Wednesday, 17 April 2024

(10.03 am)

LORD BRACADALE: Ms Grahame.

MS GRAHAME: Good morning, Mr Brown.

A. Good morning, Ms Grahame.

LES BROWN (sworn)

Examination-in-chief by MS GRAHAME

Q. You are Les Brown?

A. Yes.

Q. What age are you?

A. I'm 60.

Q. And you were employed in Crown Office and have been since 1985?

A. Yes.

Q. You joined as a trainee and you've worked your way up to the extent that in November of 2014 you were head of the Criminal Allegations Against the Police Division?

A. Yes.

Q. We've heard that that's called CAAPD?

A. Yes.

Q. Right and you had -- had you been in that unit before you took on the role of head of the unit?

A. No, I had not been in that unit. And historically that role of the investigation of criminal allegations against the police or complaints against the police,

that was dealt with by -- it was on a regional basis within the Crown Office and Procurator Fiscal Service and normally it would be the most senior Procurator Fiscal in the areas who would deal with that, but CAAPD, the Criminal Allegations Against the Police, was a specific unit that was created I think round about 2012, and that was a central unit that was staffed by a number of people and that it would deal with all criminal allegations against on duty officers nationally so that was the history of CAAPD.

I was appointed to CAAPD towards the end of 2014 and, as I said in my statement, I took over from Kate Frame, who of course became the commissioner at PIRC and I think that Kate Frame was the first head of national CAAPD, if that assists.

Q. Kate Frame, and we've had heard from her, she was the first head of CAAPD and then you were appointed from about November 2014, I think, you say in your statement?

A. Yes, it was around about that time, yes.

Q. Thank you. And that was a new unit then set up in 2012?

A. It was a relatively new national unit and, as I said, I had very limited experience prior to that for the reason that those cases tended to be dealt with separately from the rest of the organisation.

Q. Thank you. And you stayed there until November 2019,

you said in your statement?

A. Yes.

Q. When you were appointed as Procurator Fiscal for South Strathclyde?

A. Yes.

Q. And is that where you are today?

A. It is.

Q. You've mentioned in your statement that the CAAPD department unit would receive PIRC reports; is that right?

A. It would receive PIRC reports. I am confident that the first PIRC report that I saw was in fact came from that source. But you're absolutely correct, the unit would see reports from PIRC, the other unit within COPFS, within Crown Office Procurator Fiscal Service, that would see PIRC reports would be the Fatalities Unit, SFIU headed by David Green. So they would see reports in respect of sudden deaths and deaths that PIRC were instructed to investigate on behalf of the crown, but we would see in CAAPD reports submitted by PIRC, obviously normally in respect of criminality.

Q. Right. And we'll come on to that in due course, thank you. Have you watched in the evidence that's been before the Inquiry?

A. I have haven't watched a huge amount of evidence, but I

have seen some broadcasts in relation to the evidence, yes.

Q. On television?

A. Yes.

Q. Well, you may not be aware that there's a blue folder in front of you and that contains some hard copies of documents that we hope will be of assistance to you --

A. Thank you.

Q. -- in the course of your evidence. And you should feel free to open that up and use any of the documents, refer to them at any time at all.

A. Thank you.

Q. As we go through your evidence, there may be particular parts of your statements or your relate responses or documents that I would like you to comment on. They'll come up on the screen in front of you, but you'll always have the blue folder as well.

A. Thank you.

Q. And, please if there's anything else that you think you would like to refer to or that would help us, please let us know what it is. If we cannot lay our hands on it immediately, we will try and get it over the next break or overnight.

A. Thank you.

Q. All right. Let's look, first of all, at the request for

a Rule 8 statement which is SBPI00444. And you'll see this has come up on the screen. If we can move down and this is a series of questions which were sent to you by the Inquiry team and you were then asked to consider those questions and prepare responses.

A. Yes.

Q. And this was the first one that was sent to you and it covers, as we'll see on this page, your role and the experience you had and it goes through a large number of questions.

A. Yes.

Q. If we look at the very bottom of this document, so it's 38 pages long, we don't want to see the docs, but if we can look at the last sort of question, please. We'll see that its contains 194 sort of questions and the last one is:

"Please sign and date your statement".

A. Yes.

Q. And did you follow that process in order to provide the Inquiry with information about your involvement with the investigation into Mr Bayoh's death?

A. Yes, I did.

Q. Thank you. And if we could look at your response to that which I think is SBPI 00419. Now, this is the response so it's your response to that Rule 8 request

that we've just look at and it's dated 27 November 2023.

A. Yes.

Q. And if we can look at -- it's 112 pages I think. If we can look at the final page. There we are. We see that you've signed or the copy that you have should have been signed, which you're nodding; is that correct?

A. I did sign it.

Q. You did sign it.

A. It was a process which had to be followed to sign it electronically and I did sign it electronically and submitted it.

Q. Thank you, that's fantastic. And the last paragraph says:

"I believe the facts stated in this witness statement are true. I understand that the statement may form part of the evidence before the Inquiry and be published on the Inquiry's website."

A. Yes.

Q. And you understood that when you signed it?

A. Yes, I did.

Q. Thank you. And you did your best when you replied to this Rule 8 request to give a true and accurate record of your recollections of the events?

A. Yes, I did.

Q. Thank you. So that was your first response to a Rule 8

request. I may call that your first statement.

A. Yes.

Q. Just because it's shorter and easier to understand. Then if we can look at the second time the Inquiry got in touch with you, that is SBPI 00437 and this was a second Rule 8 request, and it's -- and if we can go down to the bottom of that page, we'll see that this is the final paragraph there, 28:

"Please sign and date your statement."

So it's a shorter more focused series of questions?

A. Yes.

Q. And then your response to that was SBPI 00459, and this is a 12-page response and again we can see at the bottom, the paragraph at the end, there's an area for your signature and am I right we can see it on this one, although it's redacted, it won't be redacted on your copy and your hard copy in your folder, we see you signed it on 9 February this year?

A. Yes.

Q. And again the same paragraph appears at number 27 on the screen:

"I believe the facts stated in this witness statement are true. I understand the statement may form part of the evidence before the Inquiry and be published on the website."

A. Yes.
Q. And again, you understood that to be the case when you signed it?
A. Yes, I did.
Q. And you were trying your best to give a true and accurate record?
A. Yes, I was.
Q. And then finally, you gave a supplementary statement which is SBPI 00474, and this is really only a page, so if we just go to the bottom, it was an aspect about the statute which applied, just a clarification point really.
A. Yes.
Q. And again, you've signed that on 4 March, 2024, and the final paragraph we can see is in exactly the same terms as previously and you understood that to be the case when you signed?
A. Yes.
Q. Thank you. I would like to ask you about, first of all -- before I begin going through your own personal involvement, I would like to show you a document and see whether you were aware of it. It's PIRC 04453. We've heard evidence about this document that it was dated December 2013, so the year prior to you becoming head of CAAPD?

A. Yes.
Q. But it was a memorandum of understanding between PIRC and the crown?
A. Yes.
Q. Now, on the final page of this document, sorry, the final page of the substantive document, not the appendices, if we can move up, please, we'll see it's been signed on behalf of PIRC on 10 December 2013 and on behalf of the Crown Office on 11 December 2013, so it was signed at the end of the year before you started?
A. Yes.
Q. And if we can go to the top of the document again to the first page. You'll see that it says "Memo of understanding between Crown Office and ..." If we can move down to "PIRC". And we've heard evidence that this was about essentially an agreement, an understanding, between the two organisations?
A. Yes.
Q. Were you aware of this document when you were head of CAAPD?
A. Yes, I was.
Q. Thank you. Could we look at this document, and just very briefly look first of all -- we will look at pages 3 to 5, so if we can see -- we can start with paragraph 4.1. See there it says "Role of Crown Office and

investigations" and it talks about the Crown Office being the sole prosecuting authority.

Then if we can move on to page 4. I'm interested in paragraph 4.3 at the top of the page:

"Crown Office has responsibility for the investigation of all sudden and suspicious deaths."

And then it deals with the role of the PIRC in investigations and if we can look at paragraph 5.5, it says:

"PIRC investigations are intended to comply with the five principles of effective investigation outlined by ECHR; namely, independence, adequacy, promptness and, so far as possible, public scrutiny and victim involvement."

A. Yes.

Q. And that's something you were aware of that there are five obligations in relation to an investigation, independence, adequacy, promptness, so far as reasonably possible -- so far as possible, public scrutiny and then involvement of the victim or the next of kin?

A. Yes.

Q. That will be a theme that we will continue to turn back to as we go through questions.

A. Thank you.

Q. Those five obligations. And my understanding is that

those obligations to effectively the crown investigation into sudden deaths, unexplained deaths, and that the investigation in certain circumstances for crown will be crowd by PIRC.

A. I consider that that makes it explicit and clear that there is requirement to comply with those principles in respect of the investigation carried out by PIRC. I consider that there is an overriding obligation on the part of the state as a whole, which would include the crown and any subsequent proceedings, to have regard to those principles in that overall investigation, yes.

