our written briefing in  
7 the context of the role that I had was that, you know, a  
8 written briefing would in a sense focus one's attention,  
9 require one's attention to a particular case or issue or  
10 matter and would call for a response and, you know, the  
11 practical reality of the role was that on any given day  
12 I might be receiving, you know, a box or more of written  
13 briefings on a variety of different issues, all of which  
14 would require our response. Had there been such a  
15 briefing, it would have called for a response,  
16 consideration and potentially thinking in a more  
17 considered way from the outset how matters should be  
18 taken forward.

19 Q. And you indicate that your predecessor's approach --  
20 identifying any commitments at which he had given. Why  
21 do you specifically mention that? Were there issues  
22 that arose?

23 A. Well, as it became evident and as -- well, it's evident  
24 from the material I reviewed for the purpose of  
25 preparing the statement that there were -- my

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1 predecessor's involvement with the case had given rise  
2 to expectations and certain commitments. There was the  
3 issue of an inquiry and how that interacted with any  
4 question of criminal prosecution and there was the  
5 question of disclosure of material to the -- to Mr Anwar  
6 as the solicitor for the family and there were also  
7 questions of expectation in terms of the role of the  
8 incumbent in the office.

9 Q. Because you've said this type of handover would have  
10 been of benefit, looking back now, in the absence of  
11 having that full detailed written briefing, do you --  
12 having reflected on how it was handled at the time, do  
13 you have any comments that you would wish to make?

14 A. Well, I suppose I'm looking at it very much from the  
15 role that I had in the process and I think, you know,  
16 looking -- looking at the materials I had to prepare the  
17 statement, I was reacting to particular issues as they  
18 were brought to my attention. I was dealing with the  
19 matters that, as it were, came up to my office, came  
20 across my desk and, you know, as I say, I think there  
21 was perhaps a missed opportunity to from the outset  
22 thought about how the case should be managed going  
23 forward. I relied very heavily on the experienced  
24 people around me.

25 Q. Thank you. Can we also look at paragraph 154:

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1           "Such a briefing would have been valuable not simply  
2           from the point of view of ensuring a consistency of  
3           approach. It could well have prompted a planned  
4           approach to communications with Mr Bayoh's family and  
5           their solicitor, which would have identified in advance  
6           the different levels of meeting and correspondence which  
7           might be appropriate and the point or points at which,  
8           or the issues upon which, it would be appropriate for  
9           law officers to become personally involved."

10           And you've mentioned consistency there, was there a  
11           concern looking back that you were not dealing with the  
12           family in a consistent way?

13           A. Well, I think certainly as I reviewed this that a strong  
14           sense that I was approaching it in perhaps a different  
15           way from the way that my predecessor had done in  
16           relation to the active involvement of myself.

17           Q. Did you have --

18           A. And perhaps a sense, and I can't now say to what extent  
19           this was a sense I had at the time or to what extent I'm  
20           drawing it from the material, but I suspect I probably  
21           had a sense of it at the time, was, you know, that I was  
22           approaching the role in perhaps a slightly different way  
23           from the way that my predecessor had done.

24           Q. Right. Were you aware of issues with communication  
25           between the family and yourself? You've talked there

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1           about a briefing would have prompted a planned approach  
2           to communications?

3           A. Yes, I mean I -- I, you know, once I was, as it were,  
4           sighted on the case, I was expecting that there would be  
5           a meeting with the family at an appropriate stage.  
6           I had a letter from Mr Anwar inviting such a meeting.  
7           I was very happy to have such a meeting. I think I was  
8           actually interested in look at the documents to see  
9           there were discussions between Lindsey Miller and  
10          Mr Anwar about when it would be, you know, appropriate  
11          for me to have a meeting with the family. I -- and I  
12          suppose thereafter, you know, the communications were by  
13          way of correspondence with Mr Anwar.

14                 Reflecting back, there might have been a benefit in  
15          being more proactive in terms of thinking through the  
16          way in which communications should be handled and also  
17          looking forward to the arrival of the PIRC report, the  
18          crown investigation, and, you know, the different roles  
19          that people would have in the context of that  
20          investigation and how one should -- one might think  
21          through communication and family liaison with, you know,  
22          bearing that in mind.

23          Q. You go on in your statement where we left off "Had the  
24          crown done this", so you do make a suggestion:

25                         "Had the crown done this, it would have enabled a

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1           much more substantive initial meeting, perhaps at an  
2           earlier stage, directed to finding out before the  
3           strategy was finalised what interaction with that  
4           process within the necessary institutional constraints  
5           Mr Bayoh's family would find valuable and supportive and  
6           ensuring that arrangements were put in place for  
7           consistent liaison at the right level and at the  
8           appropriate points in the process."

9           And so are these your views about how improvements  
10          could have been made had that initial briefing been  
11          provided?

12         A.   Indeed, indeed.

13         Q.   Thank you.  And do you think the suggestions you've made  
14          here would have got your relationship and the  
15          communication with the family on the right footing from  
16          the beginning?

17         A.   Well, I would like to think so.  As I say, I have tried  
18          to reflect back on, you know, what I think perhaps was  
19          an opportunity missed to -- in relation to this case to  
20          take a more considered approach from a much earlier  
21          stage.

22          I suspect we may come on to it, but the first  
23          meeting with the family was a very high level meeting in  
24          a sense from my perspective in the sense that my  
25          understanding was that it was a meeting to in effect

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1           introduce me to the family, to add my own commitment to  
2           a thorough investigation to that which they had already  
3           received, but on the eve of that meeting I received a  
4           very lengthy, very detailed letter from Mr Anwar raising  
5           a whole host of specific issues which clearly couldn't  
6           be dealt with within the framework of that meeting. I  
7           think there would have been an advantage in perhaps  
8           having had a more -- having considered more fully in  
9           advance at an earlier stage just how the crown should  
10          proactively be seeking to find out what would be most  
11          supportive to the bereaved family.

12         Q.   And had arrangements been put in place to plan that  
13          meeting perhaps in a more structured manner at that --  
14          in that framework, would you have been willing to  
15          address some of these issues that were raised by  
16          Mr Anwar?

17         A.   Well, there may still have been an issue about timing,  
18          but I suspect thinking more -- yes, thinking more  
19          positively about things like the structure of the crown  
20          investigation going forward, the -- perhaps setting up  
21          another meeting to address some of the issues that had  
22          been raised. You know there are different -- you know  
23          with hindsight, there are no doubt different ways in  
24          which one could have been more, you know, taken a more  
25          structured approach to it than with hindsight I think

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1           was taken.

2           Q. Was there an agenda for that meeting? Was there any  
3           sort of structure imposed on that meeting?

4           A. So far as I can -- I mean I should say my active  
5           recollection of the meeting is very limited so, you  
6           know, I'm afraid -- but from the documents and so far as  
7           the documents go, it would be consistent with what I --  
8           such recollections I have the purpose was in effect an  
9           introduction to Mr Bayoh's family and an opportunity to  
10          give them an assurance that I was committed to a  
11          thorough investigation of the facts and circumstances in  
12          which Mr Bayoh had died. So that was really the -- that  
13          was the purpose of the meeting as it had I think been  
14          initially envisaged and as the briefing that I was  
15          provided with advised me that was what was expected and  
16          appropriate.

17          Q. So you envisaged the meeting would be an initial  
18          meeting, an introduction to the family, you were new to  
19          the role of Lord Advocate and reassurance being given,  
20          but the evening before the family had through their  
21          solicitor provided a list of issues so perhaps there was  
22          a mismatch between expectations there between you and  
23          the family?

24          A. There may have been I mean and I can't remember how I  
25          dealt with the list of issues. I suspect that -- but



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1           this is not on the basis of any recollection, I suspect  
2           I had to be clear that those, you know, that I couldn't  
3           respond to the detail of the issues that had been raised  
4           and that there would be correspondence subsequently.

5           Q.   Would you have been in a position at that first meeting  
6           to respond to detailed questions or issues that were  
7           raised from your own knowledge of the case at that time?

8           A.   Probably not.  You I think -- again, I'm afraid I can't  
9           now reconstruct precisely what I knew at different  
10          points of time, but, you know, my role, my  
11          responsibility as head of the system of prosecution and  
12          investigation of deaths was to put in place arrangements  
13          that would secure a thorough investigation, first of  
14          all, with a view to addressing whether or not there  
15          should be a criminal prosecution and, secondly, to an  
16          investigation more broadly into the circumstances, if  
17          that was required, and I approached -- I suppose I  
18          approached my role generally as head of a system where I  
19          was responsible for a very large number of cases, many  
20          of them significant cases in for different reasons, and  
21          where, you know, I was, you know, my fundamental  
22          responsibility was to have the arrangements in place  
23          that would -- would secure the investigation that was  
24          required in each of these cases and of course very  
25          particularly in this case.

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1 Q. So was there -- from your recollection was there an  
2 approach agreed at that meeting whereby others would go  
3 and seek out the information that the family were  
4 interested in?

5 A. I don't remember whether there was any discussion or  
6 agreement at the meeting about how matters would unfold  
7 I'm afraid. Looking at the documentation, it looks to  
8 me as though what happened was that, as would be  
9 entirely usual with correspondence that came in to my  
10 office, that the letter was passed by my private office  
11 to the staff directly involved in the case, in this case  
12 Mr Brown, and he was asked to provide briefing and a  
13 draft response and that was an entirely, you know,  
14 normal approach to the way in which correspondence that  
15 came into my office would be dealt with.

16 Q. And we've heard that the head of CAAPD at that time was  
17 Les Brown?

18 A. Yes.

19 Q. Is that who you're referring to?

20 A. That's right.

21 Q. Can we look at the next paragraph, 155. You mentioned  
22 earlier the issue of disclosure and I think you  
23 addressed this here:

24 "Such a briefing could well also have prompted  
25 proactive consideration of the question of disclosure in

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1 light of the previous decisions. I remain of the view  
2 that the crown is entitled to decline to disclose  
3 material where such disclosure poses a risk of prejudice  
4 to criminal proceedings, but the issue of how to balance  
5 that with the understanding or commitments which had  
6 already been given in this case would have been grappled  
7 with proactively and the approach which would be taken  
8 going forward could have been addressed directly at an  
9 initial meeting."

10 I'm interested in this reference here to balancing.  
11 To what extent was this a balancing or would it have  
12 been a balancing exercise if you had that briefing?

13 A. Well, the starting -- I suppose the starting question is  
14 what is the substantive requirement in relation to  
15 disclosure and, as it were, what's the margin for  
16 questions of judgment. I took the view and this was an  
17 issue which did come in a sense to me to take the view  
18 on, I took the view that the Article 2 obligations on  
19 the crown in relation to participation of the victim's  
20 family, the deceased's family, did not oblige the crown  
21 to disclose in the context of a criminal investigation  
22 the -- as it were, the ongoing investigative work that,  
23 at least where such disclosure could pose a risk of  
24 prejudice to any possible criminal proceedings, that was  
25 a view I took as a matter of substance.

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1           I was made aware in I think -- I think pretty  
2           general terms, I was aware that my predecessor had  
3           approved the disclosure of certain materials at an  
4           earlier stage. I had to take a decision on the issue as  
5           it came across my desk under my incumbency and to do  
6           what I thought was the right thing in my tenure.

7           Having taken that decision, of course at a later  
8           point a question arose as to whether there were  
9           documents that were encompassed within the understanding  
10          or commitment that had been given by my predecessor that  
11          had not in fact been disclosed at the time and whether  
12          those should now be disclosed. And so having taken the  
13          view I had in relation to the crown's obligation in  
14          relation to its investigation, I then had to consider  
15          advice in relation to certain materials that were  
16          encompassed, as I understood it, within that earlier  
17          understanding.

18          Now, looking at that sequence with the benefit of  
19          hindsight, it would have been far better had I right at  
20          the outset had and indeed, you know, asked for clear  
21          briefing about what had been committed to, what  
22          understanding had been given, and that that issue -- and  
23          also I suppose that faced up with the question of what  
24          are we going to do forward ahead of the question being  
25          put on my desk by the letter from Mr Anwar and that

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1           would have enabled, you know, the issue to have been  
2           addressed proactively, perhaps at an earlier stage,  
3           whether at an introductory meeting or thereafter.

4           I'm very conscious with hindsight, you know, while  
5           one is imposing on oneself and on a system potentially a  
6           level of expectation which, you know, may not be right,  
7           but I think it is right but that's one of the purposes  
8           an inquiry such as this is to -- for individuals and  
9           institutions to reflect on how they have dealt with  
10          certain issues and whether there are things that could  
11          have made a difference in terms of improving the way in  
12          which things were dealt with.

13         Q. Thank you. So in relation to this change from  
14          Frank Mulholland to yourself, one Lord Advocate to  
15          another, you've talked about previous commitments being  
16          made by Frank Mulholland to the family in relation to  
17          disclosure and then you took a decision on disclosure  
18          when you were Lord Advocate in relation to whether  
19          disclosure should be given primarily to the family?

20         A. Yes.

21         Q. And those were different approaches?

22         A. Yes, I should say I'm not sure if I was -- I'm not --  
23          first of all, I'm not sure whether what had been given  
24          was, you know -- and Mr Brown's minute in October,  
25          I think it was October 2017, is a bit equivocal about

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1           whether we're talking about a commitment or an  
2           understanding and I'm not sure what I understood about  
3           that when I made the decision in I think it was March or  
4           February so, you know, I think --

5           Q. I was going to ask you, when you made your decision in  
6           relation to disclosure to the family, were you aware at  
7           that time that there had been previous commitments or  
8           previous undertakings or previous assurances given to  
9           the family about disclosure?

10          A. I'm not sure that I was -- if I was aware of that.  
11          I think I was probably aware that material had been made  
12          available to them and that in -- to that extent I was  
13          taking a different approach, but I'm not sure if I was  
14          aware that or of in effect how that previous disclosure  
15          should be characterised in terms of any sort of ongoing  
16          expectation --

17          Q. And were you aware of any expectations that the family  
18          may have had that disclosure would continue and be  
19          ongoing?

20          A. I suppose if I, you know, looking to -- looking at  
21          Mr Anwar's letter that perhaps reflects an assumption  
22          perhaps that there would be further disclosure.

23          Q. Right. But your view was that there should not be at  
24          that stage?

25          A. Well, I took -- I took the view that I had a -- my

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1           overriding responsibility was to, first of all, have an  
2           independent thorough investigation and in the context  
3           where as I understood it it was a -- at that stage an  
4           investigation into potential criminality, that nothing  
5           should be done that could prejudice any future criminal  
6           proceedings. It would neither serve the public interest  
7           nor the interest of Mr Bayoh's family if things were to  
8           be done in that context and there were to be a  
9           prosecution and there were then to be problems as a  
10          result of disclosure and so that was the primary driver.

11           I think I was probably also alive to the  
12          consideration that, you know, anything done in one case  
13          in a sense has to be capable of being generalised and,  
14          you know, we don't have a system of criminal  
15          investigation and prosecution where the crown discloses  
16          its investigation as it's ongoing and I suspect I had a  
17          question in my mind as to what, you know, looking beyond  
18          this case, you know, what the implications would be if  
19          one were to accept that the level of principle that  
20          there was an obligation of disclosure or even that the  
21          crown should disclose or however one might characterise  
22          it in the context of a crown investigation of a  
23          potential criminal case.

24           Bearing in mind that, you know, we're thinking about  
25          an investigative obligation that applies in Article 2

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1 cases, potentially Article 3 cases, you know, one has to  
2 be alive to the, as it were, systemic consequences of  
3 any individual decision.

4 Q. Were you concerned to some extent that allowing  
5 disclosure to the family of Mr Bayoh that that may open  
6 the floodgates to other demands and requests by victims  
7 or families for disclosure during the period of a  
8 criminal investigation?

9 A. Yes. Yes, I wouldn't put it in terms of floodgates,  
10 it's more the level of principle that the crown, as I  
11 viewed it and it may be one of the issues that  
12 the Inquiry -- this Inquiry will want to consider, you  
13 know, the crown has an obligation, responsibility, to  
14 investigate potential criminality, unexpected sudden  
15 deaths, to investigate those independently in the public  
16 interest and in a context where there is a potential for  
17 criminal proceedings, the crown has to be exceptionally  
18 careful not to do anything that could possibly prejudice  
19 future criminal proceedings and, at least historically,  
20 that's involved a high level of care about what the  
21 crown reveals or discloses while those investigations  
22 are ongoing.

23 And as I say, I wouldn't put it in terms of  
24 floodgates, it's more in terms of principle that if, you  
25 know, if one -- I was I suspect very conscious as head



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1 of a system that if you take a decision in one case,  
2 that has to be a decision you would be prepared to take  
3 in another case and that if we were to shift to a system  
4 of a great much more open disclosure of the crown  
5 investigation to victims, and the families of deceased  
6 persons, that would be a very different system and one  
7 would need to think very hard about the implications and  
8 where the boundaries might be.

9 Q. And we've heard evidence that shortly after you came  
10 into the role of Lord Advocate that the final PIRC  
11 report was received and at that stage the crown then  
12 moved into this phase of crown precognition where you  
13 are -- we'll come on to this, where you're looking at  
14 issues of criminality at that stage?

15 A. Yes, that was certainly my understanding.

16 Q. Yes, all right. Could we look finally at 156. 156:

17 "Such a briefing would also perhaps have led me to  
18 address at an early stage the fact that a commitment had  
19 been given to hold an 'inquiry' apparently whether or  
20 not there were criminal proceedings. That would have  
21 provided an opportunity to consider whether, once the  
22 PIRC report had been received, the crown should in this  
23 case depart from the normal sequential approach, which I  
24 have described above to death investigations, where an  
25 issue of criminality has to be addressed with a view to

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1           undertaking the investigations required to provide the  
2           foundation for an inquiry (whether a fatal accident  
3           inquiry or a public inquiry) in parallel with a criminal  
4           investigation."

5           So you think that a detailed briefing would have  
6           actually allowed you to address the issue of an inquiry  
7           and you mentioned that earlier that that was another  
8           issue that was a factor in relation to this period of  
9           handover where you took over the role of Lord Advocate  
10          and perhaps expectations existed in the family?

11         A. Yes, I mean I suppose at the -- yes, when I took over my  
12          first awareness was that the case was with the PIRC and  
13          in due course the crown would receive the PIRC report.  
14          I then had briefing and I suspect it may have been my  
15          assumption in any event that the crown was then  
16          proceeding to in effect a criminal investigation,  
17          investigation of potential criminality. The normal --  
18          the normal case -- the normal approach in a death case  
19          is for issues of criminality to be addressed first and  
20          dealt with, disposed of, before you look at a potential  
21          fatal accident inquiry. And in many death cases if  
22          there is a criminal prosecution that will exhaust what  
23          is required in terms of investigation and public  
24          disclosure of the circumstances so there's a logic to  
25          that sequential approach in the ordinary case.

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1           I don't think I was aware until very shortly before  
2           the meeting with the family that my predecessor had  
3           given a commitment in terms which -- a public commitment  
4           in terms which suggested there would be an inquiry  
5           regardless of whether there were criminal proceedings or  
6           not and as I say this is with the benefit of hindsight,  
7           you know, trying to construct, as it were, an  
8           alternative approach. Perhaps had I recognised that, it  
9           might have raised the question about the way in which --  
10          you know, whether that normal sequential approach was  
11          the right approach in this case, particularly bearing in  
12          mind that one wants to get to, you know, whatever the  
13          procedures are that the things should happen with the  
14          least duration of time, if I could put it that way.

