

# Transcript of the Sheku Bayoh Inquiry

Thursday, 25 April 2024

1  
2 LORD BRACADALE: Good morning. I'm sorry about the slight  
3 delay this morning. There's some difficulties with the  
4 broadcasting system, but these are now resolved.

5 Good morning, Mr McGowan, would you take the oath,  
6 please.

7 Mr McGowan (sworn)

8 Examination-in-chief by MS THOMSON

9 LORD BRACADALE: Ms Thomson.

10 MS THOMSON: Good morning.

11 A. Good morning.

12 Q. You are Stephen McGowan.

13 A. That's correct.

14 Q. How old are you, Mr McGowan?

15 A. I'm 50.

16 Q. And you are the deputy crown agent for litigation?

17 A. That's correct.

18 Q. Within the Crown Office and Procurator Fiscal Service  
19 and you have been since April of last year?

20 A. I am.

21 Q. Before we begin, can I ask you to open up the blue  
22 folder that's in front of you and take a look at what's  
23 inside. There should be there a copy of the Rule 8  
24 request that the Inquiry sent to you, that's SBPI 00440,  
25 dated 11 December of 2023?

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1 A. I have that, yes.

2 Q. You have that, grand, and there should also be a copy of  
3 your response to that request, which we will bring up on  
4 the screen, please. It's SBPI 00431.

5 A. I have that, yes.

6 Q. We'll bring it up and just have a brief look at it.  
7 This is your response to that request. It's 298  
8 paragraphs long and if we scroll to the very, very  
9 bottom, please, we'll see that you signed it on  
10 12 January of this year. Your signature has been  
11 redacted on the screen, but hopefully is visible on the  
12 copy in front of you?

13 A. Yes.

14 Q. So this is a procedure that we refer to as relate  
15 procedure whereby the Inquiry can approach a witness and  
16 ask them to give a written statement. The Rule 8  
17 request set out the matters that the inquiry was asking  
18 you to cover in your statement and your response is, as  
19 the name suggests, your response to that request and  
20 your answers to those questions.

21 Also in the folder before you are a number of  
22 notebooks that you kept during the time that we're  
23 concerned with in this Inquiry. I don't intend to take  
24 you to those notebooks, but they're in case you would  
25 it helpful as an aide-memoire to refer back to your

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1 notebooks.

2 A. Thank you.

3 Q. I want to begin by asking you a little bit about your  
4 qualifications and experience and I see from your  
5 statement that you qualified as a solicitor in 1997.

6 A. That's right, yes.

7 Q. And you have been with COPFS since 1999.

8 A. I have.

9 Q. You explain at paragraph 4 of your statement, if we  
10 could perhaps scroll up to that, I will read it short,  
11 but you explain there that in 2012 you were the deputy  
12 director of Serious Casework and you were tasked with  
13 setting up two new departments, the SFIU, Scottish  
14 Fatalities Investigation Unit and what we've been  
15 calling CAAPD?

16 A. Yes.

17 Q. Complaints Against the Police Division. So you set up  
18 those two divisions or units in 2012?

19 A. Yes.

20 Q. And for a period of two years thereafter you had  
21 oversight of those two units, but you explain in  
22 paragraph 5, if we scroll down, and again I'm read it  
23 short, you explain there that the post of  
24 deputy director for Serious Casework was split in 2014  
25 and the responsibilities of that role were shared

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1           between two new posts, procurator fiscal for major crime  
2           and fatalities investigation and procurator fiscal for  
3           organised crime and counterterrorism?

4           A. That's correct.

5           Q. And you explain too that you became the procurator  
6           fiscal for major crime and fatalities investigation and,  
7           as such, you retained responsibility for SFIU and the  
8           head of SFIU back then I think was David Green.

9           A. That's right, yes.

10          Q. However, responsibility for CAAPD fell to PF for  
11          organised crime and counterterrorism, who was I believe  
12          Lindsey Miller?

13          A. Yes.

14          Q. And that unit we've heard was headed up by Les Brown at  
15          the time?

16          A. That's correct, yes.

17          Q. So at the time of the death of Sheku Bayoh in May of  
18          2015 you had responsibility for SFIU, but not CAAPD?

19          A. That's correct, yes.

20          Q. You explain at paragraph 6 of your statement, and again  
21          I'll read this short, that in May of 2016, following  
22          further restructuring, you became the procurator fiscal  
23          for the High Court and from that point onwards, you no  
24          longer had responsibility for SFIU?

25          A. Yes, that's correct.

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1 Q. That said, you explain in paragraph 33 of your statement  
2 that you were involved in this investigation in the very  
3 early stages. When the investigation was allocated to  
4 CAAPD, you remained involved as, as you put it, a  
5 sounding board and you gave advice and guidance?

6 A. Yes.

7 Q. And that continued until 2018?

8 A. That's right, yes.

9 Q. Can we look, please, at paragraph 61 of your statement.  
10 Here you explain that during the early part of the PIRC  
11 investigation you were involved in assisting and  
12 providing guidance to David Green and then to Les Brown  
13 in the direction of the PIRC investigation and you did  
14 so due to your recent experience in dealing with CAP  
15 cases and deaths and you did so to the best of your  
16 ability.

17 So you had recent experience of dealing with CAP  
18 cases and deaths. Had you experience of dealing with  
19 deaths in custody?

20 A. There were deaths in custody as part of that role  
21 through SFIU, yes.

22 Q. Had you experience of dealing with a death in custody  
23 following restraint?

24 A. No, I don't think so.

25 Q. And had you experience of dealing with a death in

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- 1 custody where race was a factor for consideration?
- 2 A. No.
- 3 Q. Okay. So you explain in this paragraph that you gave  
4 guidance and direction to David Green and then to  
5 Les Brown on the direction of the PIRC investigation.  
6 You say elsewhere that you did continue in this advisory  
7 capacity until 2018, by which point the PIRC had  
8 reported to the crown. So should we understand that you  
9 also gave advice and guidance in relation to the crown's  
10 own investigation?
- 11 A. Yes, until about that point in 2018 when I moved role  
12 and by that time, the investigation was well underway  
13 and dedicated Crown Counsel were involved and so the  
14 need for my guidance was no longer there. And by that  
15 time the relationships with PIRC, which was part of the  
16 reason why I was involved because I had been involved  
17 with them before were -- we had learned and we had moved  
18 on and those relationships were made with the rest of  
19 the team and the rest of those who had responsibility  
20 for the case.
- 21 Q. Do you recall when in 2018 you moved away from  
22 the Inquiry?
- 23 A. I think over the course of late 2017 my role gradually  
24 became less, because Crown Counsel became involved.  
25 I think when I took up the post was somewhere round

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1 about the early summer, so perhaps June, but I can't be  
2 absolutely definite about that. If it's important,  
3 I can find out.

4 Q. I dare say it's not and which new post is that that you  
5 are referring to?

6 A. I then went to become the deputy Crown Agent for local  
7 court at that point, so I was involved with all  
8 the Sheriff Court cases and no longer involved with this  
9 kind of work at that point.

10 Q. All right. So you became the PF for the High Court in  
11 May 2016?

12 A. Yes.

13 Q. And then at some point in 2018 the DCA for local court?

14 A. That's correct, yes.

15 Q. And you've explained that your advisory role was  
16 effectively phased out as dedicated Crown Counsel was  
17 brought in?

18 A. Yes.

19 Q. I would like to ask you some questions about the initial  
20 letter of instruction to the PIRC and I wonder if we can  
21 bring up on screen COPFS 02539, and this is a letter  
22 which you sent on 5 May to Irene Scullion, head of  
23 investigations at the PIRC?

24 A. Yes.

25 Q. And if we look at this briefly please, it relates to the

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1 death of Mr Bayoh and you state that:

2 "In terms of section 33A of the Police, Public Order  
3 and Criminal Justice (Scotland) Act 2006 I write to  
4 formally confirm the request made on 3 May 2015."

5 And we've heard that was a request made over the  
6 telephone by Mr Green and it was a Bank Holiday weekend:

7 "... that you carry out an investigation in relation  
8 to the circumstances surrounding the death of Mr Bayoh."

9 And there were two areas which required  
10 investigation and they were the circumstances leading up  
11 to the incident, namely Mr Bayoh's movements late on  
12 Saturday, 2 May and during the early hours of Sunday,  
13 3 May prior to contact with the police and the incident  
14 in which the police became involved with Mr Bayoh  
15 shortly after 7 o'clock on the morning of the 3 May.

16 If we skip a couple of paragraphs, the paragraph at  
17 the bottom of the screen reads:

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

21 And if we scroll to the bottom, please, we see that  
22 this letter was signed by you.

23 So that letter was sent out on 5 May. I understand  
24 that there is an earlier version of that letter?

25 A. Yes.



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1 Q. And I believe that you were shown a copy of it and you  
2 comment on it in your statement. One of the differences  
3 between the two versions of the letters is that the  
4 earlier version refers to David Green --

5 A. Yes.

6 Q. -- head of SFIU having oversight of the investigation?

7 A. Yes.

8 Q. Now, I don't think we need to bring up the earlier  
9 version of the letter, but it was signed by you?

10 A. Yes, it was.

11 Q. To your knowledge, was it sent to PIRC that earlier  
12 letter or was it stopped?

13 A. I can't recall. I suspect it may have been stopped,  
14 because I don't refer to this being a subsequent letter  
15 in the letter. I may have -- if it had been sent,  
16 I think I would have made reference to that and said  
17 that this superceded the earlier letter.

18 Q. I see. So can we take it from the difference between  
19 these two letters that at some point on 5 May a decision  
20 was taken that the investigation should sit within CAAPD  
21 rather than SFIU?

22 A. Yes.

23 Q. Now, who made that decision?

24 A. I don't specifically recall any discussion about it.  
25 There must have been a discussion about it. I imagine

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1           that that would have involved myself, John Logue,  
2           Lindsey Miller, but I don't recall the specific  
3           discussion.

4       Q.   And who would have authority to make a decision of that  
5           sort, that a case of this complexity and profile should  
6           sit within one unit rather than another?

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

14       Q.   If you don't recall, you might not be able to help me  
15           with my next question, but I wonder whether you have any  
16           recollection as to why the view was taken that the  
17           investigation should sit within CAAPD rather than SFIU?

18       A.   Again, I don't have a specific recollection of that, but  
19           I would say that it wasn't of any great significance.  
20           We always knew that this was going to require a bespoke  
21           approach, so we would have a specific team would deal  
22           with a case of this nature and that case would be built  
23           around the particular unit.

24           My recollection at the time, from my management of  
25           the SFIU, was that there was a lot going on in SFIU at

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1 the time. It was a new unit. It had inherited a lot of  
2 cases. There were some really big cases within SFIU and  
3 also in the Health and Safety Division that David Green  
4 was also responsible for. There were a number of  
5 helicopter accidents. There was the bin lorry incident  
6 as well. There was also the work that was going on with  
7 the Scottish Government which was the precursor to the  
8 new Fatal Accidents Act, which came into force in 2016.  
9 That bill was through its passage at parliament at that  
10 time.

11 So it seemed I think that it was more convenient to  
12 put it in CAAPD was my recollection of the surrounding  
13 circumstances, but as I say I could be wrong about that  
14 and I don't have any recollection of a specific  
15 conversation that said that.

16 Q. And would it have made any difference if the case had  
17 stayed within SFIU?

18 A. I don't think so, because it was always going in my mind  
19 to be a bespoke response. So there was always going to  
20 be additional people coming in. Either unit couldn't  
21 have dealt with a case like this on its own. You would  
22 always have had to put additional people in, but it  
23 seemed because of what was going on in SFIU at the time  
24 that it would have been easier to accommodate in CAAPD.

25 Q. Can we scroll back up to the top of the letter, please.

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1           In the first paragraph you explain that the instructions  
2           in terms of section 33A of the 2006 Act and we have  
3           heard evidence that there is a subsection (b) which in  
4           turn divides into Roman numeral (i) and (ii).

5           And reading them short Roman numeral (i) refers to  
6           investigations where there's an indication of  
7           criminality and Roman numeral (ii) would encompass an  
8           investigation into a death in custody?

9           A. Yes.

10          Q. This letter doesn't specify which subparagraph --

11          A. Yes.

12          Q. -- the investigation was instructed by reference to and  
13          you explain at paragraph 76 of your Inquiry statement --  
14          we don't need that on the screen, but the hard copy is  
15          before you -- that you didn't state which subparagraph  
16          was applicable and this was a deliberate thing on your  
17          part?

18          A. Yes.

19          Q. You say that at the time the letter was sent it was  
20          unclear what had happened and so it was deliberate, it  
21          was intentional that you weren't more specific?

22          A. Yes.

23          Q. Can you expand, please, on your thinking in terms of the  
24          decision not to commit the Inquiry to being under  
25          subparagraph (b) (i) or (b) (ii)?

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1       A. Yes. So I didn't think that we had enough information  
2       at that time to be clear what had happened. I think,  
3       when I was drafting the letter, I took the view that it  
4       didn't matter whether I specified at that stage whether  
5       it was a crime or whether it was a death investigation  
6       in that the purpose of the letter was to make it clear  
7       that this was a crown directed investigation as opposed  
8       to one of the other types of investigation that PIRC may  
9       become involved in, to make that plain to everyone  
10      involved and to formally give PIRC the instructions that  
11      we had.

12             I didn't think that there was sufficient information  
13      to say that a crime had been committed, although that's  
14      entirely possible, because it was apparent from the  
15      information that we had that there was evidence that  
16      violence may have been used and a question that may  
17      arise, and subsequently did arise, would be whether or  
18      not that was justified.

19      Q. I want to move on to ask you some questions about the  
20      European Convention and Articles 2 and 14 in particular.  
21      And we've heard quite a lot of evidence about the  
22      requirement of these articles already and a number of  
23      reasons have been taken to a quotation from one of the  
24      cases De Silva which I will read to you:

25             "The court has in its case law established a number

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1 of requirements for an investigation into the use of  
2 lethal force by state agents to be effective. In  
3 summary, those responsible for carrying out the  
4 investigation must be independent from those implicated  
5 in the events. The investigation must be adequate. Its  
6 conclusions must be based on thorough objective and  
7 impartial analysis of all relevant elements. It must be  
8 sufficiently accessible to the victim's family and open  
9 to public scrutiny and it must be carried out promptly  
10 and with reasonable expedition."

11 Is that passage familiar to you?

12 A. Yes, it's familiar, yes.

13 Q. Now, a number of witnesses have been taken to quotations  
14 from the case law and the principles that can perhaps be  
15 drawn from the case law and they have agreed for an  
16 investigation into a death to be Article 2 compliant it  
17 requires to be effective; you would agree?

18 A. Yes, I would agree with that, yes.

19 Q. Sorry. I see you nodding but the proceedings are being  
20 transcribed.

21 And to be effective an investigation must be  
22 adequate?

23 A. Yes.

24 Q. Okay. And where a death follows the use of force by  
25 state agents, an adequate investigation must be capable

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1 of leading to a determination of whether the force used  
2 was or was not justified?

3 A. Yes.

4 Q. And the standard to be applied is that of no more than  
5 absolutely necessary; again, you agree?

6 A. Yes, I agree with that, yes, sorry.

7 Q. And further, when a death is at the hand of state  
8 agents, taking Article 14 in conjunction with Article 2,  
9 authorities have an additional duty to take all  
10 reasonable steps to unmask any racist motive and to  
11 establish whether or not ethnic hatred or prejudice may  
12 have played a role in events?

13 A. I agree, yes.

14 Q. And they should pursue that investigation with vigour?

15 A. I agree.

16 Q. So these are positive obligations that would fall into  
17 both the PIRC and Crown Office in terms of Articles 2  
18 and 14?

19 A. I agree, yes.

20 Q. To be discharged both through the PIRC investigation and  
21 also through the crown investigation?

22 A. Yes, they would.

23 Q. And central to the crown investigation, of course, is  
24 the precognition process?

25 A. Yes.

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1 Q. I would like to begin by asking you some questions about  
2 the PIRC investigation.

3 A. Yes.

4 Q. And then we'll look at the crown in a little while.

5 A. Okay.

6 Q. And I wonder if we can bring up on the screen  
7 paragraph 63 of your statement. So this is a response  
8 to question 27 and to save us flitting between  
9 documents, I'll simply read out question 27 for you.  
10 Question 27 was:

11 "In your view, was race sufficiently covered in  
12 COPFS instructions to PIRC? Did COPFS provide  
13 sufficient guidance and advice to PIRC in order for them  
14 to investigate is the issue of race sufficiently?"

15 So let's look at your answer. Your response was:

16 "In my view everyone was aware that race was a  
17 matter at the heart of this investigation. From the  
18 first telephone call I had with David Green, the  
19 question of the deceased's race and whether it was a  
20 factor was discussed. No one was in any doubt that it  
21 was an issue. Whilst no specific instructions were  
22 given to consider race as a motive, my recollection was  
23 that it was clearly discussed at the time and everyone  
24 involved was seized of the requirement to investigate  
25 the potential for race to have been a motive."



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1 I would like to also now before we move on and I ask  
2 you questions look at paragraph 169 which expands on  
3 this theme. This is a response to question 95 and,  
4 again, I'll simply read question 95 out. Question 95  
5 was:

6 "What is your recollection of how race was  
7 investigated by PIRC and COPFS? How did this change or  
8 develop over the course of the investigation? Were you  
9 satisfied that race was fully explored in the  
10 investigation?"

11 So that's the context for what you say --

12 A. Yes.

13 Q. -- in paragraph 169. Again, let's look at it in full:

14 "The question of race or, more particularly, whether  
15 there was any racial motivation behind these events was  
16 a factor from the very start. From the first telephone  
17 conversation I had with Mr Green, it was apparent that  
18 questions of racial motivation would require to be  
19 investigated. In the years since the reports following  
20 the murder of Chhokar, these were matters that were  
21 considered routinely and in every case. One of the  
22 reasons that the case was considered to be so high  
23 profile and sensitive was because of Mr Bayoh's race.  
24 At an early stage specific allegations of racist conduct  
25 on the part of specific officers were brought to our

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1 attention. That caused Mr Brown to write to PIRC to  
2 give specific instructions on that matter, but even  
3 before then no one was under any doubt that this was  
4 something that required to be investigated. On  
5 reflection and looking at the documents provided to me,  
6 it's unfortunate this was not more explicitly  
7 documented. Separate allegations were made of more  
8 general racist conduct in the form of Fife Constabulary  
9 and Fife Division. These were separately investigated  
10 and reported to CAAPD. I was satisfied that questions  
11 of race were being explored appropriately."