Q. And we've heard evidence that those five obligations apply to the crown and also to PIRC and that's really what you have just been saying?

A. Yes.

Q. Thank you. And then at the bottom of that page:

"Examples where the Crown Office may require an investigation by PIRC ... "

Because it's clear that the Crown Office don't always require PIRC to do an investigation?

A. Yes.

Q. But there are certain circumstances where the PIRC are required to do an investigation?

A. Yes.

Q. 6.1:

"Decisions as to which cases will be referred to PIRC will be taken by the appropriate prosecutor. Each case will be dealt with on its own facts and circumstances and the following examples of investigations that might be referred to PIRC are for illustrative purposes only and are not intended to be an exhaustive list, nor are they intended to bind the prosecutor's discretion on the facts of any specific case."

But they give some examples which are indicative of the type of situation where PIRC might be called upon by the crown to do an investigation?

A. Yes.

Q. And the first couple of examples we see on that page there are death in police custody. The decision about whether a death falls within the category of "death in police custody" lies with Crown Office.

A. Yes.

Q. And it may also include a death following direct or indirect contact with the police. So that would be -- would that be where a death occurs when the police are there or may be shortly after the police have left?

A. Yes. And as that particular paragraph seems to say, typically, where there has been some form of pursuit, some interaction with the police that has been a factor

in relation to the incident, yes.

Q. And there's mention to include the use of firearms or other weapons, a road accident directly or indirectly involving police vehicles or any incident where there's an inference that there was police involvement in which it could be inferred there was a direct or indirect causal or contributory link to death?

A. Yes.

Q. Thank you. And then if we move on to the next page, and if we start looking at section 7:

"Protocols for interaction between Crown Office and PIRC during an investigation"

And if we see here, 7.3:

"In the case of death or serious injury investigations COPFS recognises the importance of allowing the PIRC early access to ensure independence from any police investigation from the outset."

A. Yes.

Q. And does that go back to the Article 2 requirement for independence in relation to the investigation and in that sense independence from the people that are being investigated?

A. Yes, it comes back to that principle and it is the case that the creation of the PIRC was intended to address that when of course a national police force was created

so those were interlinked and clearly the creation of PIRC was concerned with ensuring that independence from the police, yes.

Q. We've heard evidence that in the past there were a number of different police forces around Scotland, people have called them "legacy forces", and there was the opportunity at that time if officers were suspected of having done something wrong, say in Fife, another area, another police force from a different area could investigate those allegations, but once it became Police Scotland that caused an issue, it wouldn't be possible, and they set-up PIRC to be independent?

A. Yes.

Q. That's maybe a bit simplistic, but does that explain it?

A. It does and obviously I'm long enough in the service to remember that as an approach that was taken. The question as to whether it was adequately independent is of course not for consideration today, but the principle of independence, I would suggest, in having a different force that was unconnected with the incident, was recognised even in those days, yes.

Q. And so that's why PIRC were set-up from 1 April 2013 to be that independent body to investigate any allegations against police officers?

A. Yes, and given that specific responsibility, yes.

Q. And it was the crown who would instruct PIRC to or the Chief Constable could refer matters to PIRC himself?
A. The Chief Constable could. There is -- I'm pretty confident there is also a discretion on the Commissioner themselves that they can take on an investigation, but certainly those are the typical routes whereby the PIRC would carry out an investigation, yes.
Q. Thank you. And then if we look at 7.4:

"In the case of a death investigation the police will be required to submit the initial death report by the next working day to the Scottish Fatalities Investigation Unit of Crown Office. The PIRC will submit its full death report into the investigation of the death within timescales determined by Crown Office in each individual case."

A. Yes.
Q. So in the case of a death investigation, there's an initial death report and that is to be sent from the police to the Scottish Fatalities Investigation Unit, the SFIU. We've heard from David Green in the Inquiry and I think he was the head of SFIU at one time?
A. He was. He was the head of SFIU for a number of years and he certainly was head of the SFIU at the time of this investigation.

Q. And then at 7.5:

"In the case of a criminal investigation... "

So there's a distinction drawn here with the previous paragraph.

A. Yes.

Q. Earlier one is death investigation, this one is criminal investigation.

"Crown Office CAAP Division will instruct whether PIRC shall by way of a full investigation report on the agreed template or/and an SPR together with full statements and productions and will determine the timescales for each individual case."

A. Yes.

Q. What's an "SPR"?

A. It's a standard police report.

Q. So this is in the situation 7.5 relates to a criminal investigation. So it's not at the SFIU referred to here, it's CAAPD, and there's a template and an SPR and then there's the suggestion full statements and productions and timescales to be determined by CAAPD?

A. Yes.

Q. And can you explain this distinction that's drawn here between 7.4 and deaths investigations involving SFIU and 7.5 involving criminal investigations involving CAAPD?

A. Yes. I think it seeks to draw a distinction because, as

I am sure the Inquiry are well aware, there are two routes set out in the legislation whereby PIRC would typically be instructed so they can be instructed in relation to the investigation of a sudden death that will involve the police, but they can also be instructed where the terms of the legislation appear to be applicable and that in relation to the criminality and the wording of that where there is -- I think it is where there is an indication that an officer may have committed an offence, that is the other route.

I would say that they are obviously both under the same section and the powers of the crown to instruct derive from that section, that being section 33A of the relevant legislation, and so to some extent they make clear that they are crown-directed or crown-instructed investigations, both of those, to distinguish them from other means by which PIRC may investigate certain circumstances.

Q. Thank you. So we've heard evidence that the relevant section is 33A and there are two types of investigation envisaged within that legislation. There's the B1, which is circumstances where the police have been involved?

A. Yes.

Q. And B2 where there are criminal -- potentially criminal

allegations?

A. Yes, that is the wording and indication. I think that is the wording, yes.

Q. So section 7 reflects that distinction that arises from the statute that created?

A. Yes.

Q. The investigation in PIRC?

A. Yes. I would consider that that is the reference in those two paragraphs of the memorandum of understanding, yes.

Q. And this section envisages that circumstances will be dealt with -- the circumstances type of investigation will be dealt with by SFIU, the criminal side will be dealt with by CAAPD?

A. Yes.

Q. Thank you. Can I turn to your -- I am finished with that document, thank you very much.

There was no reference, however, in that document that I could find certainly that refers to specifically to Article 14, discrimination?

A. No.

Q. No?

A. Yes.

Q. Are you aware of any documents akin to that memorandum of understanding between crown and PIRC that related

specifically to Article 14?

A. I'm not aware of any document that referred to Article 14. I am familiar with Article 14.

Q. We'll come on to that later, if I may. So you became head and you were head of CAAPD in May 2015. You have said in your statement -- let's look at that briefly, SBPI 00419, and I'm interested in some of your answers cover a number of pages. It's page 68 that I would like to look at, which is actually your answers to questions 108 to 109, and if we can look at paragraph 1 on page 68. I think it's the next page. Maybe sometimes the page numbers differ depending whether it's the PDF or the actual document.

Can I just check. Can you keep going, please. Thank you. Can I see the top of that page, please, yes. So this may be -- I've called it page 68. It may be page 69 on the PDF, is it? I'm sorry about that.

So this is the first paragraph and I'm interested in the final sentence here:

"To my knowledge this was the first time CAAPD had been involved in a sudden death investigation. That was normally conducted and overseen by SFIU."

Now, we have heard that SFIU were involved in arranging the postmortem which had taken place on 4 May?

A. Yes.

Q. And I'm interested in why, if this was being treated as a sudden death and we've heard evidence that it was a B1 investigation into the circumstances and that initially Dave Green was the person who contacted PIRC and instructed them to start the investigation, why was CAAPD brought in instead?

A. Yes. I'm -- I'm aware that the instruction that was issued by senior colleagues over the course of the weekend and prior to my involvement simply specified the general section and I think I'm correct in saying it did not seek to differentiate between B1 or B2.

Q. That's my understanding.

A. So that instruction had been issued and I know it was modified or expanded, again prior to my involvement, but still did not distinguish between the two, so SFIU were involved at the initial stages and that was in accordance with normal procedure in relation to being advised of the circumstances of the death of Mr Bayoh and also instructing initial procedures, including the postmortem examination, and that in my experience was very typical.

CAAPD became involved on my return to work, as it were, after the holiday weekend when, as I said in my statement, I was asked to go through to Crown Office and it was indicated to me that a decision had been taken

that the investigation would be -- would either lie with CAAPD or be overseen by CAAPD at that stage and that was a decision that had already been taken.

As regards an explanation as to why that was, I cannot recollect any clear indication other than I consider that it was -- it was considered that there was at least the potential for criminal proceedings at that stage and that it was appropriate that it be overseen by CAAPD at that stage, because it would involve considerations in relation to the actings of the police and possibly further proceedings depending on the results of that investigation. So that is my recollection in relation to that particular decision, but it was a decision that I was advised of and that was the way that matters proceeded at that stage.

I'm pretty sure that the Lord Advocate had been I think involved in that decision, because, as I say, that was the decision that had been reached and I was being advised of that decision.