15        Q. I think we'll come on to that issue again.

16                So before I move on to that process, you've  
17                described here sequential process, can I ask you a  
18                preliminary issue. You may or may not be able to assist  
19                us with this. The final PIRC report came in on  
20                10 August 2016. We've heard evidence that the crown  
21                investigation took place over a period of two years, and  
22                during that period when the crown precognition was being  
23                prepared, you were Lord Advocate for the whole period.

24                A decision was taken at some point that this  
25                investigation would be handled by CAAPD, not SFIU.

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1           We've heard from various witnesses about that. And do  
2           you know why that choice was made to allocate the  
3           Sheku Bayoh investigation to CAAPD?

4           A. I don't. I think my information about the setting up of  
5           the team comes from a minute which the Inquiry drew my  
6           attention to from Stephen McGowan to me which -- and to  
7           the Solicitor General, to law officers, basically  
8           advising us of the way in which the crown proposed to  
9           take the matter forward and dealing with certain other  
10          matters.

11          Q. We've heard from Mr McGowan on that.

12          A. Yes. But, you know, I don't recall being involved in  
13          any discussion about which part of the system the case  
14          should be allocated to.

15                 Now, I should say I can understand the logic of it  
16          sitting with CAAPD. You know that's, you know, the part  
17          of the Crown Office structure which is specifically  
18          looking at allegations of criminality against police  
19          officers. The procurator fiscal in that particular part  
20          of the system had to deal with questions of excessive  
21          force, reasonable use of force, and the like, you know,  
22          as part of their day-to-day work, so I can understand  
23          the logic. I don't remember why the decision was made.

24          Q. Thank you. Let's move on to the approach that was  
25          taken. We've heard -- I think you have mentioned and

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1           we've heard from John Logue that the normal approach is  
2           what would happen, what he would expect to happen in an  
3           investigation is they would identify a number of issues  
4           which need to be considered, the question of criminality  
5           was an immediate and an obvious issue which would need  
6           to be explored in the investigation and, in simple  
7           terms, that was an immediate priority.

8           There may be wider issues which relate to broader  
9           learning which could come out of a fatal accident  
10          inquiry or an inquiry such as a public inquiry, but the  
11          priority would be to reach a decision on the criminal  
12          aspects as quickly as possible. And he said:

13          "I would not expect that that would mean that those  
14          individual elements would be isolated off from each  
15          other and dealt with one at a time. The investigation  
16          I would expect would have an understanding of all of  
17          them and be trying to make progress on all of them at  
18          the same time as perhaps identifying particular  
19          priorities. I'm not aware of an investigation where we  
20          would take a compartmentalised approach and say, well,  
21          we're only going to look at this and we're not going to  
22          look at anything else until we've finished looking at  
23          this. I think our approach as much as possible is to  
24          progress the whole investigation."

25          Do you follow that, do you --

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1           A. I absolutely follow that and I can well understand. You  
2           know, one would hope that that's the way that things  
3           might be done. My understanding at the time was that it  
4           was normal, as Mr Logue observes, to seek to deal with  
5           any questions of potential criminality in a death case  
6           first and that, you know, decisions in relation to  
7           whether or not to have a fatal accident inquiry and,  
8           speaking generally, not in this case, whether or not  
9           there were issues that had to be dealt with or should be  
10          dealt with by a fatal accident inquiry would be often  
11          addressed after the question of criminality had been  
12          dealt with and there are good reasons for that usual  
13          sequence.

14                 I certainly don't in the least dissent from the  
15          proposition that, you know, one would hope that anyone  
16          engaged in an investigation is alive to the range of  
17          issues that might be -- might arise, but my  
18          understanding would be that the initial focus would be  
19          on has a crime been committed, can a prosecution be  
20          brought, should it be brought, and very often there may  
21          be cases where, you know, that raises a set of focused  
22          issues and there are wider issues about system, about  
23          the background and context which entirely reasonably get  
24          left until the issue of criminality has been disposed  
25          of.

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1           Now, in this case, you know, I think looking back on  
2           it, I think this was a case where there was -- would  
3           have been good reason to take as broad an approach from  
4           an earlier stage as one could and, you know, as I say,  
5           with the benefit of the hindsight, I can see that.

6           Q. And you talk about criminality, and then broader, wider  
7           issues in relation to an FAI and you've talked about  
8           system. Could you help those listening understand the  
9           distinction between the issues the crown are looking at  
10          in relation to criminality and the type of broader  
11          issues or wider issues that would be covered with an  
12          FAI?

13          A. Yes, I suppose if one is looking at a criminal  
14          prosecution or a possible criminal prosecution question  
15          of criminality, one is looking at that in -- within the  
16          framework of the criminal law, one is -- and the  
17          admissible evidence that's available so one has to ask,  
18          you know, one is investigating the case, securing the  
19          evidence, and then asking oneself does that evidence  
20          disclose that a crime has been committed, that there's  
21          an accused person who can be prosecuted and I suppose  
22          ultimately, although in a death case would be unlikely  
23          to be a question, you know, where the public interest  
24          lies. So it's an investigation that is focused through  
25          the lens of the substantive criminal law and the law of

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1 criminal evidence.

2 When one comes to a fatal accident inquiry, a fatal  
3 accident inquiry may examine a much broader range of  
4 questions in relation to the circumstances of a death  
5 and the principal purpose of most fatal accident  
6 inquiries is to examine whether things have happened  
7 from which lessons can be learned in terms of avoiding  
8 deaths in similar circumstances in the future. That's  
9 not the only circumstance, but that's a very common  
10 circumstance for a fatal accident inquiry and that's not  
11 constrained by questions of substantive criminal law.  
12 One is looking in a much more proactive, wide-ranging  
13 way at the circumstances that led up to a death; are  
14 there things from those circumstances from which we can  
15 learn lessons for the future?

16 Q. So a trial would not be looking at recommendations on  
17 how to avoid a death in the future?

18 A. No.

19 Q. Because an FAI can clearly look at those aspects?

20 A. Absolutely, so the whole lens and focus is completely  
21 different. You know, the lens of a criminal trial is,  
22 is this accused person guilty of the offence charged;  
23 whereas the fatal accident is ranging in a much wider  
24 way to ask, are there circumstances here which, you  
25 know, with the benefit of hindsight, are, you know, the



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1 system as a whole should learn lessons from. So there  
2 are, you know, there's quite a different focus and  
3 for -- the normal focus, as I understood it at the time,  
4 and I don't know if it's changed since, would be to seek  
5 to dispose of any questions of criminality first because  
6 there are real difficulties in holding, you know, sort  
7 of wide-ranging inquiry that could be undertaken in a  
8 fatal accident inquiry if there are individuals with  
9 potential criminal charges that haven't been dealt with.

10 Q. But some aspects will be common to both regardless of  
11 the procedure, such as the circumstances surrounding the  
12 death and the cause of death?

13 A. Absolutely.

14 Q. They would be relevant to whatever the outcome?

15 A. Absolutely, and that's why in some cases the public  
16 interest, and indeed possibly the Article 2 obligations  
17 if it's a case to which Article 2 applies, may be  
18 exhausted by the criminal process and then, you know, in  
19 the case of most -- I don't know, someone will have the  
20 statistics I would guess -- in most criminal cases  
21 involving deaths don't result in a subsequent fatal  
22 accident inquiry.

23 Q. So if a criminal trial covered the full circumstances of  
24 the death and the full sort of details of the cause of  
25 death, that may in itself be sufficient to satisfy the

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1 public interest?

2 A. Yes.

3 Q. And the -- so in terms of the crown precognition and the  
4 work being done by the crown in a criminal investigation  
5 or an investigation into criminality, you would expect  
6 there to be a full and detailed investigation and  
7 analysis into the circumstances and the cause of death  
8 and that would be of benefit to the crown regardless of  
9 whether there are proceedings directed towards a  
10 criminal trial or an FAI or no proceedings in the  
11 future?

12 A. Yes, although I think if the precognition is being  
13 prepared through the lens of, as it were, of a criminal  
14 investigation, I -- I'm not sure that I'm the person you  
15 should ask about what the crown rules and instructions  
16 are in relation to preparation of precognitions, but it  
17 wouldn't surprise me if the precognition was in the  
18 context, as it were, of the criminal investigation stage  
19 was focused squarely on questions of potential  
20 criminality.

21 Q. So what would be excluded from a crown investigation  
22 into the circumstances of the death where you're only  
23 looking at criminality? What would be excluded from  
24 that in terms of the circumstances of the death?

25 A. I suppose I'm -- I suppose I have been speaking in

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1           generalities so I'm now trying to think of examples.

2           I mean certainly if I go back to the  
3           Rosepark Inquiry, which is the substantial fatal  
4           accident inquiry that I conducted for the crown, that  
5           looked into aspects of the legal regime. It involved  
6           multiple deaths in a care home. You know, the fatal  
7           accident inquiry looked at aspects of the legal regime  
8           for regulating fire safety in care homes as well as more  
9           specifically the regime within the particular care home  
10          and the more, as it were -- the circumstances that were  
11          more directly focused on the events so one could  
12          envisage a fatal accident inquiry or indeed a public  
13          inquiry looking at a much wider range of the surrounding  
14          circumstances than would be appropriate to a criminal  
15          investigation that's focused on questions of whether a  
16          crime has been and whether an individual accused can be  
17          prosecuted.

18          Q. Does this come back to what you said a short while ago  
19          about systems that may be in place, may be something  
20          more of interest to an FAI rather than a criminal trial?

21          A. Generally speaking, of course once we've got health and  
22          safety at work, you know, one shouldn't be excluding  
23          questions of system and insofar as questions of system  
24          might disclose breaches of health and safety at work or  
25          rather statutory regulations, but in terms of whether

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1           that wider regulatory system was fit for purpose or not,  
2           you know, that's not something that would be within the  
3           ambit of a criminal investigation.

4       Q.   Thank you.

5       A.   I've been speaking very generally --

6       Q.   Of course.

7       A.   -- in generality.

8       Q.   Of course.  Can I ask you to look at a paragraph in an  
9           inquiry statement from Les Brown, please, this is  
10          SBPI 00419 paragraph 105.  105.  And this relates to  
11          what he referred to as "an incremental process".

12          I think you've -- it may be that you've referred to it  
13          as a "sequential process", but if we could look at that  
14          and it begins with the words "a key element", 105.

15          Sorry.  Some of the answers went over a number of pages.

16          Here we are:

17                 "A key element of the incremental strategy approved  
18                 by the Lord Advocate was to separate out and resolve the  
19                 issue of potential criminality and to get to a point  
20                 where Crown Counsel could take a decision in this regard  
21                 with the necessary confidence, thus permitting the  
22                 investigation to move forward to other areas in  
23                 anticipation of an inquiry whose forum had yet to be  
24                 determined.  It had been hoped initially that the  
25                 necessary further inquiries could be completed

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1 relatively quickly."

2 So he describes this as an incremental strategy.

3 And then moving on:

4 "The precognition that was requested by  
5 Crown Counsel was created for the limited purpose of  
6 enabling Crown Counsel to take a decision on potential  
7 criminality, but was not intended to be the end of the  
8 investigative process by the crown, particularly in  
9 relation to race and implicit bias, and further detailed  
10 inquiry would likely have been undertaken had an FAI  
11 been instructed. This would in my opinion have been  
12 highly likely to have required precognition of the  
13 police officers involved, where their approach to the  
14 incident would have been probed, scrutinised and  
15 evaluated."

16 So if we can look at the top there, you see it says:

17 "Incremental strategy was approved by the  
18 Lord Advocate to separate out and resolve the issue of  
19 potential criminality."

20 Do you remember approving that strategy for the  
21 investigation into Mr Bayoh?

22 A. The only recollection that I have, and I think it's  
23 probably been prompted by the reading the documents, is  
24 the -- there was a minute from Stephen McGowan which  
25 invited law officer approval of the proposition that was

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1 put in that minute. I think from memory that minute  
2 envisaged specifically that what was to take place was a  
3 criminal investigation. I don't now recall whether it  
4 went on to discuss any subsequent or what would happen  
5 subsequently and it may -- I don't know whether  
6 that's -- that's what Mr Brown is referring to.

7 Q. And where he refers to this as "an incremental strategy"  
8 potential criminal proceedings first and later FAI, is  
9 that what we have been talking about as what would have  
10 been the normal approach at the time, the linear or the  
11 sequential?

12 A. If I put it this way, reading Mr McGowan's minute now, I  
13 suppose I read it for the purposes of preparing my  
14 statement, it didn't surprise me that the law officers  
15 were being asked to approve the arrangements for what  
16 was I think described in that as a criminal  
17 investigation, because I would have assumed at that time  
18 that the right approach would normally be to seek to  
19 deal with any questions of criminality before moving on  
20 to consider what, you know, whether there were broader  
21 issues that would merit an inquiry.

22 Q. And can we look at the second paragraph of 105. It  
23 talks about the crown precognition:

24 "It was not intended to be the end of the  
25 investigative process by the crown, particularly in

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1 relation to race and implicit bias, and further detailed  
2 inquiry would likely have been undertaken had an FAI  
3 been instructed."

4 Was it your understanding that race -- issues of  
5 race and implicit bias would have been undertaken at a  
6 later stage only if an FAI was instructed?

7 A. No, I mean I would have assumed -- I mean I understood  
8 that race was an issue that would have to be addressed  
9 at all stages, the potential relevance of race. I don't  
10 think I had any -- certainly at that stage, I had no  
11 sort of, as it were, preconceived view about what that  
12 might involve but, you know, one -- you know, it was  
13 clearly an issue that had to be properly investigated  
14 and consideration given to what impact it might have,  
15 first of all, on any question of criminality and then,  
16 you know, potentially more wildly.

17 Q. Fiona Carnan came into the team in CAAPD, to work on the  
18 analysis primarily, in about December 2017 and she has  
19 explained in evidence it wasn't part of her remit to  
20 consider whether there were grounds for an FAI, but her  
21 role was restricted to an analysis of evidence in  
22 respect of any potential criminality for -- by the  
23 police.

24 In relation to this aspect, we've heard evidence  
25 from Stephen McGowan, and he talks about being aware of

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1           this -- the approach that was taken regarding criminal  
2           proceedings in fatal accident inquiries and he said:

3           "We would try and address the issues of criminality  
4           first and make as a decision on that criminality, which  
5           would include, if required, running a trial before we  
6           concluded our consideration of the way in which we would  
7           present the evidence before an FAI. That was typical."

8           He calls it a linear approach. It was subject to  
9           some criticism because of delays that were built in. He  
10          has indicated that and I quote:

11          "I was not of the view that what was being held back  
12          was consideration of race. Race insofar as it was  
13          relevant to the question of criminality was something  
14          that would be covered, but there was always going to be  
15          a further inquiry and I think we had stated probably  
16          from an early stage that there had been an FAI."

17          So he -- would you agree with his view that race was  
18          not something that was to be held back until a later  
19          stage?

20          A. Certainly not and I would have -- I mean, I suppose I  
21          assumed that the team that was put in place would be  
22          addressing all issues that could be relevant to  
23          questions of criminality and, you know, including in  
24          this case any issues of race.

25          Q. We've heard from John Logue who spoke of the challenges



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1 in relation to delay that this linear or sequential or  
2 incremental approach created or worsened. He said:

3 "One of the challenges we found in recent years has  
4 been that with creating the specialist units we may find  
5 ourselves with an investigation perhaps where more than  
6 one team is involved and therefore there needs to be  
7 coordination. We've learned that you may need to  
8 progress parallel investigations in two separate teams  
9 at the same time, rather than allowing one team to reach  
10 a conclusion before the other team then takes over.  
11 That simply builds in delay into the process as well.  
12 So for example you wouldn't want a team looking at a  
13 criminal investigation and no one dealing with the  
14 broader aspects that I have referred to until that team  
15 has finished. You would try to make sure that there was  
16 sharing of information and progress on all aspects at  
17 the same time."

18 Was that an approach where there was parallel teams  
19 perhaps working on the same issue -- same matters, is  
20 that an approach that developed during your tenure as  
21 Lord Advocate?

22 A. I can't now remember whether it did. I mean it's fair  
23 to say that through the course of my tenure I became  
24 quite focused on a number of issues, one of them being  
25 delay and in particular delay in relation to death

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1 investigations and the various things were done but  
2 perhaps the most -- what they call the modernisation  
3 project was undertaken in relation to SFIU, which was a  
4 pretty significant review of the way that SFIU undertook  
5 its work, coupled with what was really important was  
6 securing the resources to enable that changed approach  
7 to be put into effect. Because what became very  
8 evident -- and inevitably as one is in a role one is  
9 able to become more proactive in terms of identifying  
10 issues that need to be addressed, what became very  
11 evident to me was that there were significant resourcing  
12 challenges for the crown in various areas and in  
13 particular in death investigations for a variety of  
14 reasons.

15 So, you know, the work was done to review the work  
16 of that unit, the resources were secured. I secured  
17 resource -- quite significant additional resources over  
18 the course of my tenure to do a number of reforms, if I  
19 can put it that way, and I certainly recall that in the  
20 context of the work of SFIU one of the things that we --  
21 we were keen to do and were putting in place, as I  
22 recall it, was for example a degree of joining up and  
23 consistency of the investigations into deaths in  
24 custody, so there was a consistent learning being built  
25 in, rather than treating each case as an individual

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1 case.

2 Whether part of that involved, as it were, the  
3 cross-departmental working and the parallel working at  
4 that time, I'm afraid I can't now remember.

5 Q. All right. Thank you. We have also heard from  
6 John Logue that, and I think he agreed in response to  
7 questions from the Chair:

8 "That even though an incremental approach or a  
9 linear or a sequential approach had been taken, you  
10 could not consider the question of criminality without  
11 considering the question of race."

12 You're nodding. Would you agree with that?

13 A. Absolutely.

14 Q. Yes, and John Logue said he would have expected CAAPD to  
15 investigate race as part of their exercise of  
16 investigate criminality; would you agree?

17 A. Yes.

18 Q. And he said:

19 "You would have to look at race in order to  
20 ascertain whether there was any evidence that did have a  
21 bearing on criminality relating to race."

22 A. Yes.

23 Q. Would you see that -- you've mentioned Article 2, would  
24 you see that as part of a thorough investigation by the  
25 crown into the death of Mr Bayoh to consider questions

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1 of race?

2 A. In the Article 2 context, yes. In the context of the  
3 criminal investigation, obviously insofar as race bore  
4 on questions of criminality, and there are various ways  
5 in which it might do so, and I suppose I -- you know  
6 I had no particular preconceived view as to the ways in  
7 which race would turn out to be relevant.

8 Q. And would you have considered whether -- whether that  
9 process of considering race and investigating race from  
10 the outset would have had an impact on the confidence of  
11 the family and their engagement with Crown Office?

12 A. Well, I mean it seemed to me I mean race should be being  
13 considered and taken into account as relevant at the  
14 various stages in the investigation and the family  
15 should have, you know, should be able to have been  
16 assured that that was the case.

17 Q. Thank you. I think you talk about further reflections  
18 that you've had in your statement. Could we look at  
19 paragraphs 146 and 147, please. Here we are, 146:

20 "With hindsight it is for consideration, given the  
21 commitment which had already been given in this case to  
22 an inquiry, whether the crown's investigation might from  
23 the outset have encompassed both the question of whether  
24 a crime had been committed and wider questions which  
25 would fall to be addressed in the context of an FAI.

