

Tuesday, 22 February 2022

(10.00 am)

LORD BRACADALE: Good morning. I have called this preliminary hearing in order to consider a motion on behalf of certain core participants asking me to request first the Solicitor General for Scotland, to whom the Lord Advocate has delegated her function in respect of dealings with the Inquiry, and second, the Chief Constable of Police Scotland to give certain undertakings in respect of any statement or evidence provided to the Inquiry by these core participants. The Solicitor General accepts that it is open to her to give such undertakings.

In written submissions, senior counsel for the Chief Constable contended that it was not competent for the Chief Constable to grant such a request, in other words, it was not lawfully within the power of the Chief Constable to grant such a request, even if he were minded to do so.

Prior to this hearing, however, she departed from that position and the Chief Constable now accepts that it is competent for him, through the Deputy

1 Chief Constable designated under the Police Service of
2 Scotland (Conduct) Regulations 2014, to give
3 undertakings of the kind sought. That means that this
4 preliminary hearing allows us to concentrate on
5 addressing the question as to whether I should request
6 the undertakings sought.

7 I propose to proceed as follows: I shall ask Senior
8 Counsel to the Inquiry to make submissions. I shall
9 then ask Ms McCall on behalf of Sergeant Scott Maxwell,
10 Constable Daniel Gibson and Constable James McDonough,
11 the core participants who made the application, to
12 address me. I shall invite Ms Mitchell on behalf of the
13 family of Sheku Bayoh to explain their position.

14 I shall ask the Dean of Faculty to address me on behalf
15 of the Scottish Police Federation and Mr Jackson on
16 behalf of Constables Kayleigh Good, Alan Smith and
17 Ashley Tomlinson.

18 Some other counsel indicated that they might wish to
19 address me, so after I have heard from these counsel,
20 I shall give an opportunity to anyone else to indicate
21 that they wish to address me, and then finally I will
22 give an opportunity to Senior Counsel to the Inquiry to

1 make any final submissions.

2 So against that background, Ms Grahame, would you
3 carry on please.

4 Submissions by MS GRAHAME

5 MS GRAHAME: Thank you.

6 Before summarising the events which have brought us
7 here to this preliminary hearing, I would like to begin
8 by introducing those who are present here today. I am
9 assisted today by my junior, Laura Thomson. Appearing
10 on behalf of relatives and family members of Sheku Bayoh
11 is Claire Mitchell. Appearing on behalf of the
12 Chief Constable of the Police Service of Scotland are
13 Maria Maguire and Lisa Henderson. Representing the
14 Lord Advocate is Alastair Duncan. On behalf of PIRC,
15 the Police and Information Review Commissioner, is
16 John Scott. On behalf of the Scottish Police
17 Federation, Retired Constable Nicole Short and Constable
18 Craig Walker is the Dean of Faculty, along with his
19 junior Euan Scott.

20 Representing Retired Constable Paton is
21 Brian McConnachie and Laura Anne Radcliffe. PC Ashley
22 Tomlinson, PC Good and PC Smith are represented by

1 Gordon Jackson and Carla Fraser. Representing Sergeant
2 Scott Maxwell, PC Gibson and PC McDonough are
3 Shelagh McCall and her junior David Adams. Representing
4 former Chief Superintendent Gary McEwan and Chief
5 Superintendent Conrad Trickett is Duncan Hamilton.

6 Representing Temporary Assistant Chief Constable
7 Patrick Campbell today is Iain Cahill, a solicitor with
8 Levy & McRae, and finally representing the Commission
9 for Racial Equality and Rights is Mark Moir.

10 This preliminary hearing has been convened to allow
11 you to hear submissions on whether to seek undertakings
12 from the Lord Advocate and the Chief Constable in order
13 to secure the evidence of those core participants who
14 are serving or former police officers. As you have
15 noted, the Lord Advocate has delegated responsibility
16 for her dealings with the Inquiry to the
17 Solicitor General. Responsibility for disciplinary
18 matters is delegated to the Deputy Chief Constable. If
19 you are minded to seek undertakings, your request should
20 be directed to the Solicitor General and the Deputy
21 Chief Constable.

22 The following officers attended Hayfield Road on

1 3 May 2015 and have core participant status: Sergeant
2 Maxwell, Constables Gibson, McDonough, Walker, Good,
3 Smith, Tomlinson and Mr Paton and Ms Short who are both
4 retired. And the following senior officers who were
5 involved in post-incident management, also have core
6 participant status and are represented today: Chief
7 Superintendent Trickett, Temporary Assistant
8 Chief Constable Campbell and Mr McEuan, a retired chief
9 superintendent.

10 Now, the background is that on 11 November 2019 the
11 Lord Advocate wrote to the Chief Constable of
12 Police Scotland and the solicitors acting on behalf of
13 the officers who were involved in the restraint of
14 Sheku Bayoh and the letters were in the following terms.
15 They were headed up "The death of Sheku Bayoh on
16 3 May 2015 in Kirkcaldy", and they said, and I quote:

17 "I write to advise you that Crown counsel have
18 instructed that no criminal proceedings will be
19 instituted against any police officer in relation to the
20 death of Sheku Bayoh in Kirkcaldy on 3 May 2015 on the
21 basis of the current information available. You will be
22 aware that there is an obligation on the prosecutor to

1 keep cases under review. This includes cases in which
2 the prosecutor has decided to take no action. The Crown
3 therefore reserves the right to prosecute any of the
4 officers at a future date."

5 The Crown's decision to take no proceedings was
6 based on the evidence available in November 2019.
7 The Crown reserved the right to review that decision in
8 the future, if further evidence came to light.
9 The Crown reserved the right to prosecute any of the
10 officers at a future date in light of that further
11 evidence.

12 These officers were not granted immunity from
13 prosecution. It should be clear at the outset that none
14 of the officers are seeking immunity from prosecution,
15 there is no application before you seeking immunity from
16 prosecution and none of the matters discussed today will
17 result in any application seeking immunity for those
18 officers.

19 Since the decision by the Lord Advocate
20 in November 2019, no evidence has been led before any
21 court in relation to the death of Sheku Bayoh. Evidence
22 about the circumstances leading to Mr Bayoh's death will

1 be heard for the first time at this public hearing in
2 this Inquiry which commences on 10 May this year. It is
3 possible that evidence that was not available to
4 the Crown in 2019 will emerge at the hearing and in
5 particular, in the evidence given by the
6 police officers.

7 Something said by an officer in evidence might
8 provide new evidence against him or her and/or against
9 another officer or officers. The officers' evidence
10 will be taken on oath and will be recorded and
11 transcribed. The transcript of the evidence will be
12 available to all, including the Crown.

13 At the conclusion of the Inquiry, the transcript may
14 be used by the Crown to consider anew whether there is
15 sufficiency of evidence against any of the officers who
16 played a part in Mr Bayoh's restraint or subsequent
17 events and bring criminal proceedings if there is
18 a sufficiency of evidence and prosecution is in the
19 public interest. The transcript of an officer's
20 evidence would be admissible as evidence against him or
21 her at any future trial.

22 In the circumstances, in giving evidence to this

1 Inquiry, the officers have the right to refuse to answer
2 any questions asked of them that may tend to incriminate
3 them and this is because of the privilege against
4 self-incrimination.

5 Having considered the submissions lodged on behalf
6 of the other core participants, it is clear that the
7 nature and scope of the privilege are not in dispute.
8 My submissions refer to some authorities, but I do not
9 propose to refer to these in any detail in the absence
10 of any dispute and, indeed, large areas of agreement.
11 My submissions will be made available publicly and will
12 be part of the transcript of this hearing.

