

1 Tuesday, 22 February 2022

2 (10.00 am)

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

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

20 Prior to this hearing, however, she departed from
21 that position and the Chief Constable now accepts that
22 it is competent for him, through the Deputy
23 Chief Constable designated under the Police Service of
24 Scotland (Conduct) Regulations 2014, to give
25 undertakings of the kind sought. That means that this

1 preliminary hearing allows us to concentrate on
2 addressing the question as to whether I should request
3 the undertakings sought.

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

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

15 Some other counsel indicated that they might wish to
16 address me, so after I have heard from these counsel,
17 I shall give an opportunity to anyone else to indicate
18 that they wish to address me, and then finally I will
19 give an opportunity to Senior Counsel to the Inquiry to
20 make any final submissions.

21 So against that background, Ms Grahame, would you
22 carry on please.

23 Submissions by MS GRAHAME

24 MS GRAHAME: Thank you.

25 Before summarising the events which have brought us

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

14 Representing Retired Constable Paton is
15 Brian McConnachie and Laura Anne Radcliffe. PC Ashley
16 Tomlinson, PC Good and PC Smith are represented by
17 Gordon Jackson and Carla Fraser. Representing Sergeant
18 Scott Maxwell, PC Gibson and PC McDonough are
19 Shelagh McCall and her junior David Adams. Representing
20 former Chief Superintendent Gary McEwan and Chief
21 Superintendent Conrad Trickett is Duncan Hamilton.

22 Representing Temporary Assistant Chief Constable
23 Patrick Campbell today is Iain Cahill, a solicitor with
24 Levy & McRae, and finally representing the Commission
25 for Racial Equality and Rights is Mark Moir.

1 This preliminary hearing has been convened to allow
2 you to hear submissions on whether to seek undertakings
3 from the Lord Advocate and the Chief Constable in order
4 to secure the evidence of those core participants who
5 are serving or former police officers. As you have
6 noted, the Lord Advocate has delegated responsibility
7 for her dealings with the Inquiry to the
8 Solicitor General. Responsibility for disciplinary
9 matters is delegated to the Deputy Chief Constable. If
10 you are minded to seek undertakings, your request should
11 be directed to the Solicitor General and the Deputy
12 Chief Constable.

13 The following officers attended Hayfield Road on
14 3 May 2015 and have core participant status: Sergeant
15 Maxwell, Constables Gibson, McDonough, Walker, Good,
16 Smith, Tomlinson and Mr Paton and Ms Short who are both
17 retired. And the following senior officers who were
18 involved in post-incident management, also have core
19 participant status and are represented today: Chief
20 Superintendent Trickett, Temporary Assistant
21 Chief Constable Campbell and Mr McEuan, a retired chief
22 superintendent.

23 Now, the background is that on 11 November 2019 the
24 Lord Advocate wrote to the Chief Constable of
25 Police Scotland and the solicitors acting on behalf of

1 the officers who were involved in the restraint of
2 Sheku Bayoh and the letters were in the following terms.
3 They were headed up "The death of Sheku Bayoh on
4 3 May 2015 in Kirkcaldy", and they said, and I quote:

5 "I write to advise you that Crown counsel have
6 instructed that no criminal proceedings will be
7 instituted against any police officer in relation to the
8 death of Sheku Bayoh in Kirkcaldy on 3 May 2015 on the
9 basis of the current information available. You will be
10 aware that there is an obligation on the prosecutor to
11 keep cases under review. This includes cases in which
12 the prosecutor has decided to take no action. The Crown
13 therefore reserves the right to prosecute any of the
14 officers at a future date."

15 The Crown's decision to take no proceedings was
16 based on the evidence available in November 2019.
17 The Crown reserved the right to review that decision in
18 the future, if further evidence came to light.
19 The Crown reserved the right to prosecute any of the
20 officers at a future date in light of that further
21 evidence.

22 These officers were not granted immunity from
23 prosecution. It should be clear at the outset that none
24 of the officers are seeking immunity from prosecution,
25 there is no application before you seeking immunity from

1 prosecution and none of the matters discussed today will
2 result in any application seeking immunity for those
3 officers.

4 Since the decision by the Lord Advocate
5 in November 2019, no evidence has been led before any
6 court in relation to the death of Sheku Bayoh. Evidence
7 about the circumstances leading to Mr Bayoh's death will
8 be heard for the first time at this public hearing in
9 this Inquiry which commences on 10 May this year. It is
10 possible that evidence that was not available to
11 the Crown in 2019 will emerge at the hearing and in
12 particular, in the evidence given by the
13 police officers.

14 Something said by an officer in evidence might
15 provide new evidence against him or her and/or against
16 another officer or officers. The officers' evidence
17 will be taken on oath and will be recorded and
18 transcribed. The transcript of the evidence will be
19 available to all, including the Crown.

20 At the conclusion of the Inquiry, the transcript may
21 be used by the Crown to consider anew whether there is
22 sufficiency of evidence against any of the officers who
23 played a part in Mr Bayoh's restraint or subsequent
24 events and bring criminal proceedings if there is
25 a sufficiency of evidence and prosecution is in the

1 public interest. The transcript of an officer's
2 evidence would be admissible as evidence against him or
3 her at any future trial.