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1           Whilst there is, as I have explained, a logic to the  
2           sequential approach which is normally taken where a  
3           decision has already been taken that there will be an  
4           inquiry, it may be that this should be departed from."

5           147:

6           "There may be a learning point for Crown Office to  
7           consider. Whilst there is, as I have explained, a logic  
8           to the usual sequential approach, there may be some  
9           cases (where Article 2 is engaged and there are  
10          potential reasons for holdings a fatal accident inquiry  
11          even if there are criminal proceedings) where there  
12          would be merit in a criminal investigation and a SFIU  
13          investigation running in parallel (potentially within  
14          the same team). This could likely expedite any fatal  
15          accident inquiry."

16          Would you like to expand on your thoughts in this?

17          A. Yes, and I'm reassured that Mr Logue -- if I have picked  
18          up correctly the quote that you gave me from Mr Logue's  
19          evidence that that -- it sounds as though that's already  
20          the approach being taken. It's actually a reflection  
21          that if -- if a case -- if it's clear that it's or it's  
22          likely that there's going to need to be a process of  
23          inquiry that goes beyond criminal proceedings in any  
24          particular case, typically by a fatal accident inquiry  
25          but potentially in other ways, that if you in effect are

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1           doing -- dealing with those different aspects or that  
2           the sort of narrow question of criminality and any  
3           broader questions in parallel, there are a number of  
4           advantages.

5           I think when he wrote this I was thinking  
6           particularly about a potential advantage in terms of the  
7           overall timescale, but I can see there would be other  
8           advantages as well in terms of cross -- any possible  
9           cross-fertilisation between different issues. One would  
10          hope there wouldn't be a need for that, but I can see  
11          that as well.

12          And this really goes to the point that Mr Logue, if  
13          I picked it up correctly, was making that there are  
14          certain cases where, you know, you perhaps want to step  
15          back and ask in a -- rather than following that --  
16          that's the normal sequential approach, as I have  
17          described it, step back and ask, you know, more broadly  
18          how do we get to -- how do we secure the state's  
19          obligations under Article 2, if it's a case to which  
20          Article 2 applies, in a way that is complete and  
21          exhaustive and reaches a conclusion at the earliest  
22          practicable point, recognising that these processes take  
23          a period of time.

24          Q. The reference by Mr Logue was to the parallel  
25          investigations allowing progress to be made and

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1           effectively avoiding delay and he also said:

2           "You would try to make sure there was a sharing of  
3           information and progress on all aspects at the same  
4           time."

5           So he talks about that sharing between parallel  
6           teams.

7           A. Yes. Well, I think that -- the crown is ahead of the  
8           thoughts that I had had on reviewing this case.

9           Q. Thank you. And looking now from what you know of the  
10          investigation into Mr Bayoh's death, you talk about  
11          cases where there would not just necessarily be a  
12          criminal trial but there may be wider issues of learning  
13          available and a possible FAI. Was the investigation to  
14          Mr Bayoh's death the type of case that would have  
15          benefitted from this parallel investigation?

16          A. I think it's implicit from the fact I put in the  
17          statement that it seems to me that it is and I think  
18          that's probably -- you know, in part this thought was  
19          prompted by the fact that a commitment had already been  
20          given to an inquiry if -- I think in terms that was a  
21          commitment that applied regardless of whether there was  
22          a criminal prosecution or not and, from my understanding  
23          of the case, it's not surprising that one would expect  
24          this to be a case where there would need to be some  
25          wider process of inquiry.

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1 Q. Thank you. I would like to move on slightly from the --  
2 this discussion about the incremental process and the  
3 parallel process and talk about the investigative  
4 strategy that was adopted within the CAAPD team in  
5 relation to progressing the crown precognition.

6 I'm -- could you give me a moment. I'm conscious of  
7 the time. Would that perhaps be ...?

8 LORD BRACADALE: We'll have a 20-minute break at this point.  
9 (11.27 am)

10 (A short break)

11 (11.53 am)

12 LORD BRACADALE: Mr Wolffe, just before we move on, could I  
13 pick up on an aspect of the discussion that you were  
14 having with Ms Grahame just before the break and perhaps  
15 we could have on the screen paragraph 147 of your  
16 statement.

17 Now, Mr Logue seemed to be contemplating two  
18 different departments working in parallel on the same  
19 case in the two aspects and sharing information. At  
20 paragraph 147 you say that:

21 "There may be some cases where Article 2 is engaged  
22 and there are potential reasons for holding a fatal  
23 accident inquiry, even if there are criminal  
24 proceedings, where there would be merit in a criminal  
25 investigation and SFIU investigation running in parallel



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1 [and you say] (potentially within the same team) and  
2 this would likely expedite a fatal accident inquiry once  
3 questions of criminal responsibility have been  
4 addressed."

5 And I wanted to pick up on your parenthesis there,  
6 "potentially within the same team", and I wondered if  
7 you thought there may be advantage in the same team  
8 working with the two different aspects of the work, as  
9 opposed to two different departments?

10 A. Yes, I think the key thing it seems to me is that the --  
11 when I was thinking about this as an approach is that  
12 in -- and thinking about the questions of criminality  
13 and prosecutors with the experience of thinking about  
14 the broader issues that are involved in a fatal accident  
15 inquiry who within -- at least in the time that I was  
16 Lord Advocate would be located in the SFIU part of the  
17 system working together.

18 I think the key thing is having the right mix of  
19 skill and expertise to cover the range of issues that  
20 need to be addressed and having them working together  
21 constructively. Whether that involves or is best  
22 achieved by having, as it were, two little teams in  
23 separate units working independently or, as it were,  
24 putting them together in a single team probably has to  
25 be resolved on a case-by-case basis but one wants -- one

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1           wants constructive working within the -- between the  
2           individuals who are working on the same case bringing  
3           their different expertise to bear.

4           I should say that I can't speak to the sort of, as  
5           it were, the micro-details of how it would work, but I  
6           would imagine that in most cases these will not be  
7           individuals who are necessarily devoting themselves to  
8           the single case as the only case they're working on.  
9           Sometimes that will be true, but very often I suspect it  
10          won't be.

11         LORD BRACADALE: And the essential thing is really that we  
12          work together rather than operate in separate silos.

13         A. Absolutely, that's really what I was trying to  
14          communicate by the words in parenthesis.

15         LORD BRACADALE: Thank you very much. Ms Grahame.

16         MS GRAHAME: Thank you. I was -- I would like to move on to  
17          look at the approach taken within CAAPD.

18                 We've heard that Les Brown was the head of that unit  
19                 and in terms of the crown precognition, Alisdair McLeod  
20                 and Erin Campbell came in to work on the -- initially to  
21                 do work to help with preparing the narrative and then,  
22                 at a later stage, Fiona Carnan came in in December 2017  
23                 to work on the analysis and at some point  
24                 Ashley Edwards, then QC, now KC, who was assistant  
25                 principal Crown Counsel became the dedicated advocate

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1           depute to this matter.

2           Now, we've heard evidence from Les Brown that he  
3           prepared a minute which he sent to Alisdair McLeod and  
4           others, Lindsey Miller, on 15 September 2016 and this  
5           looked at the investigative strategy, if I can put it  
6           that way, and let's look at a passage from his Inquiry  
7           statement, SBPI 00419, and this is on pages 47 and 48 of  
8           his Inquiry statement. Some of the answers span a  
9           number of pages. And the passage I'm looking for is the  
10          one that begins:

11                 "On receipt of the second PIRC report ...."

12                 There we are:

13                 "On the receipt of the second PIRC report the  
14                 dedicated team at Crown Office agreed an investigative  
15                 strategy to facilitate the decision-making process in  
16                 relation to potential criminality. The investigative  
17                 strategy approved by the Lord Advocate instructed that  
18                 all eye witnesses to the restraint process should be  
19                 precognosed by the investigative team. It was agreed  
20                 that all witnesses should be jointly precognosed by two  
21                 investigators to safeguard against any criticism of the  
22                 precognition technique, following criticism by the  
23                 family of the deceased of the approach taken by PIRC  
24                 investigators."

25                 Was this a strategy that you approved in your role

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1 as Lord Advocate?

2 A. I think -- I don't either recall or and I haven't seen  
3 in the documents ever seeing what one might describe as  
4 the investigative strategy. I received a minute from --  
5 the minute from Stephen McGowan, which I think is  
6 referred to in paragraph 49 of my statement, which  
7 basically invited law officers to agree the various  
8 steps identified in that minute with a view to taking  
9 the investigation forward and among those steps was the  
10 allocation in that of assistant principal crown counsel  
11 to the case.

12 I picked up from the documents and it was a minute  
13 that -- I can't remember which one but a minute came to  
14 me, so it's something I would have seen at the time and  
15 it's what I would have expected in any event, that she  
16 had approved an investigative strategy of the  
17 investigative strategy. I don't myself recall, I have  
18 to confess, even ever seeing the investigative strategy.

19 Q. The -- let's have the minute on the screen,  
20 COPFS 03853A, and I don't believe you were copied in to  
21 this. You'll see this minute. We've heard evidence  
22 from Les Brown about it. 15 September 2016 and it's  
23 sent to a number of people, including Alisdair McLeod  
24 and Erin Campbell and Ashley Edwards, amongst others,  
25 but there's no suggestion this was going to the law

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1 officers or to you in particular.

2 A. Yes, and there may be some -- within Crown Office when  
3 something is approved by Crown Counsel sometimes it may  
4 be taken to have the imprimatur of the Lord Advocate,  
5 because, you know, one of the features of our system is  
6 that every advocate depute, every Crown Counsel has --  
7 is clothed with the functions and responsibilities of  
8 the Lord Advocate and, to that extent, approval by  
9 Crown Counsel is approval by the Lord Advocate, the  
10 individual who holds the office remaining answerable of  
11 course for whatever is done by Crown Counsel in their  
12 name.

13 Q. And just so people can follow, the Lord Advocate has a  
14 number of deputies who act on your behalf in that role,  
15 they're known as "advocate deputies", and they take  
16 decisions in cases. It wouldn't be possible for the  
17 Lord Advocate to prosecute every High Court trial that  
18 comes to fruition, so they prosecute on your behalf,  
19 argue appeals in the Appeal Court, take decisions on  
20 which cases should be going to trial or FAI, that type  
21 of thing?

22 A. Yes, I mean it's -- it's a central feature of our system  
23 that in effect the Lord Advocate is -- gives by a  
24 commission to advocate deputies power to take any  
25 decision the Lord Advocate might take and routinely

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1 across the whole range of Crown Office work advocate  
2 deutes or Crown Counsel, as they're often described,  
3 take decisions which constitutionally are decisions of  
4 the Lord Advocate, but which, you know, in practice are  
5 being taken by an individual advocate depute on behalf  
6 of the Lord Advocate.

7 Q. Okay.

8 A. And, you know, it would be and we may come to this -- it  
9 would be -- at least in my experience in the role, it  
10 would be absolutely routine for an advocate depute or  
11 Crown Counsel to run a case to take all the decisions  
12 that require to be taken and for the Lord Advocate or  
13 the Solicitor General to have no active direct  
14 involvement in the case and in effect to have that  
15 ultimate answerability for everything that's done in  
16 their name.

17 Q. And of that group of advocate deutes the most senior of  
18 those is the principal advocate depute known as  
19 Principal Crown Counsel and Ashley Edwards at this time  
20 that we're talking about was the assistant principal  
21 Crown Counsel?

22 A. That's right. She was one of the three, as it were,  
23 senior leadership team, if one can use that terminology,  
24 within the wider cohort of Crown Counsel.

25 Q. Thank you. And, in fact, prior to becoming

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1 Lord Advocate, you have yourself held the role of  
2 advocate depute and senior advocate depute?

3 A. Yes, I spent I think just under three years as an  
4 advocate depute and then spent some time prosecuting --  
5 conducting the Rosepark fatal accident inquiry, again  
6 technical, I think as an advocate depute.

7 Q. Thank you. Could I ask you to look at COPFS 05119B, you  
8 mentioned that a moment ago, if we have that on the play  
9 list. COPFS 05119B. And this is a minute from  
10 Stephen McGowan, 29 August 2016, and it's headed  
11 "Lord Advocate and Solicitor General" and it's also  
12 copied to a number of other people, including the head  
13 of CAAPD.

14 Is this the minute that you received from  
15 Stephen McGowan that you referred to a moment ago?

16 A. It is.

17 Q. And if we can go down the page, it says:

18 "The purpose of a minute is to update law officers  
19 in relation to progress in this case and to propose a  
20 timescale for further work."

21 And then it gives a background, and it talks about  
22 the work required, the number of witnesses of fact that  
23 are required, requirement to consult with nine experts,  
24 we propose to consult with experts, their answers are  
25 reduced to writing, and then subsequently, I think with

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1 resources, you talk about:

2 "Two senior procurator fiscal deposes with  
3 experience of large and complex cases have been  
4 allocated under the supervision of the head of CAAPD and  
5 assistant principal Crown Counsel has been nominated as  
6 the allocated advocate depute in the case and we propose  
7 that we will keep her up to date at all stages with the  
8 ongoing work."

9 A. Indeed.

10 Q. And is that the minute you were referring to --

11 A. It is.

12 Q. -- a moment ago? And just go to the bottom of that.

13 There's also mention of other matters that were being  
14 addressed at that time.

15 A. Yes.

16 Q. Thank you. Could I confirm that after the team is  
17 allocated to work within CAAPD on the investigation into  
18 the death of Mr Bayoh, I think as I understand it from  
19 the minute we looked at before this -- we can take that  
20 minute off the screen. When we were looking at  
21 Les Brown's minute that he sent to the team, it became  
22 clear that a strategy was agreed where -- whereby  
23 Alisdair McLeod and Erin Campbell would precognosce key  
24 eye witnesses and we have other information available to  
25 the Chair, primarily a briefing note prepared by



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1 Alisdair McLeod at a subsequent date in 2020, which  
2 summaries the work that was done by Crown Office and he  
3 said that precognition started at the beginning of  
4 October 2016 and, apart from one, were all completed by  
5 the 23 November 2016.

6 So between October and November of 2016 the  
7 precognitions were taken from the eye witnesses and we  
8 understand they were taken jointly by Alisdair McLeod  
9 and Erin Campbell. Were you involved in any way in that  
10 strategy?

11 A. Not that I recall. As I say, as I understand the  
12 investigative strategy was approved by assistant  
13 principal Crown Counsel, entirely routine, as I  
14 understand it, for that to happen and then it's for the  
15 team that's been put together to pursue the  
16 investigation.

17 Q. So at this stage that the team had been allocated the --  
18 Ashley Edwards had been allocated, who was in charge of  
19 the team and the direction of that team, because we have  
20 heard that the members of staff are working within CAAPD  
21 and Les Brown is in charge of CAAPD, he's the head of  
22 that department, and we've heard about Ashley Edwards  
23 who's independent Crown Counsel.

24 So who would you say was in charge of direction?

25 A. Well, I mean as I would see it and the responsibility of

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1 Crown Counsel is to provide such direction to the  
2 investigation as the team might require. Now, the  
3 extent to which Crown Counsel requires to give  
4 instructions in the context of an ongoing investigation,  
5 certainly in my own experience when I was an advocate  
6 depute, would vary. You know, once an investigative  
7 strategy has been agreed, those involved may simply  
8 pursue that and implement it without reference --  
9 needing to refer back to Crown Counsel.

10 Equally, there are cases where Crown Counsel's  
11 instruction might be required as the case goes on and so  
12 in terms of providing what one might call strategic  
13 direction or instruction on any particular issues that  
14 require to be addressed, that would sit, I would expect,  
15 with Crown Counsel, but of course the procurators fiscal  
16 undertaking the investigation itself are, as I certainly  
17 understood in this case, very experienced prosecutors  
18 themselves. They're lawyers with experience of  
19 undertake investigations. You know they have their own,  
20 as it were, professional autonomy. Because this was  
21 being undertaken within CAAPD I would regard -- I  
22 certainly understood Les Brown to be, as it were, the  
23 leader of the investigative team.

24 And this was also a case where, as I saw it, the  
25 senior professional leadership within Crown Office, in

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1 the person initially of Stephen McGowan and then also  
2 Lindsey Miller, were quite actively engaged with the  
3 case. And I have to confess I had never -- I probably  
4 didn't interrogate in my own mind who was, as it were,  
5 had line manager responsibility in that sense for what  
6 was going on, but I think from my perspective, you know,  
7 the key point that I would have taken from Mr McGowan's  
8 minute and which I would have sort of carried forward  
9 was that the crown had put in place a team of  
10 experienced procurators fiscal who, as I say, bring  
11 their own professional skill and experience who were  
12 under the direction of assistant principal Crown Counsel  
13 who, you know, had all the authority that came with the  
14 role of Crown Counsel.

15 Q. Thank you. And as well as precognosing eye witnesses,  
16 the minute that Les Brown prepared, and was subsequently  
17 discussed as we understand it amongst the team, also  
18 referred to precognosing ambulance personnel and  
19 indicated that other aspects would be looked at,  
20 airwaves, broadcasts, transcripts provided by PIRC, so  
21 that the crown could be satisfied as to the state of  
22 knowledge of the officers attending.

23 I'm interested in the phrase "the state of knowledge  
24 of the officers attending", could you explain to people  
25 what that would encompass briefly?

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1       A. I'm taking it, and I'm afraid I'm reacting to the  
2       question on the hoof rather than having any -- being  
3       able to speak to anything that I might have had at the  
4       time, but I take it that one is referring to the  
5       information that the officers had available to them when  
6       they were -- when they attended at the scene. I'm  
7       assuming that's what would be involved.

8       Q. Thank you. I would like to ask you some questions about  
9       the role of an allocated advocate depute or  
10      Crown Council when they have been allocated to a  
11      specific case such as this investigation.

12             Let's look at a statement we've received from  
13      Ashley Edwards, SBPI 00445. And if we could look at  
14      paragraph 13, please. As you know, I'm not asking any  
15      questions about the prosecutorial decision, but I would  
16      like to ask you about her role in the precognition  
17      process. So 13:

18             "I was provided with two PIRC report, and the expert  
19      reports that had been instructed by PIRC."

20             For your information, that's from Dr Karch and  
21      Dr Payne-James:

22             "I do not recall if I had any further documents at  
23      the point of instruction. In September 2016 I met with  
24      the case preparation team, at that time Erin Campbell  
25      and Alisdair McLeod; two deputy crown agents,

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1           Lindsey Miller and Stephen McGowan, and the head of  
2           CAAPD, Les Brown. At that meeting an outline  
3           investigative strategy was agreed, in particular the  
4           civilian witnesses who required to be precognosed were  
5           identified."

6           Is that the type of step you would expect to take  
7           when the team are planning how they wish to carry out  
8           the process of crown precognition?

9           A. You mean in terms of agreeing an outline investigative  
10          strategy?

11          Q. Yes.

12          A. Yes, and again I'm casting my mind back, my recollection  
13          is that at that point it was standard procedure to have  
14          an investigative strategy which would be approved by  
15          Crown Counsel.

16          Q. And then I think, going back to your own statement, you  
17          do address this at paragraph 25 of your Inquiry  
18          statement, SBPI 00529. Here we are. And you say:

19                 "At the time of this investigation only the most  
20                 significant and complex cases had a specific advocate  
21                 depute allocated to them."

22          And at that stage was Mr Bayoh's investigation one  
23          of the most significant and complex cases being handled  
24          by Crown Office?