13 In relation to the nature of this privilege, it has
14 been said:

15 "That it is sacred and inviolable principle that no
16 man is bound to incriminate himself."

17 A witness is not obliged to answer any question if
18 the answer would incriminate him in a crime for which he
19 has not been dealt with, or granted immunity.

20 The privilege is enshrined in Article 6 of the
21 European Convention on Human Rights. The right to
22 remain silent when being questioned by the police and

1 the privilege against self-incrimination have been
2 described as generally recognised international
3 standards which lie at the heart of the notion of a fair
4 trial under Article 6 and which are based upon the
5 assumption that the prosecution proves its case without
6 recourse to methods involving coercion or oppression.

7 The privilege applies equally to a guilty person who
8 wishes to avoid conviction, as to an innocent person who
9 wishes to avoid the inconvenience of a prosecution.

10 In relation to the scope of the privilege, the
11 privilege is only engaged where providing information
12 would create or increase the risk of incrimination. The
13 privilege applies not only to a direct question as to
14 whether the witness has committed a specific crime, but
15 to examination on facts which indirectly infer guilt, or
16 may form links in a chain of evidence. The privilege
17 extends to evidence which might be used for the purposes
18 of deciding whether to bring proceedings against the
19 person who gives it.

20 The privilege is not absolute. It does not extend
21 to a risk of incrimination in disciplinary proceedings
22 as they do not expose the witness to a risk of

1 conviction for an offence. The privilege does not apply
2 to the incrimination of others. On that basis,
3 an officer cannot rely on the privilege to refuse to
4 answer questions that may incriminate other officers.

5 In a public inquiry such as this where Section 21 of
6 the Inquiries Act 2005 empowers you to require the
7 attendance of witnesses for the purpose of giving
8 evidence the privilege against self-incrimination is
9 expressly preserved by section 22. As such, and because
10 the officers may be prosecuted in future in light of
11 evidence that emerges at the Inquiry, they are entitled
12 to rely on the privilege against self-incrimination.

13 Any questions asked by the Inquiry team in
14 preparation for or at the hearing in May about what
15 happened on 3 May 2015 will give rise to a risk of
16 incrimination. Questions about events in the aftermath
17 of Mr Bayoh's death may also give rise to that risk.

18 The officers involved in Mr Bayoh's restraint and
19 the subsequent events would be entitled to exercise the
20 privilege and to answer "No comment". This is their
21 right. They cannot fairly be criticised for exercising
22 that right and no adverse inference can be drawn from

1 the exercise of the privilege against
2 self-incrimination. Guilt or blame cannot be inferred
3 from silence.

4 As the Chair of this Inquiry, it is not within your
5 power to insist that the officers waive the privilege.
6 Only the officers themselves, having received legal
7 advice, may do so.

8 There have been occasions where witnesses have
9 exercised the privilege against self-incrimination and
10 refused to answer questions at inquiries and inquests.
11 On 22 December 2014, a bin lorry collided with
12 pedestrians in Glasgow city centre, killing six and
13 injuring many others. At the fatal accident inquiry
14 into their deaths the driver of the lorry, who remained
15 at risk of prosecution, elected not to risk
16 incriminating himself and answered "No comment" to
17 questions.

18 A reply of "No comment" would not have prejudiced
19 his position at any subsequent trial, but equally for
20 the purposes of the Inquiry, did not amount to evidence
21 upon which any conclusions or inferences could be drawn
22 by the Sheriff. It also caused public concern and upset

1 to the family of those who died.

2 Similarly, in the Stephen Lawrence Inquest in 1997,
3 the five men then suspected of involvement in Stephen's
4 murder refused to answer any questions asked of them.
5 Lord Macpherson in his subsequent report, following the
6 Public Inquiry into Stephen Lawrence's death, observed
7 that:

8 "This part of the Inquest must have been both
9 frustrating and indeed almost farcical to the jury. We
10 fully understand the Coroner's reasons for summoning the
11 five suspects to court and calling them, although the
12 fact is that calling them did in fact achieve nothing."

13 Now, in relation to the events leading up to today's
14 hearing, as was stated at the preliminary hearing on
15 18 November, the Inquiry is now at the stage of seeking
16 witness statements, and letters have been sent out to
17 witnesses. At that hearing we invited and encouraged
18 those who received letters to contact the Inquiry team
19 to make arrangements so that statements could be taken
20 as soon as possible and that work is ongoing.

21 Letters were sent to the legal representatives of
22 the police officers who played a part in restraining

1 Mr Bayoh on 3 May 2015. Those letters were sent on
2 29 November and 9 December last year.

3 In response, and having been advised by their
4 respective legal teams, those officers have indicated
5 a willingness to engage with the work of the Inquiry and
6 to assist the Inquiry.

7 Three of those officers, Constables Gibson,
8 McDonough and Sergeant Maxwell, have, however, requested
9 that before providing statements or oral evidence to
10 the Inquiry that you seek certain undertakings from
11 first of all the Crown and, second of all, the Deputy
12 Chief Constable. In the absence of these undertakings
13 they may exercise the privilege against
14 self-incrimination and it was their applications that
15 initially came before you today.

16 The undertakings sought from the
17 Solicitor General are to the effect that no evidence
18 given by these officers would be used against them in
19 any subsequent criminal proceedings in the future, or in
20 deciding whether to bring such proceedings.

21 The undertakings sought from the Deputy
22 Chief Constable are to the effect that no evidence given

1 by those officers would be used against them in any
2 misconduct proceedings in the future, or in deciding
3 whether to bring such proceedings.

4 The other core participant officers and former
5 officers reserve their position at this stage, but all
6 have indicated that undertakings from the
7 Solicitor General may be necessary.

8 Of the 12 core participant officers and former
9 officers, a total of eight have indicated that they may
10 also require an undertaking from the Deputy
11 Chief Constable.

12 In addition to Constables Gibson, McDonough and
13 Sergeant Maxwell, they are Constables Good, Smith,
14 Tomlinson and Chief Superintendent Trickett and
15 Temporary Assistant Chief Constable Campbell.

16 Now, with regard to the test which should be applied
17 in considering this issue, section 17 of the 2005 Act
18 provides that:

19 "... the procedure and conduct of an inquiry are
20 such as the chairman may direct."

21 This wide discretion is fettered only by the
22 requirement that you act with fairness and with regard

1 to the need to avoid unnecessary cost.

2 As Chair of the Inquiry, you have the power to seek
3 the undertakings sought from the Solicitor General and
4 the Deputy Chief Constable. It will be for the
5 Solicitor General and the Deputy Chief Constable to
6 decide whether to grant the undertakings.

7 Considering first the undertakings sought from the
8 Solicitor General. You will be aware that undertakings
9 have been sought and granted in other inquiries,
10 including the Stephen Lawrence Inquiry, the Bloody
11 Sunday Inquiry, the Baha Mousa Inquiry, the Grenfell
12 Tower Inquiry and the Undercover Policing Inquiry.

13 The applicable test when you are deciding whether to
14 request undertakings from the Solicitor General involves
15 balancing any positive effect on establishing the truth,
16 against any negative effect on the administration of
17 justice. You will require to weigh in the balance the
18 need to protect the right of witnesses not to
19 incriminate themselves, the need of the Inquiry to
20 obtain as much relevant information as possible and the
21 public interest in the administration of justice and
22 upholding the rule of law.

1 Dealing firstly with the positive effect on
2 establishing the truth. Applying the test to the work
3 of the Inquiry requires you first to consider whether an
4 undertaking from the Solicitor General would have
5 a positive effect on establishing the truth. Absent an
6 undertaking, some, perhaps all of the core participant
7 officers and former officers will exercise the privilege
8 against self-incrimination and refuse to answer
9 questions about the events of 3 May 2015.