12 So I would like to ask you some questions arising  
13 from my reading of these two paragraphs. You say that  
14 whether there was any racial motivation behind these  
15 events was a factor from the very start. So I just want  
16 to be absolutely clear that what you're referring to  
17 here is the question of whether race was a motivating  
18 factor in the actions of the officers --

19 A. Yes.

20 Q. -- who attended?

21 A. Yes, thank you.

22 Q. And you say that from the first conversation with  
23 Mr Green, and I understand he called you on the morning  
24 of 3 May?

25 A. That's correct. He called me half past 9.

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1 Q. At half past 9 in the morning. So from has past 9 in  
2 the morning of 3rd, you say that it was apparent that  
3 questions of racial motivation would require to be  
4 investigated. They would require to be investigated by  
5 both the PIRC and the crown?

6 A. Yes.

7 Q. Okay. And you say that no one was under any doubt that  
8 this was something that required to be investigated?

9 A. That's correct.

10 Q. And when you say that, would that include the PIRC?

11 A. Police -- sorry -- crown and PIRC at the time were under  
12 no doubt during that.

13 Q. You say that PIRC were under no doubt, what makes you  
14 say that?

15 A. Over the weeks following the incident, I had a number of  
16 discussions with various people at PIRC, including  
17 the Commissioner, Mr Mitchell, and others and race was  
18 always something that was covered in those  
19 conversations. So it was always part of the discussion,  
20 is there any evidence of racial motivation? During the  
21 conversations that we had that was always something that  
22 came up, so I was confident that that was being  
23 explored.

24 Q. There was a meeting, I think, on 1 September, and we'll  
25 come to that, because I think there is a file note that

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1 I would like to take you, but were there then -- should  
2 we understand there were other meetings? It was not a  
3 one off.

4 A. There were a series of phone calls, but there were also  
5 a series of meetings that we had over that period of  
6 time before the September meeting to which you referred  
7 and there was obviously regular contact as the  
8 investigation progressed. And these were obviously  
9 lines of inquiry that that were being discussed.

10 Q. Yes, and you mention some of the lines of inquiry in --  
11 this paragraph.

12 A. Yes.

13 Q. -- on the screen before us, but if we can go back to the  
14 beginning of May, 5 May or thereabouts, what were your  
15 expectations at that point in time as to how the PIRC  
16 would go about the task of investigating whether there  
17 was a racial motive?

18 A. I would have expected that that would be one of the  
19 lines of inquiry that they would follow and they would  
20 look for any evidence from any witness or any other  
21 source that suggested that Mr Bayoh's race had any part  
22 in the conduct of the police officers into whom he came  
23 with contact on 3 May.

24 Q. Okay. So that would involve a review of statements when  
25 you say evidence --

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1 A. Yes.

2 Q. -- from witnesses and evidence from any other source?

3 A. Yes.

4 Q. Okay. And were your expectations as to how they should  
5 go about their task communicated to them?

6 A. We discussed them and so we discussed that that was part  
7 of the investigation. As I understand it, they were  
8 looking for that evidence as they followed the process  
9 of taking statements from witnesses and looking at the  
10 other evidence.

11 Q. Okay. Were these discussions as early as May?

12 A. Yes.

13 Q. Yes, because we've heard evidence that the officers  
14 themselves didn't give statements until the beginning of  
15 June?

16 A. Yes, that's correct.

17 Q. And do you recall at this distance whether there were  
18 any discussions with the PIRC in the month of May as to  
19 the approach that might be taken when the officer's  
20 statements were eventually noted?

21 A. I don't think we were involved in the interview plan, as  
22 it were, that -- what specific questions that were going  
23 to be asked. That's not something typically we would be  
24 involved in with an investigative agency. They had a  
25 degree of discretion as to how they went about that, but

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1 in terms of the outcome that we expected, the outcome  
2 being that these were matters which would be covered  
3 appropriately, that is something that was being  
4 discussed.

5 Q. Okay. Would it have been your expectation then that as  
6 and when the officers gave their statements, and we've  
7 heard evidence that initially they were unwilling to do  
8 so --

9 A. Yes.

10 Q. -- but the statements were provided at the beginning of  
11 June, was it your expectation in light of the  
12 conversations that you had had with PIRC in the month of  
13 May about the need to probe whether there was a racial  
14 motivation and that that would involve looking at the  
15 evidence of witnesses and evidence from all other  
16 sources, that those matters would be explored with the  
17 officers in their statements?

18 A. Yes, I would expect that to be done.

19 Q. Now, the first written instruction to the PIRC  
20 concerning race was issued on 2 September 2015 and we'll  
21 come on to look at that, but we have not had sight of  
22 any written instructions prior to that date in relation  
23 to race and of course your initial letter of instruction  
24 that we have looked at doesn't specifically mention race  
25 and I wonder whether you had considered mentioning race

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1 in your initial letter of instruction?

2 A. I hadn't considered that. As I noted in my statement,  
3 in any incident which involved a black man, as this did,  
4 you would have expected that to have been done. That  
5 was part of all of the guidance to investigators. So in  
6 instructing PIRC I was conscious that whilst it was an  
7 organisation which was two years old, the people that I  
8 was dealing with and the people that I was instructing  
9 most of them came from a background of policing. They  
10 had been through all of the relevant police training.  
11 They were aware of the various manuals that the police  
12 had. They had been through all of that training, and  
13 that in the criminal justice system for the past ten  
14 years these had been issues which had been dealt, which  
15 had been mainstreamed and so I didn't consider doing it,  
16 because in my view it was entirely obvious that a black  
17 man having died in contact with the police, race would  
18 be at the forefront of the mind of any competent  
19 investigator, as it was in the forefront of our minds.

20 So I don't think I did consider it. I think as I  
21 have said that in hindsight it would have been better if  
22 it had said that.

23 Q. Okay.

24 A. What -- I didn't at the time think that that was  
25 necessary to do, because I thought it was obvious that

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1           that was something that had to be explored.

2           Q.   Okay.  So it would have been stating the obvious is what  
3           you are saying?

4           A.   That was the view I took at the time, yes.

5           Q.   Les Brown, Mr Brown has given evidence already and  
6           certainly he said that -- he said:

7                        "I don't accept it required a letter of instruction  
8           from the crown to consider race.  The letter of  
9           instruction was for an effective investigation to be  
10          carried out."

11                       And you're nodding your agreement?

12          A.   Yes, that was -- that was -- my view at the time was  
13          that we didn't really know what had gone on.  The letter  
14          of instruction was a letter which said, please tell us  
15          what went on and it was obvious that because of  
16          Mr Bayoh's race that was an element which had to be  
17          considered.  That was consistent with every piece of  
18          guidance to any law enforcement agency that over the  
19          past ten years or more certainly, since is the Lawrence  
20          report and everything that came from that, that was  
21          something which I didn't think needed to be said.

22          Q.   Okay.  We've also heard evidence from Kate Frame.  And  
23          she was asked did she consider that her initial terms of  
24          reference to investigate the circumstances of Mr Bayoh's  
25          death would have permitted the PIRC to actively



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1 investigate whether race was a factor. As she said that  
2 the terms of reference wouldn't have precluded that,  
3 but, and I quote:

4 "I would have expected a specific direction from  
5 Crown Office about that."

6 Can I invite your comment on her statement?

7 A. I would disagree with that. Firstly, the phrase terms  
8 of reference have been used and, in my mind, in sending  
9 this letter of instruction we were not setting terms of  
10 reference or parameters for an investigation. It was  
11 not like heads of investigation such as an inquiry like  
12 this may have -- may have to discharge.

13 What we were doing is we were -- we were asking PIRC  
14 to investigate something. So it wasn't a case of  
15 specific terms of reference and they had to work within  
16 those terms of reference. They were expected to gather  
17 evidence and follow the evidence in my view, and that  
18 evidence would take them where it took them. So  
19 anything in relation to the death of Mr Bayoh or the  
20 circumstances leading up to that, which I think are  
21 captured in one of the paragraphs of the letter of  
22 instruction, I would have expected them to follow.

23 There was no intention to preclude any -- following  
24 any lines of inquiry. I'm surprised if Ms Frame has  
25 given that evidence, because when PIRC were set up she

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1 was the first head of CAAPD and was involved in that and  
2 these were discussions that we had with policing and the  
3 first commissioner that we didn't want to restrict them  
4 in terms of evidence. So I'm always nervous when people  
5 talk about terms of reference.

6 They are instructions so PIRC know it's a crown  
7 directed investigation that we are carrying out and that  
8 gives them additional powers, should that be required in  
9 terms of the statutory scheme, so I don't agree with  
10 that.

11 Q. Okay. That's helpful. Just to clarify, I think it may  
12 be the case that the Inquiry used the expression "terms  
13 of reference" and invited Ms Frame's comment and it may  
14 not be the case that she used that phraseology, but  
15 certainly she was clear in her evidence that she would  
16 have expected a specific direction from Crown Office in  
17 relation to race.

18 A. I don't agree with that and, again, had -- had that been  
19 expected, that could have been asked for and that  
20 discussion could have been had and that didn't happen.

21 Q. Okay. We've heard evidence from the investigators  
22 within the PIRC that prior to the letter that was issued  
23 on 2 September, although they had not been directed by  
24 the crown in relation to race, they were taking  
25 cognisance of race and, in particular, Mr McSporran was

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1 taken to his policy log when he gave evidence. We don't  
2 need to bring it up on the screen, but there is an entry  
3 dated 9 May which reads:

4 "Although not directed by Crown Office at this  
5 stage, take cognisance of any issues of race if they  
6 emerge."

7 And the evidence was that although the PIRC were  
8 taking cognisance of race, race wasn't a positive or  
9 proactive line of investigation. And so, for example,  
10 when the officers did give their statements at the  
11 beginning of June on 4 June, the interview strategy  
12 didn't include race. They weren't asked questions about  
13 race. Were you aware of that at all?

14 A. I wasn't. The policy log isn't something I would see.  
15 The interview strategy isn't something I would see. If  
16 race was not being pursued as an active strand of  
17 investigation, that would surprise me.

18 Q. Okay. Would it concern you?

19 A. Yes.

20 Q. In relation to the notion that the PIRC were taking  
21 cognisance of race, Mr Brown was asked about this in his  
22 evidence and he said that his mind suggested that the  
23 PIRC were open to it if they came across it, whereas it  
24 wasn't an active investigation and he was asked:

25 "Were your expectations on the part of the crown

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1           that the PIRC would pursue an active line of  
2           investigation, that they would in terms of Article 14  
3           pursue their investigation with vigour?"

4           And he said:

5           "Yes, I think to be an effective investigation those  
6           kind of descriptions are required."

7           Would you agree with that?

8           A. I would agree with that and "take cognisance" it sounds  
9           passive. So as you say it sounds as if, if it arises,  
10          then you look at it and see what it takes, but in my  
11          view best investigative practice would have required  
12          that to be an active line of investigation which was  
13          pursued and so questions would be asked about that of  
14          almost any witness and things may emerge that would be  
15          followed up at that point.

16          Q. Thank you. Now, we've heard that the first or perhaps  
17          interim PIRC report was received in Crown Office in  
18          August of 2015. Did you read it when it was received?

19          A. Yes, I think it was actually addressed to me, if I  
20          recall, but I did -- I read it and I read the  
21          accompanying documents. I don't think it was intended  
22          that that was a first or interim report. I think that  
23          was intended to be the report and it was as a result of  
24          our reading it and considering further lines of inquiry  
25          that further instructions were given.

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1 Q. Okay. There has been slightly conflicting evidence from  
2 witnesses as to whether this was always intending to be  
3 an interim or first report or whether it was intended or  
4 expected to be the final product, but do I understand  
5 that you're saying that your expectation was that this  
6 was the final report?

7 A. I perhaps wouldn't describe it as the final report.  
8 I think it was always understood that there were a  
9 series of ongoing lines of inquiry which were going to  
10 take longer than this, but I expected it to be the main  
11 factual report of what happened on the morning of 3rd,  
12 and immediately before that. So that was -- that was  
13 I think my expectation.

14 It was always, I think, understood that there may be  
15 supplementary reports because there were bits of  
16 evidence which were awaited, et cetera, but the main  
17 report which would be supplemented would be the way  
18 I would describe it, as opposed to the final report.  
19 I think we may have expected there to be other chapters  
20 of evidence that would come subsequently to this, but  
21 this would be the piece of evidence which covered what  
22 happened that morning in terms of the factual accounts  
23 of the witnesses who were there and what we saw and what  
24 they heard, et cetera.

25 Q. Okay. So you had anticipated a report and then

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- 1 supplementary report or reports --
- 2 A. Yes.
- 3 Q. -- to tie off the ongoing and outstanding lines of  
4 inquiry?
- 5 A. That's my recollection, yes.
- 6 Q. Okay, the report of August 2015 is 351 pages long.  
7 There are references within the body of the report "a  
8 black male", "a black guy", "threat level", "terrorist  
9 risk". However, there's no mention of race, racism,  
10 racist, race discrimination, motivation, anything of  
11 that sort. That report didn't cover race discrimination  
12 Article 14, even just to raise the issue and discount  
13 it. Would you have any comment to offer on that  
14 omission?
- 15 A. I think that led us to have a -- as part of that  
16 conversation we had after that report, that led us to  
17 the conversation about, well, what is there on race, has  
18 that been pursued and we asked for further information  
19 about it.
- 20 Q. Does that perhaps take us to the meeting of  
21 1 September --
- 22 A. It perhaps does, yes.
- 23 Q. -- 2015, because the report was submitted in the August.
- 24 A. It was August, yes.
- 25 Q. Now, there is a file note in relation to that meeting,

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1           so I wonder if it might be helpful if we bring that up  
2           on the screen. It's COPFS 03585A.

3           A. Yes.

4           Q. The file note is dated 1 October and it refers to a  
5           meeting on 11 September. I'm sorry I had thought the  
6           meeting was on 1 September and given that there was a  
7           letter sent on 2 September, forgive me, I think I would  
8           rather look at the letter first so that we can deal with  
9           thinking chronologically. I've got them out of  
10          sequence. That was entirely my fault. I'm sorry.

11          So let's look, firstly, at the letter of 2 September  
12          and that is COPFS 02557. Now, this is a letter. If we  
13          scroll down, we'll see it's dated 2 September. Scroll  
14          up a little bit to the top, please, it doesn't say here  
15          who it's from, I'm sorry. It's just the fiscal office  
16          address.

17          A. I think it's Les Brown from the reference.

18          Q. You see the reference "LAB" and also Criminal  
19          Allegations Against the Police Division, of which he was  
20          the head. It's addressed to Kate Frame. It's a fairly  
21          lengthy letter.

22          Let's scroll to the bottom, first of all, please, so  
23          we can just satisfy ourselves that this is a letter from  
24          Les Brown. It has indeed and Mr Brown said in his  
25          evidence, although he couldn't recall at this distance,

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1           that it was likely that it would have been read by you  
2           before it was sent.

3           Can you help us with that? Do you recall having  
4           seen this letter before? We'll look at it more detail  
5           shortly.

6           A. I don't recall having seen it. I think, given where we  
7           were in the inquiry at that time, if I didn't see the  
8           letter, I was aware in general terms of what was in it.  
9           I wouldn't disagree with his evidence if he thinks that  
10          he saw it, but I just don't specifically recall having  
11          seen it.

12          Q. All right. Let's look at the content of the letter.  
13          That may jog your memory. Can we look at page 4 of the  
14          PDF, please. Here we are. So that bulletpoint near the  
15          top of the page. This letter was quite wide-ranging in  
16          terms of the additional instructions that were being  
17          issued to PIRC, but it's the one that relates to race  
18          that I would like to focus on just now:

19                 "I require confirmation from the Commissioner that  
20                 issues of race and whether there is any evidence of  
21                 racial motivation is a primary focus in the PIRC  
22                 investigation. The investigation should examine whether  
23                 there is any evidence that any of the officers [I think  
24                 that should say] involved has expressed any racist views  
25                 or opinions in the past."



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1           In particular, and we perhaps don't need to look at  
2           the detail, but three specific lines of inquiry are then  
3           suggested: whether officers have held views in the past,  
4           there is an issue in relation to or a reference to an  
5           issue concerning text messaging within Fife Constabulary  
6           and an issue concerning Alan Paton that is set out in  
7           the paragraph below.

8           So we've heard these three specific lines of inquiry  
9           reflect concerns that have been raised by Mr Bayoh's  
10          family with the crown directly.

11         A. Yes, I think that's correct.

12         Q. And Mr Brown in his evidence said that this paragraph  
13          here was intended to be a general instruction  
14          highlighting three specific concerns and I wonder  
15          whether that is clear from the language used or whether  
16          there's a possibility that the paragraph might have been  
17          read as exhaustive rather than illustrative by the PIRC?

18         A. I mean that's a matter of interpretation and how they  
19          interpreted it would be really a question directed to  
20          them, but I think the first sentence of that paragraph  
21          which seeks confirmation that issues of race is a  
22          primary focus, that, you know, that says what it says.  
23          It is are you looking at race in general terms and it  
24          then goes on to some specific aspects of that, but  
25          I think that was intended to be a general expression and

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1 I think that's how it reads.

2 Q. We've heard that the PIRC's consideration of race didn't  
3 really go beyond these three specific aspects and I  
4 wonder whether, with hindsight, this was an opportunity  
5 for the crown to have provided more in the way of  
6 guidance to the PIRC, perhaps by providing additional  
7 examples of lines of inquiry or perhaps by stating that  
8 the expectation was that they applied their own minds to  
9 the issue and perhaps reported back to the crown in  
10 terms of how they proposed to take this aspect of the  
11 inquiry forward?

12 A. In hindsight we could have but, again, I go back to the  
13 context and the context is a number of discussions in  
14 which these were discussed and the context is also that  
15 the people that we were dealing with at PIRC were very  
16 experienced. They were -- although PIRC was a new  
17 organisation, the Commissioner was an experienced  
18 prosecutor and the director of investigations and the  
19 senior staff there were very, very experienced police  
20 officers and very experienced detectives who, from my  
21 own knowledge, had dealt with very complex cases. So  
22 contextually I don't think that -- I think that we  
23 didn't give specific guidance because all of those  
24 factors were taken into account.