4 In the circumstances, in giving evidence to this
5 Inquiry, the officers have the right to refuse to answer
6 any questions asked of them that may tend to incriminate
7 them and this is because of the privilege against
8 self-incrimination.

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

17 In relation to the nature of this privilege, it has
18 been said:

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

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

24 The privilege is enshrined in Article 6 of the
25 European Convention on Human Rights. The right to

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

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

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

21 The privilege is not absolute. It does not extend
22 to a risk of incrimination in disciplinary proceedings
23 as they do not expose the witness to a risk of
24 conviction for an offence. The privilege does not apply
25 to the incrimination of others. On that basis,

1 an officer cannot rely on the privilege to refuse to
2 answer questions that may incriminate other officers.

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

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

16 The officers involved in Mr Bayoh's restraint and
17 the subsequent events would be entitled to exercise the
18 privilege and to answer "No comment". This is their
19 right. They cannot fairly be criticised for exercising
20 that right and no adverse inference can be drawn from
21 the exercise of the privilege against
22 self-incrimination. Guilt or blame cannot be inferred
23 from silence.

24 As the Chair of this Inquiry, it is not within your
25 power to insist that the officers waive the privilege.

1 Only the officers themselves, having received legal
2 advice, may do so.

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

13 A reply of "No comment" would not have prejudiced
14 his position at any subsequent trial, but equally for
15 the purposes of the Inquiry, did not amount to evidence
16 upon which any conclusions or inferences could be drawn
17 by the Sheriff. It also caused public concern and upset
18 to the family of those who died.

19 Similarly, in the Stephen Lawrence Inquest in 1997,
20 the five men then suspected of involvement in Stephen's
21 murder refused to answer any questions asked of them.
22 Lord Macpherson in his subsequent report, following the
23 Public Inquiry into Stephen Lawrence's death, observed
24 that:

25 "This part of the Inquest must have been both

1 frustrating and indeed almost farcical to the jury. We
2 fully understand the Coroner's reasons for summoning the
3 five suspects to court and calling them, although the
4 fact is that calling them did in fact achieve nothing."

5 Now, in relation to the events leading up to today's
6 hearing, as was stated at the preliminary hearing on
7 18 November, the Inquiry is now at the stage of seeking
8 witness statements, and letters have been sent out to
9 witnesses. At that hearing we invited and encouraged
10 those who received letters to contact the Inquiry team
11 to make arrangements so that statements could be taken
12 as soon as possible and that work is ongoing.

13 Letters were sent to the legal representatives of
14 the police officers who played a part in restraining
15 Mr Bayoh on 3 May 2015. Those letters were sent on
16 29 November and 9 December last year.

17 In response, and having been advised by their
18 respective legal teams, those officers have indicated
19 a willingness to engage with the work of the Inquiry and
20 to assist the Inquiry.

21 Three of those officers, Constables Gibson,
22 McDonough and Sergeant Maxwell, have, however, requested
23 that before providing statements or oral evidence to
24 the Inquiry that you seek certain undertakings from
25 first of all the Crown and, second of all, the Deputy

1 Chief Constable. In the absence of these undertakings
2 they may exercise the privilege against
3 self-incrimination and it was their applications that
4 initially came before you today.

5 The undertakings sought from the
6 Solicitor General are to the effect that no evidence
7 given by these officers would be used against them in
8 any subsequent criminal proceedings in the future, or in
9 deciding whether to bring such proceedings.

10 The undertakings sought from the Deputy
11 Chief Constable are to the effect that no evidence given
12 by those officers would be used against them in any
13 misconduct proceedings in the future, or in deciding
14 whether to bring such proceedings.

15 The other core participant officers and former
16 officers reserve their position at this stage, but all
17 have indicated that undertakings from the
18 Solicitor General may be necessary.

19 Of the 12 core participant officers and former
20 officers, a total of eight have indicated that they may
21 also require an undertaking from the Deputy
22 Chief Constable.

23 In addition to Constables Gibson, McDonough and
24 Sergeant Maxwell, they are Constables Good, Smith,
25 Tomlinson and Chief Superintendent Trickett and

1 Temporary Assistant Chief Constable Campbell.

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

5 "... the procedure and conduct of an inquiry are
6 such as the chairman may direct."

7 This wide discretion is fettered only by the
8 requirement that you act with fairness and with regard
9 to the need to avoid unnecessary cost.

10 As Chair of the Inquiry, you have the power to seek
11 the undertakings sought from the Solicitor General and
12 the Deputy Chief Constable. It will be for the
13 Solicitor General and the Deputy Chief Constable to
14 decide whether to grant the undertakings.

15 Considering first the undertakings sought from the
16 Solicitor General. You will be aware that undertakings
17 have been sought and granted in other inquiries,
18 including the Stephen Lawrence Inquiry, the Bloody
19 Sunday Inquiry, the Baha Mousa Inquiry, the Grenfell
20 Tower Inquiry and the Undercover Policing Inquiry.