10 The nine police officers who attended the scene are
11 key eye-witnesses to the incident in Hayfield Road.
12 Three of the core participants are senior officers and
13 are key witnesses to post-incident management in the
14 aftermath of the incident.

15 If they refuse to answer questions, the Inquiry's
16 ability to fulfil its Terms of Reference will be
17 significantly impaired. Although the officers provided
18 statements in 2015, those statements did not cover all
19 of the issues relevant to the Inquiry's Terms of
20 Reference. The Inquiry's Terms of Reference are broad
21 and wider than the remit of the Police Independent
22 Review Commissioner who noted the original statements.

1 Discrepancies, inconsistencies and conflicts are
2 apparent from a close reading of the officers'
3 statements in relation to key issues of fact and they
4 have not been explored.

5 At the hearing in May, consideration will be given
6 to whether the officers' actions complied with or
7 departed from expected standards: training, guidance,
8 standard operating procedures. Where their actions
9 departed from those standards, explanations will be
10 sought.

11 Our Terms of Reference require you to establish the
12 extent, if any, to which the events leading up to and
13 following Mr Bayoh's death, in particular the actions of
14 the officers involved, were affected by his actual or
15 perceived race. As you are aware, at every stage we
16 will ask the question "Would it have made a difference
17 if Mr Bayoh had been white?"

18 In order for the Inquiry to properly fulfil its
19 Terms of Reference, it is essential that all these
20 issues are explored in detail with the officers, both in
21 statements taken in preparation for the hearing and in
22 their oral evidence. It is essential that

1 discrepancies, inconsistencies or conflicts are explored
2 and resolved and that findings in fact are made on the
3 basis of a careful consideration of the officers'
4 evidence, alongside the evidence of civilian
5 eye-witnesses, and an assessment of their credibility
6 and reliability.

7 It is essential that the officers be given the
8 opportunity to provide the Inquiry with explanations for
9 their actions. Securing explanations from the officers
10 will allow you to consider the reasonableness and the
11 adequacy of those explanations.

12 Without an undertaking, an officer may feel
13 inhibited from giving a frank explanation because of the
14 risk of self-incrimination. In assessing the officer's
15 credibility and reliability, and, as with an
16 eye-witness, you may wish to consider their body
17 language and demeanour when giving evidence. If the
18 officers refuse to answer questions you will not have
19 that opportunity. Assessment of credibility and
20 reliability will be difficult if you do not see and hear
21 the officers give evidence.

22 If the officers rely on the privilege against

1 self-incrimination and refuse to answer questions, you
2 will be left to make findings of fact and to draw
3 inferences from those findings and to assess the
4 officers' credibility and reliability all on the basis
5 of their original statements. This would be highly
6 unsatisfactory and would thwart the Inquiry's efforts to
7 get to the truth.

8 In short, without the officers' evidence,
9 the Inquiry will be significantly inhibited in
10 fulfilling its Terms of Reference and its ability to
11 determine the facts of what happened will be undermined.

12 The reassurance of undertakings would allow the
13 officers to give full and frank evidence, without fear
14 of the consequences of self-incrimination. It would
15 allow discrepancies, inconsistencies or conflicts to be
16 fully explored. It would allow explanations to be
17 sought, put forward and assessed. That will all have
18 a positive effect on establishing the truth.

19 A core aspect of the Inquiry will be to hold
20 individual officers accountable for their own actions,
21 both in relation to the events at Hayfield Road and
22 subsequently. The task of the Inquiry in carrying out

1 that exercise will be enhanced if you have available to
2 you the full and frank evidence of the officers and
3 former officers.

4 Conversely, without the undertakings, the evidence
5 of the officers available may be limited to the
6 statements given by them to PIRC investigators with the
7 limitations of those that I have identified. Without
8 the undertakings, the ability of the Inquiry to hold
9 individuals to account for their actions would be
10 significantly impeded.

11 In addition, there would be wider benefits to the
12 core participant officers and former officers giving
13 evidence. The public and Mr Bayoh's family may wish to
14 see all the officers who attended Hayfield Road and were
15 involved in this restraint giving evidence under oath to
16 this Inquiry. There may be disappointment if
17 the Inquiry cannot secure their attendance and willing
18 cooperation, both from the perspective of ensuring you
19 have everything you need to make appropriate findings in
20 fact, but also from the perspective of allowing the
21 family and the wider public to hear evidence about the
22 circumstances that led to Mr Bayoh's death.

1 Turning to the negative effect on the administration
2 of justice. The second part of the test requires you to
3 consider any negative effect on the administration of
4 justice.

5 I recognise that Mr Bayoh's family, and indeed the
6 public, may perceive that the undertakings sought would
7 allow the officers to give evidence without fear of
8 prosecution and that if new evidence emerges in the
9 course of the Inquiry, the Solicitor General would be
10 unable to take that evidence into account in deciding
11 whether to raise criminal proceedings.

12 In responding to these two concerns, I would like to
13 make two points. First, in reviewing their decision not
14 to prosecute in light of any further evidence that
15 emerges in the course of this Inquiry, the Crown will be
16 able to take into account any new evidence given by
17 civilian eye-witnesses, other police witnesses, or
18 expert witnesses and that may relate to the use of force
19 or the cause of death, for example, and any relevant
20 documentation that is gathered in and disclosed as part
21 of the work of this Inquiry.

22 Second, the undertakings sought serve a limited

1 purpose which does not amount to immunity from
2 prosecution and that distinction is an important one.
3 The officers do not seek immunity from prosecution.
4 The Crown could rely on new evidence given by Officer B,
5 C or D when assessing whether there is a sufficiency of
6 evidence against Officer A. If the undertakings sought
7 were granted by the Solicitor General, this means
8 the Crown would not be able to rely on evidence given by
9 Officer A in determining whether to bring proceedings
10 against Officer A, or in any future prosecution, but
11 only against Officer A.

12 I fully appreciate I have not yet heard the
13 submissions of Ms Mitchell, but I foresee no negative
14 effects on the administration of justice if the
15 undertakings are sought. This Inquiry presents the best
16 opportunity to find out what happened on the day when
17 Sheku Bayoh died. As at today, no one has ever been
18 prosecuted, no one has ever been found to be at fault,
19 no evidence has ever been led about the events of
20 3 May 2015. The public and the family may have many
21 unanswered questions.

22 If the undertakings are not sought and the officers

1 exercise the privilege against self-incrimination and
2 refuse to answer questions, there is a real risk that
3 the Inquiry will be perceived to have failed to take all
4 reasonable steps to secure important evidence. I am
5 concerned that Mr Bayoh's relatives and family members,
6 core participants and the general public will be left
7 with unanswered questions and uncertainty, and a feeling
8 that they do not have closure on the matter. The
9 perception may be one of disappointment and lingering
10 uncertainty.

11 I appreciate that some may question my recommended
12 course of action. It may not be perfect, but I would
13 submit it is reasonable and would assist the Inquiry in
14 securing important evidence.

15 The only opposition to you seeking the undertakings
16 from the Solicitor General is from the relatives and
17 family members of Mr Bayoh. That alone is a highly
18 significant factor in your decision-making and you will
19 shortly hear from Ms Mitchell. However, I would like to
20 take this opportunity to reassure Mr Bayoh's family and
21 relatives that I have given careful consideration to
22 their written submissions and I have noted their

1 concerns, but I remain satisfied that it is in the
2 interests of the Inquiry and indeed the public interest
3 that the undertakings be sought and it is for that
4 reason that I make this recommendation to you.