25          A. It was certainly a significant and complex case. I mean

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1           there were a number -- a number of significant and  
2           complex cases ongoing, but I would certainly have  
3           regarded this as one of the most significant and complex  
4           cases.

5       Q.   Thank you.

6       A.   And just in terms of the allocation of advocate deputes,  
7           again, others would be better able to speak to this than  
8           me, but there were many fewer advocate deputes then than  
9           there are now and it was a resource that had to be used  
10          effectively and, as I recall it at any rate, the  
11          allocation of advocate deputes to particular cases was  
12          the exception rather than the rule, but, as I say,  
13          others may be better able to speak to that.

14      Q.   And we see that Ashley Edwards was assistant principal  
15          Crown Counsel so in a position of some seniority --

16      A.   Yes.

17      Q.   -- in relation to other advocate deputes? Was that also  
18          a reflection of the way that Crown Office viewed this  
19          case?

20      A.   I should say so, yes.

21      Q.   And you say further down the paragraph:

22                 "I expected that APCC would provide such direction  
23                 as might be required by the investigation team. I can  
24                 see from Mr McGowan's minute that consistent with that  
25                 expectation Crown Counsel had agreed the investigative

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1 strategy and had instructed further investigations."

2 And was it part of the role of assistant principal  
3 Crown Counsel, Ashley Edwards, to instruct further  
4 investigations that she saw fit at that time?

5 A. I would certainly have regarded that as part of the  
6 role.

7 Q. And you then go on to say:

8 "I can also see from other documents that there were  
9 meetings between APCC and the investigative team in July  
10 and November 2017 and there may have been others."

11 So unlike a situation where there may be very  
12 limited contact between Crown Counsel and the  
13 investigative team, it would appear that there were some  
14 meetings as well as the investigative strategy being  
15 agreed?

16 A. Yes, certainly as time went on and just looking to the  
17 documents that I have been able to review for this  
18 Inquiry, I was made aware that there were -- the  
19 meetings that I have identified there between APCC and  
20 the investigative team.

21 Q. Were you involved in selecting Ashley Edwards for this  
22 role of allocated AD or was that something that perhaps  
23 Mr McGowan was more involved in or Lindsey Miller?

24 A. So far as I can -- I have no recollection of being  
25 involved. The minute came up to law office as in effect

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1 presenting us with the team that was proposed.

2 Q. Right.

3 A. I suspect there would have been discussion with --  
4 presumably with APCC herself and potentially also with  
5 principal Crown Counsel before. So I suspect that was a  
6 decision, as it were, made in putting the team together  
7 and then it was presented to the law officers in the  
8 minute we looked at for, you know -- first of all to  
9 inform us, but also to ensure that law officers were  
10 content that the approach that being taken was  
11 acceptable.

12 Q. Could we look at paragraph 87, please, of your  
13 statement. You say:

14 "The requirement to report a case to Crown Counsel  
15 ensures insurers that, once the investigation has been  
16 completed, the case as a whole is reviewed and assessed  
17 by an experienced and independent prosecutor."

18 And that would be Crown Counsel.

19 You talk about Crown Counsel giving directions and  
20 such like. I'm interested in the final sentence of  
21 paragraph 87, which begins:

22 "Ultimately, the purpose of the precognition... "

23 There we are:

24 "Ultimately, the purpose of the precognition is to  
25 draw all the material together so that Crown Counsel can



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1 review and analyse the evidence as a whole and reach a  
2 conclusion."

3 And is that the intention of preparing what we've  
4 heard is a document called the crown precognition which  
5 contains both a narrative and an analysis to permit  
6 Crown Counsel to review and analyse the evidence as a  
7 whole and reach a conclusion?

8 A. Yes, and of course lying behind the -- there's the  
9 precognition in the narrow sense, which is the narrative  
10 and analysis, but in the broader sense includes all the  
11 supporting statements, expert reports and other  
12 materials that Crown Counsel may need to consider in  
13 order to reach a decision.

14 Q. And they're all bound up in what's known as the crown  
15 precognition?

16 A. Yes, and that's a very, very long-standing approach to  
17 the preparation of causes which is designed to seek to  
18 ensure that cases are prepared to a certain standard and  
19 with a measure of consistency so that, ultimately,  
20 Crown Counsel can reach an informed decision.

21 Q. You've talked about a situation where there may not be  
22 an allocated advocate depute or there may be, as there  
23 was in this case, an allocated advocate depute. Does  
24 the approach -- the crown approach to preparation of the  
25 crown precognition differ if there is an allocated

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1           advocate depute? I mean you have talked about standard  
2           consistency, does it change in format and content if you  
3           have an allocated AD compared to no one?

4           A. I'm not sure I'm the best person to ask that question.  
5           I would expect the basic structure and in effect the  
6           protocols and guidance in terms of the way the  
7           precognition is put together to be consistent,  
8           regardless of whether there's an allocated advocate  
9           depute or not, not least because circumstances may arise  
10          where somebody else has to, as it were, pick up a case.  
11          But of course in a case where there's an allocated  
12          advocate depute who may have been, for example, involved  
13          in consulting with expert witnesses as the preparation  
14          of the case goes along, I can see that in practice the  
15          allocated advocate depute may bring to the precognition  
16          information which is not there on the face of the  
17          document.

18          Q. If the allocated advocate depute has consulted with  
19          experts, would your expectation be that the analysis  
20          would simply not include information about that on the  
21          assumption that the allocated AD would know all about  
22          the experts or would you still expect the analysis to  
23          cover the expert evidence that was available to the  
24          crown?

25          A. I would expect the analysis to cover the expert evidence

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1           that's available. I suppose the point I'm making is  
2           simply that, you know, if counsel has been directly  
3           involved, she or he will bring to the reading of the  
4           precognition, you know, the experience they've had of  
5           considering the case over time.

6           Q. Right, thank you. In terms of your expectations of the  
7           APCC in relation to Mr Bayoh's investigation, you've  
8           talked about she determined what further investigations  
9           were to be carried out and and would you also have  
10          expected her to dictate certain approaches in relation  
11          to expert evidence, identifying experts?

12          A. She might well do. You know, in effect to provide  
13          the -- such direction as the investigative team required  
14          as the case goes on and that might include identifying  
15          lines of expert evidence that ought to be pursued. It  
16          might include lines of or issues that should be raised  
17          with a particular expert, but I don't want to impose too  
18          heavy an expectation on APCC.

19                 You know, this would be a process where, you know,  
20          she's giving direction to individuals who are themselves  
21          very experienced professionals and just what she would  
22          be called on to do would depend on the progress of the  
23          investigation and the circumstances.

24          Q. All right. Thank you. Let's look at the information we  
25          have about the approach taken by APCC. Could we look at

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1 the statement from Ashley Edwards, SBPI 00445, and I'm  
2 interested in paragraphs 14 and 15. So this is  
3 Ashley Edwards' statement. She says:

4 "The initial picture raised the possibility that  
5 there was criminality involved. For my part, I  
6 approached the matter looking for criminality. As an  
7 advocate depute experienced in criminal advocacy, I  
8 looked at all possible adminicles of evidence and how  
9 those adminicles could be strengthened, supported,  
10 evaluated and corroborated. The investigation team  
11 explored and examined every potential source of  
12 evidence. A fuller understanding of the circumstances  
13 of Mr Bayoh's death could only be achieved after the  
14 detailed exploration and with subsequent legal  
15 analysis."

16 And does that description accord with what your  
17 expectations would have been at the time?

18 A. Absolutely, yes.

19 Q. And then she goes on to say:

20 "I have read my page 3 of my notebook too. I'm not  
21 sure if it was just Mr Nelson's account [this was one of  
22 the key eye witnesses] that was being discussed at that  
23 time. I also wanted to explore what the witness  
24 Ashley Wyse could see from the windows. In addition, I  
25 wanted to explore a number of other witnesses'

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1           sightlines. When I wrote the abbreviation 'recon', I  
2           presume I was thinking about a reconstruction to assess  
3           and review all available sightlines. Because of the  
4           differing recollections of witnesses and sometimes how  
5           those recollections changed over time, I wanted, insofar  
6           as possible, to establish fixed reference points as a  
7           crosscheck to either support or challenge the witnesses'  
8           evidence."

9           And again does that -- I appreciate you might not be  
10          fully apprised of the particular circumstances, but does  
11          that accord with the type of work you would expect  
12          Crown Counsel to be looking at?

13         A. Yes, I mean I -- it doesn't surprise me that someone  
14          with the experience of then assistant principal  
15          Crown Counsel that she's identifying a line of  
16          investigation which will assist in the overall  
17          assessment which she describes in the earlier paragraph.

18         Q. All right. And did you expect her as Crown Counsel to  
19          apply an independent perspective to the case as  
20          independent Crown Counsel?

21         A. Absolutely. You know, I think there are two levels of  
22          independence, if I can put it that way. I mean the  
23          crown institutionally and through all prosecutors acts  
24          independently and one of the things I -- you know,  
25          I don't buy the idea in a sense that Crown Counsel are

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1 uniquely independent in a way that procurators fiscal  
2 aren't, for example. It's institutionally the  
3 responsibility of every prosecutor to bring to bear an  
4 independent and objective view to the cases that they  
5 assess and take forward, but Crown Counsel culturally,  
6 and often by virtue of their professional background,  
7 bring an added layer of experience but also a sense of  
8 independence from the -- as it were, from the day-to-day  
9 aspects of the investigation and it's part of the, as it  
10 were, the responsibility of all counsel to act  
11 independently in the functions they fulfil.

12 Q. And would you have expected the crown precognition, and  
13 particularly the analysis, to consider adminicles that  
14 were relevant to race or racial motivation?

15 A. Certainly to the -- you know to the extent that those  
16 issues were relevant to the question of criminality  
17 which were being considered at that stage.

18 Q. What -- can you explain the position what happens if  
19 something isn't in the analysis? Do you expect  
20 Crown Counsel to look behind the analysis if they had  
21 been in that position of allocated AD?

22 A. I suppose if there was a gap in the analysis, there are  
23 perhaps two courses of action. One would be for  
24 Crown Counsel to in effect instruct further  
25 investigation, but I can imagine a case where

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1 Crown Counsel is able to bring to bear his or her own  
2 awareness of the case, the access that -- you know, the  
3 access to the primary material that they have and, in  
4 effect, to be able to address whatever the issue might  
5 be, you know, because one has to remember one has the  
6 narrative and the analysis, but lying behind that, as we  
7 discussed a moment ago, is the body of primary material  
8 and Crown Counsel can, you know, go behind the analysis  
9 and if there's an issue that Crown Counsel wants to  
10 think about independently, they have available to them  
11 the primary material to do just that.

12 Q. And would you expect Crown Counsel to be looking at and  
13 assessing adminicles of evidence that may have had a  
14 bearing on the state of mind of the officers?

15 A. I would -- I mean I would say so, yes.

16 Q. We've heard evidence from Mr McGowan when he spoke to  
17 the Inquiry. He said:

18 "This comes down to questions of mens rea, which are  
19 again basic concepts in criminal law. So in any case we  
20 don't know what's going on in the mind of, you know, the  
21 suspect, the potential accused. You get that from  
22 everything that goes around about it, whether it's  
23 things they have said, whether it's things they've done  
24 and the surrounding circumstances. I don't understand  
25 we were asking for anything complex or novel in that

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1           respect."

2           And is that your understanding of how the crown will  
3           look into the issue of what's in the mind of someone  
4           who's a potential accused by looking at the surrounding  
5           circumstances, things they've said, things they've done?

6           A. Well, you certainly need to look at -- I mean I suppose  
7           by the nature of it if you're thinking about issues of  
8           mens rea, one is often having to infer from facts and  
9           circumstances that are available. I suppose in the  
10          context of a case of this sort you asked me earlier, you  
11          know, about questions of what were or, you know, issues  
12          of what was known to the officers attending, when they  
13          were attending the scene, could be relevant to an  
14          assessment of the way they then responded.

15          Q. So you don't disagree with Mr McGowan's comments?

16          A. No.

17          Q. No. Could we look at paragraph 90 of your Inquiry  
18          statement. You say:

19                 "I have been provided with the narrative and  
20                 analysis sections of the crown precognition. The  
21                 narrative describes, albeit in summary form, the  
22                 findings of the PIRC in relation to both the allegation  
23                 of racist behaviour on the part of one of the officers  
24                 and the question of racism within the former  
25                 Fife Constabulary. I had no involvement in directing or



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1           influencing the content of the crown precognition.  
2           I had no preconception or expectation about the way that  
3           the issue of race would be investigated and analysed.  
4           This was, in the first instance, for the professional  
5           prosecutors charged with preparing the precognition,  
6           subject to any direction or instruction from  
7           Crown Counsel."

8           You had no involvement in the preparation of the  
9           crown precognition?

10          A. No.

11          Q. But I'm interested in this line that you had no  
12           preconception or expectation about the way that the  
13           issue of race would be investigated and analysed.  
14           I would like to look into that to see what the limits of  
15           your expectation were effectively.

16          A. Yes, I mean I suppose what I'm saying there is that  
17           I would have expected race to be considered, you know,  
18           in the context of the ways in which it could be relevant  
19           to the issue. You know, I did not myself -- I wouldn't,  
20           you know -- I would not myself have had any -- been  
21           setting any limits to what that would be, if I put it  
22           that way. It was for the professional prosecutors  
23           involved to, you know, consider and raise that issue in  
24           the ways that, you know, properly. I certainly would  
25           have expected that to be considered at all relevant

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1 stages.

2 Q. Thank you. We have an Inquiry statement from  
3 Lord Mulholland and he said:

4 "Race was front and centre from the outset of the  
5 investigation. A black man has died in police custody.  
6 It was obvious."

7 Do you disagree with that?

8 A. I don't disagree with that at all.

9 Q. Thank you.

10 A. I'm sorry. I wouldn't want that sentence to be taken as  
11 suggesting I wasn't, you know, fully alive to and  
12 cognisant of the issue of race. It's more that, you  
13 know, in the, as it were, role I had relative to the  
14 investigative process, it's not for me to be setting  
15 parameters or, you know, at least in the way that I  
16 approached it, you know, I had a very experienced team  
17 in place and, you know, I was content to -- to trust to  
18 their professional -- professional judgment and, you  
19 know, ultimately I'm answerable for the approach that  
20 they took.

21 Q. And I think a moment ago you said you were not placing  
22 any limits on their investigation --

23 A. No.

24 Q. -- insofar as it related to race or racial motivation?

25 A. No.

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1 Q. Or any aspect of that.

2 Can we look back at Ashley Edwards's Inquiry  
3 statement, SBPI 004445 and look at paragraph 16. Here  
4 she says:

5 "Race was looked at as part of the investigation,  
6 with particular emphasis on the previous disciplinary  
7 record of the restraint officers. Race did not really  
8 feature in the examination of the actual restraint or  
9 the medical evidence, except with regard to the  
10 prevalence of the genes associated with sickle cell  
11 anaemia in the Afro-Caribbean population."

12 Leaving aside the fact that Mr Bayoh was not a  
13 member of the Afro-Caribbean population, do you have any  
14 comments about the statement here from Ms Edwards that  
15 race did not really feature in the examination of the  
16 actual restraint? Was that in line with your  
17 expectations of how race would be dealt with and  
18 considered within the precognition?

19 A. Well, I think, as we said a moment ago, I'm not sure I  
20 had any particular expectation. I do remember that  
21 there was an issue about things said by one of the  
22 officers that needed to be looked at and considered. As  
23 I say, I'm not sure I had any particular expectation or  
24 anticipation about, you know, where that issue might go.

25 Q. So on the face of it you take nothing special from that,

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1           you're not concerned about that, that may have just  
2           simply been where the investigation took the  
3           precognoscer?

4           A. Yes.

5           Q. Right.

6           A. I mean I think that's -- that's right.

7           Q. We've heard evidence from Fiona Carnan. She worked on  
8           the -- primarily on the analysis, as I have said, and  
9           the countersignatory was Les Brown, the head of CAAPD.  
10          Fiona Carnan has given evidence that she took a  
11          two-stage approach to matters and if we could perhaps  
12          look at her Inquiry statement that may make it easier,  
13          SBPI 00379, and if we look at paragraph 45. There we  
14          are and she was asked to what extent was race a factor  
15          in her analysis of the actions of the officers:

16                 "I was concerned with considering whether the  
17                 actions of any of the officers, either individually or  
18                 collectively, amounted to criminality. My focus was on  
19                 the actions of the officers during the period of their  
20                 engagement with the deceased and the evidence of how  
21                 they conducted themselves thereafter. I did not  
22                 identify criminality on the part of any of the officers  
23                 involved. Had I identified criminality, it would then  
24                 have been part of my analysis in respect of criminality  
25                 to consider whether the conduct was racially aggravated

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1 under section 50A(1) (b) of the Criminal Law  
2 (Consolidation) (Scotland) Act 1995 or whether race was  
3 a motivating factor that would amount to an aggravation  
4 of the conduct of the accused officers in terms of  
5 section 96(ii) of that Act."

6 And then I wonder if we could look at paragraph 38  
7 where she was asked to explain her involvement in  
8 gathering and analysing evidence in relation to the  
9 extent to which race was a factor in the actions of the  
10 police officers. And she said:

11 "I was not involved in gathering evidence about  
12 race. If my analysis of evidence had established that  
13 there was sufficient evidence to support criminal  
14 charges against any of the officers, the question of any  
15 racial motivation or intention would have been addressed  
16 at that stage. Since the analysis of evidence did not  
17 identify criminality by any officer, the question of  
18 racial aggravation did not arise since no offence had  
19 been identified."

20 That description of her approach, how did that fit  
21 with your expectations of the crown's approach to  
22 scrutinising evidence for indicators of racial  
23 motivation or racial issues?

24 A. I suppose the question I'm asking myself reading that is  
25 why questions of racial motivation wouldn't be at least

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1           potentially relevant to the question of whether or not  
2           the evidence supported criminal charges. I'm putting it  
3           in that way because, you know, I would want to think  
4           through -- think that through, but that's the question  
5           that occurs to me reading that.

6           Q. Right. Let me explain a little bit more about  
7           Fiona Carnan's approach and perhaps we can talk about  
8           those reflection at the end. In relation to -- she was  
9           asked questions about racial tropes. Perhaps we could  
10          look at paragraph 8 of her second statement, which is  
11          SBPI 462:

12                 "At the time of your involvement in the  
13                 investigation were you aware of any racial tropes being  
14                 used by any of the response officers in their  
15                 statements?"

16                 And she was asked about that aspect. And she -- her  
17                 answer in her statement there says:

18                 "I have made no reference in my analysis of evidence  
19                 to the use of racial tropes or negative stereotypes  
20                 being used by any of the response officers in their  
21                 statements. However, it is unlikely that I would have  
22                 done so since the use of racial tropes is not criminal.  
23                 Apart from the statements of PC Paton and PC Good, I  
24                 have not been provided access to all the police  
25                 statements, so I'm unable to comment on their content as

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1 to whether I am now aware of racial tropes within police  
2 statements. PC Good and PC Paton both made reference to  
3 thinking about the attack on Lee Rigby and I can see now  
4 how such reference could on one view be interpreted as a  
5 racial trope. On another view their comments reflect  
6 their knowledge of intelligence briefings provided in  
7 recent months. As police officers who had been so  
8 briefed, they were alive to the possibility of the  
9 incident being terrorist related. I would not  
10 necessarily view their comments as racial tropes.