25 On reflection and given what you've told me, yes, we

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1           could have put more in. But I would be disappointed if  
2           today, as we sit here now, if a similar incident  
3           occurred, we would have to specify in the body of a  
4           letter of instruction: these are the lines of inquiry  
5           you should follow. As I understood it, PIRC  
6           investigators followed the relevant policing guidance,  
7           because the police in the United Kingdom have produced  
8           lots of guidance about how you do an investigation and  
9           that was very specific in its terms as to how you  
10          undertook one of these investigations and in my mind,  
11          not only because they were experienced police officers  
12          in their previous careers, but in my mind they would be  
13          doing that.

14                 So I would be disappointed if we had to specify:  
15                 these are the sorts of things you need to look for,  
16                 whether it's the language of the officers before, the  
17                 language of officers after, how they have dealt with  
18                 other people, whether there's anything their past, you  
19                 know whether there are any racial tropes or stereotypes  
20                 applied in any of the material that's been produced.

21                 I would be disappointed if we had to do that now.

22          Q. You said earlier in your evidence it was your  
23                 expectation that the PIRC would gather and follow the  
24                 evidence?

25          A. Yes.

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1 Q. And that to have given a specific direction in relation  
2 to race would have been obvious.

3 A. Stating the obvious, yes.

4 Q. Stating the obvious. And do those sentiments apply  
5 equally here.

6 A. They applied to this as well.

7 Q. Thank you. So that was the letter of 2 September. If  
8 we could perhaps now move on to the meeting and bring  
9 back the file notes that we looked at a moment ago. So  
10 the file note is dated 1 October but relates to a  
11 meeting on 11 September, so about a week after the  
12 letter was sent and we can't see it, unless we scroll  
13 down a little bit, but Mr Brown's initials are at the  
14 bottom so it appears he prepared this file note. If we  
15 can return to the content please:

16 "At the meeting with PIRC attended by John Mitchell  
17 and Kate Frame, together with Les Brown and  
18 Stephen McGowan, on 11 September 2015 at PIRC offices,  
19 COPFS officials stressed the importance of ensuring that  
20 issues of race were fully addressed as part of the PIRC  
21 investigation. The importance of considering whether  
22 race had any influence in the way that the incident was  
23 dealt with as part of a wider consideration as well as  
24 any evidence of overt racism was explained."

25 Now, do you recall this meeting?

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1       A. I had -- I think over this period of time there were a  
2       series of meetings with PIRC and many of them were at  
3       the PIRC offices in Hamilton and they would all be  
4       attended by Mr Mitchell and Ms Frame so I don't think  
5       I can isolate in my mind this particular meeting. We  
6       had a number of them.

7       Q. All right. Can you assist me with what prompted the  
8       meeting at all? It does come about a week after the  
9       letter of 7th --

10      A. I can't recall if it was a specific prompt, if it was to  
11      discuss the letter or if it was just to have an update  
12      on the general -- a general update about where the  
13      evidence was post the letter. I don't recall that. I'm  
14      sorry.

15      Q. Okay. Can I take it you don't recall the discussion and  
16      this file note hasn't really --

17      A. I don't recall the specific discussion and the file note  
18      hasn't jogged my memory. I do recall that we had a  
19      number of discussion in which we -- the question of race  
20      were discussed and we sought that assurance that, you  
21      know, have you got anything and what was coming back to  
22      us was that they were not finding that evidence.

23      Q. Okay. Taking this file note at face value, it reads  
24      that:

25                 "The importance of considering whether race had any

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1 influence in the way that the incident was dealt with as  
2 part of a wider consideration as well as whether there  
3 was any evidence of overt racism was explained."

4 So it appears that a distinction was drawn and set  
5 out as between overt racism and influence and perhaps  
6 implicit bias?

7 A. Yes.

8 Q. But at this distance and given that there were a number  
9 of meetings with the same personnel, you don't recall  
10 the specifics of the discussion?

11 A. I don't recall the specifics. I mean it looks like as  
12 if one of the things that we're doing at the meeting is  
13 reinforcing the message which is in the paragraph from  
14 that earlier letter and we are reinforcing that, having  
15 perhaps had a concern from reading the report that that  
16 material hadn't been covered.

17 Q. Okay.

18 A. Or that that line of Inquiry hadn't been covered to our  
19 satisfaction.

20 Q. Okay. Now, Kate Frame in her evidence said that PIRC  
21 had expressed concerns about the feasibility of  
22 assessing whether race had any influence on the  
23 officers' actions in the absence of any evidence of  
24 overt actions on their part and she said that:

25 "No guidance was provided on the assessment of

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1 influence and a greater degree of direction and guidance  
2 would have been helpful."

3 Can I invite your comment on that?

4 A. No further guidance was asked for at the time, I would  
5 start by saying that. This comes down to questions of  
6 mens rea, which are, again, basic concepts in criminal  
7 law. So in any case we don't know what's going on in  
8 the mind of, you know, the suspect, the potential  
9 accused. You get that from everything that goes round  
10 about it, whether it's things that they've said, whether  
11 it's things that they've done and the surrounding  
12 circumstances.

13 I don't understand that we were asking for anything  
14 complex or novel here. It all goes down to those  
15 questions of looking at all of the circumstances to say  
16 what can we discern about why the officers acted in the  
17 way that they did and you get that from all the  
18 surrounding circumstances and from a further inquiry,  
19 but it goes down to those basic concepts of mens rea.  
20 You never know what's in someone's mind. You get that  
21 from what happened round and about them and what they  
22 did.

23 Q. Can we return to your statement, please, and bring up  
24 again paragraph 169. We've looked at this already.  
25 Four or five lines down you refer to the Chhokar

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1 reports:

2 "In the years since the reports following the murder  
3 of Surjit Singh Chhokar these were matters that were  
4 considered routinely and in every case."

5 And this was in the context of a discussion about  
6 racial motivation. I wanted to ask you how routinely is  
7 racial motivation considered?

8 A. It should be considered in any case where the victim is  
9 from a minority ethnic community or whether there's any  
10 other evidence that would suggest that race might be a  
11 motive depending on the facts and circumstances, but in  
12 any case where the victim is from a minority ethnic  
13 community. The lesson of Chhokar, where that wasn't  
14 explored and it was put down to the theft left of a Giro  
15 cheque, if I recall, the lesson from that was that you  
16 must explore it in every case and not just take things  
17 at face value.

18 Q. Now, we have spoken at some length about the PIRC  
19 investigation, if we can turn now to the crown  
20 investigation and I take it then that the question of  
21 race would be considered routinely in any case where the  
22 victim was from an ethnic minority background by the  
23 crown as well --

24 A. Yes.

25 Q. -- by the reporting agency. And I wonder had -- back in



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1           2015 was there guidance available to those within  
2           Crown Office as to how to investigate whether race was a  
3           motivating factor in the commission of an offence?

4           A. There would have been guidance on racial offences at  
5           that time, which had been in place for a number of  
6           years. I can't remember the specific detail of it, but  
7           there would have been guidance in relation to that which  
8           I am sure would have pointed in the right direction for  
9           that.

10          Q. There is a chapter in the Precognoscer's Handbook on  
11          racially aggravated offences.

12          A. Yes.

13          Q. Which we will look at shortly. Is that what you had in  
14          mind?

15          A. I had in mind that and I think there was also a  
16          Crown Office circular which also dealt with some of  
17          these matters as well from recollection, because often a  
18          racial case came at summary level and so there would be  
19          guidance in relation to that.

20          Q. And was there training for staff involved in the  
21          precognition process as to how to investigate whether  
22          race was a motivating factory?

23          A. I can't recall what specific training was available  
24          either to precognoscers or wider legal staff. I recall  
25          that there had been training in the early 2000s, but I

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1           can't really whether that was a course which repeated  
2           for new starts or what inputs people had on that, I'm  
3           afraid.

4           Q. Was there a guidance on compliance with Articles 2 and  
5           14?

6           A. I don't recall that there was specific guidance at that  
7           stage, no.

8           Q. Okay. Training then?

9           A. There was training in the sense -- so if you moved on to  
10          case preparation and precognition work, there was a  
11          course for that. What the content of that course was  
12          and how much and whether it dealt with some of these  
13          issues I can't recall. There was also a separate course  
14          called the deaths core course, which was about the basic  
15          investigation of deaths and, again, I'm sure that that  
16          must have covered Article 2 in some way. I just can't  
17          recall specifically what it was.

18          Q. We can ask other people about that.

19          A. I would have been on these courses over 20 years ago so  
20          I don't recall.

21          Q. Now, we ever heard evidence -- sorry -- heard that  
22          evidence of a racial motivation can in some instances be  
23          overt.

24          A. Yes.

25          Q. That might be, for example, someone shouting a racist

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- 1 slur.
- 2 A. Yes.
- 3 Q. And there's no evidence of that sort here.
- 4 A. No.
- 5 Q. We've also heard that evidence of racial motivation can  
6 be covert, subtle and harder to detect?
- 7 A. Yes.
- 8 Q. If you only look for evidence of overtly racist  
9 behaviour then you might overlook more subtle behaviours  
10 that point towards a racist motive?
- 11 A. I would agree.
- 12 Q. And if you only look for evidence of overtly racist  
13 behaviour, then your investigation may not unmask a  
14 racist motive?
- 15 A. Yes.
- 16 Q. And if you only look for evidence of overtly racist  
17 behaviour then the investigation might not ultimately be  
18 adequate?
- 19 A. I agree, yes.
- 20 Q. Now, you say at the very bottom of this paragraph that  
21 you were satisfied the questions of race were being  
22 explored appropriately. I'm not sure whether you were  
23 satisfied that they were being explored appropriately by  
24 the PIRC or by the crown or perhaps by both?
- 25 A. I think by both. At the time, I think whilst we were

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1           having to remind PIRC from these documents about these  
2           things, we were doing that and we were confident  
3           I think. I think I was confident that those messages  
4           would land with them and they would explore that.

5           Q. Okay. And so far as the crown were concerned, what did  
6           you understand was being done within CAAPD to  
7           investigate questions of race?

8           A. My understanding was that we were analysing all of the  
9           evidence that came in. We were considering what was  
10          within that, whether there was any evidence of that, we  
11          were looking at further lines of inquiry if we weren't  
12          satisfied that PIRC had followed all of the lines of  
13          inquiry, and that we would look for any evidence of  
14          racial motivation or racial factors --

15          Q. Okay.

16          A. -- contributing to what happened.

17          Q. And where did you expect the crown to be looking for  
18          evidence of these more subtle indicators of racial  
19          motivation?

20          A. They would be in all of the evidence, so they would be  
21          in the evidence of the statements so things which were  
22          said in the statements which might cause you to have a  
23          view. They would be in things like the -- all of the  
24          police radio chatter, the airwave chatter I think it  
25          was. That was all available to us. We would be looking

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1 in that. You would be looking at all of the documents  
2 that were prepared. You would be looking at the  
3 policies that I think we were then gathering. You would  
4 be looking across the piece for evidence of that.

5 Q. Okay. And at what stage of the investigation did you  
6 expect CAAPD to be on the look out for evidence of a  
7 racial motivation?

8 A. I think all of the way through you would be looking for  
9 that.

10 Q. And who within CAAPD was responsible for scrutinising  
11 the evidence in the way that you've described and  
12 assessing it for relevance to the question of a racial  
13 motivation?

14 A. All of those involved in the preparation of the case had  
15 a responsibility for that.

16 Q. So would that include the precognoscers?

17 A. It would include the precognoscers, it would include  
18 Les Brown as the head of CAAPD, it would also include me  
19 in terms of what I read in the reports that I read.

20 Q. Okay. So far as the precognoscers are concerned, we  
21 have heard that the narrative was prepared by  
22 Alisdair McLeod and Erin Campbell and the analysis by  
23 Fiona Carnan; would this responsibility fall to all  
24 three?

25 A. Yes.

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1 Q. How confident were you that the team had the necessary  
2 skill set so identify evidence of racial motivation?

3 A. I had -- I had every reason to be confident. They were  
4 experienced lawyers who had been involved in large and  
5 complex cases before. I had every confidence that they  
6 were able to discharge that duty. They were brought in  
7 specifically because of their experience in large and  
8 complex -- or certainly Mr MacLeod and Ms Campbell were  
9 brought in because of their experience of large cases so  
10 I had every confidence in them.

11 Q. Fiona Carnan prepared the analysis. She worked very  
12 closely, she told us, with Alisdair Campbell, but he led  
13 on the narrative, she led on the analysis.

14 A. Yes.

15 Q. And she gave a written statement to the Inquiry as well  
16 as giving oral evidence and in her statement she said  
17 that:

18 "Prior to the date I became involved in this matter,  
19 I had no previous involvement in the investigation of  
20 deaths in police custody or following police contact."

21 And she didn't recall any deaths that she'd been  
22 involved in investigating where race was a factor so no  
23 experience really on deaths following police contact or  
24 in police custody or in deaths where race was a factor.

25 And Mr Brown also gave evidence that he had no

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1 experience of investigating a death in police custody or  
2 following police contact and had no experience of racism  
3 being a factor to consider when investigating a death in  
4 custody or following police contact or indeed the  
5 actions of on-duty police officers. So again, limited  
6 experience, if any, in relation to deaths in police  
7 custody following police contact and race.

8 Given the limited experience of the analyst and her  
9 line manager effectively in relation to the  
10 investigation of deaths in police custody, certainly  
11 following restraint and race being a factor, and also  
12 given the limited guidance and training that was  
13 available at the time, particularly in relation to  
14 Article 2 and Article 14, with the benefit of hindsight,  
15 do you think the CAAPD team were as well equipped as  
16 they might have been to take on this task?

17 A. The staff involved were very experienced, so they were  
18 very experienced generally. In terms of that -- I think  
19 if I address your question this way, I'm not sure where  
20 else in the organisation that experience of deaths in  
21 custody or deaths with racial factor actually lay.  
22 We -- I cannot recall any other incident of this nature.

23 The only thing that I can recall that might be  
24 analogous in terms of a death was the Park Inn incident,  
25 which was of a completely nature, but it did involve,

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1           you know, a death involving the police. And there was a  
2           limited number of cases that we had where there was a  
3           death in police custody where the person was from a  
4           minority ethnic group and, in particular, where there  
5           was contact with the police as opposed to the death  
6           being for some other factor, suicide or mental health or  
7           something like that, where there was no actual contact.

8           I don't recall many cases of that nature. So I'm  
9           not sure that we had a population of lawyers in the  
10          organisation who could have come in and done that, but  
11          perhaps then goes to your question about guidance and I  
12          can't recall specifically what's in the guidance. It  
13          may well be that guidance requires to be looked at and  
14          there needs to be more guidance in that area. But  
15          I don't think there was another group of people who  
16          could go and do that who had experience of a similar  
17          type of case.

18          I think Ms Carnan is a very experienced lawyer, one  
19          of the most experienced. She's got 30 plus years as a  
20          depute, probably almost 30 by the time of this incident.  
21          As I said, Mr MacLeod and Ms Campbell were very  
22          experienced and so you sometimes have to looked at  
23          things that you've never looked at before. I had  
24          confidence that they would pick up and be able from the  
25          guidance and from the guidance that they were being



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1 given that they would be able to look at that and  
2 explore it. I don't think there were other people we  
3 could have selected who had more specialist expertise or  
4 experience in the area.

5 Q. Okay. So if there was no one within the organisation  
6 who was, if you like, better placed than the team who  
7 were assembled and brought together for the purposes of  
8 carrying out the crown precognition, was it recognised  
9 that this particular case introduced new challenges, new  
10 areas of work and that there was perhaps a gap in  
11 experience?

12 A. I'm not sure the gap in experience was something that we  
13 discussed. It was recognised that this was a -- and  
14 that is why I have referred to it -- sensitive high  
15 profile. Some of the sensitivity came because  
16 this was not an everyday occurrence. This was an  
17 unusual case and we would have to work our way through  
18 it as an unusual case from first principles.

19 Whether we -- whether we saw at that time that there  
20 was a gap in experience, I'm not sure, but in  
21 reflecting, in coming here today, I can't think of other  
22 cases. The other factor in terms of not having people  
23 who had done this before is that all of the CAAP cases  
24 had until 2012 been done by the area procurator fiscal,  
25 so it was a very small group of people who dealt with

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1 those cases and most of that group of people when we  
2 restructured and for various reasons had left the  
3 organisation.

4 So the vast majority of people who had been dealing  
5 with the complaints about at the police on a regular  
6 basis, they had all gone by this point and so we did  
7 recognise that. We did recognise that although we had a  
8 specialist team that specialism was one which was  
9 developing, as opposed to on Day 1 being a fully fledged  
10 team that could deal with everything and had experience  
11 of every aspect of dealing with the issues that might  
12 arise in terms of police criminality.

13 Q. So was the expectation then that this experienced team,  
14 who perhaps didn't have experience in relation to deaths  
15 in police custody or following restraint or looking for  
16 race or racial motivation, was the expectation that they  
17 would go back to first principles?

18 A. That was my expectation, yes.

19 Q. And draw on their existing experience and apply that  
20 experience to this new set of challenges and  
21 circumstances?

22 A. Yes.

23 Q. Was any thought given to whether there might have been  
24 benefit in, for example, approaching the crown south of  
25 the border or perhaps looking at the IPCC guidelines on

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1           investigating discrimination, including race  
2           discrimination that were published in I think 2015,  
3           drawing on the experience of other jurisdictions and  
4           other investigating authorities from perhaps larger  
5           jurisdictions who might have had more experience of  
6           dealing with this type of case?

7           A. No, thought, no.

8           Q. No.

9           A. We didn't give thought to that or I certainly hadn't  
10          given thought to that, no.

11          Q. Do you think with the benefit of the hindsight that is  
12          an exercise that might have proved to be fruitful and  
13          helpful to the team?

14          A. I certainly think it's an exercise that we could have  
15          done and explored, whether it would have been fruitful  
16          I'm not sure. There have been all sorts of confidence  
17          issues in various investigations in England and Wales as  
18          well as the matters that we're dealing with here. So  
19          how fruitful it would have been I don't know, but  
20          I think in terms of exploring that as an avenue that  
21          could have been something that we did, but it wasn't  
22          something that we thought about at the time to my  
23          recollection.

24          Q. Now, Fiona Carnan prepared the analysis and there is no  
25          consideration of race in the analysis at all. She has

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1           been asked about her approach to race and what I would  
2           like to do is bring up some passages from her written  
3           statement and tell you a little about what she said in  
4           her oral evidence, then invite your comment on the  
5           approach that she took.