5 Article 2 of the European Convention on Human Rights
6 provides that everyone's right to life shall be
7 protected by law and has been held by the European Court
8 of Human Rights to impose a procedural obligation on the
9 state to carry out an investigation following a death in
10 state custody. That investigation must be independent,
11 adequate and effective. The deceased's next of kin must
12 be involved in the investigation to the extent necessary
13 to safeguard their legitimate interests. An adequate
14 investigation is one that is capable of leading to
15 a determination of whether force used by the state was
16 or was not justified, and which identifies those
17 responsible. Securing the full and frank evidence of
18 the officers involved in Mr Bayoh's restraint will
19 assist the Inquiry in making that determination and
20 comply with the obligations under Article 2.

21 Without the reassurance of undertakings from the
22 Solicitor General it is likely that most, if not all of

1 the core participant officers and former officers will
2 exercise the privilege against self-incrimination. If
3 they do so, they will be entitled to refuse to answer
4 questions about what happened on 3 May 2015. I should
5 stress that this would be their right and they could not
6 be criticised for exercising that right. For the
7 reasons I have set out, this would inhibit the Inquiry's
8 ability to fulfil the Terms of Reference.

9 If, on the other hand, the undertakings are sought
10 and ultimately granted, then you will have the power to
11 compel the officers to give evidence and to answer
12 questions about what happened on 3 May 2015. They would
13 not be able to rely on the privilege against
14 self-incrimination. More evidence will be available to
15 the Crown in the future if the undertakings are sought
16 and granted than if they are not sought at all.

17 It would be reasonable to assume that all of the
18 officers will or may seek the reassurance of
19 undertakings from the Solicitor General before they are
20 willing to provide evidence to the Inquiry. The
21 Solicitor General has reserved her position but she is
22 bound to act fairly and in the public interest. She has

1 indicated that she will consider any request made with
2 an open mind. If you are minded to seek undertakings
3 from the Solicitor General, it would be expedient to
4 seek undertakings in relation to all of the core
5 participant officers and former officers now.

6 In all the circumstances, it is my recommendation
7 that you not only seek undertakings from the
8 Solicitor General on behalf of Constables Gibson and
9 McDonough and Sergeant Maxwell, but as we are only
10 three months from the hearing, I would recommend that
11 all officers who may seek to rely on the privilege
12 against self-incrimination be dealt with in a consistent
13 way and that progress be made now rather than waiting
14 until their positions are confirmed, which may not be
15 until they are giving evidence at the Inquiry.

16 If progress can be made now, it will avoid
17 unnecessary delay at the hearing. I have intimated to
18 all the core participants represented here today that
19 I intend to make this recommendation and all have either
20 positively confirmed that they are happy with the
21 approach I'm recommending, or they have raised no
22 objection to that.

1 The effect of the undertakings, if granted, will be
2 that no evidence given to the Inquiry by any officer
3 will be used against them in any criminal proceedings in
4 the future, or will be used when deciding whether to
5 bring such proceedings. Whether to grant the
6 undertakings and the precise wording of the undertakings
7 are, however, matters for the Solicitor General.

8 If I may turn now to the undertakings sought from
9 the Deputy Chief Constable. Of the 12 core participant
10 officers and former officers, eight have indicated that
11 they seek or may seek undertakings from the Deputy Chief
12 Constable in addition to the undertakings from the
13 Solicitor General.

14 As disciplinary proceedings cannot be raised against
15 retired officers, Ms Short, Mr Paton and Mr McEwan have
16 advised that they do not require undertakings from the
17 Deputy Chief Constable.

18 PC Walker has also indicated that he does not seek
19 an undertaking. The undertakings sought by the
20 remaining officers would be to the effect that no
21 evidence given to the Inquiry by any officer will be
22 used against them in any misconduct investigation or

1 proceedings, or when deciding whether to bring such an
2 investigation or proceedings.

3 As I said earlier, the privilege against
4 self-incrimination does not apply to disciplinary
5 proceedings, however, many public inquiries have sought
6 undertakings that the evidence given by witnesses to
7 the Inquiry will not be used against them in any
8 disciplinary proceedings brought by their employer.

9 As was observed by the chair of the Undercover
10 Policing Inquiry:

11 "... witnesses are more likely to be frank and
12 honest with their inquisitor if there will be no adverse
13 consequences to them arising from their evidence, such
14 as the use of their evidence in a criminal prosecution
15 or disciplinary proceedings against them."

16 Similarly, in the Al-Sweady Inquiry, the chair noted
17 that:

18 "Undertakings to protect witnesses from the risk of
19 their evidence being used against them in disciplinary
20 proceedings would properly serve to achieve the full and
21 frank accounts from witnesses that the Inquiry
22 requires."

1 Undertakings from employers were granted in the
2 Hutton Inquiry into the circumstances of the death of
3 Dr David Kelly, from the Secretary of the Cabinet to
4 permanent secretaries in respect of civil servants
5 consisting the inquiry; the Iraq Inquiry where both the
6 Government and the security services offered assurances
7 against disciplinary proceedings to serving officials
8 and military personnel; the Rosemary Nelson Inquiry
9 where undertakings were given by the Permanent Secretary
10 to the Ministry of Defence, the Cabinet Secretary and
11 Head of the Home Civil Service, the Head of the
12 Northern Ireland Civil Service and the Chief Constable
13 of the Police Service of Northern Ireland, and the Baha
14 Mousa Inquiry where undertakings were given by the
15 Permanent Undersecretary at the Ministry of Defence and
16 from each of the chiefs of staff of the armed services.

17 In deciding whether to seek undertakings from the
18 Deputy Chief Constable, you must again weigh in the
19 balance any positive effect on establishing the truth
20 and any negative effect on the administration of
21 justice. In my submission, the balance lies in favour
22 of you seeking the undertakings sought.

1 Undertakings from the Solicitor General alone will
2 not protect the officers from the possibility of
3 misconduct proceedings brought in response to their
4 evidence to the Inquiry. Even with the reassurance of
5 undertakings from the Solicitor General, it may be that
6 the officers who have indicated they will or may require
7 undertakings from the Deputy Chief Constable will be
8 reluctant to engage fully and candidly with the Inquiry
9 without those undertakings.

10 In order to secure the officers' full, frank and
11 uninhibited accounts of the events of 3 May 2015, it is
12 my recommendation that you seek undertakings from the
13 Deputy Chief Constable on behalf of the officers who
14 have indicated they may require them.

15 It should be noted that as with any undertakings
16 granted by the Solicitor General, the undertakings
17 sought from the Deputy Chief Constable would serve
18 a limited purpose. They would prevent the use of
19 Officer A's evidence to the Inquiry in any future
20 misconduct investigation or proceedings, or in deciding
21 whether to bring such an investigation or proceedings.
22 However, evidence given by Officers B, C or D may be

1 used against Officer A in any investigation or
2 proceedings, or in deciding whether to bring the
3 investigation or proceedings. Evidence given by
4 civilian and expert witnesses to the Inquiry may also be
5 taken into account.

6 Furthermore, as the Deputy Chief Constable has not
7 before now considered whether to bring misconduct
8 proceedings against any of the officers, she would also
9 have available to her the officers' original statements,
10 as well as the statements taken from eye-witnesses at
11 the time, and as well as other documents disclosed as
12 part of the work of the Inquiry.

13 The only evidence she would require to leave out of
14 account in any misconduct investigation or proceedings
15 against Officer A in deciding whether to bring such
16 investigation or proceedings, would be the evidence
17 given by Officer A to the Inquiry. Again, whether to
18 grant the undertakings and the precise wording of the
19 undertakings would be matters for the Deputy
20 Chief Constable.