Q. The Lord Advocate at that time would have been Frank Mullholland; is that correct?

A. Yes, it was.

Q. And I think in your statement you talk about being asked to come through to Crown Office to have a meeting with Stephen McGowan?

A. Yes.
Q. We've not heard from him yet but we hope to hear from Mr McGowan. He was the fiscal for major crimes and fatalities investigation?
A. Yes.
Q. Can you explain to people where he was or where you were in relation to his role. You're head of CAAPD at this point?
A. I'm head of CAAPD. It's a civil service structure. Stephen McGowan would be senior to myself, he occupied a higher grade and had -- and was operating in that job title. Sometimes I know that the job titles can sometimes be a bit misleading that you're head of something, but then there's somebody else that has got a different job title, but he certainly was senior to myself in effect. I'm pretty sure he was the line manager of David Green and I was further down than David Green at that time.

So if that assists, in respect of where Stephen McGowan was, he was senior to David Green who was senior to myself in terms of grade at that time.
Q. All right. So Stephen McGowan is above both you and David Green?
A. Yes.
Q. And David Green as head of SFIU has been involved in the

initial stages --

A. Yes.

Q. With the death of Mr Bayoh, but then was it at that meeting with Mr McGowan that he said you would be having oversight I think as head of CAAPD?

A. I don't know if that was the term that was used, but certainly it was made clear that the investigation was going to rest at that stage with CAAPD rather than with SFIU, the fatalities unit.

LORD BRACADALE: Sorry to interrupt.

Mr Brown, should I understand then that the head of CAAPD had a lesser grade than the head of the deaths unit.

A. Yes.

LORD BRACADALE: What was the thinking behind that?

A. I can't -- I don't think I can assist your Lordship in respect of that. As I said in my statement, the head of CAAPD when Kate Frame occupied that role was at a higher grade. The -- it had been downgraded, to use a term, after Kate Frame's departure. It had been occupied by a senior civil servant. I was not a senior civil servant when I was appointed, so I know I was the first head of CAAPD to be appointed who was not a senior civil servant.

LORD BRACADALE: Thank you.

A. A decision had been made I suppose at an organisational level. That's as far as I can say. I was not involved in those discussions and the decision to downgrade, as it were, had been made prior to my appointment and I was appointed to it on a level transfer.

LORD BRACADALE: Thank you.

MS GRAHAME: Thank you. Regarding your role, I wondered, and I don't know if this is on the play list, it's something we might have to get later, COPFS 02539, this is a letter written by Stephen McGowan to PIRC, and it's on 5 May 2015. It's not. What we'll do is we'll come back to that after our morning break if I may.

So you have that meeting with Stephen McGowan when you come back to work, you go to Crown Office and meet with him, and was it at that meeting that he appointed you to deal with the Sheku Bayoh investigation.

A. Yes, I think that would be fair to say, yes.

Q. And you've mentioned the Bank Holiday Monday, we have heard that was 4 May, so was this meeting on 5 May, the day you had returned to work, or the day after?

A. I cannot be certain, I'm sorry to say. I'm very confident that it would have been Tuesday of that week at the earliest.

Q. Right.

A. I can't be absolutely certain that it was the Tuesday,

but out of all the days I think it's most likely to have been the Tuesday, although I did go through emails as to whether -- how did I know to go to Crown Office that day, I cannot remember.

Q. Well, the letter that Stephen McGowan appears to have written was on 5 May and he sent -- as I say, we'll look at it later -- but he sent it to PIRC and he said:

"Les Brown, Head of CAAPD, will be the senior fiscal with oversight of the case and bring as much assistance from Crown Office as required."

A. Yes, that would accord with my general recollections then and I think I have seen that piece of correspondence.

Q. Your role from that point was to provide oversight and handle the investigation into Mr Bayoh's death?

A. Yes, to provide oversight and obviously investigation and the eventual PIRC report was to be submitted to CAAPD. I think I have said in my statement that at that time and in the light of the fact that even at that early stage it was clear that this was going to be a significant and important investigation. I was reassured I suppose that I would be able to draw on the experience of senior colleagues, including Stephen McGowan, in respect of that, but that is correct, yes.

Q. Thank you. And before we go into the steps that you then took, can I ask you some questions about the unit that you were head of?
A. Yes.
Q. I think in your statement you say you dealt with around 50 cases a month, is that -- was that the position in about May 2015?
A. I think -- I think it was and there was a -- there was some -- it was a memorandum that I reminded myself of in relation to that. I do think that the overall case load did reduce because I have seen that over recent years it was less than 50, but that would be correct.
Q. At around May 2015?
A. Yes, and one of the other things that I think I did say in my statement was that there was a backlog of cases that I inherited and clearly dealing with cases within CAAPD, because of the sensitivity of them and the fact that police officers will want them dealt with as quickly as possible, that was a primary source of concern, a significant number of cases that were getting older and in particular some data protection offences that seemed to be building up in respect of that. But, yes, a significant number of cases, around about 50 is the best of my recollection at that time and of course during the course of the initial investigation and

subsequently other large sensitive cases were dealt with by the unit and I had oversight of those as well.

Q. The team that you were managing at that time, you have told us that there were two part-time principal deputes?

A. Yes.

Q. Two part-time deputes and two non-legally qualified case preparers?

A. Yes.

Q. And plus yourself so was the team -- you were one of seven, you had six staff?

A. Yes, although I think at least one of the case preparers was part-time as well.

Q. I was going to ask.

A. I think they might have been, but certainly the principal deputes -- now the principal deputes are the kind of first line managers within the organisation, they were part-time and they were highly experienced and in fact the unit as a whole, if it assists the Inquiry, was I would term it pretty experienced in that all of them had certainly been there for a lot longer than I had been and some of them had been there for a considerable period of time.

Q. So they had experience of working within that unit and experience of criminal allegations against the police investigations?

A. Yes, and the processes that the unit was expected to follow, yes.
Q. Okay. So you had six staff working for you, five of them were part-time?
A. I think -- I think -- I think that's -- that's right, yes.
Q. And we've heard the names of three of them, Fiona Carnan, who's given evidence to the Inquiry?
A. Yes.
Q. Alisdair MacLeod and Erin Campbell?
A. Alisdair MacLeod was not a member of CAAPD.
Q. Right.
A. Alisdair MacLeod was seconded to this particular investigation, Alisdair MacLeod had come from another part of the organisation. The same applies to Erin Campbell. Erin Campbell was not a full member of CAAPD at any time and, again, was seconded into the Inquiry.
Q. Were they in addition to the six members of staff that you already had then?
A. Yes, they were.
Q. And were they full time?
A. Yes, yes, they were, but it was later on in the Inquiry, if it would assist the Inquiry as regards dates. I would struggle in respect of the date, but I'm pretty

confident it was, I think, around the time of the submission of the final PIRC report.

Q. And what was at the submission of the final PIRC report, when they both were seconded?

A. Yes.

Q. Right.

A. Yes.

Q. So in the initial stages at least, prior to the submission of the final PIRC report, they didn't -- they are not told seconded to the team?

A. Yes.

Q. And they only became involved after -- we've heard the final PIRC report was submitted in August 2016. So that would be sometime after that date Mr MacLeod and Ms Campbell would come on board seconded to your unit?

A. I think that is correct. I have seen an email however that suggests that Erin Campbell was there a bit earlier than that so I could be wrong, but what I am confident of is that during the initial stages, and I'm very confident that it was after the submission of the first PIRC report that they became involved. I just can't remember exactly when it was, but I thought it was around about the submission of the second PIRC report.

Q. We'll maybe be able to double-check that. So the first PIRC report was the interim report from PIRC, and the

final report. The interim report came in August 2015, and the final report came in August 2016. Does that help you further?

A. Yes, it does and that is -- I know that that's when they came in. I know that it's been referred to as the interim PIRC report, and there is reference in some of the documentation. To the best of my recollection it was not at that time submitted as an interim report but became one because of further work that was instructed and, for what it's worth, it wasn't titled "interim report", but it became an interim report. That's correct and that's why it's referred to as the interim report.

Q. All right. Thank you.

Was Fiona Carnan always part of the CAAPD unit?

A. Yes, Fiona Carnan was but for the -- Fiona Carnan only became involved in the Inquiry into Mr Bayoh's case later, much later on in the process and after the involvement of Alisdair MacLeod, but she was there all the time.

Q. Thank you. In relation to Mr MacLeod and Ms Campbell, as they were seconded to your unit, what experience did they have of investigations in relation to police officers before being seconded?

A. I know that they were brought in or I suspect they were

brought into the team because of their -- because of their experience in investigating significant and challenging cases. That's the first thing that I would say.

I know that Alisdair MacLeod had had experience, direct experience, and had involvement in a case that did involve police officers and, to the best of my recollection, it was quite a high profile case that involved allegations of police officers misleading authorities, but that wasn't a CAAPD case for the simple fact that it concerned off -- I understand it concerned off duty police officers and CAAPD only dealt with on duty-allegations, but he brought that experience.