11 "Evidence about negative attitudes of officers to  
12 Mr Bayoh's race would not be relevant to the analysis,  
13 unless criminality was identified. From rereading the  
14 narrative and analysis, it's my sense that the officers  
15 perception of threat to themselves and the public was  
16 based on the reports of Mr Bayoh's knife carrying,  
17 chasing someone, his physique and their observations of  
18 his demeanour on arrival. Although the report certainly  
19 considered the perceptions of the officers, such  
20 perceptions were relevant to the question of whether  
21 their actions amounted to criminality.

22 "PC Good's actions were very limited. Her role was  
23 in assisting and securing leg restraints during the  
24 restraint of Mr Bayoh. PC Paton's perception of threat  
25 on his approach to the locus in the context of his

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1           actions in confronting Mr Bayoh and his subsequent role  
2           in the restraint was examined in the analysis. No  
3           criminality was identified in respect of these officers  
4           or indeed of any officer involved in the incident."

5           And then in evidence Fiona Carnan said:

6           "I have made no reference in my analysis of evidence  
7           to the use of racial tropes or negative stereotypes  
8           being used by any of the response officers in their  
9           statements. It's unlikely I would have done so since  
10          the use of racial tropes is not criminal. Evidence  
11          about negative attitudes of officers to Mr Bayoh's race  
12          would not be relevant to the analysis, unless  
13          criminality was identified."

14          Do you have any concerns about the approach being  
15          taken here?

16        A. I think reading that I mean I suppose, as I said a  
17        moment ago, the question in my mind is whether the  
18        points that were being picked up in that part of the  
19        statement should have been looked at through the lens of  
20        the way it bore on the officers' motivation and, again,  
21        I put that in the sense of a question, which no doubt  
22        the Inquiry will consider because, you know, I'm, as it  
23        were, we're reacting to that as you put it on the screen  
24        in front of me.

25        Q. Just to be clear, would you have considered it to be a



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1           relevant question for Fiona Carnan to be asking whether  
2           these matters were relevant to the question of the  
3           officers' motivation?

4           A. Yes, I mean if questions of motivation are relevant,  
5           then one wants to, I suppose, at least ask oneself what  
6           evidence one has that could bear on that question.

7           Q. Regardless of the outcome --

8           A. Indeed, indeed.

9           Q. -- the question should be asked?

10          A. Indeed, you know, it on the face of it strikes me as a  
11          question that one would want to ask.

12          Q. Thank you. And then picking up further on the issue of  
13          terrorism and Lee Rigby, evidence was available to  
14          Fiona Carnan that some officers were concerned they were  
15          attending a terrorist incident, some made reference to  
16          an increase in the terrorist threat level to severe and  
17          in her evidence Fiona Carnan explained she had  
18          fact-checked that, fact-checked that, and confirmed that  
19          there had indeed been an increase in the threat level to  
20          severe.

21                 First on the scene were PC Walker and PC Paton and  
22          statements were available to Fiona Carnan from those  
23          officers. PC Walker said:

24                 "It did cross my mind that he was doing this to get  
25          at the police there, bearing in mind we're on a severe

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1 level from an attack on the police."

2 And Fiona Carnan agreed that the severe threat level  
3 referred to by PC Walker referred to a threat level  
4 involving a possible terrorist attack.

5 And PC Paton's statement said:

6 "It also ran through my mind that this male could be  
7 part of a terrorist plot. I kept thinking about the  
8 Lee Rigby boy, the soldier who was killed."

9 Now, in evidence Fiona Carnan was asked as part of  
10 the process that she went through in her analysis and  
11 ensuring Articles 2 and 14 compliance:

12 "Did you consider why the possibility of terrorism  
13 crossed their minds?"

14 She said:

15 "I asked the question, although I think it had  
16 already been answered why they had considered terrorism  
17 because they had a briefing.

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

20 She said, "no". She was asked:

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

23 She said, "no".

24 "Did you consider why Constable Paton thought about  
25 Lee Rigby in particular?"

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1 She said:

2 "I simply noted his position."

3 She was asked:

4 "You didn't give thought as to why he thought about  
5 Lee Rigby."

6 And she said:

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

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

12 "I didn't ask that question."

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

17 And she said:

18 "I did not make that assessment."

19 Again, listening to that, and I appreciate I'm  
20 reading it out to you just now, listening to that  
21 evidence from Fiona Carnan, do you have any concerns  
22 about that approach being taken where it would appear  
23 the questions or consideration in relation to these  
24 aspects was not being given by Fiona Carnan?

25 A. Well, I suppose again just, as it were, reacting to what

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1           you're reading to me I -- one can identify questions  
2           that one might like to have seen asked, as you said a  
3           moment ago, without sort of prejudging what the answers  
4           to those questions would have been or where they would  
5           have gone I can understand the -- yes, I mean it strikes  
6           me there are questions that that material raises.

7           Q. And in terms of Article 2 and Article 14, would you have  
8           expected those questions to be asked as part of an  
9           investigation into the death of Mr Bayoh?

10          A. I mean certainly ultimately and also, you know -- well  
11          I think, yes, they're questions that one would want to  
12          see asked. Where they would go in terms of an analysis  
13          from the point of view of a criminal charge, you know,  
14          is I think another matter and I'm conscious it's not  
15          within the Inquiry's remit.

16          Q. And I'm not asking you to predict where those -- where  
17          the answers might have led.

18          A. Yes.

19          Q. But certainly in terms of the questions, it's the type  
20          of questions you would have expected to be asked as part  
21          of the analysis?

22          A. Well, in terms of -- well, I suppose that's an  
23          interesting question. Questions that one would want  
24          to -- one might want the team to be asking, whether it  
25          would need to appear patently on the face of the

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1           analysis, you know, I suppose might depend on where the  
2           questions took one.

3       Q.   Right.  But where, and it will be a matter for the Chair  
4           to interpret the evidence of Fiona Carnan --

5       A.   Yes.

6       Q.   -- but where it may be that she did not consider certain  
7           questions --

8       A.   Mm-hm.

9       Q.   -- is it fair to say that your view is those should have  
10          been considered?

11      A.   Certainly reacting to what you are saying, they're  
12          questions I would -- one would want to have seen asked.  
13          As I say whether -- whether the -- whether asking the  
14          questions would result in, you know, how that would play  
15          into the analysis, I think is -- is a different  
16          question.

17      Q.   Thank you.  We've heard the evidence of Mr McGowan and  
18          he said:

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

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1           thing. That's a relevant question."

2           Do you agree with Mr McGowan's evidence?

3           A. Yes.

4           Q. We've also heard from Ms Carnan in relation to  
5           Kayleigh Good's statement. And I'm conscious of the  
6           time. Could I have a moment? Are you happy for me  
7           to -- I probably won't finish in five minutes. Do you  
8           wish me to start and carry on?

9           LORD BRACADALE: I think you could probably make a start.

10          MS THOMSON: Thank you.

11                 Kayleigh Good was one of the constables that arrived  
12                 at Hayfield Road and she also described in her statement  
13                 that she gave to PIRC about Lee Rigby and she said:

14                 "I was also thinking at that point of the Lee Rigby  
15                 incident in London, mainly due to the fact of the  
16                 coloured male and the potential terrorist connotations."

17                 And so it would appear on the face of it that she  
18                 made a direct link between the colour of Mr Bayoh's skin  
19                 and the potential terrorist connotations and  
20                 Fiona Carnan was asked about this and she said -- she  
21                 was asked:

22                 "Did her statement [that's Kayleigh Good's  
23                 statement] not perhaps cause you to wonder whether  
24                 others who also thought about terrorism and Lee Rigby  
25                 had done so because of the colour of Mr Bayoh's skin?"

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1           And she had -- she said:

2           "I have to say, no, I didn't."

3           So in this regard Fiona Carnan was saying she didn't  
4           consider this aspect.

5           Again, is that something that causes you any concern  
6           that this was simply not considered?

7           A. Well, I'm going back to the -- Mr McGowan put it perhaps  
8           more succinctly than I did. You know these are  
9           questions that perhaps -- well, questions that one would  
10          want to have seen asked and addressed.

11          Q. We asked Lindsey Miller about this passage yesterday and  
12          she was asked whether Fiona Carnan's response concerned  
13          her and she replied:

14                 "Yes, it is to me indicative of at least unconscious  
15                 bias on the part of the police officer."

16          Would that be any part of the concerns that you had?

17          A. Well, precisely. I mean the whole, you know, the nature  
18          of the, as you put it, tropes is that they feed into  
19          unconscious bias.

20          Q. And Lindsey Miller was also asked whether this could  
21          also be indicative of unconscious bias on the part of  
22          Ms Carnan and she said:

23                 "I think I would have to say potentially, yes."

24          Have you any concerns about that?

25          A. Well, I don't -- I can't disagree with Ms Miller, you

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1 know.

2 Q. Ms Carnan was asked in evidence if she had considered  
3 whether the link was being made by Ms Good was  
4 reasonable or indicative of racial stereotyping. She  
5 was asked:

6 "The link made between the colour of Mr Bayoh's skin  
7 and the potential terrorist connotations, did you  
8 consider whether the link she made was reasonable or  
9 whether it might have been indicative of racial  
10 stereotyping?"

11 And Ms Carnan's answer was:

12 "I considered it was not unreasonable, given the  
13 briefings.

14 "Was it indicative of racial stereotyping?"

15 "Possibly."

16 She was then asked:

17 "Are you saying that now, with the benefit of time  
18 to reflect, did you think that at the time?"

19 And she said:

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

21 And then she was asked:

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

24 She said "yes". And she was asked:

25 "At the time you didn't think that of racial



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1           stereotyping? With the benefit of hindsight and  
2           reflection your evidence today is that it could be  
3           indicative of racial stereotyping?"

4           And she said "yes".

5           And she was asked:

6           "If it had occurred to you at the time or if you had  
7           thought that way about it at the time, is it something  
8           that you might have included in the analysis?"

9           And her answer was, "It's possible, yes".

10          And Lindsey Miller gave evidence about this passage  
11          of evidence yesterday and she said:

12          "I think that is something that should have been  
13          included in the analysis."

14          And she's obviously reflected that with the benefit  
15          of height.

16          "I don't think necessarily that it would have made  
17          any difference in relation to the consideration of  
18          criminality, but it is something that should have been  
19          within that document for the consideration of  
20          Crown Counsel."

21          Would you agree with Lindsey Miller in relation to  
22          that?

23          A. Yes, I don't think -- I wouldn't disagree with that.

24          Q. Then there was further questions asked of Fiona Carnan  
25          in relation to the use of language in the officers'

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1 statements and I would like to move on to that, but I  
2 see it's --

3 LORD BRACADALE: We'll stop now for lunch and sit at  
4 2 o'clock.

5 (1.00 pm)

6 (Luncheon adjournment)

7 LORD BRACADALE: Ms Grahame.

8 MS GRAHAME: Thank you.

9 Before lunch we were talking about Fiona Carnan and  
10 the approach she had taken and I would like to carry on  
11 in relation to some other evidence that she gave  
12 the Inquiry. A topic was raised with her about her  
13 awareness of racist stereotypes in society such as black  
14 men are more violent, unpredictable or aggressive and  
15 she said that she had come across those types of  
16 stereotypes. She was asked:

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

19 And she said, "no". She was asked if she had  
20 considered patterns of behaviour, for example, whether  
21 they had used their sprays or drawn their batons at  
22 knives at previous incidents and she said, no. Did she  
23 consider whether they treated all knife calls as  
24 potentially terrorist related and she said, no, that  
25 wasn't a question that was asked. She was asked if she

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1 had considered looking for comparator evidence, for  
2 example, looking at Walker, Paton and Tomlinson's  
3 history of the use of spray or Tomlinson's history of  
4 the use of force involving a baton with a view to  
5 establishing whether those officers had ever used sprays  
6 or batons before and she said, no.

7 She was asked whether they had used sprays or batons  
8 when defending -- sorry -- detaining a white suspect and  
9 she said, no, and she was asked if she had considered  
10 whether the speed with which officers elected to use  
11 force against Mr Bayoh was because he was black. In  
12 that regard she said:

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

17 She was then asked whether she considered whether  
18 Constable Walker and Paton decided to opt for a  
19 hard-stop may have been influenced by Mr Bayoh's race  
20 and she said "it wasn't a consideration per se" and she  
21 was then asked about the process which she adopted, a  
22 two stage process, looking for evidence of criminality:

23 "You didn't find any, so you didn't get past first  
24 base."

25 And she said:

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1            "That was right.

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

6            And she said "yes".

7            Now, in light of that evidence, we asked  
8 Stephen McGowan what he thought of that and it was his  
9 view that in relation to those questions posed that they  
10 are all relevant questions:

11           "So I have referred to looking at the totality of  
12 the evidence and that would be -- those would be  
13 questions that you would ask and the answers to those  
14 questions would be part of that totality which would --  
15 which I would expect her to look at because they're all  
16 relevant questions."

17           Would you agree with that?

18           A. I would certainly agree with Mr McGowan that those are  
19 all relevant questions, the questions you have  
20 identified.

21           Q. Thank you.

22           A. I'm uncomfortable about being drawn to criticise a  
23 member of staff, you know, my --

24           Q. All right.

25           A. -- approach to my role was to trust the professionalism.

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1 I thought that was a way that one gets the best out of  
2 staff and, ultimately, for me to take the responsibility  
3 and answer for what they did, so I'm, you know, but I  
4 entirely agree those are all relevant questions and the  
5 questions you asked me before the break are also all  
6 relevant questions.

7 Q. Thank you. Lindsey Miller was also asked about the  
8 approach that was taken and she said she thought that  
9 was too prescriptive an approach:

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

19 Would you -- would that accord with your  
20 understanding?

21 A. Yes.

22 Q. Does she fairly reflect what you wished to be done in  
23 relation to race?

24 A. I would have expected race to be examined fully in  
25 its -- where it's relevant to the issues that had to be

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1           addressed.

2           Q. Right.

3           A. And I can see that that could cover a wide range of  
4           possible issues.

5           Q. As you can see, we've discussed with a number of  
6           witnesses in relation to Article 14 in conjunction with  
7           Article 2 and looked at the issue of compliance with  
8           those articles. We've talked with witnesses about  
9           whether the crown took all reasonable steps to unmask  
10          any racist motive.

11                    In light of the excerpts of evidence that I have  
12          heard out to you today and the comments that have been  
13          made, looking at the picture that I presented to you,  
14          are you satisfied that all questions of race and race  
15          motivation were explored appropriately during that  
16          period of crown precognition?

17          A. I think given what you have read to me, I can't think  
18          that they were. They were quite clear -- from what  
19          you've said, there were clearly a set of questions that  
20          to be asked. Where those would have gone in terms of a  
21          criminal investigation, that's obviously a different  
22          question, and I'm conscious it's not within the remit of  
23          the Inquiry, but these were relevant questions and even  
24          if they didn't bear on the criminal decision, would  
25          ultimately be relevant in the context of any fatal

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1 accident inquiry or public inquiry that might be held.

2 Q. Thank you. Certainly the evidence from Mr McGowan was  
3 that he was of the view that further steps could have  
4 been taken in relation to this and Lindsey Miller said  
5 in evidence that with the benefit of -- she was asked,  
6 with the benefit of height, what did she think about  
7 whether all reasonable steps were taken and she said:

8 "I think on the basis of Ms Carnan's evidence, no."

9 So it would appear that you agree with Mr McGowan  
10 and Ms Miller in that regard?

11 A. I do.

12 Q. Now, earlier I asked you to look at a comment that was  
13 in Ashley Edwards' Inquiry statement and I wonder if we  
14 can look at that again briefly, SBPI 445, and it was  
15 paragraph 16, and I would just like to go back to this  
16 where:

17 "Race was looked at as part of the investigation  
18 with particular emphasis on the previous disciplinary  
19 record of the restraint officers. Race did not really  
20 feature in the examination of the actual restraint or  
21 the medical evidence, except in relation to the sickle  
22 cell anaemia."

23 In light of what you have now heard regarding  
24 Fiona Carnan's approach and the content of the crown  
25 precognition, the analysis which Fiona Carnan prepared,

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1 do you have any reflections on that comment that  
2 Ashley Edwards has made, race did not really feature in  
3 the examination of the actual restraint?

4 A. Well, I think what you have identified is a series of  
5 questions that could and should have been asked in the  
6 context of examining the question of restraint.

7 Q. Right. And earlier I said I would come back to a  
8 question I asked you. You had said you wanted to  
9 reflect on that. I said I was going to talk to you  
10 about evidence we had heard from Fiona Carnan and I  
11 referred to two paragraphs within her Inquiry statement.  
12 Maybe we could have those on the screen, SBPI 00379 and  
13 it was paragraphs 45 and then 38 and I'll just remind  
14 you of those.

15 If we could look at 45 first, please. And you'll  
16 remember I asked you about this. This is Fiona Carnan's  
17 statement. She was asked about to what extent was race  
18 a factor in her analysis of the actions of the police  
19 officers and she talked about being concerned with  
20 criminality, her focus was on the actions of the  
21 officers during the period of their engagement with the  
22 deceased, and the evidence of how they conducted  
23 themselves thereafter. She did not identify criminality  
24 on the part of any of the officers involved.

25 And towards the bottom of that chapter, paragraph,



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1 she says she -- if she had identified criminality, then  
2 she would have gone on to look at whether race was a  
3 motivating factor.

4 And then if we could look at paragraph 38 again.  
5 She was asked to explain her involvement in gathering  
6 and analysing evidence in relation to the extent to  
7 which race was a factor in the actions of the officers  
8 engaging Mr Bayoh. And she said she wasn't involved in  
9 gathering evidence about race:

10 "If my analysis of evidence had established there  
11 was sufficient evidence to support criminal charges  
12 against any of the officers, the question of any racial  
13 motivation or intention would have been addressed at  
14 that stage. Since the analysis of evidence did not  
15 identify criminality by any officer, the question of  
16 racial aggravation did not arise since no offence had  
17 been identified."

18 And having drawn that sort of two-stage approach  
19 being adopted by Fiona Carnan, I asked you did that fit  
20 with your expectations of the crown's approach to  
21 scrutinising evidence for indicators of racial  
22 motivation or racial issues and your reply was:

23 "I suppose the question I'm asking myself reading  
24 that is why questions of racial motivation wouldn't be  
25 at least potentially relevant to the question of whether

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1           or not the evidence supported criminal charges. I'm  
2           putting it that way because I would want to think  
3           through, but that's the question that occurs to me  
4           reading that."

5           And I said afterwards I would explain a little more  
6           about Fiona Carnan's approach and then I would come back  
7           to you and we could maybe talk about your reflections at  
8           the end.

9           So having gone through that process and looked at  
10          the approach taken by Fiona Carnan now, do you have any  
11          reflections about this idea of a two-stage approach  
12          being taken where race and racial motivation is not  
13          considered unless criminal charges are identified or  
14          criminality is identified?

15         A. Well, you know, having had the benefit of the process we  
16          have been through I -- I mean it doesn't seem to me to  
17          be right to treat it as a -- as a two-stage process in  
18          that way. You know, we've identified a series of  
19          questions that would have been relevant to ask as I say.