21 The applicable test when you are deciding whether to
22 request undertakings from the Solicitor General involves
23 balancing any positive effect on establishing the truth,
24 against any negative effect on the administration of
25 justice. You will require to weigh in the balance the

1 need to protect the right of witnesses not to
2 incriminate themselves, the need of the Inquiry to
3 obtain as much relevant information as possible and the
4 public interest in the administration of justice and
5 upholding the rule of law.

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

15 The nine police officers who attended the scene are
16 key eye-witnesses to the incident in Hayfield Road.
17 Three of the core participants are senior officers and
18 are key witnesses to post-incident management in the
19 aftermath of the incident.

20 If they refuse to answer questions, the Inquiry's
21 ability to fulfil its Terms of Reference will be
22 significantly impaired. Although the officers provided
23 statements in 2015, those statements did not cover all
24 of the issues relevant to the Inquiry's Terms of
25 Reference. The Inquiry's Terms of Reference are broad

1 and wider than the remit of the Police Independent
2 Review Commissioner who noted the original statements.
3 Discrepancies, inconsistencies and conflicts are
4 apparent from a close reading of the officers'
5 statements in relation to key issues of fact and they
6 have not been explored.

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

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

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

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

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

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

21 If the officers rely on the privilege against
22 self-incrimination and refuse to answer questions, you
23 will be left to make findings of fact and to draw
24 inferences from those findings and to assess the
25 officers' credibility and reliability all on the basis

1 of their original statements. This would be highly
2 unsatisfactory and would thwart the Inquiry's efforts to
3 get to the truth.

4 In short, without the officers' evidence,
5 the Inquiry will be significantly inhibited in
6 fulfilling its Terms of Reference and its ability to
7 determine the facts of what happened will be undermined.

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

15 A core aspect of the Inquiry will be to hold
16 individual officers accountable for their own actions,
17 both in relation to the events at Hayfield Road and
18 subsequently. The task of the Inquiry in carrying out
19 that exercise will be enhanced if you have available to
20 you the full and frank evidence of the officers and
21 former officers.

22 Conversely, without the undertakings, the evidence
23 of the officers available may be limited to the
24 statements given by them to PIRC investigators with the
25 limitations of those that I have identified. Without

1 the undertakings, the ability of the Inquiry to hold
2 individuals to account for their actions would be
3 significantly impeded.

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

16 Turning to the negative effect on the administration
17 of justice. The second part of the test requires you to
18 consider any negative effect on the administration of
19 justice.

20 I recognise that Mr Bayoh's family, and indeed the
21 public, may perceive that the undertakings sought would
22 allow the officers to give evidence without fear of
23 prosecution and that if new evidence emerges in the
24 course of the Inquiry, the Solicitor General would be
25 unable to take that evidence into account in deciding

1 whether to raise criminal proceedings.

2 In responding to these two concerns, I would like to
3 make two points. First, in reviewing their decision not
4 to prosecute in light of any further evidence that
5 emerges in the course of this Inquiry, the Crown will be
6 able to take into account any new evidence given by
7 civilian eye-witnesses, other police witnesses, or
8 expert witnesses and that may relate to the use of force
9 or the cause of death, for example, and any relevant
10 documentation that is gathered in and disclosed as part
11 of the work of this Inquiry.

12 Second, the undertakings sought serve a limited
13 purpose which does not amount to immunity from
14 prosecution and that distinction is an important one.
15 The officers do not seek immunity from prosecution.
16 The Crown could rely on new evidence given by Officer B,
17 C or D when assessing whether there is a sufficiency of
18 evidence against Officer A. If the undertakings sought
19 were granted by the Solicitor General, this means
20 the Crown would not be able to rely on evidence given by
21 Officer A in determining whether to bring proceedings
22 against Officer A, or in any future prosecution, but
23 only against Officer A.

24 I fully appreciate I have not yet heard the
25 submissions of Ms Mitchell, but I foresee no negative

1 effects on the administration of justice if the
2 undertakings are sought. This Inquiry presents the best
3 opportunity to find out what happened on the day when
4 Sheku Bayoh died. As at today, no one has ever been
5 prosecuted, no one has ever been found to be at fault,
6 no evidence has ever been led about the events of
7 3 May 2015. The public and the family may have many
8 unanswered questions.

9 If the undertakings are not sought and the officers
10 exercise the privilege against self-incrimination and
11 refuse to answer questions, there is a real risk that
12 the Inquiry will be perceived to have failed to take all
13 reasonable steps to secure important evidence. I am
14 concerned that Mr Bayoh's relatives and family members,
15 core participants and the general public will be left
16 with unanswered questions and uncertainty, and a feeling
17 that they do not have closure on the matter. The
18 perception may be one of disappointment and lingering
19 uncertainty.

20 I appreciate that some may question my recommended
21 course of action. It may not be perfect, but I would
22 submit it is reasonable and would assist the Inquiry in
23 securing important evidence.

24 The only opposition to you seeking the undertakings
25 from the Solicitor General is from the relatives and

1 family members of Mr Bayoh. That alone is a highly
2 significant factor in your decision-making and you will
3 shortly hear from Ms Mitchell. However, I would like to
4 take this opportunity to reassure Mr Bayoh's family and
5 relatives that I have given careful consideration to
6 their written submissions and I have noted their
7 concerns, but I remain satisfied that it is in the
8 interests of the Inquiry and indeed the public interest
9 that the undertakings be sought and it is for that
10 reason that I make this recommendation to you.