As regards Erin Campbell, Erin Campbell was, like Alisdair MacLeod, regarded as a very competent investigator and I can't recollect any specific case that she would have been involved in that involved the police, but that was part of the skill set that I think was under consideration when they were seconded to the team.

Q. And were they seconded because of the existing level of the work -- the workload that the existing team were covering, that you needed additional staff to come in?

A. I think my recollection in relation to that was that it was clear that at the crown were going to have to

undertake significant enquiries, those were going to be detailed and probably time consuming and were important and that in effect this was at the crown moving after the submission of the PIRC investigation towards the decisions that the crown were going to have to take and I am confident that there was a recognition that secondment and additional resources was required in order to achieve that and that certainly was what I was keen to secure, that there would be those who had that skill set who were going to be dealing with this particular case in itself.

Q. Did they work exclusively on the Sheku Bayoh investigation when they did come into the team?

A. Yes, they certainly were not -- they certainly were not given any other CAAPD work.

Q. Right.

A. No, they were a resource to assist in the preparation of the case of Mr Bayoh.

Q. We've heard evidence from witness from PIRC who said that -- we asked them questions about their workload and the number of investigations they had and they've mentioned that there was the M9 crash in relation to Yuill and Bell and that occurred in roughly around July and they've explained, those witness, about the impact of that significant investigation on their resources and

the workload and I wonder, you have mentioned other significant investigations, did that incident have an impact on the workload of your team?

A. Yes, it did. As I said in my statement, the M9 tragedy was reported and dealt with by CAAPD and that was dealt with by an existing member of CAAPD with some assistance from a case investigator so to that extent that particular investigation was dealt with within existing resources.

Q. So that was absorbed into the existing workforce, the team?

A. Yes, I would say it was.

Q. And was that one of the principal deputes or one of the deputes?

A. It was actually one of the deputes with assistance from myself and the principal deputes, yes.

Q. But again someone who was remained part-time at that stage?

A. Yes.

Q. Right. I think in your statement SBPI 00419 -- perhaps if we could look at page 3, which is one of the answer 4. So page 3 and it's -- here we are:

"Prior to becoming involved in this case I had no experience of investigating deaths following police contact or in police custody, nor any cases where race

was a factor."

So you didn't have any experience of cases where race may have been a possible factor and was that in relation to simply police contact or police custody cases or any type of case?

A. It was in relation to police contact cases or significant investigations where race was a factor. I think I have said later on in my statement that as part of my general duties at one stage in my career as a district Procurator Fiscal I was aware of cases that had a race element in my own jurisdiction and there was a process within the organisation as a whole for monitoring those and ensuring compliance with policy so I had dealings with those, but in relation to significant investigations and in particular deaths investigations or deaths with the police -- following police contact, I had no experience of that.

Q. I think in fairness to you, question 173, which I think is page 104, you do say so -- that's question 173, page 104:

"I have no previous experience of racism being a factor to investigate in an investigation relating to a death in custody or death during or following police contact or the actions of on-duty police officers."

A. Yes.

Q. Do you know -- I have asked you about Mr MacLeod and Ms Campbell, do you know of the team -- your core team, if I can call them that -- what experience they had of handling an investigation which involved consideration of the factor of race? What experience did your core team have of that?

A. I'm not aware of what experience they had.

Q. Right. Looking back now, do you think that was a disadvantage? You've talked about Mr MacLeod and Ms Campbell and the limited experience that perhaps they had in relation to that. You're not aware of others. Do you think you're conscious of an absence of experience in relation to race investigations?

A. I don't recollect that being part of the discussions at the time that they were seconded into the unit. What I certainly valued -- I first of all valued the fact that there were some additional resources coming and also, as I have already said, they were -- they were resources with considerable investigative experience and, to use the term, a proven track record of carrying out sensitive investigations very efficiently and very diligently and very effectively and that was a -- you know, I think that was a consideration in the selection of them, although I don't recollect being involved in actually selecting them, but that was a consideration

that I had.

Q. If you had had the option to select who was to join the team, for the purposes of being part of the investigation in relation to Mr Bayoh, is race a factor, experience of race investigations something you would have look forward?

A. I think it would be important to either have had experience of race or to be able to demonstrate that you could acquire and did acquire those kind of -- those kind of skills and have that -- have that experience, yes.

Q. Thank you. Looking back now at the team you had at your disposal, do you think a team with more experience in race investigations might have proved to be of assistance and of benefit?

A. I think -- I think it would always be of benefit if -- if members of the team had a particular skill set that was relevant and I certainly regard those kind of skills as being relevant to this -- to this particular investigation.

Q. In relation to the investigation into the death of Mr Bayoh, who we know was a black man, would those skills have been of benefit? Looking back now, do you think that might have been of benefit?

A. I think -- I think it could have been of benefit, yes.

Q. Right. Thank you. Now, you're going to be here for the remainder of this week and your involvement which is clear from your statements as the head of CAAPD spans four and a half or more years. To make things a little bit easier for people to follow what you're telling us, I would like to break this period down into three phases or periods and I will focus my questions on each period in chronological order?

A. Thank you.

Q. So period 1 will be the period that we've touched on from 3 May when Mr Bayoh died up to what we've heard was called an interim PIRC report, so that first PIRC report, which I understand was sent to Crown Office on 7 August 2015. So it will be that period between May 2015 and August 2015?

A. Yes.

Q. That's period 1.

A. Yes.

Q. Period 2 will be from the first PIRC report or the interim report, which is 7 August 2015, up until the final or second PIRC report and that's as I -- as we've heard 10 August 2016, so it's roughly a year's period between 7 August 2015 and 10 August 2016. So period 2 will be that year between the two PIRC reports.

A. Yes.

Q. And period 3 will cover the period from the final or second PIRC report on 10 August 2016 up until August 2018 when we've heard that there was a decision taken by Crown Counsel in relation to proceedings?

A. Yes.

Q. And I won't be going into that decision as part of the Inquiry, but that period between August 2016 and August 2018, which is a two-year period, I will be exploring as period 3?

A. Yes.

Q. Now, there might be other little miscellaneous things that I have to add in, but largely that will be the structure of my questioning over the next three days.

A. Thank you.

Q. And I will remind you about those dates as we go through.

A. Thank you.

Q. So let's start with period 1, which we've already touched upon, and that's from his death up until the first PIRC report or the interim PIRC report, whatever we call it. And we have heard, just to put this into context, Mr Bayoh died at 09.04 on Sunday, 3 May. It was a Bank Holiday weekend.

A. Yes.

Q. We've heard evidence from David Green at SFIU that he

contacted PIRC at approximately 9.35 in the morning and asked them to investigate the death and he asked them to investigate the circumstances of the death, but primarily at that stage they were to look at the events in Hayfield Road and the events after the cause of death. The police at that stage were to continue to look into the events leading up to Mr Bayoh's arrival at Hayfield Road.

And we have then heard that there was no formal letter of instruction that day. The first letter of instruction from the crown came on 5 May, which I think was probably around about the day that you came back to work, sent to PIRC and instructed them at that stage to take over the entire investigation, both the events leading up to Hayfield Road, the events at Hayfield Road and the cause of death.

A. Yes.

Q. And I think we do now have that letter on the play list, COPFS 02539, and this is a letter written to Irene Scullion, head of investigations, it's dated 5 May 2015 and if we look at the top you'll see that the heading is:

"Crown Office. Mr Stephen McGowan, Procurator Fiscal, Major Crime & Fatalities Investigation."

And if we look down the letter refers to Mr Bayoh

and, as you've pointed out, it refers to section 33A of the 2006 Act.

A. Yes.

Q. And it's a form -- to formally confirm the request made on 3rd, which was two days prior, that PIRC carry out an investigation into the circumstances surrounding the death of Mr Bayoh. And then it specifies the circumstances leading up to the incident and then the incident itself. And at the end it says:

"My colleague Les Brown, head of the Criminal Allegations Against the Police Division, will be the senior fiscal with oversight of this case and will bring in such assistance from Crown Office as required."

And if we carry on to the bottom, we will that there's a signature from Mr McGowan. So that was the first formal letter of instruction. Were you given a copy of this?

A. Yes, I think I was.

Q. Thank you. And thinking about this period of time, we're calling period 1, I would like to ask you questions around the sort of five procedural obligations under an Article 2 investigation and the first thing I would like to ask you about is independence.

A. Yes.

Q. We're focusing on this period of time when you've become

involved, you're head of CAAPD and I want to ask you some questions all related to the issue of independence, which we know is important under Article 2.

So I would like to ask you about the independence of PIRC from Crown Office or what the relationship is between PIRC and Crown Office. Could we look at SBPI 00419, and I'm interested in answer 14 on page 9. So it's page 9 and it's an answer 14. Here we are:

"I do not consider that the Act envisages that Crown Office are responsible for the supervision of PIRC in relation to their day-to-day investigations as this would call into question the role and operational independence of the Commissioner. The fundamental relationship between crown and PIRC is set out in the Act and provides that the Commissioner must comply with a lawful instruction issued by the appropriate prosecutor under section 33A, but I do not consider that this provision envisages supervision of PIRC in relation to the discharge of their function and responsibilities. Essentially my view is that Crown Office can direct the PIRC to investigate in a similar way that it does with the police, but does not seek to prescribe how to achieve this, nor does it micromanage investigations."