20         Q. Thank you very much. I would like to move on now to  
21          deal with the issue of experts.

22         LORD BRACADALE: Just before you leave that, could I ask you  
23          this, Mr Wolfe: given what you said earlier about the  
24          ability of Crown Counsel to identify gaps by reference  
25          to primary material in the precognition and having

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1           regard to what Crown Counsel said at paragraph 16 of her  
2           statement, would you have expected Crown Counsel herself  
3           in reading the materials to have identified the kind of  
4           issues that would give rise to these questions that  
5           Ms Grahame has been discussing with you?

6           A. I think having identified them as relevant questions to  
7           ask, I mean I suppose I ask it this way, if -- and I  
8           mean I'm not sighted on the interaction between  
9           Crown Counsel and the team so I don't want to -- again,  
10          I want to be cautious about being critical in  
11          individuals, but it's -- yes, these are the kinds of  
12          questions that one might hope would be identified, if  
13          there was a gap in the analysis or if the analysis was  
14          structurally flawed that these are questions that would  
15          be asked.

16                 And Crown Counsel, of course, may herself, you know,  
17                 might herself, you know, she could ask for further work  
18                 to be done or she herself could apply her mind and take  
19                 a view as to whether the issue that -- the gap is one  
20                 that in her judgment is one that is going to take  
21                 the Inquiry anywhere.

22          LORD BRACADALE: Perhaps I need to explore this with  
23          Crown Counsel herself.

24          A. Yes, I mean I -- I -- as I say it's -- I'm acutely  
25          conscious that I have immensely experienced

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1           Crown Counsel who exercises professional judgment and,  
2           you know, makes judgments on the basis of the material,  
3           you know, available to her or him in any individual case  
4           and, you know, we have identified in the material that  
5           Ms Grahame has put in front of me a series of questions  
6           that I have accepted are on the face of it relevant  
7           questions to ask and would be relevant questions to ask,  
8           you know, at all stages of the Inquiry. Having done  
9           that, yes, one might want to think about whether  
10          Crown Counsel should have identified those questions or  
11          not.

12         LORD BRACADALE: Thank you. Ms Grahame.

13         MS GRAHAME: Thank you.

14                 I would like to ask you some questions around the  
15                 issue of experts. We've heard evidence a number of  
16                 experts were instructed by the crown as part of this  
17                 process of the crown investigation. And I wonder if we  
18                 can look, first of all, at COPFS 05687, and we've heard  
19                 evidence that there is a knowledge bank available in  
20                 Crown Office for staff, we've heard about a Book of  
21                 Regulations, Precognoscer's Handbook. This is a  
22                 document that is part of the serious and complex case  
23                 guidance and this particular chapter relates to expert  
24                 evidence and the role of the expert.

25                 I don't know if you recognise this guidance that was

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1 available?

2 A. I would be aware there was guidance. I'm not sure I can  
3 say that I recognise this particularly.

4 Q. But you'll recognise there was guidance available to  
5 staff in relation to the expert evidence?

6 A. Well, certainly in relation to a wide variety of issues  
7 I would have expected it to include expert evidence.

8 Q. Okay. I wonder if we can just very briefly look at a  
9 part of this, page 8, it's a 14-page document, page 8  
10 that I'm interested in and it's section 8.6.1, and this  
11 guidance says:

12 "The use of the consultation to establish and  
13 confirm expertise is discussed at paragraph 8.1. This  
14 is a vital step and must not be overlooked or rushed  
15 through and there is a presumption that crown experts  
16 will be consulted with in High Court cases.

17 "Case investigators should aim to consult with the  
18 crown expert witnesses prior to the case being reported  
19 to Crown Office for Crown Counsel's instructions and  
20 indicting. Where an allocated AD has been identified,  
21 then the consultation should ideally be conducted with  
22 that allocated AD and the case investigator both  
23 present."

24 And as a general statement of principle, would you  
25 agree with the comments within this guidance?

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- 1 A. Yes, it certainly makes sense.
- 2 Q. For example, using a consultation to establish and  
3 confirm expertise, would you agree it's important that  
4 an expert has the necessary expertise --
- 5 A. Of course.
- 6 Q. -- before he or she gives opinion evidence to the court?
- 7 A. Yes, of course.
- 8 Q. And the presumption that crown experts will be consulted  
9 with in High Court cases, do you have any comments about  
10 that?
- 11 A. Well, it's always sensible to consult with an expert if  
12 circumstances permit, whether that -- I mean I suspect  
13 that in the generality of High Court cases there are  
14 probably many situations where for a variety of reasons  
15 that won't happen. It may be because the evidence is of  
16 a relatively standard nature or for other practical  
17 reasons.
- 18 Q. There is other guidance available, I won't take you to  
19 it, but in a trial if the defence agree the expert  
20 evidence and it's incorporated into a joint minute,  
21 there wouldn't be any need to consult necessarily in  
22 that regard.
- 23 A. Yes, and I have to confess, as an advocate depute, I  
24 will have prosecuted High Court trials involving, let's  
25 say, you know, relatively standard forms of expert

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1 evidence, if I can put it that way, where I may not have  
2 consulted with the expert.

3 Q. All right thank you. And then it talks about:

4 "Case investigators should aim to consult with  
5 experts prior to reporting or where an allocated AD has  
6 been identified, ideally the consultation would be with  
7 the allocated AD."

8 And is that the type of approach you would expect to  
9 be taken in a serious and complex case?

10 A. Absolutely makes sense and, you know, the opportunity  
11 for the prosecutor who one expects to conduct the trial  
12 to have met the expert and have the opportunity to test  
13 and ask questions is a valuable one.

14 Q. We will -- we have heard that there were consultations  
15 with the allocated AD and then it says:

16 "An advocate depute may conduct a consultation  
17 without the presence of the case investigator if he or  
18 she considers that appropriate."

19 And why would that be a matter of comment in the  
20 guidance?

21 A. It may be because in the normal -- if one takes the  
22 situation away from the prosecution of crime to other  
23 parts of the justice system, counsel would normally  
24 consult with a solicitor present and I suspect that this  
25 is signalling that in this context an advocate depute

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1           may, if he or she considers it appropriate, conduct the  
2           consultation without the case investigator being  
3           present.

4           Q. Thank you. And then can we look at the bottom of page  
5           8. In fact it mentions here:

6                     "In solemn cases there is a presumption that a  
7           consultation should be conducted with all crown expert  
8           witnesses, including expert medical witnesses, unless  
9           the evidence relates to routine forensic analysis of  
10          drugs, confirmation has been provided by the defence  
11          that the evidence will be the subject of agreement, or a  
12          satisfactory statement from a medical witness has been  
13          submitted by the police in accordance with the Serious  
14          Crime Protocol."

15                    In terms of when you were the Lord Advocate, was  
16          there a presumption that a consultation would be  
17          conducted with all crown expert witnesses, including  
18          medical expert witnesses? Is that something you were  
19          aware of in practice?

20          A. I'm afraid I can't say what the guidance was when I was  
21          Lord Advocate.

22          Q. Right.

23          A. The examples given there are situations where one might  
24          not conduct a consultation are generally consistent with  
25          what I described earlier.



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1 Q. All right. So outwith those exceptions or examples  
2 where a consultation wouldn't be required, would you  
3 expect an allocated AD to conduct a consultation with  
4 all crown experts?

5 A. Well, it's stated as a presumption, so assuming that was  
6 the guidance at the relevant time, then, you know, that  
7 would be I suppose if one put it this way the norm, but  
8 not an absolute rule.

9 Q. Thank you.

10 A. It's what I take from that. I should say I'm simply  
11 reading what's on the page.

12 Q. Now, we've heard evidence that after the final PIRC  
13 report was received in August 2016 and initially that in  
14 2017, from March to August 2017, Crown Office instructed  
15 three experts: a Professor Anthony Freemont, who was an  
16 osteoarticular pathologist; a Dr William Lawlor, who was  
17 a forensic pathologist, and Professor Michael Eddleston,  
18 who was a clinical toxicologist and pharmacological -- I  
19 mucked that word up -- pharmacologist.

20 I would like to ask you about some evidence we've  
21 heard from Les Brown about the instruction of experts  
22 and particularly in relation to the involvement of  
23 Dr Lawler who was a forensic pathologist and I'm hoping  
24 you can help us with something.

25 Mr Brown in evidence referred to the Lord Advocate

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1           and he talked about guidance or advice or a discussion  
2           with the Lord Advocate about the instruction of an  
3           expert who could be a reviewing expert. Now, he said it  
4           may have been Lord Mullholland, but obviously at the  
5           point in time when Dr Lawler was being instructed, you  
6           were the Lord Advocate at that stage.

7           So Dr Lawler was instructed for the first time on  
8           28 March 2017, so not quite a full year after you had  
9           been in the position, but almost a year, and I would  
10          like to tell you about the evidence of Mr Brown and see  
11          if you think it was you or if it was not you.

12         A. I can say now I have absolutely no recollection of it,  
13          but if it emerges from other evidence then, you know, so  
14          be it.

15         Q. Mr Brown talked about Dr Lawler being instructed, a  
16          forensic pathologist, and he's described him as a  
17          reviewing pathologist and he said:

18                 "That was the course of action that had been I think  
19                 suggested by the Lord Advocate at an early stage in the  
20                 investigation. It was within the consideration that  
21                 there would be some advantage in having a pathologist  
22                 who would be able to take a view independently on all of  
23                 the pathology evidence that had been obtained with a  
24                 view to, I suppose, coming to a conclusion as to what  
25                 this amounted to and, if there were differences, which

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1 area they could offer useful comment on and this was the  
2 context in which Dr Lawler was ultimately instructed."

3 And he said:

4 "That is how Professor Lawlor's name came up and at  
5 the time that Crown Counsel were wanting to identify a  
6 reviewing pathologist, the full CV of Professor Lawlor  
7 was forwarded as I recollect it to Ashley Edwards and  
8 Ashley Edwards considered that and approved an approach  
9 being made to Dr Lawler."

10 So again, it appears at the time Ashley Edwards was  
11 the allocated AD in place which is when you were  
12 Lord Advocate.

13 He said:

14 "I can only say that I personally have not had  
15 experience of that, but, as I indicated, the intentional  
16 to consider and approach a reviewing pathologist was  
17 something that was clearly considered by the  
18 Lord Advocate."

19 And he said he thought it was Frank Mulholland as he  
20 recollected it and that raised the question of the  
21 benefit of having a reviewing pathologist.

22 So I just wonder if that description or that  
23 evidence from Mr Brown, does that prompt any  
24 recollection on your part of having a discussion about  
25 this role?

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1           A. I'm afraid it doesn't ring any bells. As I say, I do  
2           have a poor recall. I found when I was doing statements  
3           for the UK Covid inquiry that I had poor recollection of  
4           events which one might think were significant, so the  
5           fact that I don't remember something, you know, the --  
6           is not necessarily -- doesn't necessarily mean it didn't  
7           happen, but none of that rings any bells to me.

8           Q. All right. Well, I have got a few questions to ask you  
9           about Dr Lawler who was instructed at the time you were  
10          Lord Advocate and I'll see if you can assist.

11                    I wonder if we could look at his first report. This  
12          is COPFS 00033. You'll see there at the top of the page  
13          his name, Dr William Lawler, he's a forensic pathologist  
14          and it's dated 22 May 2017. It's sent to Mr MacLeod,  
15          senior procurator fiscal depute in Crown Office; do you  
16          see that?

17          A. Yes.

18          Q. If you move down the page, please, he refers to the  
19          invitation to review various reports and he's being  
20          asked, you'll see at the bottom of the first paragraph,  
21          sorry:

22                    "Whether and to what extent I agree with the  
23          conclusions and findings of the others who have been  
24          instructed."

25                    He then lists the materials and if we can look

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1 further down, please, and then the background is noted  
2 by him. He's been sent a number of documents to assist  
3 with that.

4 And then if we could look at page 8, please, and it  
5 says:

6 "I have been asked..."

7 If we could maybe go to the top of page 8:

8 "I have been asked as a forensic pathologist to  
9 comment upon the pathological aspects of this case,  
10 including methodology and approach adopted, and  
11 specifically whether or to what extent I agree with the  
12 conclusions and findings of the others who have been  
13 instructed."

14 And if we can then look at page 9, he says:

15 "May I say at the outset that I have no criticisms  
16 of either the methodology or the approach adopted by  
17 Dr Shearer and Dr Bouhaidar in this case or indeed of  
18 anyone else instructed."

19 And we have heard evidence that Dr Shearer and  
20 Dr Bouhaidar were the pathologists who carried out the  
21 postmortem in relation to Mr Bayoh.

22 And then if we can look at page 11, please. I'm not  
23 going to take you through the whole report. I would  
24 like to look at section that deals with Dr Lipsedge  
25 which is -- here we are:

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1           "Dr Maurice Lipsedge. Dr Lipsedge is an emeritus  
2 consultant psychiatrist and he addresses the deceased's  
3 mental state, particularly in the context of the drugs  
4 which he was known to have taken."

5           And then if we can look on to page 12, he summaries  
6 Dr Lipsedge's reports and he says in "Comments":

7           "This expert confirms that I (as an acknowledged  
8 non-expert in this field) had concluded."

9           And I don't want to ask you about the conclusions or  
10 the comments that are given, but you'll see there that  
11 Dr Lawler, as a forensic pathologist, is being asked to  
12 comment on the report of a consultant psychiatrist and  
13 I'm interested in any views you may have about the value  
14 of that to the crown. You're smiling.

15       A. Well, simply as a matter of the law of evidence, an  
16 expert is qualified to give opinion evidence only in  
17 areas in which the expert has expertise, and to the  
18 extent that a witness offers opinion evidence on matters  
19 where they don't have expertise, that evidence is not of  
20 any evidential value or it's not evidence I suppose.

21       Q. So it's not of any evidential value, in fact is it  
22 admissible evidence?

23       A. No.

24       Q. Thank you. And do we see on page 14 he's also asked to  
25 comment on the report of a Dr Bleetman, a consultant in

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1 emergency medicine and -- sorry, in the comment section.

2 It may be that I have -- I'm talking about the PDF.

3 There it is, "comments":

4 "Dr Bleetman provides what I, as a nonexpert,  
5 consider to be ...."

6 So again he's not an expert in consultant -- an  
7 expert consultant in emergency medicine, but again he's  
8 being asked to comment. Is the position the same in  
9 relation to this specialism?

10 A. Well, he says he's a nonexpert. I suppose it slightly  
11 depends what the -- as it were, what one -- the  
12 reviewing expert is being asked to do.

13 I have been involved in a case entirely in a  
14 different context in a civil case where the -- we had  
15 the benefit of a what one might call a coordinating  
16 expert who drew together -- was helpful in the  
17 instruction of other experts who was able to provide  
18 some informed commentary from the perspective of someone  
19 skilled in a scientific discipline on the quality of  
20 what had been provided, so not in a position to provide  
21 opinion evidence, but in a position to give some quality  
22 assurance, or not, of the quality of what was being done  
23 by others so that's -- I think that's a different  
24 exercise from the one that, you know, you're looking at  
25 here, but I offer that simply as a -- something from my

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1 own practising experience.

2 Q. Thank you. And then on pages 23 and 24 of 26 we should  
3 say the heading "Professor Anthony Freemont". There we  
4 are. Professor Anthony Freemont, who is an  
5 osteoarticular pathologist. You may know this, we've  
6 heard evidence from Professor Freemont and he  
7 specialises in bone pathologist, so it's a very -- as I  
8 understand it, quite a particular area of specialism in  
9 that field. And we also heard evidence from  
10 Professor Freemont that when he decided to retire,  
11 the Home Office asked him to assist training others in  
12 the field because the UK did not have a lot of  
13 osteoarticular pathologists.

14 And again Dr Lawler, if we can look at the comments  
15 section, says:

16 "Admittedly this is not a matter within... "

17 Yes. So look at the overview section, sorry, and if  
18 we can look number 1:

19 "Although admittedly not within my field of  
20 expertise ..."

21 So again, he's highlighting that again this is not  
22 an area within his particular expertise.

23 Sorry, that's maybe the wrong page. Can we look  
24 further up, please. I think I have missed the section.  
25 I'll have to come back to that. I think I have -- oh,



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1           can we look at -- no, I have lost my number, my page  
2           number. I'll come back to that in a moment.

3           But again, do you have any concerns about Dr Lawler,  
4           a forensic pathologist, being asked to comment on a  
5           specialism of osteoarticular pathology?

6           A. I don't know enough about the interaction between those  
7           two disciplines, as to whether there's any value to a  
8           pathologist of one nature commenting on views by a  
9           pathologist of another related discipline.

10          Q. All right. Thank you.

11          A. But if he says he himself he's not an expert in the  
12          field, then that's -- that answers the question I think.

13          Q. Yes. And then can we look at a supplementary report by  
14          Dr Lawler, which is from 13 August 2017, COPFS 00034,  
15          and page 2 of 6. Again, there's reference there to  
16          Professor Freemont. Here it is:

17                 "Although I readily accept that I am not a  
18                 specialised osteoarticular pathologist, I do have a  
19                 career background of diagnostic histopathology, albeit a  
20                 long time ago."

21          So again he acknowledges that he's not a specialist  
22          in that field, but he did have a background in  
23          diagnostic histopathology. Is that something you would  
24          have expected would be explored in some detail in  
25          relation to the value of any comments Dr Lawler makes in

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1 relation to Professor Freemont?

2 A. Yes, on the face of it, it's something one might want to  
3 explore with the author, what one might take from any  
4 comment that he makes.

5 Q. And is one of the possibilities that he simply isn't in  
6 a position to comment on Professor Freemont's opinion  
7 because --

8 A. Yes.

9 Q. -- he doesn't have that specialism himself?

10 A. Either he doesn't have the specialism or his -- to the  
11 extent has an expertise, it is out of date or to the  
12 extent he has an expertise, it's at a lesser level than  
13 that of the person he's commenting on. There could be  
14 various possibilities.

15 Q. Thank you. And can we look at page 4, please, and I'm  
16 interested in the comments about  
17 Professor Michael Eddleston. You'll see there's a  
18 section relating to him. There we are.  
19 Professor Eddleston who's a consultant clinical  
20 toxicologist and had been asked to consider effects of  
21 drugs taken by the deceased prior to his death.

22 And then if we looked at page 5 and you'll see that  
23 there's a comments section:

24 "Although Professor Eddleston's area of expertise is  
25 significantly different from mine, I found his report

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1           very interesting."

2           Again, can you help us with understanding the value  
3           of that to the crown?

4           A. I'm not quite sure what the context is, but I suppose  
5           one expert -- an expert in one discipline may read a  
6           report from an expert in another disciplinary and find  
7           that illuminating in terms of what they have been asked  
8           to comment on, but whether that's what he's saying or  
9           simply a more general observation about it being  
10          interesting, I can't say.

11          Q. Certainly at the outset in relation to his instructions,  
12          he was asked to comment on methodology and approach  
13          adopted and whether to and to what extent he agreed with  
14          conclusions and findings of others.

15          A. Mm-hm.

16          Q. Would you have concerns, given the area of expertise of  
17          Professor Eddleston is significantly different from that  
18          of Dr Lawler, would you have concerns about the value of  
19          any comments he did have regarding methodology or the  
20          opinion of Professor Eddleston?

21          A. Well, again, I'm as it were speaking very much in the  
22          abstract, I mean he clearly can't give expert evidence  
23          in an area of expertise that is not his own area of  
24          expertise. Whether as a skilled scientist or medical  
25          scientist he's in a position to provide useful comment

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1           on, as it were, issues of general methodology, I can't  
2           say.