21 The only opposition to you seeking undertakings from
22 the Deputy Chief Constable comes from the relatives and

1 family members of Mr Bayoh. The comments I made earlier
2 in the context of the undertakings sought from the
3 Solicitor General, and which I hope will have offered
4 some reassurance to Mr Bayoh's family, apply equally
5 here. You may find it helpful to hear from other
6 counsel now. I would be very happy to respond to their
7 submissions thereafter, if it is necessary.

8 LORD BRACADALE: Thank you, Ms Grahame.

9 Ms McCall.

10 Submissions by MS MCCALL

11 MS MCCALL: Yes, thank you, Chair. I appear for

12 Sergeant Maxwell, Constable Daniel Gibson and Constable
13 James McDonough.

14 In enacting the Inquiries Act 2005, Parliament chose
15 to respect and protect the fundamental right of any
16 witness against self-incrimination. It did so in
17 section 22 and in very many statutory inquiries, of
18 which this is one, that decision by Parliament sets
19 a challenge for the Inquiry panel how best to seek the
20 truth while not infringing fundamental rights, and that
21 this would be a challenge for this particular Inquiry is
22 obvious from the Terms of Reference because part of

1 the Inquiry's work is to determine what happened on
2 3 May 2015 in the encounter between Mr Bayoh and
3 the police, and what the officers did or did not do in
4 the immediate aftermath.

5 This is not the first inquiry to have to address
6 that challenge. There are innumerable examples, many of
7 which have been referenced in the written submissions
8 lodged by core participants and indeed in the written
9 submissions I lodged on behalf of those I represent,
10 which I adopt here.

11 The most common method of meeting that challenge is
12 for the Chair of the Inquiry to seek undertakings and in
13 every instance it is for the Chair to seek the
14 undertakings. It is not for an individual witness or
15 core participant to approach the Solicitor General, or
16 the Deputy Chief Constable; it is a matter for the
17 Chair, because as Ms Grahame has said, in terms of
18 section 17 of the Act, it is entirely for the Chair to
19 determine how best to conduct the Inquiry, bearing in
20 mind its aims and its Terms of Reference.

21 It is perhaps therefore a little unfortunate that
22 this process of submissions and a hearing on the

1 question of undertakings had to be initiated by me on
2 behalf of the core participants whom I represent, rather
3 than being initiated ex proprio motu by the Inquiry
4 team, and the reason it is raised by me at this stage is
5 the happenstance of timing that those whom I represent
6 were sent a letter asking for a statement.

7 As I understand it, the intention of the Inquiry
8 team is to take statements from all officers who
9 attended the scene that day.

10 It is also perhaps a little unfortunate that it fell
11 to me to raise the matter, in light of the submission
12 just made by Senior Counsel to the Inquiry because she
13 is the person responsible for the investigation and the
14 presentation of evidence to the Inquiry and she submits
15 that undertakings should be sought from the
16 Solicitor General and the Deputy Chief Constable.

17 LORD BRACADALE: I think, Ms McCall, in the other inquiries,
18 certainly the ones that I have looked at, the matter
19 tends to have been raised by a core participant.

20 MS MCCALL: There are, Chair, quite a number where it is
21 raised by the Inquiry panel itself. One example has
22 been given by Ms Grahame, which is the Undercover

1 Policing Inquiry, where Counsel to the Inquiry produced
2 a very lengthy submission to the Chair on which
3 contributions were invited from various core
4 participants.

5 Be that as it may, there is a risk -- I agree with
6 Ms Grahame here, there is a risk of misconception as to
7 what is being sought here. In their second submission
8 on this issue, the legal representatives of the Bayoh
9 family framed the application made by Maxwell, Gibson
10 and McDonough as officers demanding some form of -- some
11 convoluted form of immunity and the submission, in my
12 respectful view, misunderstands three things, that is
13 that any request for undertakings is to be made by you,
14 Chair, on the basis that you decide it will facilitate
15 the best interests of the Inquiry. I will come to the
16 test in a moment.

17 Secondly, there is no suggestion that an undertaking
18 grants any sort of immunity to any officer. What is
19 being sought is, as Ms Grahame says, very limited,
20 simply that any evidence given by the officer will not
21 be founded upon in relation to proceedings or a decision
22 to bring proceedings in respect of that officer himself.

1 It should be clear that the undertakings will not
2 prevent any officer being prosecuted or disciplined
3 based on other evidence that may emerge in the course of
4 this Inquiry, including from their colleagues.

5 The third matter is that the provision of
6 undertakings, as a matter of fact and as a matter of
7 law, will facilitate what it is that the family in their
8 written submission have said that they want, namely that
9 you, Chair, use all your legal powers to find and get to
10 the truth of how Sheku Bayoh died.

11 Can I perhaps then cover four things in my
12 submission. The first is the scope of the right against
13 self-incrimination, the second is the test which the
14 Chair should apply in deciding whether to seek
15 undertakings, because to some extent I disagree with
16 Senior Counsel to the Inquiry about that test. Then
17 I will come to look at the reasons why an undertaking
18 should be sought from the Solicitor General and then the
19 reasons why an undertaking should be sought from the
20 Deputy Chief Constable.

21 So just dealing first then with the scope of the
22 right against self-incrimination, and in order to be

1 effective, in my submission, any undertaking sought
2 should be coextensive with the scope of the right
3 against self-incrimination, in other words it should
4 cover the same scope, the same range, and the right
5 against self-incrimination has a broad scope, which
6 Ms Grahame has already said something about. It is not
7 confined solely to providing answers or evidence which
8 may constitute an admission, or may directly implicate
9 a witness in the commission of a crime. In fact, in the
10 present case insofar as the officers I represent are
11 concerned, that is not a likely scenario, but the right
12 extends to evidence which may indirectly implicate the
13 witness, or which may form links in a chain of
14 circumstantial evidence, and of course, as you well
15 understand, Chair, a piece of circumstantial evidence
16 can have more than one interpretation.

17 It also, in my submission, extends to evidence which
18 may inform the case which the prosecution may wish to
19 establish and/or evidence which they may wish to rely on
20 in deciding whether to prosecute.

21 I provided to you ahead of today a number of
22 authorities. I don't propose, unless you wish me to do

1 so, to take you to the detail of those, but in the Rank
2 Film Distributors case it is clear that the right
3 extends to use of an answer which may set in train
4 a line of inquiry. We see that at 443D of that case.

5 In the Den Norske Bank case it is also clear that
6 the right extends to using material in deciding whether
7 or not to prosecute, not simply in the course of a case
8 in court. That's at 289A of that judgment.

9 Ms Grahame referred to Article 6 of the European
10 Convention as also enshrining the right against
11 self-incrimination and I agree with that, while of
12 course Article 6 is not engaged in relation to
13 an officer providing evidence to this Inquiry there is
14 no discernible difference in the content of the right
15 under Article 6 as under domestic law, and I lodged in
16 advance a copy of the case of Saunders v United Kingdom.
17 Again, I don't intend to take you to it in any detail,
18 but at paragraph 71 the European Court of Human Rights
19 made clear the scope of the right and that it extended
20 beyond directly incriminating answers or admissions,
21 where they said:

22 "... bearing in mind the concept of fairness in

1 Article 6, the right not to incriminate oneself cannot
2 reasonably be confined to statements of admission or
3 wrongdoing or ... remarks which are directly
4 incriminating. Testimony obtained under compulsion
5 which appears on its face to be of a non-incriminating
6 nature -- such as exculpatory remarks or mere
7 information on questions of fact -- may later be
8 deployed in criminal proceedings in support of
9 the prosecution case..."