6           I wonder if we can bring up Fiona Carnan's  
7           statement. It's SBPI 00379. SBPI 00379. I beg your  
8           pardon, sorry, and can we go to paragraph 45, please.  
9           You'll see that she has copied over the questions into  
10          the document that contains her answers. So the question  
11          that she was asked was:

12          "To what extent was race a factor in your analysis  
13          of the actions of the police officers? In your view,  
14          was this sufficient to inform Crown Counsel of the  
15          impact, if any, that Mr Bayoh's race had on the actions  
16          of the police officers who engaged him?

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

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

7 If we could also look at paragraph 38, please, which  
8 expanding on the approach that she took here. She was  
9 asked to explain her involvement in gathering and  
10 analysing evidence in relation to race. And she said:

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

20 So in her evidence I took her to both of these  
21 paragraphs and then said:

22 "Am I right to understand that essentially this was  
23 a two-stage process. You would look for evidence of  
24 criminality first and if you found criminality, if and  
25 only if you found evidence of criminality, then you

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1 would go looking for evidence of a racial aggravation or  
2 motivation."

3 And she said "that's right".

4 "So does that fairly set out the approach that you  
5 took?" and she said, "yes".

6 Can I ask you, and appreciate I have given you quite  
7 a lot information -- if you would like to see that on  
8 the screen again, please, just say -- but how does this  
9 two-stage process fit with your expectation of what the  
10 crown's approach to scrutinising the evidence for  
11 indicators of a racial motivation would have been?

12 A. There are -- there are -- perhaps I wouldn't describe  
13 the way I would approach this as a two-stage process.  
14 It all depends on the evidence, but depending upon the  
15 evidence in a case like this where you're considering  
16 whether or not the violence that we came to understand  
17 that the police officers used was justified, questions  
18 about why the violence was used, which would be tied up  
19 with the motivation, and so I'm not sure it's a strict  
20 two-stage approach that you say: was there an assault  
21 and if you tick the box that says, yes, there is an  
22 assault, was that racially motivated?

23 I think it's slightly more subtle than that. So I  
24 wouldn't describe the approach as I would go through as  
25 being a strictly two-stage process in that way. I think

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1           that when you're looking at the justification for the  
2           officers' actions and whether that was a justified  
3           assault or not, you would probably have to look at why  
4           they were doing it and so if they were doing it and if  
5           they had race in their mind in any way, that would be a  
6           factor that you would take into consideration in terms  
7           of whether the violence was justified. It may not  
8           amount to -- it may not -- you may not come to a  
9           different conclusion on criminality, but I would analyse  
10          it in a slightly different manner when you're looking at  
11          it in that way, so not a two stage approach, no.

12         Q. Does it concern you at all to hear that was the approach  
13          taken?

14         A. I'm not sure, because I have only seen the narrative and  
15          analysis when I was preparing my statement and that was  
16          some time ago so I can't -- it would concern me if we  
17          would have come to a different conclusion depending upon  
18          that and I'm not in a position to say whether or not we  
19          would have come to a different conclusion looking it the  
20          way I've described, as opposed to the way that Ms Carnan  
21          says she has described it. If we had come to different  
22          conclusions, that would concern me. Because of the  
23          involvement of Crown Counsel and the victim right of  
24          review, I'm relatively confident we wouldn't have come  
25          to and therefore any concern I would have would be

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1           lessened by that, but I certainly would have approached  
2           it in as lightly different manner.

3           Q. I appreciate that you didn't see the narrative and the  
4           analysis at the time that they were prepared in  
5           Crown Office because that was after you had moved on --

6           A. Yes.

7           Q. -- to other responsibilities and I understand that you  
8           saw them for the first time when they were provided as  
9           part of a package of documents that were made available  
10          to you for the purposes of answering your Rule 8  
11          request. Please take it from me, and I will be  
12          corrected if I'm wrong, there is simply no analysis of  
13          race in the analysis section of that precognition at  
14          all. Does that surprise you?

15          A. As I said, if it had been me that had been writing it,  
16          I would have written it in a different way and so from  
17          that point of view it wouldn't have been what I would  
18          have done, so I'm surprised at that. But whether or not  
19          it was fit for purpose in that sense or not, I'm unable  
20          to say.

21                 Approaching it in the way that Ms Carnan has, I can  
22          understand why she hasn't referred to race if she's  
23          looking at it -- if she is looking at whether a crime  
24          has been committed. In the second -- you have shown  
25          paragraph 30. I think it's paragraph 46 when she refers



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1 to --

2 Q. It's 45 I think.

3 A. 45. When she refers to the section 50A crime, I mean  
4 that's all about race in its own way. That's not an  
5 aggravation to another substantive criminal offence and  
6 so you would have to look at and analyse race if you  
7 were considering that at all, so I'm not actually sure  
8 what she means.

9 Q. This might be --

10 A. It may be that she simply hasn't found that, but I don't  
11 know.

12 Q. All right. This might be a convenient point to look at  
13 50A, to look at the text of it, but I'm conscious that  
14 we normally take a break at half past 11.

15 LORD BRACADALE: We will have a 20-minute break at this  
16 point.

17 (11.30 am)

18 (A short break)

19 (11.53 am)

20 LORD BRACADALE: Ms Thomson.

21 MS THOMSON: Thank you. Before the break, we had mentioned  
22 in passing sections 50A and sections 96 --

23 A. Yes.

24 Q. -- of the 1995 Act and I think it might be convenient to  
25 turn to them just now.

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- 1 A. Okay.
- 2 Q. Now, they're helpfully set out in fact in a Crown Office  
3 document. It's a chapter from the  
4 Precognoscer's Handbook, the one I mentioned earlier on  
5 racially aggravated offences.
- 6 A. Yes.
- 7 Q. COPFS 06441, please. Now, you'll recall that before the  
8 break I took you to Fiona Carnan's statement, two  
9 paragraphs within her statement and then to the evidence  
10 that she gave before the Inquiry.
- 11 A. Yes.
- 12 Q. We can only have one document on the screen at a time,  
13 but just as a reminder she said in her statement:  
14 "Had I identified criminality, it would then have  
15 been part of my analysis in respect of criminality to  
16 consider whether the conduct was racially aggravated  
17 under section 50A(1)(b) or whether race was a motivating  
18 factor that would amount to an aggravation in terms of  
19 section 96(ii)(2)."
- 20 So this is the Precognoscer's Handbook, chapter 44,  
21 "Racially aggravated offences", but I'm really only  
22 looking at today for the purpose of bringing up the  
23 relevant text of the legislation.
- 24 A. Yes.
- 25 Q. So I wonder whether we can look at page 3, firstly. Can

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1 we scroll down a bit, please. There we are. Let's look  
2 firstly at section 96(ii). Section 96(ii) defines  
3 racial aggravation for the purposes of section 96 in the  
4 following terms:

5 "An offence is racially aggravated if at the time of  
6 committing the offence or immediately before or after  
7 doing so the offender evinces towards the victim, if  
8 any, of the offence malice and ill will based on the  
9 victim's membership or presumed membership of a racial  
10 group or the offence is motivated wholly or partly by  
11 malice and ill will towards members of a racial group  
12 based on their membership of that group."

13 And if we scroll down, keep scrolling, please, we  
14 will see that there's a requirement to libel the  
15 aggravation and that evidence from one source is  
16 sufficient to establish the aggravation.

17 A. Yes.

18 Q. And we should also see, I think slightly further down  
19 the page, that:

20 "Where the aggravation was libeled and the person is  
21 convicted, the court shall take the aggravation into  
22 account in determining the appropriate sentence."

23 A. Yes.

24 Q. That is section 96 and for that section to apply there  
25 has to be evidence of an offence.

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1 A. Yes.

2 Q. And in addition to that evidence of racial aggravation.

3 A. That's correct.

4 Q. And a single source for the racial aggravation will  
5 suffice.

6 A. That's right.

7 Q. Let's compare that now to section 50A and that I think  
8 is set out in page 2 of this document. If we can go up  
9 a little bit, please. Sorry, other way. So section 50A  
10 creates a statutory offence of racially aggravated  
11 harassment and racially aggravated behaviour.

12 Section 50A(1) provides that "a person is guilty of  
13 an offence if he pursues a racially aggravated course of  
14 conduct which amounts to harassment of a person" and we  
15 can perhaps skim over that, because I don't see that has  
16 any bearing on the circumstances here, but let's look at  
17 the alternative, we'll see at the end of 50A(1)(a)  
18 subparagraph (ii) the word "or" so these are  
19 alternatives.

20 A. Yes.

21 Q. "So a person is guilty of an offence if he acts in a  
22 manner which is racially aggravated and which causes or  
23 is intended to cause a person alarm or distressed."

24 So a person is guilty of an offence if he acts in a  
25 manner which is racially aggravated.

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1 A. Yes.

2 Q. And if we scroll down the page a little, please, to the  
3 definition of racial aggravation for these purposes:

4 "A course of conduct or an action is racially  
5 aggravated if immediately before, during or immediately  
6 after carrying out the course of conduct or action the  
7 offender evinces towards the person affected malice and  
8 ill will based on that person's membership or presumed  
9 membership of a racial group or the course of conduct or  
10 action is motivated wholly or partly by malice and ill  
11 will towards members of a racial group based on their  
12 membership of that group."

13 So if we could read this section short, in effect it  
14 criminalises behaviour that would not necessarily be  
15 criminal otherwise?

16 A. Yes.

17 Q. And it does so where two criteria are met; firstly, a  
18 person acts in a way that causes or is intended to cause  
19 another person alarm or distress and their actions are  
20 racially aggravated.

21 A. Yes.

22 Q. And the definition of racial aggravation is in two parts  
23 and includes the action being motivated by malice and  
24 ill will towards members of a racial group.

25 A. Yes.

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- 1 Q. Where these two criteria are met then behaviour that  
2 might not otherwise be criminal is criminal.
- 3 A. That's correct.
- 4 Q. Okay. So when considering the applicability of  
5 section 50A(2), the person carrying out that assessment  
6 will require to consider whether an individual's  
7 behaviour has been motivated by malice and ill will?
- 8 A. Yes.
- 9 Q. So their state of mind will become relevant.
- 10 A. Yes.
- 11 Q. And as you said earlier, we cannot look inside people's  
12 heads, it's a question of looking at what was said, what  
13 was done and the surrounding facts and circumstances.
- 14 A. That's right, yes.
- 15 Q. And so evidence about racial motivation would have been  
16 relevant to the assessment of whether an offence had  
17 been committed under section 50A?
- 18 A. It would have been, yes.
- 19 Q. Okay. And would you have expected an assessment as to  
20 whether there was evidence supportive of a contravention  
21 of section 50A to have been included in the analysis of  
22 the evidence in this case?
- 23 A. It's difficult to say whether I would have expected that  
24 to be in and excluded or not without having seen the  
25 narrative. Again, it would have been better if that had

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1           been covered because it is -- given that race was a  
2           factor all the way through this, given that that would  
3           be part of the consideration that you would have to give  
4           and given that this specific offence, it would have been  
5           better if that had been covered somewhere in the  
6           precognition and I think you have told me it wasn't.

7           Q. It would certainly demonstrate that the analyst had  
8           applied their minds to whether the criteria for  
9           section 50A(2) were met or not?

10          A. Yes, I agree.

11          Q. So irrespective of the conclusion that they reached,  
12          even if they reached the view that there was no  
13          criminality in terms of section 50A(2), it might have  
14          been helpful with the benefit of hindsight --

15          A. I agree.

16          Q. -- for their thinking to have been set out --

17          A. I agree.

18          Q. -- in the analysis. So returning to the two-stage  
19          process that Fiona Carnan adopted where she looked first  
20          for evidence of criminality and because she didn't find  
21          any, she didn't then go further to consider whether  
22          there was evidence of racial aggravation, does that not  
23          rather put the cart before the horse?

24          A. In terms of the section 50 A offence it does, yes. It's  
25          a stand-alone offence. I only saw the statement, the

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1 passage from her statement briefly. I had anticipated  
2 that she might have been perhaps talking about the  
3 section 96 and that was -- that still wouldn't have been  
4 my way of looking at it, I don't think, for reasons  
5 I can explain, but, yes, I agree with the proposition  
6 that you just put to me.

7 Q. Would you like to see her statement again?

8 A. No, I don't think so.

9 Q. All right. And certainly the approach -- two-stage  
10 approach that she told us she had adopted wouldn't  
11 detect behaviour that might only be criminal by virtue  
12 of section 50A?

13 A. Not in that way she's explained it, no.

14 Q. Okay. I want to move on to look at other aspects of her  
15 evidence with you, and I wonder if we can return to her  
16 second statement, SBPI 00462, at paragraph 8, where she  
17 was asked whether she was aware of an racial tropes  
18 being used by any of the response officers in their  
19 statements, would they have been relevant to her  
20 analysis and she said:

21 "I have made no reference in my analysis of evidence  
22 to the use of racial tropes or negative stereotypes  
23 being used by any of the response officers in their  
24 statements. However, it is unlikely that I would have  
25 done so since the use of racial tropes is not criminal."



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1           And -- sorry, can we scroll down just a little bit,  
2           please. If we stop there, maybe three or four lines  
3           from the top:

4           "Evidence about negative attitudes of officers to  
5           Mr Bayoh's race would not be relevant to the analysis  
6           unless criminality was identified."

7           So again a suggestion that a two-stage process was  
8           taken and that the use of racial tropes was not criminal  
9           and would not have been relevant to her analysis unless  
10          criminality was identified. Do you have any concerns  
11          about that approach?

12         A. Looking at that statement, evidence about negative  
13          attitudes of officers to Mr Bayoh's race would not be  
14          relevant unless analysis of criminality or unless  
15          criminality was identified, I don't agree with that  
16          statement. In certain circumstances, negative attitudes  
17          could be criminality in and of itself in terms of  
18          section 50A that we just looked at a moment ago.

19         Q. Okay. And certainly this approach will not identify the  
20          sort of behaviours that are criminalised by section 50A?

21         A. That's a possibility, yes.

22         Q. If one were to leave out of account racial tropes and  
23          things of that sort?

24         A. Yes, all of that could go to section 50A.

25         Q. Okay. There was also evidence available at the time

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1           that Ms Carnan prepared the analysis that some of the  
2           officers were concerned they were attending a terrorist  
3           incident?

4           A. Yes.

5           Q. Some made reference to an increase in the terrorist  
6           threat level to severe?

7           A. Yes.

8           Q. And Ms Carnan explained in her evidence that she had  
9           fact checked that and confirmed that there had indeed  
10          been an increase, a recent increase, in the threat level  
11          to severe.

12                 The first officers on the scene were  
13          Constables Walker and Paton and their statements were  
14          available to her. I will tell you what they had to say  
15          on this subject and then I'll read to you a passage of  
16          Ms Carnan's evidence and invite your comment. We can  
17          perhaps take this off the screen for now thank you.

18                 Constable Walker said in his statement, the one that  
19          was given to the PIRC:

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

23                 And Ms Carnan agreed that the severe thread level  
24          referred to by Constable Walker related to the threat  
25          about a terrorist attack and Constable Paton said that

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1 it ran through his mind that this male could be part of  
2 a terrorist plot and, as events unfolded and at a point  
3 in time where he had been incapacitated by his own  
4 spray, at that point in his statement he said:

5 "I kept thinking about the Lee Rigby boy, the  
6 soldier who was killed."

7 So when she gave evidence, Ms Carnan was reminded of  
8 what Walker and Paton had said in their statements and  
9 she was asked:

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

14 She said:

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

19 "And did you consider whether they would have  
20 thought about terrorism if Mr Bayoh had been white?"

21 "No."

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

24 "No."

25 "And did you consider why Constable Paton thought

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1 about Lee Rigby in particular?"

2 "I simply noted his position."

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

5 "I didn't interpret it as being influenced by race,  
6 no."

7 She was asked:

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

11 And she replied:

12 "I didn't ask that question."

13 She was asked:

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

18 And she replied:

19 "I did not make that assessment."

20 Can I invite your comment on that chapter of her  
21 evidence?

22 A. So that information about was this a terrorist incident,  
23 that was available at a very early point in the case and  
24 I recall that. My own views is it would have been  
25 relevant to ask why it was that they thought it was

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1 terrorism and to consider whether Mr Bayoh's race had  
2 anything to do with that, and whether or not had  
3 Mr Bayoh been white, they would have wondered the same  
4 thing, that's a relevant question.

5 Q. And where might an analyst have looked to find the  
6 answers to those questions?

7 A. In the evidence as a totality.

8 Q. Might you have given consideration to instructing the  
9 PIRC to take supplementary statements from the police  
10 officers?

11 A. I wouldn't have started at that. I would have started  
12 not at the police officers but round and about in that  
13 if I was concerned that it might amount to a section  
14 50A, because you would get involved in the rights of  
15 potential suspects but -- so I would certainly involve  
16 asking further questions to see if I could discern from  
17 the surrounding circumstances.

18 I think practically speaking in terms of what might  
19 be admissible in the future actually asking the officers  
20 what did you have in mind at that point might have been  
21 a difficult thing to do, because if you were actually  
22 asking that you might be moving on to some sort of  
23 suspicion, but I think looking at that, again in the  
24 round, there has obviously been some sort of look about  
25 it, she refers to the threat assessment, but whether

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1           there were further steps that could have been taken with  
2           that, you would certainly look to do that.

3           Q.   So an approach to the officers might have been  
4           problematic for the reasons you outlined.  If suspicion  
5           had crystallised and started to form, those statements  
6           might have been, if they were given, might have been  
7           inadmissible, so it would have been a question of  
8           discerning from the surrounding facts and circumstances.

9           A.   Yes.

10          Q.   And can that involve a process of perhaps drawing  
11          inferences?

12          A.   Yes, it would.

13          Q.   Okay.  Fiona Carnan was then asked, did you consider  
14          whether there was evidence from which the inference  
15          could be drawn that the colour of Mr Bayoh's skin was  
16          relevant to their concern the incident was related to  
17          terrorism.  She said:

18                 "I did not make that assessment."

19                 It was then brought to her attention that  
20          Constable Good had also thought about Lee Rigby.

21          Constable Good in her statement said:

22                 "I was also thinking at that point of the Lee Rigby  
23          in London, mainly due to the fact of the coloured male  
24          and the potential terrorist connotations."

25                 So it appears that Constable Good did make a direct

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1 link between the colour of Mr Bayoh's skin and the  
2 potential terrorist connotations. So Ms Carnan was  
3 asked:

4 "Did Constable Good's statement not perhaps cause  
5 you to wonder whether others who also thought about  
6 terrorism and Lee Rigby had done so because of the  
7 colour of Mr Bayoh's skin?"