Now, I'm interested in this paragraph. We've heard from a number of witness who talk about this

relationship between PIRC and the crown and I'm interested in your perspective.

We know that PIRC were only set-up on 1 April 2013 and we have heard evidence about how this investigation into the death of Mr Bayoh was a significant investigation and can you explain to the Chair how you saw the relationship with PIRC. You've mentioned it as being akin to the -- with the police but can you help us understand.

A. Of course or I'll try.

Q. Thank you.

A. I do think I say at one point in my statement that I considered that at this stage the relationship was relatively undeveloped and that to some extent is my perspective at this stage. I'm also bringing to bear experience over the whole of my time in CAAPD and I think I probably was reflecting that in that particular answer. I consider that the crown has obviously got responsibility for instructing the PIRC to carry out an effective investigation. But I consider that the PIRC has I would term it a wide operational discretion as to how to carry that out.

One of the terms that I do remember Frank Mulholland using was that his expectation was that PIRC would follow the evidence and I took it that he clearly meant

in respect of that the PIRC didn't need to go constantly going back to the crown to ask for authority, should we look at this? Should we look at that? I considered that PIRC did have a degree of independence and operational responsibility and statutory responsibility to carry out an effective investigation, whatever that might mean in relation to the particular facts and circumstances of any investigation that they were required to carry out and for that reason when I say that I didn't consider that it was for the crown to micromanage an investigation, that it would not normally be for the crown to instruct how the PIRC should carry out its investigations, especially at an early stage in the investigation.

As the Inquiry will be well aware and I suspect you will want to explore this, that somewhat changed following the submission of the first or the interim report where detailed instructions were given, but in respect of the general instruction that was given to PIRC to investigate the tragic death of Mr Bayoh, that is why I do not consider that it is the role of the crown to micromanage the investigation or to supervise each and every one action that the PIRC takes and, in generality, I think it is for the crown to instruct the PIRC to investigate and that the PIRC has a discretion

as to how to carry that out, clearly looking to the principles of Article 2, and in particular to carry out an effective investigation.

Q. Was it your view that you were really giving PIRC free reign to use their experience as investigators to, as you say the Lord Advocate put it, to follow the evidence and carry out their own investigation?

A. I don't know that I personally would use the term "free reign", but I do consider that the PIRC required to address what is it that we need to investigate here and I know there was a general instruction in respect of it, but it was implicit in that, I consider, that it would have to be effective and it would have to examine the most obvious things that were relevant to that investigation, including, just to take as a generality, the use of force and the circumstances of that. Now, that was not specified in the instruction to PIRC, but I think it would be inconceivable that that could not form part of the consideration of an effective investigation.

Clearly, independence was a relevant factor and that means, to my mind, that the investigation must analyse and consider what is important and come to some form of conclusion as to where the investigation is going and also that at the early stage of the investigation,

especially of this type of potentially complex and very sensitive investigation, the situation is relatively fluid. And so when I say to draw on their investigative expertise, the PIRC's investigative expertise to my mind does draw on the kind of skill set that the police bring to an investigation and the reason that I mention the police is that technically the crown will not be involved in micromanaging a police investigation but will rely on the investigative skills that the police have to prepare and submit a report which was then for the crown to consider as part of their responsibilities and, if necessary, to instruct it further inquiries to direct on the areas that further Inquiry is required, but not typically in my experience to prescribe how to go about doing that.

Q. Thank you. We've heard evidence, obviously Mr McGowan in his letter said you would provide assistance from Crown Office. Perhaps we would look at and, again, I'm not sure if this is on the play list, but Billy Little's statement to the Inquiry, SBPI 00421. No. We can come back to that.

But to summarise we may have heard some evidence from witnesses from PIRC who said they had higher expectations of Crown Office, that Crown Office would raise issues that had been -- they had identified as

being significant and they would raise those issues with PIRC. Did you see that as part of your role to raise issues and send them to PIRC?

A. To some extent I did and I responded to PIRC, I was in communication with PIRC, to direct them to areas and I'm sure the Inquiry is -- has a number of pieces of correspondence where I have directed PIRC as to areas that they require to explore. Those were intended to reflect, to quite a significant extent, concerns that had been expressed by the Bayoh family.

As the Inquiry will be aware, I was involved in meetings with the Bayoh family from an early stage and I think I have said in my statement that I was aware of the profound effect that the death of Sheku Bayoh had had upon them.

And so when I was communicating with PIRC, I would on a number of occasions communicate the concerns of the family as to areas of the investigation that they considered were important and that was one of what I thought was one of the appropriate actions that I could take. Having said all of that, that came from the fact that the crown were meeting with the family and in regular dialogue with their solicitor, even from the early stages, but I would suggest that that doesn't absolve the PIRC from engaging and listening to the

family's concerns as well, but I do think a dynamic developed during the course of this Inquiry whereby the crown was relaying the concerns of family and asking that that either be incorporated into the PIRC's general investigation or directing them to specific areas that required investigation.

Q. Thank you. Could we look at page 5 and this is in response to question 9. There we are. And you say here I think slightly further down, keep going, please -- no, go back up. I'm looking for a section that says:

"It was important not to police any limitation or restriction on the scope."

Here it is. It's just below halfway down that page. About halfway:

"The approach recognised that it was important not to place any limitation or restriction on the scope of the investigation at an early stage in the process. The crucial fact was that this was a crown directed investigation to distinguish it from other PIRC investigations, including requests by SPA or Chief Constable to investigate serious incidents or where the Commissioner considers it to be in the public interest."

So you felt at that stage it was important not to place limitations or restrictions on the scope of the

investigation and was that what you were saying earlier that you were not providing a very strict framework in which the PIRC investigation was to be carried out?

A. Yes, certainly not at an early stage and I was mindful of the fact that although I was not involved in the letters of instruction, I don't recollect being consulted or drafting it, it was already done by the time I became involved, clearly, as I have said, this was a general direction to investigate the circumstances that was at a very -- it was at an early stage I would say because it occurred -- same day PIRC were involved as the incident and that I think was consistent. A general direction -- I appreciate this will be a matter for the Inquiry as to whether a general direction was appropriate, but my colleagues obviously considered it was appropriate and I was mindful of that and I considered that it gave PIRC considerable scope to employ their investigative skills and to, I suppose, consider, reflect and refine on those as -- as information and evidence was gathered and assessed.

Q. And I think later in your statement you say you saw your role as providing PIRC with advice and assistance as required?

A. Yes, and I think my general approach, I think my general approach to work is to try to assist in the effective

investigation and I would see that as my role in relation to PIRC. There are questions later on that I won't approach at the moment where it talked about operating responsibilities and I do consider that there are operational responsibilities, but in general I think it's unhelpful to refuse to engage in respect of it. So if I was asked for a view, I consider that I would try to be as helpful as possible, but recognising also that it was sometimes not for the crown to give assurances to PIRC or to give authority to PIRC to approach things in a certain way or to obtain evidence. That would not, I consider, be for the crown to do in normal circumstances, but I would, as I say, attempt to be as helpful as possible if PIRC did have questions and I would either consider those myself or in most cases would share those with others, other senior colleagues, and we would take a view in respect of that and when crown counsel became involved, that generally was my approach as well.

Q. So at this stage in the early stages of this investigation, you have told us how you had limited involvement with PIRC at that time or in terms of your experience of PIRC it was limited at that time. This was the first PIRC report ultimately that CAAPD had obtained. You've mentioned in your statement and you've

mentioned today about the experience of PIRC and their investigators. How satisfied were you at that stage that the PIRC investigators were experienced and sufficiently experienced to undertake an investigation into the death of Mr Bayoh or was that an assumption that you made?

A. I saw no reason to question their skill set at that stage and to some extent autumn this was clearly going to be a demanding investigation, it was this type of investigation that PIRC was created for in my view.

Q. Were any other issues raised with you by PIRC questioning whether they had the skill set to investigate the death of Mr Bayoh, any concerns raised with you?

A. No, I don't recollect any, and also, as I said at one point in my statement, and I don't know how relevant this is, but at that time, PIRC, and the Commissioner in particular, were in active dialogue with the crown and the Lord Advocate looking to extend the range of cases that they considered should be referred to PIRC as a primary investigator and those included cases of some complexity and sensitivity, in particular allegations of a sexual nature, but that was -- you know, I mention that because of the general background so as opposed to any suggestion that PIRC didn't possess sufficient

skills that PIRC were looking to expand the range of investigations which they considered they should handle and by implication considered that they should be handling.

Q. We've also heard evidence about the resources available to PIRC at that time and this is prior to the M9 events. Were any issues raised with you about pressure of resourcing the investigation into Mr Bayoh's death?