10 So a witness, any witness is able to invoke the
11 right against self-incrimination, not just in respect of
12 directly incriminating answers but in respect of
13 evidence which might subsequently be used to his
14 detriment in the course of later criminal proceedings,
15 or a decision to raise those proceedings, so it follows
16 that unless the prohibition on the use of such evidence
17 by the prosecuting authority is absolute in terms of the
18 undertaking, the scope of a witness's right not to
19 answer the questions or produce documents will be very
20 wide indeed.

21 Can I turn then to the test to be applied. I agree
22 with Senior Counsel to the Inquiry that section 17 of

1 the Act gives you the power to seek undertakings,
2 subject to the caveat of fairness. Ms Grahame suggests
3 that the test involves consideration of any positive
4 effect of establishing the truth balanced against any
5 negative effect on the administration of justice and she
6 went on to elaborate on that by weighing in the balance
7 the need to protect the rights of witnesses, the need of
8 the Inquiry to obtain as much relevant information as
9 possible, and the public interest in the administration
10 of justice and the upholding of the rule of law.

11 I respectfully disagree that that is the test. In
12 my submission, the test for the Chair is only to decide
13 how best the Inquiry can perform its duty in fulfilling
14 its aims and its Terms of Reference, while protecting
15 the fundamental rights of witnesses. What that means in
16 practice is that in deciding whether to seek
17 undertakings, you should be considering whether in the
18 absence of such undertakings, the work of the Inquiry
19 will be hampered.

20 While she did not refer to the source, I understand
21 that Senior Counsel to the Inquiry draws that test from
22 a ruling in the Manchester Arena Inquiry where that test

1 was set out by reference to something that was said by
2 the Chair of the Undercover Policing Inquiry.

3 In my submission, the Chair in the Manchester Arena
4 Inquiry inaccurately stated the origin of that test,
5 because when one examines the Undercover Policing
6 Inquiry ruling, the only reference to that test is in
7 the submission of Counsel to the Inquiry and the only
8 context in which that submission was made and reference
9 made to it by the Chair of the Undercover Policing
10 Inquiry was in the context of an application for what
11 I might describe as an extended undertaking, in other
12 words, not an undertaking of the sort that is sought
13 here but rather an undertaking that the evidence of one
14 witness could not be used against another witness or
15 a third party.

16 So in that context it was clearly important to
17 conduct some sort of balancing exercise because in that
18 context, of course, what the Inquiry required to
19 consider was the public interest and the effect on it in
20 the inability to prosecute third parties rather than in
21 relation to the witness themselves and it was noted in
22 the Undercover Policing Inquiry -- and can I say, the

1 undertaking was never sought -- that the breadth of it
2 was striking and it was noted that it would be wide
3 enough to permit a witness in the Inquiry to identify
4 a murderer and that murderer to be unable to be brought
5 to justice. So that is the very particular context of
6 that test and it was adopted in the Manchester Arena
7 Inquiry, in my submission without noticing its proper
8 origin.

9 Other inquiries that we have reviewed -- and many of
10 them are mentioned in our written submission -- when
11 considering undertakings restricted to being coextensive
12 with the privilege against self-incrimination, have
13 taken a different approach, leaving the question of the
14 public interest to the prosecuting authorities to
15 consider in deciding whether or not to grant the
16 undertaking.

17 If I am wrong about the test, and Senior Counsel to
18 the Inquiry is right, then I agree with her that the
19 negative effect here is minimal, not least because
20 the Crown has already decided and reviewed its decision
21 not to prosecute having conducted a fulsome
22 investigation, including having an account from each of

1 the officers available to it.

2 In my submission, as I say, the test which you
3 should apply is simply whether the work of the Inquiry
4 will be hampered.

5 The other aspect of the public interest in
6 prosecution in other inquiries has been left expressly
7 to the prosecuting authorities. One example of that is
8 the Grenfell Tower Inquiry, and again, I lodged this
9 ruling with you in advance, but at paragraph 24 of his
10 ruling the Chair said:

11 "It is for the Attorney General of course to decide
12 whether it would be appropriate for him to give an
13 undertaking and if so, in what terms. It will be for
14 him to balance the competing demands of the Inquiry
15 against the need to avoid prejudicing any future
16 criminal proceedings. Both engage the public interest
17 but in different ways."

18 And in Grenfell the test which was ultimately
19 applied -- it was at paragraph 14 -- was whether an
20 undertaking is necessary to enable the Inquiry to carry
21 out its work and fulfil its Terms of Reference.

22 Similarly in the Bloody Sunday Inquiry, the issue of

1 self-incrimination and undertakings is dealt with in
2 their report from page 65, and at page 71 it is clear
3 that the test that was applied was:

4 "... whether in absence of an assurance we are
5 likely to be hampered in carrying out our task of trying
6 to find out what happened."

7 That is the test I urge you to apply here.

8 Can I turn then to the third part of my submission:
9 reasons to obtain an undertaking from the
10 Solicitor General. As we have already heard, the scope
11 of the right against self-incrimination is a broad one
12 and the Terms of Reference here are broad and cover not
13 only the events at the scene of Mr Bayoh's encounter
14 with the police, but also insofar as my clients are
15 concerned, subsequent events at the police office and
16 during the investigation, and while it is the position
17 of those whom I represent that no crimes have been
18 committed by them, the Inquiry will be looking into the
19 circumstances in which allegations of various types of
20 potentially criminal conduct may be leveled against
21 them.

22 These may obviously fall within the scope of the

1 right against self-incrimination, for example, looking
2 at what happened in the encounter in the street with
3 Mr Bayoh, the potential criminal allegations are in my
4 submission obvious, but leaving aside those most obvious
5 of possibilities there are a number of other areas into
6 which this Inquiry will conduct an investigation and
7 hear evidence in which the right against
8 self-incrimination would also apply, for example,
9 matters that might fall within section 22 of the Police
10 and Fire Reform (Scotland) Act 2012, that is the offence
11 of neglect or violation of duty, and that statutory
12 offence has a broad sweep and is apt to cover a great
13 many topics in relation to which this Inquiry will want
14 to ask questions of the officers.

15 I note already, for example, that you have asked for
16 position statements from the Chief Constable and
17 the Police Federation about officers' obligations in
18 terms of completing various forms and so on.

19 Because of that broad sweep, in my submission it can
20 be concluded that the Inquiry is likely to be hampered
21 in fulfilling its Terms of Reference if no undertaking
22 is obtained from the Solicitor General.

1 The question then is what is the effect of seeking
2 and obtaining an undertaking. In a letter to the core
3 participants of 21 January, the Inquiry team asked legal
4 representatives of police officers other than those whom
5 I represent, whether if undertakings were obtained they
6 would waive their privilege. That, in my respectful
7 submission, is to misunderstand the nature of an
8 undertaking, because if an undertaking is sought and
9 given from the Solicitor General, the right against
10 self-incrimination is not engaged and cannot be relied
11 upon. It is not a question of waiver. The officers
12 will be compellable to answer the questions that they
13 are asked.

14 That is why I said at the outset that the provision
15 of undertakings is the means to achieve the aim that
16 the Inquiry find and get to the truth of how Sheku Bayoh
17 died. That is in everyone's interests, including those
18 whom I represent.

19 Ms Mitchell on behalf of the family may say that the
20 officers owe a duty of candour to the Inquiry, subject
21 to their right against self-incrimination, and I agree
22 with that and those whom I represent have already stated

1 to the Inquiry in writing that they acknowledge that
2 duty, but without the undertaking, inquiry hearings risk
3 being derailed by the invocation of the right which, as
4 we have seen, has a broad scope here, or as Senior
5 Counsel to the Inquiry has just put it, the Inquiry may
6 be thwarted in its efforts. So in order to ensure that
7 the Inquiry can fulfil its aims, in my submission an
8 undertaking should be sought from the
9 Solicitor General in the terms which we propose.