3           Q. All right. Dr Lawler did not disagree with any of the  
4           forensic pathologists who were of the same specialism as  
5           he had and that included Crane, Carey, Dr Shearer, and  
6           Dr Bouhaidar. Do you have any recollection now of why  
7           so many forensic pathologists were instructed by the  
8           crown?

9           A. I don't I'm afraid.

10          Q. Right. Dr Lawler was instructed between the period  
11          of -- instructed, first of all, in March 2017. His  
12          final report was received in May 2018, some 14 months  
13          later. Considering Article 2 obligations and avoiding  
14          delay, and in light of what I told you, do you have any  
15          concerns about the period of time that this reviewing  
16          pathologist -- the involvement of Dr Lawler had in  
17          relation to the period of time that the crown  
18          investigation took?

19          A. I suppose the starting point is a general concern about  
20          the time that the investigation took. As I have said in  
21          my statement, not unusual and I'm not sighted on the  
22          detail of why the investigation took the time that it  
23          did. I am aware from subsequent work that was done  
24          generally into death investigations that the  
25          availability and response of expert witnesses is often a

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1           significant factor in delay. It sounds like a very long  
2           period of you know to await this expert's view.

3           I'm afraid I haven't quite been following  
4           sufficiently the points you've been taking me through to  
5           really comment on the value or otherwise of his -- you  
6           know what he's got to say in the area in which he is an  
7           expert, so I'm not sure I can really assist beyond that.

8       Q. I would like to move on then and ask you about another  
9       expert who was instructed by the crown, Dr Steven Karch,  
10      and you have been asked about Dr Karch in your Inquiry  
11      statement and certainly Dr Lawler was also asked to  
12      comment on Dr Karch.

13            Could we look at your -- could we look actually at  
14            the questions that were posed to you in relation to  
15            the Inquiry statements. So this is the Rule 8 request,  
16            which is SBPI 00438, and could we look at question 20.  
17            And it says:

18            "Were you aware of any issues relating to  
19            Dr Steven Karch that were apparent from a time prior to  
20            your involvement in the investigation? Were you aware  
21            of Mr Bayoh's family views of Dr Karch and were you  
22            aware of any media statements attributed to Dr Karch?  
23            What were the previous Lord Advocate's views of Dr Karch  
24            as far as you were aware and how, if at all, did any of  
25            these matters affect your understanding of Dr Karch and

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1 his opinion?"

2 And you'll remember being asked about that and then  
3 if you look at your response, you relate response, which  
4 is 529 and paragraph 53:

5 "I have no recollection of the issues referred to in  
6 this question. If they were drawn to my attention,  
7 I would expect that to be apparent from the documentary  
8 record."

9 So do you have any recollection at all about issues  
10 being raised with you regarding Dr Karch and his  
11 instruction?

12 A. I'm afraid I have no such recollection. Now, I suppose  
13 I should qualify the second sentence that, you know,  
14 I wouldn't -- if something was mentioned to me in  
15 some -- in an oral briefing or orally, I wouldn't  
16 necessarily now remember it.

17 Q. Right. All right.

18 A. But I have absolutely no recollection of any of the  
19 points or issues raised in that question.

20 Q. We've heard evidence from Stephen McGowan and from  
21 Mr Les Brown about Dr Karch in connection with there  
22 being issued about the funding, the source of funding of  
23 his research, and whether that had implications in  
24 relation to his objectivity. We've heard evidence from  
25 them in relation to a newspaper article which appeared

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1           where Dr Karch had made comments about Mr Bayoh and the  
2           investigation to the press and we've heard evidence that  
3           I think the then Lord Advocate, who was  
4           Frank Mulholland, had been concerned about Dr Karch,  
5           about his engagement with the press, about engagements  
6           with his instruction, and that had also been reflecting  
7           a concern that the family had about his -- his  
8           instruction, his views on excited delirium, and those  
9           views had been reflected to Crown Office through their  
10          lawyer, Mr Anwar.

11           And we've also heard other evidence that in fact  
12          Dr Karch is not a forensic pathologist, he's not carried  
13          out any autopsies, he has no formal toxicology  
14          qualifications.

15           And does any of that, the information I'm giving  
16          you, prompt any memories or recollections on your part  
17          of being advised about Dr Karch or any of the previous  
18          concerns?

19          A. I'm afraid it doesn't.

20          Q. Right. You have said that you would have:

21            "If they were drawn to my attention, I would expect  
22          that to be apparent from the documentary record."

23           Thinking about when you were Lord Advocate, are  
24          these the types of things you would want to know about  
25          an expert if he was being instructed by the crown?

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1           A. I expect it depends what was being done about them. I  
2           would not expect to be routinely or indeed at all made  
3           aware of concerns about an individual expert in an  
4           individual case. I would rather expect Crown Counsel  
5           to, you know, make a decision about what should be done  
6           in relation to that expert if there were particular --  
7           if there was a particular reason to do so, then either  
8           the crown generally or Crown Counsel could raise the  
9           issue with me and, you know, I can imagine there might  
10          be a situation where there -- you know, let's say, again  
11          speaking generally, there are concerns about an expert  
12          but Crown Counsel takes a view that, you know, for good  
13          reason that the expert should be instructed but wants to  
14          have in effect reassurance of law officers are aware of  
15          the issue. I can see that happening.

16                 I don't remember it happening in this case or indeed  
17                 in any other, you know, it's the kind of issue that  
18                 I would expect counsel in effect, you know, routinely to  
19                 be alert to questions of independence, expertise and for  
20                 counsel to, you know, who have the full authority to do  
21                 so and are allocated to the case to make the decision  
22                 that is appropriate and to make the judgment. The  
23                 judgment call is for them, unless there's a good reason  
24                 to bring it to the officers.

25                 Given the particular sensitivities of this case, I



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1           could see such an issue being brought to law officers  
2           potentially, but, as I say, I'm afraid I have no memory  
3           of that happening.

4           Q. If your predecessor had indicated the crown would not  
5           rely on an opinion from Dr Karch, for many of the  
6           reasons that I have discussed with you, would you expect  
7           that to be an issue that was raised within the crown  
8           precognition, either in the narrative or the analysis,  
9           when it came to highlighting issues regarding Dr Karch?

10          A. I mean if it was known to the authors, I would have  
11          thought so, but if my predecessor had taken a view that  
12          particular experts should not be instructed or relied  
13          on, then I would have a question in my mind about why it  
14          features in the crown precognition at all.

15          Q. And would you expect that sort of information, that a  
16          Lord Advocate has said we're not relying on this expert,  
17          to be drawn to the attention of the precognoscers?

18          A. I would have thought so, yes.

19          Q. And would that be the case even if they didn't get  
20          involved until after the comment had been made by the  
21          Lord Advocate, sometime after?

22          A. I can see how -- I suppose when you put it that way,  
23          I can see how the precognoscer might not be aware of the  
24          point and I suppose that leads me to a set of questions  
25          about how within Crown Office that information would be

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1           disseminated.

2           Q.   And I'm interested in your thoughts about how that sort  
3           of information could be disseminated and not just those  
4           involved at that moment that the comment may be made or  
5           the decision taken, but for the future staff who may  
6           come in at a later stage.  Do you have any procedures in  
7           place or did you have any procedures in place or was  
8           there any process whereby something like that being said  
9           by a Lord Advocate could be noted and had regard to by  
10          others?

11          A.   I can't -- I don't recall any, as it were, specific  
12          process or procedure.  I can envisage I suppose might  
13          depending on the context in which the statement was  
14          made.  If it was written down, one might expect it to  
15          be -- the written record to be available.  If it was  
16          said in a meeting, I suppose it would depend on the  
17          record and the recollection of those in the meeting.

18                 There's an interesting question I suppose about how  
19          one ensures that in a case which is being investigated  
20          within the police or the PIRC, but with crown engagement  
21          and then a subsequent crown investigation, how one  
22          ensures that there's a sort of continuity of knowledge  
23          and understanding and appreciation of any points that  
24          have arisen from one to the other.

25                 I have to confess, I suspect that didn't even occur

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1           to me at the time. I would have assumed that the system  
2           would ensure there was appropriate continuity.

3           Q. So there's not just the issue of a Lord Advocate saying  
4           we're not using this particular opinion from this  
5           expert, and the issue of how that is communicated to  
6           subsequent precognoscers, who may or may not become  
7           involved in the matter, but also the other implications  
8           about how would Crown Office ensure that that expert --  
9           if there are serious concerns about an expert, how that  
10          would be communicated amongst the wider staff in  
11          Crown Office that maybe this is not an expert we would  
12          be inclined to go to again? Is there a blacklist of  
13          experts that's prepared?

14          A. I have to confess I'm not aware, but when you put the  
15          point to me I'm entirely -- I can entirely see that  
16          there should be that if there's an expert who for one  
17          reason or another has proved to be not acceptable that  
18          there should be a way of making sure they're not used  
19          subsequently. You know, let's say there's an expert who  
20          has been, you know, found to be or been the subject of  
21          serious criticism by a court, crown might well not want  
22          to use that expert at all, because of the risk that that  
23          would present to criminal proceedings and having some  
24          form of database or record that allowed that to be  
25          disseminated and doublechecked I suppose would be a

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1           useful thing.

2           Q. Right, thank you. I'm conscious of the time if that  
3           might be a ...

4           LORD BRACADALE: We'll take a 15-minute break.

5   (A short break)

6           LORD BRACADALE: Ms Grahame.

7           MS GRAHAME: Thank you. I would like to move on to the  
8           instruction of further experts that took place in the  
9           Crown Office in 2018. And there's evidence available to  
10          the Inquiry that at that stage a Professor David Rees, a  
11          Dr Elizabeth Soilleux and a Dr Sebastian Lucas were  
12          being instructed by the crown and they were looking into  
13          histopathology, sickle cell anaemia, issues of that  
14          sort.

15                 It was during 2018 that, as we understand it,  
16          consultations took place between the allocated AD and  
17          the head of CAAPD with various experts and I would like  
18          to ask you again about something that we addressed prior  
19          to the break. When we were looking at the guidance  
20          available in relation to expert evidence, you may  
21          remember the use of the consultation to establish and  
22          confirm expertise was described as a vital step that  
23          must not be overlooked or you rushed through; do you  
24          remember I asked you about that?

25          A. Yes.

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1 Q. I won't put it back on the screen unless you wish. We  
2 have copies in the Inquiry of consultation notes that  
3 were taken during the course of a number of  
4 consultations with experts. It would appear from those  
5 notes that qualifications and experience was not part of  
6 the discussion.

7 Now, I fully appreciate we've not yet heard from  
8 Ashley Edwards in relation to how she led at  
9 consultations, but would you have expected, at  
10 consultations with an allocated AD and someone from  
11 CAAPD, to consider issues of qualifications and  
12 experience in relation to each of the experts?

13 A. Well, as a generality, I can really only speak to my own  
14 practice, if one consults with an expert, the first  
15 thing one wants to address is their relevant experience,  
16 expertise, qualifications, and so on. Obviously in an  
17 individual case that may be so obvious that it doesn't  
18 need to be addressed; in other cases it may not to be  
19 explored in detail.

20 That does strike me as the sort of thing that's  
21 ultimately a matter of judgment for -- for Crown Counsel  
22 and I appreciate the guidance is sound guidance, but,  
23 you know, one is dealing with an extremely, extremely  
24 experienced professional advocate who will have dealt  
25 with many, many expert witnesses and will have made her

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1 own judgment about what she needed to cover.

2 Q. And in your own experience, what are the types of  
3 situations where you would feel comfortable not going  
4 into detail with an expert about their qualification or  
5 experience?

6 A. I suspect if it's a relatively routine area of expertise  
7 where, you know, the expert's qualifications are patent  
8 or possibly in other cases where the expert has set out  
9 you know in -- you know in reasonable detail in their  
10 report or otherwise their qualifications. You know,  
11 I can easily envisage cases or think of cases where I  
12 wouldn't think it was necessary to explore those issues,  
13 yes.

14 Q. And presumably if an expert is regularly appearing in  
15 the High Court in Scotland and you perhaps have  
16 questioned that witness on a number of occasions,  
17 presumably that's another occasion when you may not need  
18 to go into their qualifications and experience?

19 A. Indeed. I mean it's -- it's -- I wouldn't be  
20 prescriptive and I think the -- as I say, the guidance  
21 is very sound guidance and one has to I think bear in  
22 mind that that's probably guidance being directed at  
23 staff, professional staff, but professional staff at all  
24 levels. You know, when one has very experienced  
25 counsel, it's not that they throw the guidance out by

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1           any means, but experienced counsel exercises judgment  
2           and experience all the time in relation to the way they  
3           conduct particular matters.

4           Q. But in the absence of the examples we've discussed now,  
5           the guidance is good guidance, good practice and it's  
6           always worthwhile checking the expert has got the right  
7           experience and expertise?

8           A. Absolutely, and the starting point is an expert -- you  
9           know, any witness can only give evidence of opinion if  
10          they have appropriate expertise and so, you know, you  
11          want to confirm that if it's not -- if it's not clear.

12          Q. And an expert -- it's only admissible evidence, the  
13          opinion evidence, if they do have that -- those skills  
14          and qualifications and expertise?

15          A. Absolutely.

16          Q. And one of the obligations of an advocate depute would  
17          be to satisfy the court that that evidence from that  
18          expert in relation to their opinion would be admissible  
19          and relevant to be heard in the court proceedings?

20          A. Well, indeed, you would need to establish the witness'  
21          expertise before leading their evidence of opinion.

22          Q. Thank you. So in relation to consultation notes which  
23          we have, which do not explore issues of qualifications  
24          and skills and expertise, if those issues were not  
25          addressed, would you be concerned that that wasn't being

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- 1           thoroughly looked at, subject to leaving aside,  
2           obviously, all the examples where it might not be  
3           necessary?
- 4        A. Well, I think all I can really say in the abstract is  
5           that it perhaps invites a question as to whether it was  
6           necessary to do that exercise.
- 7        Q. All right. Thank you. And if the allocated AD was  
8           conducting the consultation with the expert, that  
9           question should probably be directed to her rather than  
10          you?
- 11       A. Well, I mean I wasn't present, you know, I can't speak  
12          to what was done and, equally, you know, I -- I had an  
13          immensely experienced senior Crown Counsel conducting  
14          the case and it's the nature of that role that one is,  
15          you know, exercising professional judgment all the time  
16          and I would not expect to have to interrogate the way in  
17          which she is exercising that professional judgment,  
18          I would rely on that and trust that, accepting of course  
19          that I'm answerable constitutionally when I was  
20          Lord Advocate for that trust.
- 21       Q. Where there is a consultation and it's conducted by  
22          Crown Counsel, and we have heard that Les Brown would  
23          often attend with the allocated AD, however Fiona Carnan  
24          would not attend. And I'm interested in your views on  
25          the precognoscer who's preparing the analysis is not at



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1 consultations with the allocated AD with the experts,  
2 and whether you think reflecting on that approach,  
3 whether that's a disadvantage for the precognoscer who's  
4 not been party to those discussions, often about complex  
5 issues?

6 A. Put in the abstract, I can certainly see that it could  
7 well be a disadvantage, yes. If the issues in the  
8 report are being explored and investigated at  
9 consultation, it's going to be helpful for any member of  
10 the team who's then going to have to, as it were, use  
11 that information to have been party to those  
12 discussions, but I put that very much in the generality,  
13 you know. Again, not having been party to that kind  
14 of -- precisely who was attending what meeting, I'm not  
15 sure I can be more specific.

16 Q. I'm only asking in the generality. And then where in  
17 this case Les Brown attended with the allocated AD, what  
18 would your expectations be in relation to sharing  
19 information about that consultation, either by the  
20 allocated AD or by the head of CAAPD with the  
21 precognoscer who was working on the analysis? Would you  
22 expect there to be some sort of discussion or meeting or  
23 handover or would you be comfortable with them relying  
24 on consultation notes? Do you have any thoughts about  
25 that?

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1           A. I suspect it depends very much on the particularities of  
2           any individual -- individual case, and there may be  
3           cases where, you know, a note of the meeting is  
4           sufficient or whether the issues explored didn't reveal,  
5           as it were, new material which needed to be drawn to the  
6           attention of the precognoscer.

7           Equally, there might be other cases where, you know,  
8           one would -- if the individual hadn't been present, you  
9           might in the ideal world want some form of oral  
10          explanation. I think it's very hard to be prescriptive  
11          and I think it would be quite wrong of me, you know,  
12          from the role of head of system, to be put in a position  
13          of seeking to comment on what one might regard as  
14          matters of very fine case management.

15         Q. Thank you. One other aspect in relation to the experts.  
16         We've heard evidence from Les Brown about consultations  
17         which he attended with Ashley Wyse and on his own. And  
18         then I asked him about some other experts who there were  
19         no consultations notes in relation to them and should we  
20         assume there were no consultations and he thought that  
21         was a reasonable approach to take.

22                 Do you have a concern about the fact that it appears  
23                 that nobody from the crown consulted with these experts,  
24                 so Dr John Parkes, Dr Maurice Lipsedge,  
25                 Dr Sebastian Lucas, Dr Payne-James, Dr Mary Sheppard,

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1 Professor Jack Crane, Dr Nat Carey, Professor Anthony  
2 Freemont or Professor Michael Eddleston? So there's  
3 quite a large number of experts there where we have no  
4 consultation notes and it would appear, from Les Brown's  
5 recollection, that they were not consulted with. Do you  
6 have any thoughts about the absence of consultation with  
7 experts where they have been instructed?

8 A. It very much depends on the nature of their evidence,  
9 the issue they're addressing and the clarity and, you  
10 know, clarity of the opinion that's being expressed.  
11 I'm not sure I can really answer the question in any  
12 sort of abstract way.

13 Again, it perhaps invites a question about why there  
14 wasn't a consultation with particular experts but, you  
15 know, I have certainly in the past been in a position of  
16 taking a view that, you know, there was nothing I could  
17 usefully spend time with the expert asking -- asking the  
18 expert because the issue was clear and the, you know,  
19 the expert -- their expertise and everything else was  
20 adequately -- adequately patent from a written document.

21 Q. Again, do you think that perhaps if the Inquiry is  
22 looking for further information about this and further  
23 explanation that Ashley Edwards would be the person to  
24 speak to about that?

25 A. I think you would have speak to those who were involved

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1           in setting up the consultations, deciding whether or not  
2           to consult with particular experts and, you know,  
3           I would, you know, I would be relying on their  
4           professional judgment.

5           Q. Thank you.

6                     I would like to move on and ask you about a  
7           different type of expert. Perhaps we could look at  
8           paragraph 52 of your Inquiry statement, and this relates  
9           to an expert in relation to restraint. There we are.  
10          Can we just see the question just above that. Again,  
11          it's about expert witnesses and you were asked what  
12          involvement, if any, you had in the instruction of  
13          experts and then if we can move down and your paragraph  
14          52 says:

15                    "The documents which have been provided to me by the  
16          Inquiry contain an email exchange between my office and  
17          APCC in December 2017 in relation to the identification  
18          of a suitable qualified restraint expert, in which I  
19          suggested that inquiries might be made with police  
20          forces elsewhere in the UK and with police training  
21          institutions north and south of the border. Otherwise,  
22          so far as I can recall, I had no personal involvement in  
23          the matters referred to in this question. These were  
24          all matters for the investigative team under the  
25          direction of APCC. As I have already noted, when I

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1 received APCC's report with a recommendation in relation  
2 to prosecution of the officers, I had a discussion with  
3 her which resulted in further consultation with a  
4 restraint expert before a final decision was taken.  
5 I cannot now recall the specific point upon which I  
6 considered that further work was required."