8 And she said:

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

10 Do you have any concerns about that?

11 A. As I have said a moment ago, I think these are all  
12 relevant factors that ought to have been looked at,  
13 particularly if the other officer had made a direct link  
14 between the question of terrorism and the colour of  
15 Mr Bayoh's skin.

16 Q. Okay. She was then asked some questions around whether  
17 the link that Constable Good made to terrorism was  
18 reasonable or whether it might have been indicative of  
19 racial stereotyping. Did you consider whether the link  
20 she made was reasonable or whether it might have been  
21 indicative of racial stereotyping and the answer was:

22 "I considered it was not unreasonable given the  
23 briefings.

24 "Was it indicative of racial stereotyping?"

25 "Possibly."

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1           And she was then asked:

2           "You are saying that. Are you saying that now with  
3 the benefit of time to reflect or did you think that at  
4 the time?

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

6           I then said to her:

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

9           "Yes.

10          "At the time you didn't think that of that as racial  
11 stereotyping. With the benefit of hindsight and  
12 reflection, your evidence today is that it could be  
13 indicative of racial stereotyping?

14          "Yes.

15          "And if it had occurred to you at the time or if you  
16 had thought about it that way at the time, is it  
17 something that you might have included in the analysis?

18          "It's possible, yes."

19          Again, can I just invite your comment on that?

20          A. As I noted, I would have expected it to be there.

21          Q. Okay. She was then asked about other possible lines of  
22 inquiry, firstly concerning the use of language. I said  
23 to her:

24          "I'm sure you'll be aware of racist stereotypes in  
25 society that black men are more violent, unpredictable,



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1 aggressive. You will have come across these stereotypes  
2 I would imagine.

3 "I have.

4 "And did you examine the officers' statements for  
5 language of that sort?

6 "No.

7 "And did you consider patterns of behaviour?  
8 Whether, for example, they had used their sprays or  
9 drawn their batons at previous knife incidents?

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

11 "Did you consider whether they treated all knife  
12 calls as potentially terrorist related?

13 "No, that wasn't a question that was asked.

14 "Did you consider looking for comparator evidence  
15 for example, looking at Walker, Paton and Tomlinson's  
16 history or use of spray or Tomlinson's history of using  
17 force involving a baton, with a view to establishing  
18 whether those officers had ever used sprays or batons  
19 before?

20 "No.

21 "Or whether they had used sprays or batons when  
22 detaining a white suspect?

23 "No.

24 "Did you consider whether the speed with which the  
25 officers elected to use force against Mr Bayoh was

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1 because he was black?"

2 She said:

3 "That wasn't my understanding. I think I've  
4 explained in one of my answers my understanding of their  
5 perception was based on a whole lot more than the colour  
6 of his skin.

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

10 "Again, we didn't cross the threshold on criminality  
11 so that wasn't a consideration per se."

12 So she was candid in her oral evidence that these  
13 questions simply were not asked and, again, I would like  
14 to just invite your comment on that?

15 A. They are all relevant questions. So I have referred to  
16 looking at the totality of the evidence, that would  
17 be -- those would be questions that you would ask and  
18 the answers to those questions would be part of that  
19 totality which I would expect her to look at, so they're  
20 all relevant questions.

21 Q. At the end of paragraph 169 of your statement you said:

22 "I was satisfied that questions of race were being  
23 explored appropriately."

24 What steps did you take to satisfy yourself that  
25 questions of race were being appropriately explored

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- 1           within CAAPD?
- 2           A. In terms of all of the conversations I was having with  
3           Les Brown, he was alive to the questions of race, and we  
4           had been alive to questions of race in the PIRC  
5           investigation. So those were the steps I was taking to  
6           satisfy myself of that and I was also relying upon there  
7           being a very experienced team of people who were looking  
8           at it, subject to the caveats that we discussed about  
9           their experience in racial matters, but it was an  
10          experienced team of lawyers who were looking at the  
11          questions.
- 12          Q. And with hindsight do you consider the questions of race  
13          were being explored appropriately?
- 14          A. I think in evidence this morning we have identified a  
15          potential gap, yes.
- 16          Q. Okay. So with the benefit of hindsight, did the crown  
17          investigation take all reasonable steps to unmask any  
18          racist motive?
- 19          A. I think there are further steps that could have been  
20          taken.
- 21          Q. Was the investigation adequate?
- 22          A. I think you have to look at the investigation in the  
23          round and so that's a difficult question for me to  
24          answer, but there are certainly further steps that could  
25          have been taken in that analysis of whether or not some

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1 of the factors, such as the apparent assumption, if I  
2 can call it that, that it might be a terrorist incident  
3 because of Mr Bayoh's skin, that should have been  
4 explored further. So the adequacy of the full  
5 investigation it is difficult for me to answer, but  
6 there are certainly further things which could be done.

7 Q. And could the race aspects perhaps have been  
8 investigated with more vigour?

9 A. They could have been -- those questions could have been  
10 asked and that would have meant it was more thorough.

11 Q. Okay. I want to move on to a separate but slightly  
12 related issue. We've spoken about Fiona Carnan's  
13 personal approach to the analysis being a two-stage  
14 process, but I want to move on to discuss with you now  
15 what has been described by witnesses as an incremental  
16 approach being taken.

17 Fiona Carnan said in her Inquiry statement, and  
18 I don't think we need this on the screen, that it was  
19 not part of her remit from Mr Brown to consider whether  
20 there were grounds for an FAI:

21 "My role was restricted to an analysis of evidence  
22 in respect of any potential criminality by the police."

23 So she considered that she had a limited remit to  
24 analyse whether there was evidence of criminality by the  
25 police.

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1           Mr Brown was asked about this too and I wonder if we  
2           can bring his statement up. It's SBPI 00419  
3           paragraph 105. Mr Brown explained in his statement --  
4           I'm afraid I don't have the corresponding question, but  
5           I think this speaks for itself. He said:

6           "A key element of the incremental strategy approved  
7           by the Lord Advocate was to separate out and resolve the  
8           issue of potential criminality and to get to a point  
9           where Crown Counsel could take a decision in this regard  
10          with the necessary confidence, thus permitting the  
11          investigation to move forward to other areas in  
12          anticipation of an inquiry whose forum had yet to be  
13          determined. It had been hoped initially that the  
14          necessary further inquiries could be completed  
15          relatively quickly. The precognition that was requested  
16          by Crown Counsel was created for the limited purpose of  
17          enabling Crown Counsel to take a decision on potential  
18          criminality, but was not intended to be the end of the  
19          investigative process by the crown, particularly in  
20          relation to race and implicit bias, and further detailed  
21          inquiry would likely have been undertaken had an FAI  
22          been instructed. This would in my opinion have been  
23          highly likely to have required precognition of the  
24          police officers involved, where their approach to the  
25          incident would have been probed, scrutinised and

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1           evaluated."

2           So here in his statement Mr Brown sets out an  
3           incremental approach whereby only criminality was  
4           addressed in the precognition --

5           A. Yes.

6           Q. -- in anticipation that after the prosecutorial decision  
7           had been taken by Crown Counsel the possibility of an  
8           inquiry of some description would be revisited.

9           He was asked about this in his evidence and was  
10          asked by the Chair what sort of things would be left for  
11          further investigation in the event no proceedings were  
12          taken and he said:

13          "We would be looking at the wider issues that could  
14          be explored at an FAI and I was of the view that could  
15          include factors such as race and exploration with the  
16          officers of their consideration."

17          He was then asked by the Chair if he could provide  
18          any other examples of issues that would be considered at  
19          stage two and he said "wider issues of race". So it  
20          appears that the only issue that was effectively held  
21          back or held over for the second stage of the  
22          investigation was race. You frowned in response to  
23          that. Were you aware that this approach was being  
24          taken?

25          A. So I was aware that the approach to this, and this was

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1 typical of approach to deaths where there was a  
2 possibility of criminal proceedings and a fatal accident  
3 inquiry, was that we would try and address the issues of  
4 criminality first and make a decision on that  
5 criminality, which would include, if required, running a  
6 trial before we concluded our consideration of the way  
7 in which we would present the evidence before an FAI.  
8 That was typical of our approach.

9 That's an approach that, to give a recent example,  
10 was also adopted in the M9 case where there was the  
11 criminal proceedings against Police Scotland and then  
12 the fatal accident inquiries. The evidence has only  
13 recently -- relatively recently concluded. There are  
14 other examples that I could go into where we had done  
15 that. That approach -- Les has called it an incremental  
16 approach. I would call it a linear approach where you  
17 take the two issues separately is an issue which has  
18 been the subject of some criticism because of the delays  
19 that are said to have been caused by it and it's an  
20 approach that certainly in our -- between 2021 and 2023,  
21 when I was deputy crown agent for serious case work, it  
22 was an approach which, in conjunction with the direction  
23 of the Lord Advocate, we were trying to change so that  
24 we did the two investigations, the criminality and any  
25 wider matters, in parallel.

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1           I was not of the view that what was being held back  
2 was consideration of race. Race, insofar as it was  
3 relevant to the question of criminality, was something  
4 that would be covered, but there was always going to be  
5 a further inquiry and I think we had stated probably  
6 from an early stage there had been an FAI. There came a  
7 time, and I can't remember exactly when, that we thought  
8 there were matters which went beyond the precise cause  
9 of death which have gone into the thinking behind there  
10 being a public Inquiry today in order that the state's  
11 Article 2 obligations were satisfied.

12           So in my view there was a whole series of other  
13 questions. The approach of organisations to race  
14 outwith the context of the criminality was one of them,  
15 the whole post-incident way that this was approached in  
16 terms of processes and management with the police and  
17 others, there was a whole series of other factors which  
18 are no doubt part of the terms of reference for  
19 the Inquiry, but it was never my understanding that race  
20 on its own was an issue that was going to be the thing  
21 which was held back. Race was always going to be, to my  
22 mind, something that was going to be assessed insofar as  
23 it was relevant for the purposes of determination of  
24 whether there had been criminality, and it wasn't -- it  
25 wasn't to my mind just race that was a factor. As I



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1 say, it was post-incident management, it was the way the  
2 families were dealt with, it was the whole series of  
3 wider factors which, as I say, when we began to think  
4 that through, they went much beyond the cause of death  
5 which is really the factor which in terms of the four  
6 corners of the 76 Act the Sheriff could determine on in  
7 any fatal accident inquiry.

8 Q. In fairness I think what was said in evidence was not so  
9 much that race was held back in itself entirety, but  
10 that it was considered insofar as it was relevant to  
11 considerations of criminality, but that the exploration  
12 of the question of race was not exhausted within the  
13 precognition process and that wider issues of race would  
14 be considered at a later stage.

15 A. Yes.

16 Q. I don't have the transcript before me and I'm  
17 paraphrasing. I will be corrected if my summary is  
18 inaccurate, but I just wanted to clarify that I don't  
19 think that there was a suggestion by anyone that race  
20 had been left out of account. It certainly had been  
21 considered by CAAPD to the extent that they considered  
22 it to be necessary for the purposes of looking at  
23 criminality.

24 A. Yes.

25 Q. But I think it was recognised by Mr Brown that certain

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1 issues would require further exploration in the fullness  
2 of time.

3 A. Yes. I think that's fair and I would agree that there  
4 were -- there would be further issues of race that would  
5 be required to be brought before the further inquiry as  
6 we saw it at that point.

7 Q. And you mentioned that there had been discussion in  
8 recent years about an alternative to the linear approach  
9 where you have two inquiries running in tandem or in  
10 parallel.

11 A. Yes.

12 Q. What was the outcome of those discussions? Have  
13 procedures been changed?

14 A. Procedures have been -- yes, procedures have been  
15 changed. So in some of the cases that we had, and we  
16 were looking at this primarily health and safety  
17 division, because that's where often we have issues of  
18 criminality and, because it's often a workplace death, a  
19 mandatory fatal accident inquiry and that's where we  
20 were look at this first and so we have approached those  
21 cases in a different way in that the analysis of  
22 evidence is not limited to the criminality, that things  
23 which will be relevant to a fatal accident inquiry will  
24 be looked at and analysed at the same time, perhaps not  
25 quite in the same depth initially. The focus will still

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1 be the criminality, but I think the linear approach was  
2 such that things were often simply put to one side and  
3 there was no analysis and there was no analysis of it at  
4 that time for the purposes of the subsequent inquiry and  
5 that clearly caused delays because you would have the  
6 criminal proceedings. Once you initiated the criminal  
7 proceedings, the timescale for them was -- that was  
8 outwith your control. It could take some time because  
9 of the complexity and nature of some of the charges and  
10 you would then be picking it back up some years after  
11 the original incident and that wasn't satisfactory.

12 As I say, there was -- there are many determinations  
13 which are published in which the sheriff in the FAI does  
14 comment upon that. So that linear approach is not one  
15 that we're adopting now, very much driven by being  
16 conscious that the timescales that that was leading to  
17 for the determination of a fatal accident inquiry to  
18 issue, sometimes an important matter of safety wasn't  
19 satisfactory and was taking too long.

20 Q. And, of course, there's a responsibility in terms of  
21 Article 2 to ensure an investigation is prompt?

22 A. Of course, yes.

23 Q. And the linear approach, as you have described it,  
24 effectively builds in delay?

25 A. Yes, it does.

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- 1 Q. Okay.
- 2 A. It was thought to be essential in some of these cases,  
3 because often the same actual factual matrix will be  
4 relevant to the criminal proceedings and the FAI and  
5 I know in the past, going right back to the start of my  
6 career, we have looked at whether or not we can have the  
7 FAI first and there has always been a concern that in  
8 some way that will prejudice the trial, because there  
9 will be the testing of the evidence, and I think that  
10 approach then led to us not simply not having the fatal  
11 accident inquiry before the trial, but actually in  
12 effect pausing some parts of the investigation until the  
13 trial proceedings have been completed.
- 14 Q. And you say that this new approach, the parallel inquiry  
15 approach --
- 16 A. Yes.
- 17 Q. -- if I can call it that, was initiated in the Health  
18 and Safety Division. Has it now been rolled out to  
19 other departments?
- 20 A. So it's SFIU and the other -- so SFIU, Health and Safety  
21 Division, and the custody deaths in terms of prison  
22 deaths, which is another area where some of the delays  
23 have become apparent. They are all now having that same  
24 approach.
- 25 Q. These are the departments --

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1 A. These are the departments.

2 Q. -- that would be dealing with --

3 A. These are the relevant parts of Crown Office in terms of  
4 the way we structure ourselves that are relevant to  
5 that. So that's the approach that we're trying to take  
6 in these cases now.

7 Q. Do you see any benefits from the new approach?

8 A. I'm not sure if they have had -- I'm not sure if we have  
9 had any cases where we've have now completed the journey  
10 of the cases, because this is in the last two years to  
11 18 months that we had been doing this probably, but the  
12 clear benefit is the timelines and the journey times to  
13 the final determination by the Sheriff, because that  
14 would be what it is. I would be the final determination  
15 of the closing of the FAI will inevitably shorten as a  
16 result of that.

17 Q. John Logue has also given evidence this week, in fact,  
18 and he was unaware that this incremental or linear  
19 approach had been taken and he was asked for comment.

20 Again, I would like to share a passage from his oral  
21 evidence. This won't come up on screen again. I will  
22 read it to you and then invite your comment. He said:

23 "What I would expect to happen is that an  
24 investigation would identify a number of issues which  
25 needed to be considered and I said yesterday that it was

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1 clear I think to all of us who were involved in those  
2 initial days that the question of criminality was an  
3 immediate or obvious issue which would need to be  
4 explored in the investigation and in simple terms was an  
5 immediate priority. There may be wider issues which  
6 relate to broader learning which would come out of a  
7 fatal accident inquiry or an inquiry of this nature, but  
8 the priority would be to reach a decision on the  
9 criminal aspects as quickly as possible.

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

22 "You may need to progress parallel investigations in  
23 two separate teams at the same time rather than allowing  
24 one team to reach a conclusion before the other team  
25 then takes over. That just simply builds a delay into

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1 the process. So, for example, you wouldn't want a team  
2 looking at a criminal investigation and no one else  
3 dealing with the broader aspects that I have referred to  
4 until the team had finished. You would try to make sure  
5 that there was sharing of information and progress on  
6 all aspects at the same time."

7 So he has set out in effect the parallel inquiry --

8 A. Yes.

9 Q. -- approach that you have described as now being  
10 applicable within the relevant departments in  
11 Crown Office that deal with death investigation. And he  
12 spoke about the need to avoid delay and the parallel  
13 approach allowing both parts of the investigation to  
14 progress at the same time. I'll invite your comment,  
15 although I think that his evidence seems very much to  
16 chime with the picture that you have just painted for us  
17 as to how things are done now.

18 A. I agree with what is says in principle. You should do  
19 them -- you should do the investigations in parallel.  
20 The same facts will often be -- you know, the factual  
21 matrix will be the same across both things. There may  
22 be different aspects and certainly for a fatal accident  
23 inquiry you will be presenting the evidence in a  
24 different way to -- different forum, different  
25 evidential rules, et cetera, so there's a whole aspect

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1 of that that you would be progressing differently.

2 So I agree with him. It is not the way that we did  
3 it in the past, however, and as I say there are -- I  
4 have given a couple of examples, but there are many more  
5 where we had adopted that as I have called it linear  
6 approach. I think Les Brown has called it incremental  
7 in the passage that you put to me.

8 Another part -- the reason why we adopted that I  
9 think was resource based, because it is more resource  
10 intensive to be doing -- to be looking at the two  
11 different fora at the same time, and so I think that was  
12 also part of the reason why we ended up where we ended  
13 up in that unsatisfactory linear approach that I have  
14 described.

15 Q. And the way that it's done now, is all of the work done  
16 within the same team or do you have two completely  
17 separate teams working in parallel?