10 Can I turn then to the reasons to seek an
11 undertaking from the Deputy Chief Constable. I of
12 course agree that the right against self-incrimination
13 does not extend to disciplinary matters, yet
14 undertakings in relation to the use of evidence provided
15 by a witness in subsequent disciplinary proceedings are
16 not uncommon in inquiries such as this. So what is the
17 rationale, Chair, for you to seek them? In my
18 submission, it is the same: will the provision of the
19 undertaking assist the Inquiry in fulfilling its aim and
20 getting to the truth? And the reason disciplinary
21 undertakings are sought is that they provide witnesses
22 with a comfort that encourages full and frank testimony.

1 Other inquiries have recognised a potential chilling
2 effect on witnesses if they may be exposed to
3 disciplinary proceedings as a result of what they say,
4 particularly where those disciplinary proceedings can
5 significantly impact their professional life by way of
6 dismissal and so on. That is the position here.

7 As it has been put in other inquiries, while there
8 may be an expectation of cooperation, it is nonetheless
9 recognised that an undertaking from the disciplinary
10 authority has value, even where it may be part of the
11 professional duty of the witness to provide full and
12 frank testimony, for example, in the case of a soldier,
13 for example, here in the case of a police officer.

14 I have provided to you in advance a number of
15 undertakings that have been given in previous inquiries
16 and the reason I have done so is that they set out the
17 rationale behind giving them. So in the Hutton Inquiry,
18 as Ms Grahame has already referred to, the Cabinet
19 Secretary provided an undertaking in relation to the
20 civil servants and he began by saying:

21 "The Government expects witnesses to cooperate fully
22 with the Inquiry and to give full and frank testimony.

1 To help witnesses to do so, the Government therefore
2 gives the following undertaking ..."

3 In other words, a recognition of the expectation,
4 but a recognition that the undertaking provides
5 assistance in fulfilling that expectation.

6 As Senior Counsel to the Inquiry has said, in the
7 Rosemary Nelson Inquiry, such undertakings were obtained
8 from the head of the Civil Service in the UK and
9 Northern Ireland, from the Ministry of Defence and from
10 the Chief Constable of the PSNI, and in each of them
11 they acknowledged either an expectation or a duty, in
12 the case of the Police and the military, to cooperate
13 fully, but that the undertaking would encourage full and
14 frank testimony from those witnesses.

15 It is now conceded by the Deputy Chief Constable
16 that an undertaking would be competent. Again, in my
17 submission, it is for the Deputy Chief Constable to
18 weigh in the balance the need for an undertaking to
19 assist the Inquiry, with the need to maintain public
20 confidence in the police by holding officers to account
21 for any wrongdoing.

22 It is also for the Deputy Chief Constable to

1 determine the scope of any undertaking which she may
2 give. Previous inquiries demonstrate that there are
3 a variety of approaches.

4 In my submission, you, Chair, should seek a broad
5 undertaking, as proposed in our draft, and leave the
6 matter to the Deputy Chief Constable to decide whether
7 to grant it, whether it should be in those terms, or
8 whether it should be in narrower terms and again, can
9 I emphasise, as Ms Grahame does, that an undertaking
10 does not preclude disciplinary proceedings against any
11 officer based on evidence that may emerge from this
12 inquiry from another source and it does not, therefore,
13 ask the Deputy Chief Constable to abrogate her
14 responsibility for good conduct.

15 So with those submissions, I invite you, Chair, to
16 seek the undertakings from the Solicitor General and the
17 Deputy Chief Constable in the terms which we have
18 proposed in our written submission.

19 LORD BRACADALE: Thank you, Ms McCall.

20 Ms Mitchell.

21 Submissions by MS MITCHELL

22 MS MITCHELL: Yes. For the purposes of the recording we

1 have been asked to identify ourselves. Once again, I'm
2 Claire Mitchell, senior counsel for the family of
3 Sheku Bayoh.

4 On the issue of principle, namely whether any
5 undertakings of any kind be granted, the family of
6 Sheku Bayoh oppose the request for an undertaking from
7 both the Solicitor General for Scotland and the Deputy
8 Chief Constable from those seeking them.

9 The family of Sheku Bayoh have waited now some seven
10 years to hear the truth of what happened and want
11 the Inquiry to use its power to establish the truth.

12 Whether the legal test is as already set out by
13 Counsel to the Inquiry, or whether the test is as
14 Ms McCall has identified, put short, whether the work of
15 the Inquiry would be hampered if undertakings were not
16 granted, it is submitted that in the application of
17 either test, the balance can and should be struck in not
18 granting those undertakings.

19 As everyone understands, those seeking undertakings
20 are all police officers. The duties of police officers
21 are to be found in the declaration that each officer
22 makes in taking up office and that's now to be found in

1 the 2012 Act, in Police Scotland's code of ethics and in
2 statutory standards of professional behaviour.

3 In the recent independent review on policing,
4 complaints handling investigation and misconduct issues,
5 which was published in November 2020, it stated that
6 these aforementioned duties:

7 "... all of which to some extent express or imply
8 a statutory, ethical or procedural duty on that person
9 to assist in the investigation of a serious incident and
10 to uphold Convention rights."

11 In the aforementioned report, it is also clear, as
12 is accepted by Ms McCall, that the duty of candour
13 exists on police officers, but in that report it was
14 considered that that duty may not have been sufficiently
15 clearly set out. I don't intend to take the Chair to it
16 but that's recorded at paragraph 7.108.

17 Thus, a recommendation was made that the duty of
18 candour be put beyond any doubt by statute and whilst
19 this recommendation has not yet been implemented, the
20 duty nonetheless exists. Reference is further made to
21 paragraph 7.108 wherein it states:

22 "I have considered whether the current position is

1 sufficiently clear to police officers, and to the public
2 who have a legitimate expectation that police officers
3 will give every assistance after a serious incident.
4 That assumption of cooperation should be put beyond
5 doubt in the primary legislation, including the wording
6 of the constable's declaration."

7 On the issue of Convention rights, the report
8 suggests that there is an argument to be made that
9 a duty of candour:

10 "... is an obligation under Article 2 of the
11 European Convention on Human Rights which requires
12 parties to positively assist the state in conducting
13 a thorough and effective investigation."

14 Part of the purpose of the duty on the state to
15 investigate is to ensure the accountability of those who
16 work for the state, which of course includes
17 police officers. The duty under Article 2 requires
18 cooperation in good faith by individual officers and
19 failures to do so may give rise to a breach of
20 Article 2.

21 It is submitted that the review is correct when, at
22 paragraph 7.111, it states:

1 "... those in the office of constable and holding
2 the powers of that office have a higher duty than others
3 to account for their actions and record what they did or
4 saw in the execution of their duties."

5 The family of Sheku Bayoh have a legitimate
6 expectation that police officers will give every
7 assistance after a serious incident and that expectation
8 extends to coming to a public inquiry and answering all
9 and any legitimate and relevant questions put to it by
10 the Inquiry.

11 On the issue of whether the Chair has power to seek
12 undertakings from the Solicitor General and Deputy Chief
13 Constable it appears not to be an issue, but for the
14 avoidance of doubt, no submissions are made on behalf of
15 the family in that regard.

16 Picking up on a small point made by Counsel to
17 the Inquiry, Counsel to the Inquiry indicated that
18 transcripts would be admissible in any criminal
19 proceedings and I simply remind the Chair that it is
20 only in certain circumstances, as identified in the
21 Criminal Procedure Act 1995, that statements are used in
22 that way, that being prior inconsistent statements and

1 those statements which are adopted by a witness.