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

1 comply with the obligations under Article 2.

2 Without the reassurance of undertakings from the
3 Solicitor General it is likely that most, if not all of
4 the core participant officers and former officers will
5 exercise the privilege against self-incrimination. If
6 they do so, they will be entitled to refuse to answer
7 questions about what happened on 3 May 2015. I should
8 stress that this would be their right and they could not
9 be criticised for exercising that right. For the
10 reasons I have set out, this would inhibit the Inquiry's
11 ability to fulfil the Terms of Reference.

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

20 It would be reasonable to assume that all of the
21 officers will or may seek the reassurance of
22 undertakings from the Solicitor General before they are
23 willing to provide evidence to the Inquiry. The
24 Solicitor General has reserved her position but she is
25 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.

23 The effect of the undertakings, if granted, will be
24 that no evidence given to the Inquiry by any officer
25 will be used against them in any criminal proceedings in

1 the future, or will be used when deciding whether to
2 bring such proceedings. Whether to grant the
3 undertakings and the precise wording of the undertakings
4 are, however, matters for the Solicitor General.

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

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

15 PC Walker has also indicated that he does not seek
16 an undertaking. The undertakings sought by the
17 remaining officers would be to the effect that no
18 evidence given to the Inquiry by any officer will be
19 used against them in any misconduct investigation or
20 proceedings, or when deciding whether to bring such an
21 investigation or proceedings.

22 As I said earlier, the privilege against
23 self-incrimination does not apply to disciplinary
24 proceedings, however, many public inquiries have sought
25 undertakings that the evidence given by witnesses to

1 the Inquiry will not be used against them in any
2 disciplinary proceedings brought by their employer.

3 As was observed by the chair of the Undercover
4 Policing Inquiry:

5 "... witnesses are more likely to be frank and
6 honest with their inquisitor if there will be no adverse
7 consequences to them arising from their evidence, such
8 as the use of their evidence in a criminal prosecution
9 or disciplinary proceedings against them."

10 Similarly, in the Al-Sweady Inquiry, the chair noted
11 that:

12 "Undertakings to protect witnesses from the risk of
13 their evidence being used against them in disciplinary
14 proceedings would properly serve to achieve the full and
15 frank accounts from witnesses that the Inquiry
16 requires."

17 Undertakings from employers were granted in the
18 Hutton Inquiry into the circumstances of the death of
19 Dr David Kelly, from the Secretary of the Cabinet to
20 permanent secretaries in respect of civil servants
21 consisting the inquiry; the Iraq Inquiry where both the
22 Government and the security services offered assurances
23 against disciplinary proceedings to serving officials
24 and military personnel; the Rosemary Nelson Inquiry
25 where undertakings were given by the Permanent Secretary

1 to the Ministry of Defence, the Cabinet Secretary and
2 Head of the Home Civil Service, the Head of the
3 Northern Ireland Civil Service and the Chief Constable
4 of the Police Service of Northern Ireland, and the Baha
5 Mousa Inquiry where undertakings were given by the
6 Permanent Undersecretary at the Ministry of Defence and
7 from each of the chiefs of staff of the armed services.

8 In deciding whether to seek undertakings from the
9 Deputy Chief Constable, you must again weigh in the
10 balance any positive effect on establishing the truth
11 and any negative effect on the administration of
12 justice. In my submission, the balance lies in favour
13 of you seeking the undertakings sought.

14 Undertakings from the Solicitor General alone will
15 not protect the officers from the possibility of
16 misconduct proceedings brought in response to their
17 evidence to the Inquiry. Even with the reassurance of
18 undertakings from the Solicitor General, it may be that
19 the officers who have indicated they will or may require
20 undertakings from the Deputy Chief Constable will be
21 reluctant to engage fully and candidly with the Inquiry
22 without those undertakings.

23 In order to secure the officers' full, frank and
24 uninhibited accounts of the events of 3 May 2015, it is
25 my recommendation that you seek undertakings from the

1 Deputy Chief Constable on behalf of the officers who
2 have indicated they may require them.

3 It should be noted that as with any undertakings
4 granted by the Solicitor General, the undertakings
5 sought from the Deputy Chief Constable would serve
6 a limited purpose. They would prevent the use of
7 Officer A's evidence to the Inquiry in any future
8 misconduct investigation or proceedings, or in deciding
9 whether to bring such an investigation or proceedings.
10 However, evidence given by Officers B, C or D may be
11 used against Officer A in any investigation or
12 proceedings, or in deciding whether to bring the
13 investigation or proceedings. Evidence given by
14 civilian and expert witnesses to the Inquiry may also be
15 taken into account.

16 Furthermore, as the Deputy Chief Constable has not
17 before now considered whether to bring misconduct
18 proceedings against any of the officers, she would also
19 have available to her the officers' original statements,
20 as well as the statements taken from eye-witnesses at
21 the time, and as well as other documents disclosed as
22 part of the work of the Inquiry.