A. No, I don't recollect any -- any exchanges or information being conveyed in that respect.

Q. Could we look at page 21 of your first statement and this is in response to question 34. It's page 21 that I'm interested in. Here we are. Can we look at the next paragraph, please. There's a section that talks about -- you'll see it towards the bottom of this page:

"Both myself and others in Crown Office were in a position to lend assistance and advice to PIRC where required or requested but care had to be taken at an early stage in the investigation not to risk usurping the role of the Commissioner as independent investigator who will be reporting to the crown."

I'm interested in this use of "usurping the role of the Commissioner". Can you explain what you meant by that?

A. I think what I meant in relation to that was

the Commissioner had a role, and I consider had an important role, in respect of the conduct of an investigation that was being carried out by the PIRC and that my expectation and I think the expectation of others would be that senior people, if not the Commissioner, but the Commissioner, you know, had experience in relation to these types of investigation, would bring their investigative and professional skills and that rather than the crown issue a list of detailed instructions at that stage, that it was appropriate to allow PIRC to carry out the investigations as they saw fit and to submit a report to the crown and thereafter for the crown to assess whether they could proceed on the basis of that report or whether further investigations were required.

So when I say "usurping", I think I'm referring in particular to the stage prior to the submission of a report by the crown where I do consider that the Commissioner and other senior investigators have an important role to play and can also bring a skill set which is different to the skill set which I hope that the crown can bring to the -- to the investigation.

Q. Would it be fair to describe the relationship as you understood it as to be one at arm's length or that the crown were taking a light touch in relation to

instructing PIRC?

A. Well, if the PIRC had asked for advice in relation to a particular aspect, then I think that I'm confident the crown would have responded, they would not have said no, this is -- this is not for us. We would have responded in hopefully a constructive and a helpful way, but I don't recollect any correspondence or exchanges to that extent prior to the submission of the first report.

Q. So prior to submission of the first report do you remember anyone from PIRC asking you to provide more direction in relation to how the investigation should be conducted?

A. I don't recollect in relation to the -- how the -- the investigation should be constructed. I do recollect and I have seen some -- some general inquiries or looking for reassurance in respect of an approach that was to be taken. I recollect an approach in respect of some of the material that had been gathered, in particular a mobile phone. That was -- to my recollection that was the level of approach that was requested.

There were however meetings at -- well, there were meetings at Crown Office and I can recollect that there were meetings that involved the Lord Advocate and that the Commissioner was present in respect of those so there was -- there was discussion at that level, but I

don't recollect any direct approach to me asking for specific direction I don't think.

Q. Later in your Inquiry statement you say that after the first report from PIRC, and we will come on to that period later, but you took a more directive approach. That was a phrase you used in your statement.

A. Yes, it is.

Q. But so is it correct to think you did not take a "directive approach" in this first period to the PIRC investigation.

A. I used the term "directive" because what I did at that stage was I -- that I was involved in carrying out -- along with others, but very much myself -- in carrying out a review of the PIRC report an analysis of what I requested required to be done. I shared that with other senior colleagues and I did share that with the Lord Advocate, and there was quite intensive discussion at that stage as to what still required to be done in order to progress the investigation and I used the term "directive" because clearly, and the Inquiry will be aware of this, there was more detailed and directive instruction given as to the areas that required to be further explored and that is --

Q. We'll come on to that later, but that's not the approach you took initially.

A. I wasn't asked, as I recollect, for any specific direction and the PIRC were clearly preparing the report and I know that they were waiting on the submission of statements, but when they received the statements in June there was an expectation that the PIRC would be reporting in fairly short course the results of their investigation and that they did so, because it was August when the crown received that report.

Q. Looking back now, do you think there would have been some benefit in the crown taking a more directive approach in that first period between May 2015 and August 2015?

A. I think that there was -- there was potentially scope for doing that, that the overall strategy on approach, that would have given an opportunity for input at that -- at that stage in respect of the overall strategy and approach and, with hindsight, clearly the overall strategy and approach was of importance in respect of this -- in respect of this case.

But it is difficult to do that in isolation before one actually sees the results of the Inquiry and that is why I do come back to the point that you're only seeing the results of the Inquiry when the report is submitted.

Q. And so would you have had concerns to come back to the issue of independence if you had been given -- been

taking a more directive approach at that period between May and August 2015? If you had taken a more directive approach during that first period between May and August 2015, would that have then given you cause for concern in relation to the issue of independence?

A. I'm sorry. Do you mean the independence of the PIRC?

Q. Yes.

A. Well, I consider that the independence of the investigation as a whole is the important thing and therefore if the crown were in a position to lend assistance, I think that that would be something that would have been -- if we had been approached, that would have been done, but I wouldn't have concerns about interfering with the -- with the independence of the PIRC, because I consider that the obligation on the PIRC was to be independent and it was the same obligation on the crown to be independent to some extent we were working for the same ends. We both had an interest in ensuring that the investigation was effective.

Q. Okay. Thank you very much.

Would that be an appropriate moment?

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

(11.34 am)

(A short break)

LORD BRACADALE: Ms Grahame.

MS GRAHAME: Thank you. We've heard evidence about the postmortem which took place on 4 May 2015 and so this is the day before you became -- had the meeting with Mr McGowan and started providing oversight. We've heard that Bernie Ablett, who was a fiscal, was present.

A. Yes.

Q. The crown we've heard organised the postmortem, I understand through the SFIU, the Scottish Fatalities Unit?

A. Yes.

Q. In addition, PIRC -- people from PIRC were present, investigators, and at that time PIRC -- in terms the instruction from crown, PIRC were in charge of investigating the cause of death?

A. Yes.

Q. The police were still in charge of investigating events leading up to Mr Bayoh's arrival at Hayfield Road, but that didn't involve the cause of death which was the PIRC part. We've also heard evidence that neither PIRC nor Mr Ablett for the crown expressed any concerns about the police being present at the postmortem.

Now, we've obviously been talking about the period 1, talking about this early stage. We are talking about Article 2 and the independence requirement in terms of Article 2. I'm interested in your views about the

presence of police -- members of Police Scotland officers at the postmortem which was being carried out at that time. So the presence of the police at the postmortem?

A. Yes.

Q. Do you have any concerns about that?

A. Yes, I would. Going back to Article 2, Article 2, amongst other things, in respect of independence requires no organisational or hierarchical connection between the investigators and those being investigated.

I think that there is a risk, a potential risk, in relation to how that would square with those who the organisation, which is itself being potentially investigated and its members are being potentially investigated, being present during the early stages of an investigation where important information that relates to obviously the cause of death, but how that might relate to the -- how that cause of death came about, that there is a risk that that would be compromised, that independence would be compromised.

Q. Thank you. And then we've also heard evidence that at the conclusion of the postmortem that the then lead investigator from PIRC discussed with one of the pathologists about the cause of death. It was an early stage at that point, but in particular discussed whether

blunt force trauma had caused the death -- blunt force trauma to the head.

And we've heard, and I'm summarising here, we've heard a number of witnesses in relation to this, that information that blunt force trauma to the head had not been the cause of death was later shared with the officers who had attended Hayfield Road and at that stage those officers had not yet given statements. They had yet completed use of force or use of spray forms. There was no paperwork had been completed at a point.

And I'm interested -- we've also heard that the lead investigator authorised that sharing of information from the pathologist for the purpose of getting statements from the officers. We've also heard that the permission was not sought from the crown or consent was not sought from the crown to share that information. Do you have any concerns about that?

A. I think I was asked about that in my statement. I would have concerns for the same reasons, as I explained in my previous answer, that there would be a risk that the provision of information could affect the approach to the giving of statements and in particular the information contained in those statements.

Q. And again, thinking about Article 2 and independence, was that a concern with that sharing of information from

the pathologist through PIRC authorising the sharing with the officers?

A. Yes. I think there is always great care has to be taken in the sharing of any evidential information during the -- during the whole of an Inquiry, but particularly in the early stages where it has the potential to affect critical stages of it and one critical stage would clearly be the provision of statements, the accuracy of those, and whether they have been affected by any information that has been provided where it shouldn't have been provided, if I can put it like that.

Q. We've also heard that information regarding the postmortem was shared with those officers prior to -- or we've heard evidence to this effect that it was shared with the officers prior to being shared with the family; do you have any concerns in relation to that?

A. Well, I would have concerns from a number of respects. First of all, I consider that those who are bereaved are entitled to learn of significant information in advance of -- in advance of others. I think that type of information has to be conveyed sensitively and that clearly the -- that has got the potential to affect the way that the family consider that they are being treated. It would affect, I would suspect, the way that they would view the fairness of the procedure, and

affect the overall confidence that they should have and are entitled to have in the independence of the investigation.

So I would have concerns from a number of respects, including a basic human response that that certainly does not sit right and that they would be well entitled to feel upset and let down in respect of that.

Q. Thank you. Sticking with the independence issue, I would like to ask you some questions about other evidence that we've heard, that PIRC itself, the organisation, was resourced by a large number of former police officers, particularly from -- in relation to this investigation from the Strathclyde area. Do you have any concerns about independence in light of that, that PIRC carrying out an independent investigation for the crown in relation to the death of Mr Bayoh yet was populated by a large number of former officers?