18 A. In the custody deaths team, which is the first example I  
19 gave, that is one team and that does both aspects of it.  
20 I think that's the same in the health and safety case  
21 and some of the cases I can think where I was involved  
22 before I left serious case work they were being done  
23 within want same team. It may be that there are  
24 different people on the team who have got different  
25 roles and some people may have a different focus during



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- 1           that.
- 2           Q.   Okay.  So the custody deaths team, is that where a case  
3           such as the death of Mr Bayoh would sit today?
- 4           A.   That's a difficult question to answer.  The custody  
5           deaths team at the moment is dealing with prison deaths  
6           or death on -- in police cells.  I think a case such as  
7           the one that the Inquiry is dealing with is one which  
8           would demand a bespoke approach again, hopefully taking  
9           on board the lessons that we've learned.  It may be  
10          based around about the custody deaths team.  I have  
11          never actually -- I've never paused to think about that.  
12          That is probably where you would put it, because it  
13          would have I think the right experience of looking at  
14          the state's Article 2 obligations in sharp focus the way  
15          in which Mr Bayoh's death involves but, you know, I have  
16          never actually thought of -- thought that through.
- 17          Q.   And you said that it can be more resource intensive  
18          effectively running two inquiries --
- 19          A.   Yes.
- 20          Q.   -- in parallel, but you did also say that quite often  
21          the same factual matrix --
- 22          A.   Yes.
- 23          Q.   -- will be applicable whether you're looking at  
24          criminality or a fatal accident inquiry.  And I suppose  
25          in the circumstances of this case, you know, what

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1           happened would be relevant --

2       A.   Yes.

3       Q.   -- in both fora, use of force and the decision-making

4           around use of force?

5       A.   Yes.

6       Q.   Cause of death and race would also be relevant --

7       A.   Yes.

8       Q.   -- to both -- you mentioned the M9?

9       A.   Yes.

10      Q.   -- fatal accident inquiry having recently concluded its

11         evidence.  You said, I think, that it was run as two

12         parallel investigations.

13      A.   It was run as two parallel investigations, yes.  Sorry.

14         It wasn't run as two parallel.  It was run as a linear

15         investigation.

16      Q.   It was run as a linear investigation.

17      A.   And that I think explains why we have just finished the

18         evidence in the case I think.

19      Q.   I see.

20      A.   I think that was also a 2015 incident.

21      Q.   It was, I think I misheard you.

22      A.   Sorry.  Just to clarify, they were linear as well and --

23      Q.   That clarifies the matter.  I think I misheard you and I

24         had wondered why one death might be linear and the other

25         would be parallel given their proximity in terms of

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1 timescale.

2 A. This is something since -- it was in that period 2021 to  
3 2023 when I was the DC serious case work. That was when  
4 we were taking that forward.

5 Q. Thank you. I had taken you to Mr Logue's evidence.  
6 Just to complete that passage, even though an  
7 incremental approach was taken in this case, Mr Logue  
8 agreed with the Chair to the Inquiry that you could not  
9 consider the question of criminality without considering  
10 the question of race. He said would have expected CAAPD  
11 to investigate race as part of their exercise of  
12 investigating criminality, that you would have to look  
13 at race in order to ascertain whether there was any  
14 evidence that did have a bearing on criminality. He  
15 would see that as part of a thorough investigation of  
16 the kind that would inspire confidence in the family.

17 Is there anything in that chapter of his evidence  
18 that you would disagree with?

19 A. No, not at all. I agree with it.

20 Q. Mr Logue was also asked if the inquiry were to be split  
21 in this linear fashion, where would the wider issues be  
22 explored, and he said he anticipated that they would  
23 remain with SFIU. Did you anticipate the investigation  
24 being returned to SFIU following the prosecutorial  
25 decision?

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1       A. I don't think I ever considered that at the time, but,  
2       no, I would have anticipated that insofar as possible  
3       the same people would remain with the case, because  
4       otherwise it just builds in further delay. Obviously an  
5       investigation such as this generates a lot of material,  
6       statements and other evidence. To move the case around  
7       would seem to me to build in a whole series of months as  
8       a new team got up to speed with the issues. That  
9       would -- that would for me be unsatisfactory.

10       So I don't think I ever thought about this at the  
11       time and I think that's probably because before I left  
12       the case, we'd got to the point where we envisaged that  
13       there would be a public inquiry as opposed to a Fatal  
14       Accident Inquiry, but I don't think if I had thought of  
15       it, I wouldn't have thought it was satisfactory to move  
16       it back to SFIU.

17       Q. Thank you. I want to move away from the issue of race  
18       and ask you some questions now about the instruction of  
19       expert witnesses in this case.

20       A. Yes.

21       Q. I wonder if we can return to your statement, please, and  
22       look at paragraph 91. I don't have the question handy,  
23       but you were essentially asked a question around the  
24       instruction of experts.

25       A. Yes.

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1 Q. And you said:

2 "In general terms, where expert evidence is required  
3 for a sufficiency of evidence in a criminal case, the  
4 reporting agency, in this case PIRC, will be responsible  
5 for finding and instructing expert witnesses. However,  
6 given that the expert witnesses will be likely to have a  
7 significant role in any future proceedings or FAI, the  
8 Procurator Fiscal or even Crown Counsel will commonly  
9 want to be involved in the selection and instruction of  
10 experts. That was what happened in relation to the  
11 death of Mr Bayoh."

12 Now, I wonder if I can take you briefly to a  
13 statement prepared by Lord Mulholland, former  
14 Lord Advocate, SBPI 0047, and if we can look at  
15 paragraphs 114 and 115, please. He was asked similar  
16 questions around the instruction of experts and I just  
17 want to tease out whether there's any difference between  
18 you or perhaps there isn't:

19 "Choice of expert witnesses, the choice of experts  
20 and instruction lies with the crown. The crown may take  
21 advice from a reporting agency such as PIRC or the  
22 police on the appropriate experts to instruct. In other  
23 cases where the crown is not involved prior to  
24 reporting, the reporting agency, including PIRC, may  
25 identify and instruct appropriate experts without

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1 recourse to the crown."

2 And there's a reference made to the memorandum of  
3 agreement between the crown and PIRC that the final  
4 decision on the instruction of expert witnesses lies  
5 with the crown.

6 So in your statement you say that in general terms  
7 it's a matter that rests with -- the PIRC is the  
8 investigating agency responsible for finding and  
9 instructing expert witnesses. Lord Mulholland,  
10 reflecting on his time as Lord Advocate, says that the  
11 choice of experts and instruction lies with the crown  
12 who may take advice from a reporting agency such as  
13 PIRC. And I just wonder if there's a slight tension  
14 between your position and his. It may not come to much,  
15 but if I could invite your comment on that.

16 A. I'm not sure if Lord Mulholland's statement is referring  
17 to the instruction as a totality or the instruction for  
18 court, in which case where we are using courts  
19 absolutely a matter for the crown. In practical terms,  
20 I think we approached this -- I think I have referred to  
21 it somewhere else in my statement as we approached it on  
22 a collaborative basis so, as you say, it may come to  
23 nothing. That will be a matter for the Chair. But  
24 I think in practical terms we looked to the PIRC to give  
25 us suggestions as to who the experts may be and to give

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1 the initial instruction for them, but we were involved  
2 in that process from an early stage.

3 I say there is perhaps a tension between the  
4 positions, but I don't think it comes to much because  
5 I don't think any expert was instructed in this case  
6 without consideration being given by certainly the  
7 procurator fiscal between myself and Les Brown, but also  
8 I think Lord Mulholland was involved in that discussion  
9 as well, at all stages, so I don't think there was any  
10 practical impact.

11 Q. Can we return to your statement, please?

12 A. Yes.

13 Q. You said a moment ago that you referred elsewhere to  
14 taking more of a collaborative approach and I would like  
15 to bring up what I think is the paragraph you're  
16 referring to. Paragraph 92, please:

17 "I was involved in discussions about the expert  
18 witnesses to be used by the crown. I was also involved  
19 in discussions with colleagues and COPFS, in particular  
20 with Les Brown, in relation to possible experts that  
21 were identified by PIRC. That included discussions  
22 about the choice of experts, including consideration of  
23 their qualification, experience and independence."

24 And you go on to say you don't recall having direct  
25 involvement in preparing letters of instructions or

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1           being involved in discussions around the material that  
2           was to be provided to the experts.

3           And at paragraph 96 -- were you looking for  
4           something, Mr McGowan? Would you like to take a moment?

5           A. Yes, I am sorry. I was just looking at the question,  
6           because I think I was posed the question in my original  
7           request and something that the Commissioner had said was  
8           put to me about I think perhaps that the Lord Advocate  
9           chose the relevant experts or I -- that was not my  
10          recollection that he had specifically chosen them.  
11          I think that was -- there was a process of discussion  
12          between ourselves and PIRC and then between Mr Brown and  
13          I and the Lord Advocate about who ultimately were  
14          instructed and that's what I was -- that's what I was  
15          looking for.

16          Q. I see.

17          A. So I'm not sure the particular passage that you took me  
18          to in my questions is the bit that says that, but it's  
19          probably of no moment, given what I've just said.

20          Q. Would you like to look at the question as well for  
21          completeness?

22          A. No. As I say, I was looking for a particular passage  
23          that I recalled and it was a different question to what  
24          I was trying to --

25          Q. I see.



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1 A. Sorry.

2 Q. Not at all. If you would like to pause to look for  
3 something --

4 A. No.

5 Q. -- in your notes or statements at any time, please just  
6 say.

7 In that case, let's look at paragraph 96. This  
8 might have been one of the paragraphs that you were  
9 referring to:

10 "The choice of witnesses was discussed with the  
11 Lord Advocate at the time. I recall that these  
12 discussions were collaborative, rather than being a case  
13 of the Lord Advocate personally directing the names of  
14 the specific witnesses to be instructed. He could have  
15 so directed had he chosen to and no doubt he suggested  
16 witnesses to consider, but my recollection was that PIRC  
17 sourced potential experts and these were discussed in  
18 COPFS and with the Lord Advocate and we agreed  
19 collectively, as COPFS and the Lord Advocate, who fitted  
20 the bill. Those witnesses were so instructed."

21 Is that perhaps the paragraph?

22 A. I think that's perhaps the passage, yes, thank you.

23 Q. All right. And does that adequately summarise the  
24 approach that was taken in this case, a collaborative  
25 one that included the PIRC making recommendations and

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1 discussion at the highest level within the Crown Office?

2 A. Yes, I think I would reflect that for the initial choice  
3 of witnesses, yes, that was the case. I think we moved  
4 on to a period of time later in 2015 where we took a  
5 much more hands on approach. So the first experts were  
6 PIRC sourced and I think, as we moved on to instruct  
7 further experts, that came directly from us with less  
8 discussion with PIRC and more discussions with the  
9 Lord Advocate, so there were maybe two distinct phases.

10 Q. Yes. We've certainly heard evidence that the initial  
11 group of experts were -- suggestions were put forward --

12 A. Yes.

13 Q. -- by the PIRC. There was this type of discussion --

14 A. Yes.

15 Q. -- and collaboration that you have described here in  
16 paragraph 96, and then letters of instruction, although  
17 they were sent to the crown I believe in draft, were  
18 ultimately issued by the PIRC?

19 A. That's correct, yes.

20 Q. And further down the line, the crown instructed  
21 additional medical experts on cause of death and also an  
22 expert in the use of force?

23 A. Yes, that's my recollection as well, so thank you.

24 Q. Okay. So there were two phases and my focus today  
25 really is on the first phase and the selection of the

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1 experts on the basis of the short list produced by the  
2 PIRC and I have a particular interest in Dr Karch.

3 A. Yes.

4 Q. I wonder if we can look at paragraph 93. This relates  
5 to Dr Karch and you say:

6 "I recall that Dr Steven Karch was instructed. He  
7 was identified by PIRC as having the relevant experience  
8 to assist the investigation. There were no initial  
9 concerns about him and his CV was apparently impressive.  
10 We were happy that he was instructed as he seemed to  
11 give us insight into the effects of alpha-PVP.  
12 Alpha-PVP was not common in Europe."

13 Now, you say here that Dr Karch's CV was apparently  
14 impressive, did you consider his CV?

15 A. I must have seen it at the time, yes.

16 Q. Okay. And would the discussions that you had with the  
17 PIRC within the Crown Office, perhaps even with the  
18 Lord Advocate, include considerations of his  
19 qualifications, expertise and independence?

20 A. It would have, yes.

21 Q. And what steps did you take to satisfy yourself as to  
22 his qualifications and his expertise and his  
23 independence?

24 A. I think we relied upon the various directories and the  
25 CV to give the first instruction. I think from my

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1           recollection we subsequently had a meeting with the  
2           family and the solicitor and I think at that point we  
3           received additional information from Mr Anwar in  
4           relation to some of that which raised concerns on our  
5           part.

6           Q. Yes, and we'll come to that, but I think those concerns  
7           were perhaps raised after the letter of instruction had  
8           been issued, so if we can perhaps focus on the period --

9           A. I don't recall --

10          Q. -- leading up to the issues of the letter of  
11          instruction. So his name was put forward, amongst  
12          others, by the PIRC. You say you must have seen his CV  
13          at the time. You would have looked at his CV and  
14          directories and what steps, if any, did you expect the  
15          PIRC to take in terms of satisfying themselves as to his  
16          qualifications, expertise and independence?

17          A. Similar steps to the steps that we took, although  
18          perhaps not as detailed to be fair, but I think similar  
19          steps.

20          Q. Was any guidance given to the PIRC as to the need to  
21          satisfy themselves as to his qualifications, experience  
22          and independence and how they should go about that?

23          A. No, no specific guidance was given, no.

24          Q. Okay. Kate Frame was asked about this in her evidence  
25          and she was asked whether any research was undertaken by

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1 the PIRC in relation to possible conflicts or potential  
2 bias or impartiality, and she said:

3 "I don't recall that being undertaken within PIRC."

4 And she was asked:

5 "Was that something you anticipated the crown  
6 doing?"

7 And she said:

8 "Yes. To my mind, they required to be satisfied in  
9 the experts they were instructing."

10 Can I ask for your comment on that?

11 A. I think it's fair comment that we would have to be  
12 satisfied. I don't think there was anything in the  
13 material which was available to us at the time that  
14 flagged up specific concerns. I can't recall the extent  
15 to which we went beyond or if we did anything beyond the  
16 CV and the directories. Of course giving those initial  
17 instructions never committed us to using him at any  
18 future stage and during the process of engaging with an  
19 expert, you would look for further information, you  
20 would precognosce and there would be consultations and  
21 you would explore whether or not there was any conflicts  
22 at that stage if you got to that stage with them.

23 Q. Okay. Did you consider, as a precursor to any of that,  
24 making contact with him to explore issues of conflict,  
25 bias, impartiality, independence, expertise and so on

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1           and so forth?

2           A. No, I didn't personally consider that, no.

3           Q. I appreciate that those are matters that might have been  
4           flushed out in the fullness of time at consultation, but  
5           by that point in time the crown would have incurred the  
6           expense associated with instructing an expert, it would  
7           have taken the time that it takes for the expert to read  
8           into the materials and prepare a report. So by the time  
9           a consultation was set up, if issues surrounding their  
10          independence or impartiality or indeed their  
11          qualifications or experience only came to light at that  
12          later stage, then there's a waste of money and  
13          potentially a waste of time as well.

14          And I just wonder whether there might have been  
15          something to have been said for picking up the phone or  
16          setting up a call with this expert whether it was the  
17          crown or the PIRC before he was formally instructed to  
18          explore these issues?

19          A. There would be something to be said for that. I think  
20          part of the reason we didn't do it at the time was that,  
21          for the reasons I have outlined, that perhaps saw PIRC  
22          as being responsible for the identification of the  
23          witnesses at that time, but, no, we didn't do any of  
24          that and I accept that that's a step that could be  
25          taken.

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- 1 Q. Okay. Did you have any expectation as to whether PIRC  
2 would be taking that step?
- 3 A. I'm not sure that I did. As I said in my statement, the  
4 original -- our original view was that his CV appeared  
5 to be apparently impressive. I can't recall what his CV  
6 said or whatever, but, as I've said, we didn't initially  
7 have a concern.
- 8 Q. Okay. He was instructing on 13 August 2015. Would you  
9 have seen the letter of instruction at some point?
- 10 A. I can't recall if I saw it.
- 11 Q. Okay. We can bring it up if we need to, but if I were  
12 to read it short, he was being asked to comment on the  
13 physiological effects on the drugs Mr Bayoh had taken?
- 14 A. Yes.
- 15 Q. The effects of the sprays?
- 16 A. Yes.
- 17 Q. The effects of restraint and the effect of all of the  
18 above in combination. Does that chime with your  
19 recollection?
- 20 A. Yes, my recollection was that he was a cardiologist with  
21 an interest in the pharmacological and toxicological  
22 aspects of that.
- 23 Q. Okay.
- 24 A. I could be wrong. That's just my recollection.
- 25 Q. Can we bring up paragraph 94 of your statement, please.

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1 Here you're referred to an entry in your notebook dated  
2 25 August:

3 "Les Brown. John McSporran was with Nat Carey. He  
4 said the experts were the best we could get, Dr Karch  
5 world renowned."

6 And in paragraph 95 you say:

7 "This reflects a conversation with Les Brown. In it  
8 he is advising me that John McSporran, senior  
9 investigator with PIRC, had a discussion with  
10 Dr Nat Carey, the forensic pathologist engaged by the  
11 family. Les Brown was telling me that John McSporran  
12 had told him Dr Carey was advising that the experts we  
13 had engaged were the best we could get and that Dr Karch  
14 was world renowned.

15 "My recollection was that the decision had already  
16 been taken to instruct Dr Karch at this stage. The  
17 information being passed on to Mr McSporran was not in  
18 any way determinative of Karch's instructions,  
19 instructions having already been given, but it did give  
20 [scroll down, please] us confidence that an eminent  
21 pathologist in Dr Carey spoke highly of a witness we  
22 were instructed."

23 So you describe here getting a sense of confidence  
24 as a result of this conversation --

25 A. Yes.



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1 Q. -- that you had instructed the right person?

2 A. Yes.

3 Q. Okay. Can we continue to paragraph 97, please. And you  
4 referred to, again, one of your notebooks and the text  
5 of the notebook has been copied into the typewritten  
6 entry:

7 "Bayoh family meeting. 26/8/15."

8 So this was a meeting the day after a conversation  
9 with Les Brown in which you were told that Nat Carey had  
10 said that Dr Karch was world renowned. The very next  
11 day:

12 "Bayoh family meeting. Concerns re  
13 Dr Payne-James..."

14 That was another expert who I understand had been  
15 instructed:

16 "... and Dr Karch instructed in defence of police  
17 [et cetera] in USA. Experts, in just a few days PIRC  
18 had concluded a view this was an open and shut case,  
19 particularly the use of excited delirium. PIRC thought  
20 it was open and shut.

21 "Dr Carey, serious concerns. Proponents of excited  
22 delirium. Sit on panel in US who exclude restraint  
23 techniques in positional asphyxiation. Carey says not  
24 acceptable if Karch according to Carey will try to have  
25 us believe that restraint techniques not part of COD."