23 The only evidence she would require to leave out of
24 account in any misconduct investigation or proceedings
25 against Officer A in deciding whether to bring such

1 investigation or proceedings, would be the evidence
2 given by Officer A to the Inquiry. Again, whether to
3 grant the undertakings and the precise wording of the
4 undertakings would be matters for the Deputy
5 Chief Constable.

6 The only opposition to you seeking undertakings from
7 the Deputy Chief Constable comes from the relatives and
8 family members of Mr Bayoh. The comments I made earlier
9 in the context of the undertakings sought from the
10 Solicitor General, and which I hope will have offered
11 some reassurance to Mr Bayoh's family, apply equally
12 here. You may find it helpful to hear from other
13 counsel now. I would be very happy to respond to their
14 submissions thereafter, if it is necessary.

15 LORD BRACADALE: Thank you, Ms Grahame.

16 Ms McCall.

17 Submissions by MS MCCALL

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

19 Sergeant Maxwell, Constable Daniel Gibson and Constable
20 James McDonough.

21 In enacting the Inquiries Act 2005, Parliament chose
22 to respect and protect the fundamental right of any
23 witness against self-incrimination. It did so in
24 section 22 and in very many statutory inquiries, of
25 which this is one, that decision by Parliament sets

1 a challenge for the Inquiry panel how best to seek the
2 truth while not infringing fundamental rights, and that
3 this would be a challenge for this particular Inquiry is
4 obvious from the Terms of Reference because part of
5 the Inquiry's work is to determine what happened on
6 3 May 2015 in the encounter between Mr Bayoh and
7 the police, and what the officers did or did not do in
8 the immediate aftermath.

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

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

25 It is perhaps therefore a little unfortunate that

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

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

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

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

21 MS MCCALL: There are, Chair, quite a number where it is
22 raised by the Inquiry panel itself. One example has
23 been given by Ms Grahame, which is the Undercover
24 Policing Inquiry, where Counsel to the Inquiry produced
25 a very lengthy submission to the Chair on which

1 contributions were invited from various core
2 participants.

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

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

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

25 The third matter is that the provision of

1 undertakings, as a matter of fact and as a matter of
2 law, will facilitate what it is that the family in their
3 written submission have said that they want, namely that
4 you, Chair, use all your legal powers to find and get to
5 the truth of how Sheku Bayoh died.

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

16 So just dealing first then with the scope of the
17 right against self-incrimination, and in order to be
18 effective, in my submission, any undertaking sought
19 should be coextensive with the scope of the right
20 against self-incrimination, in other words it should
21 cover the same scope, the same range, and the right
22 against self-incrimination has a broad scope, which
23 Ms Grahame has already said something about. It is not
24 confined solely to providing answers or evidence which
25 may constitute an admission, or may directly implicate

1 a witness in the commission of a crime. In fact, in the
2 present case insofar as the officers I represent are
3 concerned, that is not a likely scenario, but the right
4 extends to evidence which may indirectly implicate the
5 witness, or which may form links in a chain of
6 circumstantial evidence, and of course, as you well
7 understand, Chair, a piece of circumstantial evidence
8 can have more than one interpretation.

9 It also, in my submission, extends to evidence which
10 may inform the case which the prosecution may wish to
11 establish and/or evidence which they may wish to rely on
12 in deciding whether to prosecute.

13 I provided to you ahead of today a number of
14 authorities. I don't propose, unless you wish me to do
15 so, to take you to the detail of those, but in the Rank
16 Film Distributors case it is clear that the right
17 extends to use of an answer which may set in train
18 a line of inquiry. We see that at 443D of that case.

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

23 Ms Grahame referred to Article 6 of the European
24 Convention as also enshrining the right against
25 self-incrimination and I agree with that, while of

1 course Article 6 is not engaged in relation to
2 an officer providing evidence to this Inquiry there is
3 no discernible difference in the content of the right
4 under Article 6 as under domestic law, and I lodged in
5 advance a copy of the case of Saunders v United Kingdom.
6 Again, I don't intend to take you to it in any detail,
7 but at paragraph 71 the European Court of Human Rights
8 made clear the scope of the right and that it extended
9 beyond directly incriminating answers or admissions,
10 where they said:

11 "... bearing in mind the concept of fairness in
12 Article 6, the right not to incriminate oneself cannot
13 reasonably be confined to statements of admission or
14 wrongdoing or ... remarks which are directly
15 incriminating. Testimony obtained under compulsion
16 which appears on its face to be of a non-incriminating
17 nature -- such as exculpatory remarks or mere
18 information on questions of fact -- may later be
19 deployed in criminal proceedings in support of
20 the prosecution case..."

21 So a witness, any witness is able to invoke the
22 right against self-incrimination, not just in respect of
23 directly incriminating answers but in respect of
24 evidence which might subsequently be used to his
25 detriment in the course of later criminal proceedings,

1 or a decision to raise those proceedings, so it follows
2 that unless the prohibition on the use of such evidence
3 by the prosecuting authority is absolute in terms of the
4 undertaking, the scope of a witness's right not to
5 answer the questions or produce documents will be very
6 wide indeed.