A. I think that's probably quite a difficult thing to assess. What I would say is that -- I would think personally that there has to be a recognition as to a potential conflict and that at an organisational level there would have to be processes, procedures, in place, and that the organisation at an organisational level would require to address that.

Having said that, I think I do recognise that where

one requires a specific skill set, and in particular an investigative skill set, and I think in relation to what -- if you're investigating the police, on one review the best people to investigate the police are those who have experience of policing, but I do think that there would require to be a much wider consideration as to how that can be dealt with and assessed at an organisational level through the mix of stuff, through the checks and I suppose checks and balances within the organisation, organisational values, quite a wide range of things, but I do think it would have to be a consideration.

Q. I think in your statement, and I won't go to the section at the moment, but you were referred to an email from Mr McGowan which was dated 12 May 2015 where concerns were expressed about PIRC requesting statements from officers who had been involved in the incident through Police Scotland, so the PIRC were requesting statements from the individual officers but through Police Scotland. We've heard evidence that they didn't provide statements until the 4 June, a later date. Can you share any concerns that you had with this part of the process that PIRC are asking Police Scotland to get statements from the officers?

A. Well, I -- I think I said in my statement that I did

have concerns as regards that approach because my view is that it gives the impression and it would be an unfortunate impression and I think a very mistaken impression where you are trying to -- it's important that you assess your independence that in some way you require to go through the organisation which in effect is being investigated in order to obtain essential information for your investigation. It introduces an unnecessary layer but I would suggest a very undesirable layer in respect of that, because I consider that it implies that the organisation -- the police have some measure of control over the way that such information is provided.

Q. In your experience, what would your preference have been in relation to PIRC making requests for statements from the individual officers?

A. Well, I -- from my perspective, and I think also from Stephen McGowan's, his concern was that going through the officers created that impression and that in order to assert independence -- sorry -- to assert independence there requires to be an approach directly to the officers. They're the ones who are being asked to give statements and that there doesn't require to be any organisational filter applied to that.

And even if the officer said, which was anticipated

at the time of that email because I did look at that email when I was preparing my statement, the statement would probably be "I am not providing a statement", at least it would be a statement to that effect that was provided directly to the PIRC investigators.

Q. I would like to ask you about another situation that we've looked at and you comment on. This was at a later period, so I'm slightly moving out of period 1 and this is a minute in around November 2017 and you say there was a sense of frustration in your approach that PIRC inquiries were being conducted by making requests to Police Scotland for documentation regarding training, and standard operating procedures. So this is later.

But they were being referred for approval to senior officers from Police Scotland. Was this an ongoing issue that you had concerns with about PIRC going through Police Scotland to seek advice -- seek information that was relevant to their investigation?

A. Well, it was -- it was -- it was the same issue, it was the same common theme, and I do remember pointing this out to I think it was law officers that I considered it was frustrating that that seemed to be another example of going through the organisation and the officer in those circumstances, to the best of my recollection, had said something like I'm seeking permission to provide

information, so getting authority to provide information, whereas I considered that that was -- that was something that shouldn't be happening because PIRC have got a statutory -- a statutory responsibility and have a number of -- have a number of avenues open to them to obtain information directly so, yes.

Q. Did you point this out to PIRC?

A. I don't recollect that this was ever specifically highlighted to PIRC. In relation to the provision of statements, the focus at that time was actually to secure the statements rather than ask PIRC to obtain statements that would effectively say "I'm not providing a statement" so that was the focus at that time.

The purpose of my memorandum to the law officers was to point out my -- as I say, the sense of frustration and that this was an example. I have no knowledge as to whether anybody else pointed this out to PIRC at a later stage. It was something that perhaps could have been included in any review of the case, but I'm not aware as to whether it was pointed out at an organisational level.

Q. I'm interested in whether and to what extent you think PIRC had the authority to go, first of all, direct to the individual officers and ask statements. Do you consider there to be any particular authority that was

required or particular instruction required that gave them the authority to do that?

A. The legislation provides that the PIRC have the -- have the authority in a crown-directed investigation of a constable and applying that, applying that similar consideration, they have the authority to approach and obtain information from witness directly rather than going through the organisation. I don't know what the motivation was in respect of it, whether it was deferential or otherwise, but I considered that it was worth -- that it had the potential to create an impression that PIRC in some way, shape or form had to go through the organisation which it was in effect actively engaged in investigating.

Q. And was it your view at that time that police were witnesses and not suspects?

A. Yes.

Q. And then in relation to the PIRC authority or power to obtain standard operating procedures or SOPs, did you consider that PIRC had the authority to seek the SOPs and go direct to whatever department retained those?

A. Yes, I did.

Q. And was that on the same basis as you have just explained?

A. Yes.

Q. Can I move on. Still dealing with this first period and still dealing with the issue of independence -- no, but moving on from independence to the second procedural obligation under Article 2, which is adequacy, and I would likely to ask questions around that procedural obligation.

So we've heard that the investigation on behalf of the crown begins with the instruction to PIRC. They're an independent body. And are they -- they're carrying out the investigation on -- ultimately on behalf of the crown, on instruction --

A. Yes.

Q. -- of the crown. You've talked about the instruction being under section 33A. There was no distinction drawn initially between B1, investigation into the circumstances, and B2, more criminal focused?

A. Yes.

Q. As far as you were concerned, I'm interested in whether you feel that made a difference to PIRC, because we've heard two different answers on this. So the Commissioner, Kate Frame, said she didn't think it made much difference to PIRC the fact that B1 or B2 distinction hadn't been made in that letter of instruction, but the lead investigator on 3 May, who was Mr Keith Harrower, said that those were two very

different referrals requiring a different response and a different legal framework.

Now, it may be in relation to that response that he saw these two differently or it's possible that he was referring to crown-led and Chief Constable directed?

A. Yes.

Q. But as far as you're concerned, whatever the Chair makes of the different answers, did you see there being a big different in terms of the PIRC investigation?

A. To state the obvious, it's under the same section. I know there are different subsections, but it's under the same section. They are both crown-directed and the powers of the PIRC are the same in any crown -- as I understand it, in any crown-directed investigation.

The potential for criminality, I considered that that was well-recognised throughout the PIRC from the early stages that although clearly the assessment was that the police should be treated as witnesses and were treated and were advised they were being treated as witnesses, in any investigation, there is the potential for the focus of that investigation and the direction of that investigation to change and I do mention that and specifically in respect of PIRC powers.

The PIRC are used to, I would suggest, the status changing, not so much in respect of section 33A but if

we go back to the memorandum of understanding, where the PIRC have a statutory responsibility to deal with and review complaints handling, and those are complaints about the conduct of the police that are assessed as not amounting to criminality, there is a clear understanding on the part of the PIRC that -- that if they come across information that suggests that a crime may have been committed, they immediately refer that to the crown.

And in my experience, as a head of CAAPD, that happened on numerous occasions. So PIRC were used to the status of investigations changing and it requires a constant, I would suggest, assessment of information to consider whether the status of the investigation has changed by the provision of information and that could have potentially happened in any -- in this case or in any case depending on what information comes out.

Q. Thank you. I would like to look now at a letter you wrote on 11 May 2015. So it's COPFS 02833A. You'll see this is a letter from the Criminal Allegations Against the Police Division to Kate Frame, PIRC, on 11 May 2015. And if we look to the bottom, we'll see that this is written by you. There you are, the head of CAAPD.

A. Yes.

Q. And if we can go to the beginning. Now, it's my understanding this is the first letter that you actually

wrote to PIRC. You can tell me if that's wrong but -- so you refer to the ongoing investigation.

You say a letter was received by Crown Office from the solicitor acting for the family of the deceased and there was mention there that they had instructed Professor Busutil regarding inquiries and then you say in paragraph 2:

"I have been able to advise the solicitors that no police casualty surgeon was in attendance, no photographs were taken of the body of the deceased at the scene of death by the authorities. However, I would highlight the following questions that have been raised by the solicitor in order that these can be covered in your investigations and so that there can be ongoing discussions with the crown regarding appropriate disclosure."

I think at that time, there had been a request for disclosure from the family through their solicitor, partly in relation to their instruction of Professor Busutil, who was a pathologist.

A. Yes.

Q. And was this one of the types of letter you mentioned earlier before the break where concerns raised by the family were shared by you with PIRC?

A. Yes.

Q. And if we can look at these bulletpoints. I will read them short, but there's a number of points raised: a request for a detailed narrative of events immediately preceding the death, past medical history of the deceased should be fully looked into, particularly with -- there's mention there of sickle cell disease and a history -- any history of mental health problems should be looked at, recovery of tablets is mentioned, observation that the deceased collapsed in the course of being arrested, handcuffed, leg restraints, and a query as to why this was necessary, how many officers were involved and what procedures were used to enable restraint. An observation that he was actively resuscitated on-site and in hospital. There were various puncture marks from needles and a query raised in relation to how good the resuscitation was. Whether anything removed from inside his mouth when he was being resuscitated and observing damage. And then in respect of the autopsy examination a number of separate points raised there. Observation of petechial hemorrhaging in the eyes suggestive of asphyxia. Observation there was no evidence of upper airway lumenal obstruction. Raising issues of constriction of his neck. Observing that there was evidence of a terminal physical struggle, abrasions to his mouth and querying whether the level of

restraint by the officers was justified and commenting on restraint and impact of that.