2 LORD BRACADALE: But a statement made by an officer could be
3 in the evidence -- in the Inquiry could be used in
4 a subsequent criminal trial of that officer if it was
5 against interest.

6 MS MITCHELL: Yes, indeed, I'm just reminding the Inquiry of
7 the circumstances it could be used in being put to that
8 witness and there are two circumstances in which that
9 would happen. They are not simply admissible as course,
10 as part of the evidence which would be included in
11 a case.

12 The Chair has the issue of principle and the
13 position of the family of Sheku Bayoh on this, namely
14 that they oppose the request for undertakings from
15 the Crown and the Deputy Chief Constable and I have no
16 further submissions to make.

17 LORD BRACADALE: Thank you, Ms Mitchell.

18 Now, Dean of Faculty.

19 Submissions by THE DEAN OF FACULTY

20 DEAN OF FACULTY: As recognised already, I am instructed in
21 this matter on behalf of the Scottish Police Federation
22 and also Officers Short and Walker, although today I'm

1 really representing the interests of the Federation only
2 and really my appearance today is prompted by the
3 opposition made on behalf of the family.

4 The depth of feeling in this matter is clear and
5 understood and understandable, but, my Lord, I cannot
6 let pass without comment the criticisms that are made of
7 the officers and indeed of the Federation regarding the
8 request that your Lordship should seek these
9 undertakings.

10 In the written submissions that request is described
11 as astonishing, as shameful and as insulting. Those
12 descriptions, my Lord, in my submission are wholly
13 unwarranted. A request for undertakings in an inquiry
14 such as this is commonplace. No respectable, sensible
15 lawyer would recommend proceeding without at the very
16 least exploring the availability of undertakings on
17 behalf of his or her client. There is nothing shameful;
18 it is sensible and it is lawful, in particular against
19 a backdrop where there is an ongoing campaign on social
20 media describing matters in a way that suggest
21 criminality on the part of certain individuals.

22 So, my Lord, in those circumstances, the Federation

1 resists any suggestion of any wrongdoing, shamefulness
2 or insulting behaviour in the seeking of these
3 undertakings and supports the seeking of those
4 undertakings.

5 My Lord, as to the test, in my submission there is
6 a cigarette paper between the test suggested by Counsel
7 to the Inquiry and the test suggested by my learned
8 friend Ms McCall. In my submission, perhaps the most
9 guiding aspect of this is the need to establish the
10 truth and the reasons that have been so eloquently set
11 out by Counsel to the Inquiry as to why the establishing
12 of the truth would be facilitated by the request of
13 these undertakings is in my respectful submission the
14 dominant consideration in this matter and if one needs
15 an example of that, one need only hark back to
16 the inquiry into the bin lorry disaster to see how that
17 inquiry was thwarted and impaired by the fact that
18 Mr Clarke required to stand up and say "No comment" to
19 all the questions that were asked of him.

20 My Lord, in these circumstances I simply wish to
21 advocate the position there is nothing wrong in these
22 undertakings; on the contrary, it is sensible, and in my

1 otherwise in the circumstances of no undertaking than to
2 give that advice to their clients.

3 But behind that, and I do find this somewhat
4 disturbing, behind that position is underlying the
5 suggestion which has been stated publicly that those who
6 rely on that right have somehow got something to hide,
7 that they are abusing the process, they are hiding
8 behind the right which they have and that frankly should
9 stop being said because in my submission it is wrong.

10 Counsel for the Inquiry in dealing with that -- and
11 I think I quote -- says that those who do rely on such
12 a right cannot be criticised for the exercise of that
13 right. That is undoubtedly a correct legal statement
14 and I can only hope that those who represent the family
15 will take that on board, but it remains my position,
16 along with others, that it is not a right that we should
17 be forced into because that is what would happen, but
18 that for the reasons that have been given very clearly
19 by others, you should accede to the request to seek the
20 undertakings from both the Solicitor General and the
21 Chief Constable.

22 LORD BRACADALE: Thank you, Mr Jackson.

1 Do any other legal representatives wish to address
2 me because this would be the opportunity to do so?
3 I don't think anybody has indicated that they wish to do
4 so.

5 Accordingly, Ms Grahame, do you want to say
6 something further?

7 Submissions in reply by MS GRAHAME

8 MS GRAHAME: Yes, thank you. I would like to make two
9 further comments.

10 First of all, in relation to the comments made by
11 Ms McCall, that, as she said, it was unfortunate that
12 she had to raise the matter on behalf of her clients,
13 and I would like to make some comments about the timing
14 of this hearing which has been very carefully selected
15 for different reasons.

16 This matter of undertakings and the privilege has
17 been raised by a number of core participants, with
18 a number of core participants, last year. It was raised
19 in fact at the first meeting that I had with Ms McCall
20 and with other core participants, so it is something
21 that we have been planning for a significant period of
22 time.

1 At the preliminary hearing on 18 November last year,
2 I explained about the many thousands of documents which
3 had been gathered in and those documents are large in
4 number and it was vital, in my view, that they be
5 carefully considered and analysed and as a result of
6 that work, a chronology has been prepared and circulated
7 amongst all the core participants, along with issues
8 which have been identified.

9 That careful consideration and analysis allowed us
10 to identify discrepancies, inconsistencies and apparent
11 conflicts, which I have mentioned. We wished to do that
12 and carry out that task prior to taking statements and
13 that was in order that the task of taking witness
14 statements would address key issues which are in
15 dispute, or where there is contradictions amongst
16 witnesses. It also allowed us to give fair notice to
17 the witnesses and the officers as to what the position
18 was, and even today only three out of the 12 officers
19 who could rely on the privilege have reached the stage
20 where they are in a position to make formal applications
21 and that is the three officers whom Ms McCall
22 represents.

1 Even today, nine out of the 12 officers do not yet
2 consider it possible, for various reasons, to put formal
3 applications before you, albeit I am recommending to you
4 that you deal with all consistently and in a uniform
5 manner.

6 Letters seeking witness statements were, as I said
7 in my submission, issued to officers on 29 November and
8 9 December and they were designed effectively to flush
9 out this issue and provide an appropriate moment,
10 an opportunity to address you on it. It is open to you
11 today to simply deal with the three applications before
12 you, but I have urged you not to do this. I would
13 wholly reject any criticism that this should have been
14 done earlier and that in some way now is not the
15 appropriate time. It is quite appropriate for the
16 matter to be raised when statements are being sought and
17 not before. Before statements were sought and before
18 today, officers simply did not have the chronology or
19 the issues identified to them.

20 The second point that I would like to make relates
21 to the test. The Manchester Arena Inquiry ruling on the
22 application for the Attorney General to give an

1 undertaking by Sir John Saunders was on 10 June last
2 year. Paragraph 6 of that ruling makes it clear the
3 test that he has carried out, Sir John Saunders, in
4 deciding whether to make a request to the
5 Attorney General and that test is:

6 "... any positive effect on establishing the truth
7 falls to be balanced against any negative effect on the
8 administration of justice."

9 No one disputed that that was an accurate summary of
10 the appropriate test and in fact that is the test that
11 was used by Sir John in his ruling last year. Whether
12 Sir John made an error as to the underlying source
13 unfortunately I'm not in a position to comment on that
14 this morning. The argument made by Ms McCall was not
15 foreshadowed in her written submission, or in any
16 communication between counsel, so unfortunately I have
17 not had the opportunity to consider it in any detail.
18 But my submission to you is it makes absolutely no
19 difference to the task that you have before you today
20 and to use the expression used by the Dean of Faculty,
21 there is a cigarette paper between the test which
22 I proposed and what Ms McCall said in submission.

1 Submissions in reply by MS GRAHAME53
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