7 Can I turn then to the test to be applied. I agree
8 with Senior Counsel to the Inquiry that section 17 of
9 the Act gives you the power to seek undertakings,
10 subject to the caveat of fairness. Ms Grahame suggests
11 that the test involves consideration of any positive
12 effect of establishing the truth balanced against any
13 negative effect on the administration of justice and she
14 went on to elaborate on that by weighing in the balance
15 the need to protect the rights of witnesses, the need of
16 the Inquiry to obtain as much relevant information as
17 possible, and the public interest in the administration
18 of justice and the upholding of the rule of law.

19 I respectfully disagree that that is the test. In
20 my submission, the test for the Chair is only to decide
21 how best the Inquiry can perform its duty in fulfilling
22 its aims and its Terms of Reference, while protecting
23 the fundamental rights of witnesses. What that means in
24 practice is that in deciding whether to seek
25 undertakings, you should be considering whether in the

1 absence of such undertakings, the work of the Inquiry
2 will be hampered.

3 While she did not refer to the source, I understand
4 that Senior Counsel to the Inquiry draws that test from
5 a ruling in the Manchester Arena Inquiry where that test
6 was set out by reference to something that was said by
7 the Chair of the Undercover Policing Inquiry.

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

21 So in that context it was clearly important to
22 conduct some sort of balancing exercise because in that
23 context, of course, what the Inquiry required to
24 consider was the public interest and the effect on it in
25 the inability to prosecute third parties rather than in

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

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

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

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

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

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

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

21 Similarly in the Bloody Sunday Inquiry, the issue of
22 self-incrimination and undertakings is dealt with in
23 their report from page 65, and at page 71 it is clear
24 that the test that was applied was:

25 "... whether in absence of an assurance we are

1 likely to be hampered in carrying out our task of trying
2 to find out what happened."

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

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

18 These may obviously fall within the scope of the
19 right against self-incrimination, for example, looking
20 at what happened in the encounter in the street with
21 Mr Bayoh, the potential criminal allegations are in my
22 submission obvious, but leaving aside those most obvious
23 of possibilities there are a number of other areas into
24 which this Inquiry will conduct an investigation and
25 hear evidence in which the right against

1 self-incrimination would also apply, for example,
2 matters that might fall within section 22 of the Police
3 and Fire Reform (Scotland) Act 2012, that is the offence
4 of neglect or violation of duty, and that statutory
5 offence has a broad sweep and is apt to cover a great
6 many topics in relation to which this Inquiry will want
7 to ask questions of the officers.

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

12 Because of that broad sweep, in my submission it can
13 be concluded that the Inquiry is likely to be hampered
14 in fulfilling its Terms of Reference if no undertaking
15 is obtained from the Solicitor General.

16 The question then is what is the effect of seeking
17 and obtaining an undertaking. In a letter to the core
18 participants of 21 January, the Inquiry team asked legal
19 representatives of police officers other than those whom
20 I represent, whether if undertakings were obtained they
21 would waive their privilege. That, in my respectful
22 submission, is to misunderstand the nature of an
23 undertaking, because if an undertaking is sought and
24 given from the Solicitor General, the right against
25 self-incrimination is not engaged and cannot be relied

1 upon. It is not a question of waiver. The officers
2 will be compellable to answer the questions that they
3 are asked.

4 That is why I said at the outset that the provision
5 of undertakings is the means to achieve the aim that
6 the Inquiry find and get to the truth of how Sheku Bayoh
7 died. That is in everyone's interests, including those
8 whom I represent.

9 Ms Mitchell on behalf of the family may say that the
10 officers owe a duty of candour to the Inquiry, subject
11 to their right against self-incrimination, and I agree
12 with that and those whom I represent have already stated
13 to the Inquiry in writing that they acknowledge that
14 duty, but without the undertaking, inquiry hearings risk
15 being derailed by the invocation of the right which, as
16 we have seen, has a broad scope here, or as Senior
17 Counsel to the Inquiry has just put it, the Inquiry may
18 be thwarted in its efforts. So in order to ensure that
19 the Inquiry can fulfil its aims, in my submission an
20 undertaking should be sought from the
21 Solicitor General in the terms which we propose.

22 Can I turn then to the reasons to seek an
23 undertaking from the Deputy Chief Constable. I of
24 course agree that the right against self-incrimination
25 does not extend to disciplinary matters, yet

1 undertakings in relation to the use of evidence provided
2 by a witness in subsequent disciplinary proceedings are
3 not uncommon in inquiries such as this. So what is the
4 rationale, Chair, for you to seek them? In my
5 submission, it is the same: will the provision of the
6 undertaking assist the Inquiry in fulfilling its aim and
7 getting to the truth? And the reason disciplinary
8 undertakings are sought is that they provide witnesses
9 with a comfort that encourages full and frank testimony.

10 Other inquiries have recognised a potential chilling
11 effect on witnesses if they may be exposed to
12 disciplinary proceedings as a result of what they say,
13 particularly where those disciplinary proceedings can
14 significantly impact their professional life by way of
15 dismissal and so on. That is the position here.

16 As it has been put in other inquiries, while there
17 may be an expectation of cooperation, it is nonetheless
18 recognised that an undertaking from the disciplinary
19 authority has value, even where it may be part of the
20 professional duty of the witness to provide full and
21 frank testimony, for example, in the case of a soldier,
22 for example, here in the case of a police officer.