7 So you had some involvement in relation to the  
8 restraint expert?

9 A. Yes, I mean my -- the exchange which is recorded in the  
10 documents indicates that the team had been having  
11 difficulty identifying a suitable restraint expert and I  
12 had suggested the inquiries that are to described there  
13 and then I think there is -- if I remember it correctly  
14 from the documents, I think there's then an exchange  
15 where there's a question of whether I had someone in  
16 particular in mind and I didn't. You know, it was  
17 simply that I was encouraging the team to look firth of  
18 Scotland and to those institutions described in order to  
19 find somebody who could suitable and independently  
20 comment from a restraint point of view.

21 Q. Thank you. It may assist if we look at the moment at  
22 COPFS 02126A, and this was a briefing note that was  
23 prepared by Alisdair McLeod at a later stage and you'll  
24 see it's dated 28 February 2020, but it covers the  
25 period of the crown investigation from 3 May 2015, which

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1 is the date of Mr Bayoh's death, to 11 November 2019.

2 I wonder if we could look at page 13 of this. And  
3 it deals with what's called the OST expert, so that's  
4 officer safety training expert, and it summaries the  
5 issues that the crown experienced during this time:

6 "The crown encountered considerable difficulty in  
7 identifying a suitable OST expert and a number of  
8 inquiries were made in England and Northern Ireland and  
9 the approaches were made to the  
10 Metropolitan Police College in Hendon."

11 Do you see all of that?

12 A. I do, yes.

13 Q. And there's mention of details of a known and trusted  
14 former training officer, Martin Graves, now operating as  
15 an OST expert in the private sector. Were you aware  
16 that Martin Graves had been instructed by the crown?

17 A. Well, I was certainly aware that an expert had been  
18 instructed. I don't now remember the name.

19 Q. Mr Graves was contacted in December 2017 and the  
20 following day he forwarded his CV and confirmed he would  
21 be in a position to start reviewing materials. And then  
22 during January 2018, there seems to have been a view  
23 that he would be able to provide a report. He was  
24 contacted by telephone in January and given specific  
25 details about the case, and then you'll see he was given

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1 a detailed letter of instruction and then if we can move  
2 on:

3 "The original materials provided to him in January  
4 included documentation in relation to the training  
5 delivered to the material officers."

6 And then there was further communication with  
7 Mr Graves over a period of time and there appears to  
8 have been some issues about whether he could provide the  
9 report as instructed within that period of time.

10 If we can move on. And then it says:

11 "This was with a view to finalising the report to  
12 Crown Counsel by 23 May 2018. Although the consultation  
13 with Mr Graves was very useful, he advised the crown  
14 that his report would not be completed until April 2018  
15 and, as a result, it was decided not to submit a report  
16 to Crown Office until Mr Graves' report was received and  
17 assessed and other investigation were ongoing."

18 And then if we move on, it says:

19 "The report was received on 14 April 2018. There  
20 were a number of typing and dictation errors and a  
21 number of points about factual accuracy that were also  
22 raised with Mr Graves. After consideration of the  
23 points raised by the crown, his initial report was  
24 treated as a draft and he submitted his final report at  
25 the end of April 2018 and he was then precognosed by the

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1           precognoscers on 11 May 2018."

2           So he was initially instructed, he prepared a what  
3           became known as an interim report, after further  
4           discussion there was a final report, he was consulted  
5           with by Crown Counsel, and he was also precognosed by  
6           the precognoscers in May of that year.

7           And is that the type of engagement with crown that  
8           you would expect an expert in relation to restraint or  
9           officer safety training would have in this type of  
10          investigation?

11         A. Again, there's nothing there which strikes me as  
12          surprising, if I can put it that way. The -- you know,  
13          again, the precise approach to any particular expert  
14          will obviously depend on the circumstances and the  
15          judgment of the professionals involved as to what --  
16          what's required but, you know, there's nothing in what  
17          you've shown me that I find unusual or surprising.

18         Q. Thank you. Could you now look, please, at the letter of  
19          instruction to Mr Graves, COPFS 00008, and this is a  
20          letter of instruction to Mr Graves dated 24 January  
21          2018, and on page -- there's a reference to recent email  
22          correspondence and telephone calls with Alisdair McLeod,  
23          who was the precognoscer at that time, and an  
24          introduction to the work that the crown were doing.

25                 Could we look at page 2 of 12, please, and there's a



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1 passage in bold there:

2 "Given your expertise, the crown wish to instruct  
3 you to prepare a report commenting on the actions of  
4 police from the point of engagement with Mr Bayoh and  
5 particularly providing opinion on whether the method of  
6 engagement with and restraint of the deceased by  
7 officers was reasonable and justifiable, taking into  
8 account the requirement for their use of force to be  
9 necessary, accountable, proportionate, legal and  
10 ethical. In general in providing your opinion please  
11 comment on whether the officers concerned seem to have  
12 followed their OST training. We would ask that you  
13 consider all of the materials supplied to you in  
14 reaching your opinion."

15 And so he was instructed in this letter to prepare a  
16 report in relation to those matters and then you will  
17 see that there is a list of materials that were  
18 enclosed. You will see a large number of documents  
19 included. I don't want to go through these in any  
20 detail, but if we can scan down the page, and a number  
21 of statements are also provided to the expert that we  
22 can see listed, a composite disc, maps, 999 calls,  
23 airwave recordings, photographs, that sort of thing.  
24 It's all detailed in this letter.

25 And could we look at page 7 of 12, please, at the

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1 section "Restraint on the ground". There we are:

2 "Restraint on the ground. You will notice that on  
3 the composite CCTV timeline a stop-clock appears on the  
4 left of the screen at the moment when the now deceased  
5 is taken to the ground and stops at 4 minutes and 2  
6 seconds when PC Smith contacted force control to ask  
7 an ambulance for the now deceased."

8 So there's some description there of what can be  
9 seen on the CCTV timeline that's been provided by the  
10 crown to Mr Graves and then there's also reference in  
11 the second paragraph to:

12 "Snapchat footage taken by Witness Wyse contains a  
13 brief glimpse of the methods of restraint being used at  
14 that time. Six officers are in various positions  
15 on/around the now deceased. From that Snapchat footage,  
16 it appears Mr Bayoh that was lying on the south southern  
17 pavement on Hayfield Road surrounded by five police  
18 officers, namely PCs Smith, Tomlinson, Paton, Gibson and  
19 McDonough. A sixth officer, believed to be PC Walker,  
20 appears to be lying lengthwise on top of or beside  
21 Mr Bayoh, his high-visibility clothing visible  
22 momentarily."

23 And then it goes on to describe other matters, and  
24 also talks about handcuffs and fastraps.

25 Could we -- so do you see that section there that we

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1           can see on the screen? It appears that in sending the  
2           letter of instruction to Mr Graves the crown have  
3           highlighted within the Snapchat footage that it appears  
4           Mr Bayoh was lying on the pavement, five officers were  
5           surrounding him, and a sixth officer, believed to be  
6           PC Walker, appeared to be lying lengthwise on top of or  
7           beside Mr Bayoh; do you see that?

8           A. Yes.

9           Q. That's raised specifically by the crown.

10           Could we look now, please, at Mr Graves' report,  
11           COPFS 00024, and you'll see that this is instructed by  
12           Mr MacLeod, the expert is Mr Graves, and the date of it  
13           is 13 April 2018 and I would like to go through some  
14           aspects of this report with you and then I'll ask you  
15           some questions at the end.

16           Could we look at page 30 of 41, please. And if we  
17           look at letter S, so it will just be at the bottom  
18           there, he notes -- this is a section in the report where  
19           Mr Graves is beginning to draw out factors that he's  
20           taken from the documents prepared by -- produce to him  
21           by the crown, and I'll just go over these very quickly:

22           "S talks about PC Walker fell to the ground at this  
23           time dropping the baton he had taken from his colleague.  
24           He states he ended up on his knees next to Mr Bayoh who  
25           was on his back."

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1           And then if we can look at page 31, and I'm  
2 interested in D and E:

3           "The whole restraint period appears to have been no  
4 longer than four minutes. While this may look like a  
5 long period for three of four officers to get someone  
6 under control, I have examined many such incidents and  
7 this is by no way a prolonged period of time."

8           Do you see that?

9           A. Yes.

10          Q. And then E:

11           "At the start of this process PC Walker describes  
12 the subject lying on his left side with him behind  
13 [that's Walker behind] on his knees. He states he  
14 attempted to get hold of Mr Bayoh and he was placing  
15 some downward pressure on his shoulder with his upper  
16 body."

17           So this is a description given by PC Walker in  
18 documents that have been sent to Mr Graves for  
19 consideration. And then H, I, please:

20           "At this time there are differing accounts of the  
21 body position of Mr Bayoh. PC Tomlinson, Smith and  
22 Mr Nelson appear to have him on his front with PC Walker  
23 lying over his upper body. PC Walker describes this as  
24 being on his knees with his upper body over the  
25 subject's right shoulder with him lying on his left

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1 side."

2 So this is where Mr Graves notes that there are  
3 differing accounts that are available to him in the  
4 Crown Office papers and on the one hand there are  
5 statements from PC Tomlinson, Smith and a statement from  
6 Mr Nelson who have Mr Bayoh on his fronted with  
7 PC Walker lying over his upper body and a differing  
8 account, however, is given by PC Walker who describes  
9 this as being:

10 "He was on his knees with his upper body over the  
11 subject's right shoulder with him lying on his left  
12 side, him lying on his left side."

13 And then if we can look at L, please, which is on  
14 the next section:

15 "I would also be very surprised that during this  
16 time PC Walker was not at times lying across the upper  
17 body of Mr Bayoh and putting a degree of pressure onto  
18 him. I do not think this could have been sustained or  
19 prolonged pressure due to my comment in the next  
20 paragraph.

21 "PC Tomlinson provides an example of this when he  
22 states that Mr Bayoh was bench-pressing PC Walker who is  
23 a substantial weight, off the ground. In this position,  
24 the fact that PC Walker was on his back would not have  
25 placed any pressure on his chest if this was not on the

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1 ground and Mr Bayoh would have been able to breathe in  
2 this position."

3 Then V for victor:

4 "Whilst I am not a medical expert in such matters, I  
5 have dealt with and reviewed many such cases and this is  
6 not one that jumps out as a typical case of positional  
7 asphyxia. It does have some of the hallmarks, but due  
8 to the short time of restraint, four minutes, the  
9 constant movement of Mr Bayoh and his opportunity to  
10 take breaths during the restraint process, I do not  
11 believe this was a major contributing factor to his  
12 unfortunate death."

13 Then I would like to look at the summary of  
14 conclusions in section 8 which is on page 38. Thank  
15 you. And if we look at F, please:

16 "In relation to all the variations in body position  
17 of Mr Bayoh and the officers, I would suggest this fits  
18 with my explanation as to the fluidity of the control  
19 and restraint process and that there were indeed times  
20 when Mr Bayoh was face down and the officers were at  
21 times placing pressure on him to keep him on the ground.  
22 However, I do not believe this was constant or  
23 prolonged."

24 Now, I would like to -- I appreciate that I'm taking  
25 you through this reasonably quickly and I have taken a

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1 snapshot of the restraint, but from this do you see that  
2 Mr Graves recognises that there are alternative versions  
3 that have been given: two police officers and Mr Nelson,  
4 who we've heard was an eyewitness, who talk about their  
5 impression of what happened during the restraint and PC  
6 Walker on the other. And on the basis of the statements  
7 of Tomlinson, Smith and Nelson, Mr Bayoh was remembered  
8 to be on his front with PC Walker lying over his upper  
9 body during the restraint. PC Walker's description was  
10 of PC Walker being on his knees with his upper body over  
11 the subject's right shoulder with Mr Bayoh lying on his  
12 side.

13 Now, do you remember the letter of instruction that  
14 I drew to your attention?

15 A. I certainly remember you drawing it to my attention and  
16 generally the points that you drew my attention.

17 Q. Let's have that back on the screen for a moment. If we  
18 could go back to COPFS, there it is, and if we can look  
19 at the section on page 7 out of 12, which was the  
20 restraint on the ground, and if we could look at the  
21 restraint on the ground, yes, thank you.

22 The very bottom of that there's a reference to the  
23 Snapchat footage that was available and the crown  
24 specifically drew attention to the fact that:

25 "From that Snapchat footage it appears Mr Bayoh was

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1           lying on the southern pavement of Hayfield Road,  
2           surrounded by five police officers, and the sixth  
3           officer, believed to be PC Walker, appears to be lying  
4           lengthwise on top of or beside Mr Bayoh... "

5           Do you see that?

6           "His high visibility clothing visible momentarily."

7           A. Yes.

8           Q. So the crown precognoscer who instructed Mr Graves,  
9           Alisdair McLeod, drew his attention to the Snapchat  
10          footage, drew his attention to what he gave an  
11          indication or what it appeared he could see. Obviously,  
12          Mr Graves had the versions of Tomlinson and Mr Nelson  
13          and PC Walker available and he recognised as part of his  
14          report that there was -- let me just see what he said --  
15          differing accounts.

16          In relation to this aspect of the restraint,  
17          restraint is obviously a very significant matter in  
18          relation to the crown precognition, it's a very  
19          significant matter that you've sought expert opinion on  
20          from Mr Graves, and the precognoscer, Mr MacLeod, has  
21          drawn attention to the Snapchat footage which some could  
22          view as very significant and has drawn attention to  
23          Mr Graves to the fact that it would appear to show  
24          PC Walker lying lengthwise on top of or beside Mr Bayoh.

25          I'm not asking which is right or which is wrong, but



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1           would you agree that this is a very significant matter  
2           that should be addressed as part of a consultation with  
3           Mr Graves looking at the differing accounts, looking at  
4           the Snapchat footage and what's been said by the crown  
5           that it shows and resolving that issue in terms of  
6           working out what Mr Graves' evidence and what his  
7           opinion is in relation to the restraint, because you  
8           have these different hypothesis? Do you think that  
9           would be something that you would really want to discuss  
10          with Mr Graves at consultation?

11         A. Well, obviously, you have taken me to a series of  
12          passages. I noticed in passing in his report he  
13          actually makes a -- as it was flicking through, he makes  
14          a point about there being different factual hypotheses  
15          and it being ultimately for the -- I think if I caught  
16          it as it went past -- for the crown to resolve those,  
17          but certainly if I were faced with an expert who was  
18          expressing a view on one hypothesis but I had evidence  
19          that supported a different hypothesis, I would want to  
20          explore that with the expert.

21                 Equally, if I have got an expert who's expressing a  
22          view on different hypotheses, I might want to explore  
23          that at a consultation, but I do go back to the comment  
24          I made earlier, you know, I have got immensely  
25          experienced Crown Counsel who's both exercising her

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1 professional judgment in how to approach these issues  
2 and questions and, I'm afraid, other than recalling in  
3 very general terms that there was some -- an issue that  
4 arose from her report to me that invited some further  
5 inquiry, I'm afraid I can't remember what that was, with  
6 the restraint expert, I'm not sure I can really assist  
7 much further.

8 Q. I don't want you to think I'm criticising Mr Graves. He  
9 recognises within his report that there are --

10 A. Yes.

11 Q. -- differing accounts. And would you agree that one of  
12 the ways that those differing accounts can be resolved  
13 is you mentioned the word "hypothesis" is that a  
14 recognised technique where lawyers can explore one  
15 factual hypothesis and the implications of that, but  
16 they can explore another. On the assumption this --  
17 these facts exist, what would your opinion be?

18 A. Perfectly usual way to approach issues with an expert.

19 Q. Right, and so if that hasn't been specifically set out  
20 in a letter of instruction, is that the type of approach  
21 you would expect to be explored during a consultation?

22 A. Yes, I mean a consultation would be an obvious way to  
23 tease out the implications of different hypotheses. You  
24 know, there may be other ways of doing it, but, you  
25 know, one may well get the best out of it by way of an

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- 1 exchange at a meeting.
- 2 Q. So you wouldn't expect the expert to decide which  
3 version is correct, but you would ask the expert to help  
4 you understand if version one is correct, what's your  
5 opinion; if version 2 is correct, what's your opinion?
- 6 A. Yes. Unless you've already -- you have a view as to  
7 which is the correct hypothesis. I mean, equally,  
8 I would expect if you've got a view of a hypothesis and  
9 the expert appears to be proceeding on a different  
10 hypothesis, you would want to bottom that out.
- 11 Q. Right. So if your view of one factual hypothesis was  
12 that the officer was lying lengthwise on top of or  
13 beside Mr Bayoh, that is a hypothesis you would want to  
14 explore with the expert, even if he had not fully  
15 addressed that in his report?
- 16 A. Well, I mean one would certainly want to make -- one  
17 would want to make sure one had the expert's opinion on  
18 the, as it were, the best hypothesis that the crown had  
19 of the -- of the factual circumstances.
- 20 Q. And so in relation to any consultation with Mr Graves,  
21 would you expect the issue of restraint and the  
22 positions to be addressed perhaps in some detail as part  
23 of the consultation?
- 24 A. Well, I mean taking what you've shown me, you know, I  
25 can see that there are issues there that could be

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1 resolved at consultation and I should say I'm not trying  
2 to be sort of, you know, I'm just, you know, conscious  
3 I'm being asked to, you know, express a judgment on or  
4 express a view about things which were done by  
5 experienced professionals on the basis of being taken  
6 very quickly to documents.

7 Q. Yes, I know and there's a lot of detail on the screen.  
8 I'm not asking you to form a concluded view on the  
9 outcome obviously.

10 A. Yes.

11 Q. Just asking you if it's the sort of issue that you think  
12 questions should be asked?

13 A. Well, it's certainly the sort of issue that, you know,  
14 in my own professional practice I would seek to, you  
15 know, resolve, unravel through a consultation with an  
16 expert.

17 Q. Thank you. And we know also that there was a  
18 precognition and is it the sort of issue that may also  
19 be addressed at precognition?

20 A. Yes, indeed.

21 Q. Thank you. And we have consultation notes in relation  
22 to the consultations with Mr Graves. If that issue does  
23 not appear to be addressed as part of that consultation,  
24 would I be right in thinking you would direct us perhaps  
25 to the APCC?

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1 A. I would ask a question, yes. I mean I'm -- you know and  
2 I shall, you know, I'm -- I hope not being -- yes, I'm  
3 very conscious I had an immensely experienced prosecutor  
4 engaged in this case, you know, I'm -- you know, upon  
5 whose judgment, you know, I placed and place reliance.  
6 You know, if there are questions about the judgments  
7 that she made in the course of the Inquiry, then, you  
8 know, it's really for her to explain her thinking.

9 Q. Thank you very much. I would like to move on. Could  
10 you give me a moment, please. I would like to move on  
11 now and I wonder if it would be possible to rise early  
12 today to allow me a chance to reflect on further  
13 questions. I will not finish the remainder of my  
14 questions tonight, even if we continue, and because  
15 I would like to move on to a completely different  
16 chapter, I wonder if it would be possible?

17 LORD BRACADALE: Very well. We'll continue with your  
18 evidence tomorrow morning at 10 o'clock, Mr Wolffe.

19 A. Yes, thank you.

20 LORD BRACADALE: Thank you.

21 (The hearing was adjourned to 10.00 am on Wednesday, 1 May

22 2024)

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(affirmed)

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GRAHAME

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