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1                   That's cause of death?

2           A. Cause of death.

3           Q. Deborah Coles, who we've heard is from Inquest says --

4           A. Yes.

5           Q. -- WHO"

6                   That's the World Health Organisation?

7           A. Yes.

8           Q. "... says excited delirium is not an accepted term.

9                   Introduced by Karch to the UK. She has similar  
10                   concerns. Carey and Coles say not independent."

11                   And you say -- you explain at paragraph 97:

12                   "My recollection is that this is a note of comments  
13                   from the family in relation to the expert witnesses that  
14                   were to be used. The criticisms were more specific and  
15                   pointed in relation to Dr Karch. The criticisms of  
16                   Dr Payne-James were less specific. In consequence of  
17                   the issues raised, we did further research on the  
18                   witnesses. I recall material to assist us with this was  
19                   provided by the family's solicitor, Mr Anwar. When we  
20                   looked at Dr Karch in more detail it did seem that his  
21                   research was funded entirely by US military and law  
22                   enforcement, which gave us cause to consider whether  
23                   Dr Karch be used by us and whether he was independent."

24                   So this was just the day after the call on which you  
25                   had been told that Dr Carey had said Karch was

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1 world-renowned and it was about two weeks after the  
2 letter of instruction was sent out and now you were  
3 being told that far from considering Dr Karch to be  
4 world renowned, Dr Carey opinion was in fact that he had  
5 serious concerns --

6 A. Yes.

7 Q. -- about both his views and his independence.

8 A. Yes.

9 Q. Did this cause you to query what you had been told the  
10 previous day --

11 A. Yes, it was a surprise given the information that I had  
12 had only the day before that on the one hand it appeared  
13 we were being told and the source of that was said to be  
14 Dr Carey himself was that he was world-renowned and then  
15 we were being told that Dr Carey said that not only was  
16 he not world-renowned but there was a concern about him  
17 and it was a surprise and a concern.

18 Q. Did you investigate how it had come about that you had  
19 been told that Dr Carey said that Dr Karch was  
20 world-renowned?

21 A. I don't think that we went back to Mr McSporran in  
22 relation to that, I certainly didn't, it hadn't been me  
23 that had spoken to him, it was Mr Brown who had that  
24 conversation. Where our inquiry about this went, as I  
25 have said in my statement, is that we then did further

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1 research and we were assisted in doing further research  
2 which took us into who funded Dr Karch's research, et  
3 cetera, and that did cause us to think that he -- his  
4 independence was very much in doubt.

5 Q. These were concerns that were brought to your door by  
6 the family --

7 A. Yes.

8 Q. -- of Mr Bayoh --

9 A. Yes.

10 Q. -- and they weren't issues that had come to your  
11 attention through PIRC --

12 A. No.

13 Q. -- or as a result of your own researches?

14 A. No, and they had ran contrary to I think what on the  
15 face of it I had been told by PIRC.

16 Q. Okay. And you discovered through your researches that  
17 Dr Karch's research was funded entirely by the US  
18 military and law enforcement and this gave you cause to  
19 consider whether he should be used by you and whether he  
20 was independent?

21 A. Yes, there was that element and also what we had been  
22 told about his advocacy for excited delirium, which as I  
23 noted before was a -- we were aware of excited delirium  
24 being a cause of death that was only ever found in  
25 people who were in police custody or the custody of the

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1 state and it being a controversial cause of death which  
2 was -- which noted the World Health Organisation there  
3 but I think we also knew at the time that the Royal  
4 College of Pathologists advised that it was not  
5 something which on its own was to be used as a cause of  
6 death. I don't think they strictly speaking excluded it  
7 at that time but it was certainly not -- it was an area  
8 that was not -- that wasn't something that we would want  
9 to rely upon, there seemed to be a lack of independence  
10 there.

11 Q. Okay. So you're aware that it was controversial and  
12 that the royal college had said shouldn't be given as a  
13 cause of death --

14 A. In isolation --

15 Q. -- on its own --

16 A. -- I think was the guidance at that time.

17 Q. The Inquiry has the relevant guidance before it, I  
18 think. Were you aware of any association between  
19 excited delirium or deaths attributed to excited  
20 delirium in North America and black men?

21 A. I'm not sure if I was aware of that at that time or if I  
22 got a greater understanding of that through the work  
23 that Lady Elish Angiolini did on behalf of the  
24 authorities in England and Wales where she explored some  
25 of these issues so I couldn't precisely date when I



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1           "When we looked at Dr Karch in more detail it did  
2           seem that his research from funded entirely US military  
3           and law enforcement, which gave us cause to consider  
4           whether Dr Karch should be used by us and whether he was  
5           independent."

6           A. Yes.

7           Q. What did looking at Dr Karch in more detail involve?

8           A. I can't specifically recall. I know that Mr Anwar gave  
9           us some information and we did some further research  
10          ourselves. It may have been looking at what was available  
11          online, but I couldn't say specifically what it was that  
12          we did.

13          Q. Whatever you did it resulted in the discovery that his  
14          researches are funded by US military and law  
15          enforcement?

16          A. I think that's right, yes.

17          Q. And I'm just wondering what sort of searches that  
18          revealed this information and whether those searches  
19          might have been undertaken at the outset?

20          A. There was -- I think had we done those searches at the  
21          outset, we would have recovered the same material so,  
22          yes, we could have done that but we didn't.

23          Q. And at this distance, you can't specifically recall what  
24          it was that you did --

25          A. No.

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1 Q. -- that revealed this information. You go on to say  
2 that this information gave you cause to consider whether  
3 Dr Karch should be used and whether he was independent.  
4 What was the upshot of those considerations?

5 A. So there was obviously something else which you will no  
6 doubt take me to in relation to a newspaper article and  
7 what I can't recall was whether, because we took a  
8 decision that we would not rely upon Dr Karch, and I  
9 can't recall whether or not we had formed a final view  
10 on that as a result of the researches or whether that  
11 view crystallised as a result on the newspaper article  
12 or whether we were just -- if I can put it this way --  
13 some way down the road of thinking that we weren't going  
14 to but we would see what he produced in any event.  
15 I don't recall specifically.

16 The upshot of it was that we decided we weren't  
17 going to rely upon his evidence at that time. The  
18 timeline I'm not entirely certain of.

19 Q. I might be able to help you to an extent. The meeting  
20 with the family was on 26 August 2015. The comment in  
21 The Sun was on 1 November 2015 and by the time that you  
22 met at the family, Dr Karch had been instructed but his  
23 report hadn't been received --

24 A. Yes.

25 Q. -- by you. And I'm wondering whether consideration was



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1 given after the meeting with the family and your own  
2 independent researches to simply withdrawing his  
3 instruction?

4 A. We didn't consider that from recollection I think. I  
5 think having instructed him, we thought that we ought to  
6 go through with that in any event and his -- whatever he  
7 produced. So I understood he'd actually had -- by that  
8 point had access to some of the material and had begun  
9 considering it. So if we were going to end up in  
10 criminal proceedings, whatever he produced might not be  
11 something that we were going to rely upon, but it would  
12 be there and, as a matter of fairness, I think we should  
13 just consider doing that.

14 So we never considered withdrawing the instructions  
15 at the time. We kept the instructions with him and, as  
16 I say, we later decided that we weren't going to rely  
17 upon them, but I'm not sure if that was the decision  
18 that was taken before The Sun article, after The Sun  
19 article or whether or not we had considered that we were  
20 unlikely to use him and The Sun article was, if you  
21 like, the icing on the cake that prevented us from doing  
22 that.

23 Q. A further letter of instruction was issued on  
24 8 September to Dr Karch. Again, I don't think we need  
25 to bring it up on the screen, but he was instructed by

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1 the Lord Advocate to consider and provide expert witness  
2 opinion on the effect of cuffs and leg restraints and  
3 the rib fracture. Does that ring a bell?

4 A. That tends to suggest that we hadn't made the final  
5 decision then and we were -- the final decision was made  
6 after The Sun article just at that point.

7 Q. Had the Lord Advocate been made aware of the concerns  
8 raised by the family and the products of your research  
9 at this point in time?

10 A. I think he was at the meeting where the concerns were  
11 expressed if I recall correctly.

12 Q. The meeting with the family?

13 A. The meeting with the family. I can't recall if he was  
14 made aware of what we had discovered --

15 Q. All right.

16 A. -- at that point.

17 Q. Let's perhaps look briefly at this further letter of  
18 instruction. It's PIRC 03435A. So let's just see who's  
19 issued this letter. So it's been issued by the PIRC,  
20 who were issuing at this stage letters of instruction,  
21 dated 8 September. Can we scroll to the bottom to see  
22 whose name is on this, please. It's been issued by  
23 the Commissioner herself and if we return to the top of  
24 the text:

25 "In furtherance of the above and my letter of

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1 instruction dated 13 August, as you are aware I  
2 undertake independent investigation under direction from  
3 the Lord Advocate. In furtherance of the four areas  
4 outlined in my letter of instruction: [and we have  
5 discussed these already] physiological effects of the  
6 drug, physiological effects of the sprays, physiological  
7 effect of the restraint and the effect of all of the  
8 above in combination.

9 "I have been instructed by the Lord Advocate to ask  
10 that you consider and provide expert witness on the  
11 significance of the effect of the deceased being  
12 handcuffed and the leg restraints applied, whether such  
13 restraint could have contributed to any positional  
14 asphyxiation, given the restraints continued to be  
15 applied following him becoming unresponsive and during  
16 and following resuscitation attempts and the fracture to  
17 the deceased's rib and the most likely mechanism as to  
18 how this injury was sustained."

19 So it appears that in the period between the family  
20 bringing concerns to your door, and not just their  
21 personal concerns?

22 A. Yes.

23 Q. -- but concerns expressed by Dr Carey, who's an eminent  
24 forensic pathologist, you then carried out your own due  
25 diligence and realised that there was a funding issue.

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1 A. Question mark over his independence.

2 Q. And a question mark over Dr Karch's independence. You  
3 have explained why the instruction perhaps wasn't  
4 withdrawn, but appears that the crown -- the  
5 Lord Advocate has referred to here --

6 A. Yes.

7 Q. -- but I suppose the instructions could come from others  
8 within the crown acting on his behalf?

9 A. Yes.

10 Q. But the crown have instructed two further questions to  
11 be asked of Dr Karch?

12 A. Yes.

13 Q. But were you aware that that was going on?

14 A. I can't recall, but I would have been aware. I would  
15 have been aware at the time. I recall the additional  
16 questions. I recall that at that point where we were in  
17 our investigation, the continuing restraint and the  
18 question of positional asphyxiation were and, you know,  
19 the justification for the restraint of someone who was  
20 apparently unconscious, these were questions that we  
21 were asking and, similar, with the rib, these were  
22 questions which were exercising us at that time.

23 I don't recall the specific letter, but it sounds as  
24 if, in that timeline that I was struggling with, that we  
25 had not made up our mind not to use Dr Karch at that

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1 point. We were maybe beginning to form views, but they  
2 were not fully formed by the sounds of it.

3 Q. So there were perhaps some red flags but you hadn't  
4 reached a --

5 A. Yes, I don't think we could have reached a conclusion,  
6 standing in terms of the letter which has been put to  
7 me.

8 Q. All right. Around about this time, did anyone think to  
9 speak to Dr Karch about the concerns that had been  
10 raised and identified?

11 A. We didn't speak to Dr Karch about it. I'm not sure,  
12 from my recollection of what we had discovered, whether  
13 or not that would have changed our thinking or given us  
14 any new information. I think the information that we  
15 had in terms of the funding of his research and the  
16 funding all being from a particular direction, it was  
17 information that we had and that was from published  
18 material that I think he was partly responsible for  
19 publishing. So we didn't speak to him and I think we  
20 didn't speak to him because we weren't sure that he was  
21 going to tell us anything that we didn't know in  
22 relation to those -- that would address those concerns.

23 Q. And what about his qualifications and expertise?

24 A. No, we didn't go into them any further with him.

25 Q. And you said earlier that you understood that he was a

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1 cardiologist with an interest in pharmacology and  
2 toxicology aspects?

3 A. That's my recollection. I would have to see the CV  
4 again to see what it said, but that's my recollection.

5 Q. Certainly Kate Frame gave evidence that she understood  
6 he was a cardiac pathologist and toxicologist.

7 A. Similar.

8 Q. Something similar?

9 A. Yes.

10 Q. Dr Karch provided a statement to the Inquiry and in  
11 response to quite simple questions about his  
12 qualifications and expertise said:

13 "I have no formal toxicology qualifications or  
14 training as a clinically toxicologist."

15 Does that surprise you?

16 A. Standing some of the things we were asking him, yes.

17 Q. Yes, and we were also advised that he's not a forensic  
18 pathologist and has never performed an autopsy. Does  
19 that surprise you?

20 A. I'm not sure that -- I don't recall what his -- whether  
21 he was a forensic pathologist. We understood he was a  
22 cardiologist I think so I'm not -- I'm not sure that  
23 surprises me as much. The toxicology part surprises me,  
24 because that was certainly one of the areas that we were  
25 looking for assistance with and, as I referred to in my

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1 statement, the effect of alpha-PVP on -- was one of the  
2 areas that we were really quite concerned about.

3 Q. And if you had known that he had no formal toxicology  
4 qualifications or training as a clinical toxicologist,  
5 would that have made a difference to whether or not the  
6 crown approved his instruction?

7 A. I expect it would have.

8 Q. In the event, he prepared two reports. They're both  
9 dated 10 September 2015. I don't think we need to look  
10 at them. Would you have seen them at the time?

11 A. Yes.

12 Q. Reading them very short, he said that there was  
13 preexisting heart disease that could have been fatal in  
14 its own right. The effect of physical restraint would  
15 have been de minimis. He dismissed positional asphyxia  
16 as junk science and described excited delirium as a  
17 disease.

18 Did these conclusions allay or compound the concerns  
19 that you already had about his instruction?

20 A. I think they would have compounded the concerns that we  
21 had in relation to his instruction of excited delirium  
22 and in relation to what he was saying vis-a-vis  
23 positional asphyxiation. Regardless of the label, my  
24 understanding of the other evidence that we had and from  
25 other cases was that the position of a person was

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1 something which was significant in terms of their  
2 ability to breathe and also in terms of resuscitation,  
3 the position of the person was crucial to that being  
4 successful, so that surprised me.

5 Q. Okay. What, if anything, was done on receipt of  
6 Dr Karch's reports, given that the content of them, his  
7 conclusions, served only to compound your existing  
8 concerns?

9 A. I think by that stage we had already begun to look for  
10 other witnesses and a number of other witnesses were  
11 subsequently identified who would supply the gaps in  
12 expertise that we were missing at that stage.

13 Q. You mentioned his comment in The Sun newspaper --

14 A. Yes.

15 Q. -- that went to print on 1 November, and if we can  
16 perhaps look briefly at your statement again, paragraph  
17 101, you were shown an extract and at the top of the  
18 second page you say:

19 "It was entirely inappropriate for a witness to  
20 comment on an ongoing investigation in the media. The  
21 place to comment was in his report. These comments as  
22 well as the additional research that we had done were  
23 crucial factors in the crown deciding not to rely on  
24 Karch as a witness in the case. This took place before  
25 Crown Counsel were allocated to the case. I was not



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1 involved in the precognition process and so I'm unaware  
2 as to how these concerns were made known to  
3 Crown Counsel at the decision-making stage."

4 Now, we have a statement from Lord Mulholland,  
5 I don't think we need to put it on the screen, but if I  
6 might read it short, he says:

7 "I understand that Dr Karch gave an interview to  
8 The Sun newspaper commenting on the case which made him  
9 unsuitable to be retained as an expert instructed by the  
10 crown."

11 And you're nodding, were you --

12 A. Yes, that was certainly a discussion that we had.

13 Q. Okay. So you were aware at the time that that was the  
14 Lord Advocate's view?

15 A. Yes. I'm sure we discussed it on the day that the  
16 article appeared.

17 Q. Lord Mulholland goes on to say:

18 "An expert witness will provide independent  
19 assistance to the court by way of objective unbiased  
20 opinion in relation to matters within his expertise.  
21 His interview to a newspaper was inconsistent with his  
22 duties as an independent expert."

23 A. I would agree with that.

24 Q. You would agree. And if we can stay with your  
25 statement, please, and go to paragraph 104. If we can

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1 go a little further down, please. Here we see some  
2 extracts from your notebook. If we can keep going,  
3 please. You record -- sorry, I think we in fact need to  
4 look at the italicised text just for a --

5 (Youtube feed frozen)

6 "... the Lord Advocate's comments on Dr Karch  
7 reflect our view of him at that stage, we had no  
8 intention of positively relying upon it to make a case  
9 as our view was that his independence was compromised."

10 Sorry, can you bear with me just a moment.

11 "... his independence was compromised. It was  
12 however evidence in a case and could not be ignored. We  
13 could not unknow his view and whilst we may not put a  
14 great deal of weight on it, if any, it couldn't simply  
15 be disregarded. Whilst the crown may take a view on how  
16 we intended to use or not use the material, it would  
17 have to be disclosed and considered with the other  
18 evidence albeit that we thought it compromised. The  
19 family would have been in no doubt that we were not  
20 going to positively rely on Karch's report in a  
21 prosecution."

22 I understand what you're suggesting or alluding to  
23 there is if there had been a prosecution the crown  
24 wouldn't have relied on this report --

25 A. Yes.

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1 Q. -- but your disclosure obligations would have required  
2 you to disclose it to the defence.

3 A. Yes, absolutely, yes.

4 Q. And so to that extent it wasn't something you could  
5 simply sweep under the carpet --

6 A. Yes --

7 Q. -- or put to one side --

8 A. -- it was there, it would had to be dealt with but it  
9 was a question of weight and we had decided that we  
10 would attach no weight to it and we wouldn't use it  
11 positively in a prosecution.

12 Q. Okay. Can we continue on to paragraph 106(?), please.

13 "I have read the narrative and analysis from the  
14 precognition."

15 And you read them for the first time I think when  
16 you were provided with copies in order to prepare your  
17 statement, you didn't read them at the time because you  
18 had moved on.

19 A. Yes, that's correct.

20 Q. You say:

21 "I was not involved in the precognition and have not  
22 seen these documents before as I noted the report from  
23 Dr Karch's evidence. Given that it seems that his  
24 report proposes contributory factors to the deaths that  
25 the other experts did not, it is entirely appropriate

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1           that it was considered in the narrative and analysis.  
2           Not to have done so would have given Crown Counsel an  
3           incomplete picture. However, given the view that we had  
4           formed in 2015, I would have expected the concerns in  
5           relation to Karch that we had formed then to be  
6           reflected somewhere. Having not been involved in  
7           reporting the case to Crown Counsel, I am unable to say  
8           why they were not."