23 I have provided to you in advance a number of
24 undertakings that have been given in previous inquiries
25 and the reason I have done so is that they set out the

1 rationale behind giving them. So in the Hutton Inquiry,
2 as Ms Grahame has already referred to, the Cabinet
3 Secretary provided an undertaking in relation to the
4 civil servants and he began by saying:

5 "The Government expects witnesses to cooperate fully
6 with the Inquiry and to give full and frank testimony.
7 To help witnesses to do so, the Government therefore
8 gives the following undertaking ..."

9 In other words, a recognition of the expectation,
10 but a recognition that the undertaking provides
11 assistance in fulfilling that expectation.

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

21 It is now conceded by the Deputy Chief Constable
22 that an undertaking would be competent. Again, in my
23 submission, it is for the Deputy Chief Constable to
24 weigh in the balance the need for an undertaking to
25 assist the Inquiry, with the need to maintain public

1 confidence in the police by holding officers to account
2 for any wrongdoing.

3 It is also for the Deputy Chief Constable to
4 determine the scope of any undertaking which she may
5 give. Previous inquiries demonstrate that there are
6 a variety of approaches.

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

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

22 LORD BRACADALE: Thank you, Ms McCall.

23 Ms Mitchell.

24 Submissions by MS MITCHELL

25 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
23 the 2012 Act, in Police Scotland's code of ethics and in
24 statutory standards of professional behaviour.

25 In the recent independent review on policing,

1 complaints handling investigation and misconduct issues,
2 which was published in November 2020, it stated that
3 these aforementioned duties:

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

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

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

19 "I have considered whether the current position is
20 sufficiently clear to police officers, and to the public
21 who have a legitimate expectation that police officers
22 will give every assistance after a serious incident.
23 That assumption of cooperation should be put beyond
24 doubt in the primary legislation, including the wording
25 of the constable's declaration."

1 On the issue of Convention rights, the report
2 suggests that there is an argument to be made that
3 a duty of candour:

4 "... is an obligation under Article 2 of the
5 European Convention on Human Rights which requires
6 parties to positively assist the state in conducting
7 a thorough and effective investigation."

8 Part of the purpose of the duty on the state to
9 investigate is to ensure the accountability of those who
10 work for the state, which of course includes
11 police officers. The duty under Article 2 requires
12 cooperation in good faith by individual officers and
13 failures to do so may give rise to a breach of
14 Article 2.

15 It is submitted that the review is correct when, at
16 paragraph 7.111, it states:

17 "... those in the office of constable and holding
18 the powers of that office have a higher duty than others
19 to account for their actions and record what they did or
20 saw in the execution of their duties."

21 The family of Sheku Bayoh have a legitimate
22 expectation that police officers will give every
23 assistance after a serious incident and that expectation
24 extends to coming to a public inquiry and answering all
25 and any legitimate and relevant questions put to it by

1 the Inquiry.

2 On the issue of whether the Chair has power to seek
3 undertakings from the Solicitor General and Deputy Chief
4 Constable it appears not to be an issue, but for the
5 avoidance of doubt, no submissions are made on behalf of
6 the family in that regard.

7 Picking up on a small point made by Counsel to
8 the Inquiry, Counsel to the Inquiry indicated that
9 transcripts would be admissible in any criminal
10 proceedings and I simply remind the Chair that it is
11 only in certain circumstances, as identified in the
12 Criminal Procedure Act 1995, that statements are used in
13 that way, that being prior inconsistent statements and
14 those statements which are adopted by a witness.

15 LORD BRACADALE: But a statement made by an officer could be
16 in the evidence -- in the Inquiry could be used in
17 a subsequent criminal trial of that officer if it was
18 against interest.

19 MS MITCHELL: Yes, indeed, I'm just reminding the Inquiry of
20 the circumstances it could be used in being put to that
21 witness and there are two circumstances in which that
22 would happen. They are not simply admissible as course,
23 as part of the evidence which would be included in
24 a case.

25 The Chair has the issue of principle and the

1 position of the family of Sheku Bayoh on this, namely
2 that they oppose the request for undertakings from
3 the Crown and the Deputy Chief Constable and I have no
4 further submissions to make.

5 LORD BRACADALE: Thank you, Ms Mitchell.

6 Now, Dean of Faculty.

7 Submissions by THE DEAN OF FACULTY

8 DEAN OF FACULTY: As recognised already, I am instructed in
9 this matter on behalf of the Scottish Police Federation
10 and also Officers Short and Walker, although today I'm
11 really representing the interests of the Federation only
12 and really my appearance today is prompted by the
13 opposition made on behalf of the family.

14 The depth of feeling in this matter is clear and
15 understood and understandable, but, my Lord, I cannot
16 let pass without comment the criticisms that are made of
17 the officers and indeed of the Federation regarding the
18 request that your Lordship should seek these
19 undertakings.

20 In the written submissions that request is described
21 as astonishing, as shameful and as insulting. Those
22 descriptions, my Lord, in my submission are wholly
23 unwarranted. A request for undertakings in an inquiry
24 such as this is commonplace. No respectable, sensible
25 lawyer would recommend proceeding without at the very

1 least exploring the availability of undertakings on
2 behalf of his or her client. There is nothing shameful;
3 it is sensible and it is lawful, in particular against
4 a backdrop where there is an ongoing campaign on social
5 media describing matters in a way that suggest
6 criminality on the part of certain individuals.

7 So, my Lord, in those circumstances, the Federation
8 resists any suggestion of any wrongdoing, shamefulness
9 or insulting behaviour in the seeking of these
10 undertakings and supports the seeking of those
11 undertakings.

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

1 all the questions that were asked of him.

2 My Lord, in these circumstances I simply wish to
3 advocate the position there is nothing wrong in these
4 undertakings; on the contrary, it is sensible, and in my
5 submission the undertakings should be sought from both
6 the Solicitor General and the Chief Constable in the
7 manner proposed by Counsel to the Inquiry.

8 LORD BRACADALE: Thank you, Dean of Faculty.

9 Mr Jackson.

10 Submissions by MR JACKSON

11 MR JACKSON: Thank you, my Lord.

12 I represent Officers Good, Smith and Tomlinson.

13 Having listened to the submissions, I am tempted to
14 say nothing because it has all been really covered.

15 I agree the distinction between the test being suggested
16 is perhaps not a great one, but I want to say one thing
17 in particular. I do find Ms Mitchell's position
18 somewhat ironic, if I may use that word.

19 The family wish to have the truth in every possible
20 way that it can be explored, yet what the submission of
21 Ms Mitchell amounts to is to say to you as the Chair,
22 "do not seek the undertakings", in the knowledge -- it
23 must be in the knowledge -- that that will force
24 officers to rely on the provision of the right against
25 self-incrimination because, as has been explained, that

1 is a very wide right and no responsible lawyer would do
2 otherwise in the circumstances of no undertaking than to
3 give that advice to their clients.

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

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

23 LORD BRACADALE: Thank you, Mr Jackson.

24 Do any other legal representatives wish to address
25 me because this would be the opportunity to do so?

1 I don't think anybody has indicated that they wish to do
2 so.

3 Accordingly, Ms Grahame, do you want to say
4 something further?

5 Submissions in reply by MS GRAHAME

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

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

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

21 At the preliminary hearing on 18 November last year,
22 I explained about the many thousands of documents which
23 had been gathered in and those documents are large in
24 number and it was vital, in my view, that they be
25 carefully considered and analysed and as a result of

1 that work, a chronology has been prepared and circulated
2 amongst all the core participants, along with issues
3 which have been identified.

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

18 Even today, nine out of the 12 officers do not yet
19 consider it possible, for various reasons, to put formal
20 applications before you, albeit I am recommending to you
21 that you deal with all consistently and in a uniform
22 manner.

23 Letters seeking witness statements were, as I said
24 in my submission, issued to officers on 29 November and
25 9 December and they were designed effectively to flush

1 out this issue and provide an appropriate moment,
2 an opportunity to address you on it. It is open to you
3 today to simply deal with the three applications before
4 you, but I have urged you not to do this. I would
5 wholly reject any criticism that this should have been
6 done earlier and that in some way now is not the
7 appropriate time. It is quite appropriate for the
8 matter to be raised when statements are being sought and
9 not before. Before statements were sought and before
10 today, officers simply did not have the chronology or
11 the issues identified to them.

12 The second point that I would like to make relates
13 to the test. The Manchester Arena Inquiry ruling on the
14 application for the Attorney General to give an
15 undertaking by Sir John Saunders was on 10 June last
16 year. Paragraph 6 of that ruling makes it clear the
17 test that he has carried out, Sir John Saunders, in
18 deciding whether to make a request to the
19 Attorney General and that test is:

20 "... any positive effect on establishing the truth
21 falls to be balanced against any negative effect on the
22 administration of justice."

23 No one disputed that that was an accurate summary of
24 the appropriate test and in fact that is the test that
25 was used by Sir John in his ruling last year. Whether

1 Sir John made an error as to the underlying source
2 unfortunately I'm not in a position to comment on that
3 this morning. The argument made by Ms McCall was not
4 foreshadowed in her written submission, or in any
5 communication between counsel, so unfortunately I have
6 not had the opportunity to consider it in any detail.
7 But my submission to you is it makes absolutely no
8 difference to the task that you have before you today
9 and to use the expression used by the Dean of Faculty,
10 there is a cigarette paper between the test which
11 I proposed and what Ms McCall said in submission.

12 I would simply reiterate that the material factors,
13 which I have suggested are relevant and important to
14 your decision, have been raised. I maintain my
15 submission in that and I have nothing further to add.

16 LORD BRACADALE: Thank you, Ms Grahame.

17 Well, I am grateful to counsel for their
18 submissions. I shall issue a decision as soon as I can
19 and the Inquiry will now adjourn.

20 (11.33 am)

21 (The Inquiry adjourned)

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

Submissions by MS GRAHAME2
Submissions by MS MCCALL28
Submissions by MS MITCHELL44
Submissions by THE DEAN OF FACULTY49
Submissions by MR JACKSON51
Submissions in reply by MS GRAHAME53