9           Now, there is no discussion of his report in the  
10          analysis section of the precognition at all, but in the  
11          narrative, you may recall, there are summaries of each  
12          and every one of the reports that were instructed --

13         A. Yes.

14         Q. -- and lifts of --

15         A. Yes.

16         Q. -- quite substantial passages of text and all the main  
17          conclusions. You may recall that the narrative  
18          summaries Dr Karch's report. It's not discussed, as I  
19          say, in the analysis, but nowhere in the narrative or  
20          analysis are the concerns around his independence, his  
21          funding, the results of your due diligence, or the  
22          article in The Sun recorded.

23                 Did that surprise you?

24         A. Yes, and I've said in my statement that I would have  
25          expected that to be reflected somewhere, the view that

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1 we had taken. I can see why it would be in there for  
2 completeness, but for completeness you would need to  
3 have given its full context and the full context would  
4 be the concerns that we had formed in 2015 and the view  
5 that we had taken in 2015, that would have to be there  
6 as well. So Crown Counsel should have been aware of  
7 that.

8 Q. Okay. And what -- what consequences can potentially  
9 follow where a report is narrated in a narrative or  
10 analysis, but not put in its proper context?

11 A. It's possible that the interpretation of it by  
12 Crown Counsel may -- Crown Counsel may form a view based  
13 upon incomplete information and therefore interpret it  
14 in a way that that was inconsistent with our previous  
15 views that led us to put a witness before a court that  
16 was not appropriately qualified or was not appropriately  
17 independent.

18 Q. I wonder if we can bring up the statement of  
19 James Wolffe, who was also Lord Advocate during the  
20 period of --

21 A. Yes.

22 Q. -- this investigation. It's SBPI 00529, and can we look  
23 at paragraph 53, please. If we can perhaps scroll a  
24 little bit so we can see the question that sits above  
25 it. He was asked the question:

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1           "Were you aware of any issues relating to Dr Steven  
2 Karch that were apparent from a time prior to your  
3 involvement in the investigation? Were you aware of  
4 Mr Bayoh's family's views of Dr Karch? Were you aware  
5 of any media statements attributed to Dr Karch? What  
6 were the previous Lord Advocate's views of Dr Karch as  
7 far as you were aware? How if at all did any of these  
8 matters affect your understanding of Dr Karch and his  
9 opinion."

10           And Mr Wolffe's reply is:

11           "I have no recollection of the issues referred to in  
12 this question. If they were drawn to my attention,  
13 I would expect that to be apparent from the documentary  
14 record."

15           So here we have the second Lord Advocate involved in  
16 the case --

17           A. Yes.

18           Q. -- being asked a question some years down the line, but  
19 seemingly having no recollection of there being an issue  
20 with Dr Karch at all. And I'm wondering whether another  
21 reason perhaps to include concerns about an expert  
22 within the body of the precognition, whether in the  
23 narrative or the analysis, might be because Crown Office  
24 works in such a way that there are from time to time  
25 restructures, as you have described, post holders

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1 change, people come and go and indeed, during the course  
2 of this Inquiry, one Lord Advocate left and another  
3 replaced him and whether having concerns of this type  
4 recorded in the precognition would ensure that those  
5 concerns were brought to the attention of anyone  
6 involved in the case at a later stage, who might not  
7 have been aware of what was going on at the time?

8 A. I would say that the principal reason for having it in  
9 the analysis was for the benefit of the marking advocate  
10 depute, but it would also serve the purpose that you  
11 suggest. It would ensure that there was a complete --  
12 there was complete clarity about the audit trail of the  
13 view that had been taken in 2015.

14 Q. Thank you. Can you bear with me just a moment, please.  
15 I have no further questions for you. Thank you,  
16 Mr McGowan.

17 A. Thank you.

18 LORD BRACADALE: Are there any Rule 9 applications,  
19 Ms Mitchell?

20 Mr McGowan, would you mind withdrawing to the  
21 witness room while I hear submission.

22 Submissions by MS MITCHELL

23 MS MITCHELL: (Youtube feed frozen).

24 The second that I would like to ask him about,  
25 Mr Brown in his evidence indicated that at the time

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1 Fiona Carnan had written her analysis, he had read a  
2 mixture of some of the police and civilian witnesses'  
3 evidence and it's not clear indeed that he had read them  
4 all. This witness said when he was asked about scrutiny  
5 of the evidence and who within CAAPD was responsible for  
6 scrutinising it, he says -- he said to the question:

7 "Would that include the precognoscers?"

8 It was said:

9 "It would include precognoscers. It would include  
10 Les Brown as the head of CAAPD. It would also include  
11 me in terms of what I read in the report that I read."

12 Now, what I would like to ask this witness is did he  
13 read all the statements, including the police  
14 statements, and if he did so, why it was that he did not  
15 pick up on these issues of race? And I say that because  
16 he said that he was confident that his staff would have  
17 been able to pick up on issues of race.

18 The third question is in relation to training. And  
19 in this statement that we have from the Lord Advocate at  
20 the time this witness was involved at the start,  
21 Lord Mulholland, he gives an indication that following  
22 the January report all staff were trained in diversity  
23 and discrimination, including racism and religious  
24 bigotry, a steering group was set up to ensure policies  
25 and procedures were implemented, staff were trained to



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1 ensure that issues relative to diversity and racism were  
2 dealt with at the highest level and groups were set up  
3 reporting to steering groups and local issues. He also  
4 said all new staff had to undergo the training within  
5 six months to a year of taking post.

6 And what I would like to ask him is given his  
7 evidence about the way in which the issue of race was  
8 dealt with by -- sorry -- by CAAPD, did he consider that  
9 the training, such as it was, was sufficient such that  
10 Ms Carnan did not seem to pick up on various issues of  
11 race and the newer staff would have been recently  
12 trained in this and, again, their input doesn't seem to  
13 have had an effect on race being included.

14 Finally, also in relation to race, when this witness  
15 was asked how confident he was that the team had the  
16 necessary skill set to identify the evidence of racial  
17 motivation, he responded that he had every reason to be  
18 confident, because they were experienced lawyers who had  
19 been involved in large and complex cases before.  
20 However, he doesn't then go on to explain anything in  
21 relation to race and what I would like to ask this  
22 witness was when the people were specifically chosen for  
23 this role, was any consideration given specifically to  
24 the issue of race and/or whether someone ought to be  
25 identified even, for example, outwith the organisation

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1 to bring assistance in that regard to Crown Office.

2 LORD BRACADALE: Thank you. I'm going to rise for a period  
3 to consider these submissions.

4 (2.33 pm)

5 (A short break)

6 (2.47 pm)

7 LORD BRACADALE: I shall allow Ms Mitchell to examine this  
8 witness on the second issue relating to whether the  
9 witness himself had read statements and what he took  
10 from them and on the third issue in relation to training  
11 and the evidence of Frank Mulholland about that. And I  
12 consider that I would not be assisted by further  
13 examination of the first and fourth issues.

14 So can we have the witness back, please.

15 Mr McGowan, Ms Mitchell who is the senior counsel  
16 for the families of Sheku Bayoh, has some questions for  
17 you.

18 A. Thank you.

19 LORD BRACADALE: Ms Mitchell.

20 Questions by MS MITCHELL

21 Q. I would like to ask you a question in relation to the  
22 statements, both civilian and police statements, in this  
23 case. When Mr Brown had evidence taken from him, I  
24 asked whether or not by the time of the crown analysis  
25 had been brought together, had he read the civilian and

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1 the police statements, and he said that he couldn't  
2 remember what he had read entirely. He went on to say  
3 that he had read a mixture of police and civilian  
4 statements.

5 Earlier when you gave evidence, when asked about  
6 scrutiny of evidence, you said you were asked and who  
7 within CAAPD was responsible for scrutinising the  
8 evidence in the way that you've described it in  
9 assessing for -- in assessing in relation to the  
10 question of racial motivation. And you were asked about  
11 precognoscers and you said:

12 "It would include precognoscers. It would include  
13 Les Brown as the head of CAAPD and it would also include  
14 me in terms of what I read in the reports that I read."

15 Now, what I want to ask you is you've indicated that  
16 you read reports. Did you read the police and the  
17 civilian statements?

18 A. When I refer to me reading the statements, that was at  
19 the stage of what has become known as the interim  
20 report. That was at that stage. I do not think that I  
21 read every statement when the final report was  
22 submitted. I've certainly read them all at that initial  
23 stage and then come the final precognition, which would  
24 have contained those statements plus precognition  
25 statements we had taken, I wasn't involved so I didn't

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- 1 read them.
- 2 Q. So at the time what we're calling the initial report --
- 3 A. Yes.
- 4 Q. -- or interim report, you had read all the police
- 5 statements and all the civilian statements we had?
- 6 A. Yes, my recollection is that it came in a number of
- 7 folders and I read all of the material in there.
- 8 Q. When you read in particular the police statements, did
- 9 you form a view on, for example, language that was --
- 10 could be considered racial in nature? Did anything --
- 11 A. I don't recall that at the time.
- 12 Q. Do you mean that you don't recall whether you did or you
- 13 didn't or you don't like seeing anything that would have
- 14 caused you concern?
- 15 A. I don't recall whether I did or I didn't.
- 16 Q. When you saw that there was a question in relation to
- 17 terrorism, did you at that time consider anything in
- 18 relation to race?
- 19 A. The question of terrorism I was aware of on 3 May and I
- 20 formed the view at that stage that, perhaps wrongly, but
- 21 I formed the view that it was unlikely that there was a
- 22 terrorist incident in Kirkcaldy and I came to form the
- 23 view that it was unlikely that that would have been said
- 24 had the deceased been white.
- 25 Q. So when you looked at the statements, having formed that

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1 view really from the off on the very first day, when you  
2 looked at the police statements and you had already  
3 formed the view that that you thought it unlikely that  
4 they would have said had the witness been white, what  
5 did you think then when you saw the police statements  
6 saying that?

7 A. The same thing, that it would have been unlikely that  
8 that would have been said whether it was white and I  
9 questioned some of that.

10 Q. When you say you questioned it, who did you question it  
11 with?

12 A. Whether it was in my own mind or whether I discussed it  
13 with Mr Brown I can't recall, but certainly that was  
14 something that was in my mind at the time when I  
15 approached the statements and was reading them.

16 Q. Ought you to have raised it formally with someone if  
17 it's only a recollection from your own mind?

18 A. Raised the -- what I thought about?

19 Q. What you thought about what was in the police  
20 statements. What I'm looking for here is you say, it's  
21 a black man in custody, it's obvious that race is going  
22 to be the centre of it. You're then presented with  
23 statements, statements which may use language which  
24 could be considered racial, use on the word "coloured",  
25 and you're also given statements which talk about a link

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1           between what the police thought and the fact that  
2           Mr Bayoh was black and your immediate assessment of  
3           that. And what I'm trying to ascertain is once that  
4           happened, what did you do with it, where did you go with  
5           that, you having ascertained this link?

6           A. So that was all -- to my mind that was all subject to  
7           inquiry and we would pursue that further. I think the  
8           whole question of terrorism was a question that we did  
9           discuss, myself and Les Brown. I'm not sure if the  
10          Lord Advocate became involved in some of those  
11          discussions later on, but certainly Les and I had  
12          discussed that.

13          Q. And by the Lord Advocate do you mean Mr Wolffe?

14          A. No, at that time, because the time I'm talking was  
15          2015/2016, that would be Frank Mulholland at the time.  
16          So there was certainly discussion about that linkage or  
17          that possible linkage having been made. At the same  
18          time, when we were asking questions about that, we were  
19          being told of a general warning that had been given,  
20          I think it was some time before of a general -- general  
21          measures that police officers should be taking, because  
22          there was a general fear that police officers may be  
23          subject to a terrorist attack of some kind and they were  
24          doing various things to protect police officers round  
25          and about that so --

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- 1 Q. But that wasn't in connection with anyone's race?
- 2 A. No, it wasn't. So bottoming out whether there was an  
3 assumption on the part of the officers that because  
4 Mr Bayoh was black it might be terrorist related and  
5 whether that was a trope or an assumption and/or whether  
6 or not their view was informed by this general warning  
7 was something which to my mind had to be bottomed out  
8 during the course of the inquiry, because that would be  
9 something which assisted us in determining whether or  
10 not the force which was used was justifiable.
- 11 Q. And did you ever come to see it being bottomed out?
- 12 A. I had left the case by that point so by the time that  
13 was finally or my anticipation would be that that would  
14 be covered in the final analysis and we've heard  
15 evidence about that earlier on so I --
- 16 Q. When you handed that over, did you flag up these  
17 concerns with anyone so that they would be aware to look  
18 for it in the finality analysis?
- 19 A. No, I didn't flag that up. I don't think I thought I  
20 needed to flag up, because I had discussed it with  
21 others in the team.
- 22 Q. What about -- you have mentioned that the issue of  
23 racist tropes when you read the statements were you  
24 concerned about the fact that there were possible racist  
25 tropes being used?

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1 A. I can't recall. I can't recall if there were beyond the  
2 terrorism link if there were racist tropes in there.

3 Q. Well, for example, the strength of Mr Bayoh, the size of  
4 Mr Bayoh, did any of that concern you in relation to the  
5 question of race?

6 A. All of that generally concerned me for the purposes of  
7 race and otherwise. It appeared that -- it appeared  
8 there was lots of use of phrases like "super human  
9 strength" and I thought that was fundamentally unhelpful  
10 and we needed to get to the bottom of that.

11 Q. And did you express that view to anybody?

12 A. I certainly expressed the view that we needed to get to  
13 the bottom of the super human strength issue and how  
14 that was -- how the use of phraseology like that was  
15 fundamentally unhelpful.

16 Q. Why did you think it was fundamental unhelpful?

17 A. We were looking for an evidence-based analysis of a case  
18 and super human strength is -- evidentially is a  
19 meaningless phrase in that sense. I'm not sure at the  
20 time I considered that to be a trope, but I thought it  
21 was -- we had to get to the bottom of what people were  
22 meaning in relation to that.

23 Q. And what about the size of Mr Bayoh, one of the police  
24 officers said something to the effect of this was the  
25 biggest man they had ever seen?



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1 A. I think fairly early on as a matter of fact we knew he  
2 wasn't the biggest man they would ever -- I think most  
3 of the police officers were in fact taller.

4 Q. And did that give you any concerns in relation to the  
5 issues of race?

6 A. It gave me concerns, but I'm not sure if it was  
7 specifically in relation to race. It gave me concerns  
8 about the accuracy and reliability of the accounts and  
9 potentially the credibility of the accounts that we had.

10 Q. Would it have been helpful if you had these concerns,  
11 particularly if you had these concerns from reading it  
12 in relation to race, or you had these concerns in  
13 relation to the other matters, if you had written down  
14 that and communicated that formally with somebody, be it  
15 to Les Brown, to someone senior to you, or directly to  
16 PIRC?

17 A. It would have -- it would have meant that we had a  
18 proper audit trail of it I accept. As I say, I think I  
19 did discuss it with Les Brown who was directly involved  
20 at the time. I think these were conversation that we  
21 had.

22 Q. Specifically in relation to terrorism?

23 A. I think we had the conversation in relation to  
24 terrorism, we had the conversation in relation to size,  
25 we had the conversation in relation to super human

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1 strength. All of these were conversation that we had.

2 Q. And the latter two weren't connected with race?

3 A. I don't think I connected them with race at that point  
4 in time, no.

5 Q. Would you connect them with race now?

6 A. It's possible that they could be -- it's possible they  
7 could be connected with race. I didn't see it that way  
8 at the time. As I say, at the time, I took them to be  
9 indications that the material that we had from the  
10 police, there were doubts over its reliability and its  
11 credibility.

12 Q. I'll move on to my next question. Following on from the  
13 Chhokar case, we understand from the evidence in  
14 statement form that's been given by Lord Mulholland that  
15 the crown embarked on a systemic review of all its  
16 policies and procedures to ensure it wasn't  
17 institutionally racist. Presumably you having been in  
18 Crown Office that length of time were aware of that?

19 A. I was. That was very early on in my career. At that  
20 time, I would have been a -- I would have been a fiscal  
21 depute at Hamilton so I was never involved in the  
22 process, but I was aware that process was ongoing and  
23 new policies and amendments to policies training was  
24 coming out at that time.

25 Q. It says:

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- 1            "All staff, new and existing, were trained on  
2            diversity and discrimination as a result... "
- 3            A. Yes, there was a two-day course I recall being on.
- 4            Q. "... including racism and religious bigotry."
- 5            A. Yes.
- 6            Q. And it says:
- 7            "A steering group was set up to ensure that such  
8            policies and procedures were implemented. Staff,  
9            including all ADs, were trained to ensure that issues  
10           relative to diversity and racism were dealt with at the  
11           highest level and area groups were set up reporting to  
12           the steering group on local issues."
- 13           A. Yes.
- 14           Q. So you had a top to bottom, as it were. The idea was  
15           there was going to be a top to bottom review. You have  
16           heard about the way that the evidence has been dealt  
17           with by, for example, Fiona Carnan, Mr Brown --
- 18           A. Yes.
- 19           Q. Given your view about the way in which the evidence was  
20           dealt with, does it suggest that the training which was  
21           put in place at the time for Ms Carnan who would have  
22           been there --
- 23           A. Yes.
- 24           Q. -- for the training and her 30 years and for the new  
25           members of staff who have to undergo training when they

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1 arrive isn't fit for purpose?

2 A. It certainly suggests that there is a need to review and  
3 refresh that training. There are elements of training  
4 in relation to race I think for new starts. I couldn't  
5 say exactly what they are, but it certainly sounds if  
6 all of that needs to be reviewed and refreshed  
7 absolutely.

8 Q. Would you find benefit in that?

9 A. I think I would, yes.

10 Q. Thank you.

11 LORD BRACADALE: Thank you.

12 Mr McGowan, thank you very much for coming to give  
13 evidence to the Inquiry. I'm very grateful for your  
14 time. We're about to rise for the day and you're going  
15 to be free to go.

16 A. Thank you.

17 LORD BRACADALE: So we'll adjourn now until Monday at  
18 10 o'clock, next Monday.

19 (3.01 pm)

20 (The hearing was adjourned to 10.00 am on Monday, 29 April

21 2024)

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