So these were all issues that had been raised by the family. Was this in relation to a meeting with the family that the crown had already had or you had been involved in or was it through correspondence?

A. I'm sorry. I can't remember.

Q. All right. We'll come on to meetings with the family at a later time. Now, you have said that -- at the bottom there you wanted to ensure that PIRC were sighted on these issues as the Inquiry proceeded and was this an example of you alerting PIRC to the family's concerns.

A. Yes, it --

Q. Were no other letters from you saying we want you to look at or we're instructing you to look at these various aspects that are raised here?

A. To the best of my recollection, this was an example of me reflecting back concerns of the family. Looking to the date of the letter, I am pretty sure this was at the stage that the Inquiry, and I make reference to that, had instructed their own expert. So to some extent I think the purpose of this letter was twofold. It was to get clarification of certain factual matters that presumably Professor Busutil or certain of the family and their solicitor requested would assist

Professor Busutil in their inquiries on behalf of the family, but also, as I suppose I put it at the end, I wanted to sight PIRC on these concerns so that they were aware of them and so they could give appropriate consideration to these issues at that early stage of their Inquiry.

Q. If there is a perception that to some extent the family were providing more direction to PIRC than the crown in relation to issues that were of concern to them, would you have any comment to make about that? Were you concerned that the family were giving more direction to PIRC or comment to PIRC than the crown were?

A. I think it's entirely understandable that when the investigation was with PIRC that there would be issues being raised by the family, either directly or through their solicitor, with PIRC as regards issues that they wished investigated, but what I do recollect obviously is that a significant amount of concerns were being expressed by the crown and that tended to result in sighting the PIRC of those or on occasions for directions to investigate those areas on behalf of the family.

Q. And these were on behalf of the family?

A. On behalf of the family having regard to the obligation to involve the family, but also to ensure that PIRC were

in a position to so far as possible answer concerns that the family had that were requested appropriate and were relevant to the investigation.

Q. Thank you. I would like to move on to -- we've heard evidence about a forensic strategy meeting and that took place on 12 May 2015 and there are minutes for that meeting, which we can have on the screen, where you are specifically named, if I'm right in thinking, and I think you say in your statement you attended that forensic strategy meeting?

A. I did.

Q. And you say that you had very limited involvement in the instruction of forensic tests and analysis. You say at one point in your statement:

"I had no experience of receiving SOCO statements in PIRC directed investigations."

So can you explain what you meant by that, you had no experience of receiving statements?

A. I think I was asked a specific question.

Q. Right.

A. In my -- in my request for a statement as regards SOCO statements and that -- I was asked about the provision of those types of statements, typically scenes of crime statements, and I simply have no experience of receiving those directly. In police cases they normally go to the

police and, you know, in a PIRC-directed investigation I don't recollect ever being engaged with that at all. So that's why I put it that way, but I recollect I think I was specifically asked about those.

Q. Let's have the minutes on the screen, please, PIRC 04161. We have look at the these before, but we'll put them up.

And you see this is minutes for that meeting, 2.40, Tuesday, 12 May and a number of people are present, I think it was chaired by John McSporran, who we've heard at that time was a senior investigator with PIRC and was the lead investigator ultimately with the investigation in relation to Mr Bayoh. And Mr Little was also present and then we also see "COPFS Les Brown, head of CAAPD".

I think you're mentioned specifically at the minutes relating to agenda items 4 and 7. So 4 it says that you spoke briefly about the role of Crown Office in respect of the investigation of deaths and the tasking of PIRC to undertake an independent investigation and report their findings to Crown Office.

And then at 7 you were mentioned and you made a request in relation to a personal radio that had been taken from PC Craig Walker which appeared to have a bloodstain on it, submitted for examination and you

asked for the examination to establish if the blood could be identified as contact or spray in nature and DNA profile would also be required.

If we can go back to the -- near the top of that, and we'll look at the introduction. So we see that -- we see the introduction:

"Number 2. Welcome and purpose. John McSporran opened the meeting and thanked everyone for attending. He outlined that the purpose of the meeting was to discuss and agree the prioritisation of the forensic examination of productions seized during the PIRC investigation into the death in police custody of Mr Bayoh on 3 May."

We've heard evidence that there were a number of areas covered in this meeting and I'm interested primarily in two of those areas and the first relates to the knife that was found at Hayfield Road some distance away from where Mr Bayoh first had contact with the police. Do you remember the discussion at this meeting about the purpose of forensic examination of the knife? Do you remember anything about that?

A. I'm sorry, I don't.

Q. You don't. Was there any other explanation given by Mr McSporran or anyone else on behalf of PIRC as to what they were trying to achieve by examining the knife?

A. I am struggling to remember any detail of that discussion at all in relation to that. I would think that it might have been the case that they were looking to see whether there was any link to that knife that you could prove a link to the incident and where the knife had been obtained from.

Q. Right. And then the other thing I'm interested in, and you have been asked about this in your statement, is Nicole Short's vest or body armour?

A. Yes.

Q. And I think you say in your statement you weren't involved in the direction to the SPA in relation to any fingerprint examination of her vest and you were not aware that this might hinder further examination?

A. Yes.

Q. We've heard about the order in which certain tests are carried out.

A. Yes.

Q. We've heard evidence that when fingerprint testing is carried out a particular substance is used which is dark and can cause the appearance of material to alter. And we've also heard evidence that on Nicole Short's vest there was a mark sort of described as possibly being a footprint or a footmark and that was to be analysed.

Do you recall any part of the discussion at this

forensic strategy meeting in relation to Nicole Short's vest about whether fingerprint examination and testing was required in the circumstances?

A. No, I don't recall any discussion in respect of that.

Q. Do you remember if there was any consideration given or advice given by the forensic scientists about the order of fingerprint testing in relation to the vest and whether it should be done at a later stage primarily?

A. No, I don't recollect any discussion in respect of that. I obviously -- in preparing my statement I realised why the Inquiry is interested in this and thinking back, I would think if there had been discussion that had indicated or made clear that the order of the examinations could affect whether another type of examination could have been carried out that I would have remembered that and that I, you know, there might have been expected to have been some discussion as to, you know, whether that was right, whether it was appropriate and to some extent, which was the more important, if you had to choose between one or the other.

Q. We certainly saw in the welcome/purpose section that the purpose of the meeting was to discuss and agree the prioritisation of the forensic examination of productions, but you don't remember any specific

discussion about prioritising fingerprint evidence on Nicole Short's vest?

A. No.

Q. From the perspective of the crown, could you see any benefit in fingerprint examination of the vest worn by Nicole Short at Hayfield Road?

A. Well, it would depend obviously on the result of that and to some extent, you know, the more information that you potentially have you can factor that into your investigation.

Q. Right. Was there any discussion about the order of tests?

A. No, I don't recollect any discussion about the order of tests and, in particular, whether it would affect the ability to undertake further tests.

Q. Was there any discussion about a possible stamp having taken place at that time and that a stamp in relation to Nicole Short who was wearing the vest?

A. I thought about that, because obviously that -- a stamp during the incident was -- is of interest to the Inquiry. I don't -- I don't recollect any mention of that at that meeting. Having said that, there must have been some reason to suggest that type of examination of the vest.

Q. Right. And was any consideration or any part of the

discussion at the meeting about the possibilities of soil analysis by forensic experts in relation to the vest and in particular a mark on the vest?

A. I don't recollect any and I -- I don't think there was. So my answer to that is I do not recollect any discussion about potentially carrying that out.

Q. In terms of the crown rule, and you were present at this meeting, can you explain to the Chair what your -- what the purpose of your presence at this meeting was?

A. I think it was expected that my presence was, first of all, to be involved in this process as the head of CAAPD. I think in addition to that, to ensure that no obvious investigative -- investigative approaches were not being considered and also I think to have some input, because clearly I did have some input in respect of whether it would be possible to examine whether it was dropped blood or spray blood because that might be of assistance in indicating what was going on at the time that that was taking place.

Q. Had you been -- so this is 12 May. Had you been briefed by PIRC as to where they were in terms of their investigation into the circumstances that had taken place at Hayfield Road?

A. I don't recollect a formal briefing. I know that there were briefing documents that were circulated and shared,

but I don't recollect being briefed by PIRC as regards what stage they were at in their investigation at this point or any detailed discussion.

Q. To what extent did that lack of a briefing limit your ability to contribute to this forensic strategy meeting in relation to what they were going to do and what tests there were to be carried out and the order of those tests?

A. I think my attendance and my contribution was limited to hearing what was being considered and clearly I made a brief contribution in explaining what the role of the crown was and suggesting something that I thought you might be of assistance.

Q. Had you been given a briefing by PIRC at that point, would it have been possible for you to have given a more effective contribution at that meeting?

A. I think that might have been the case. It might have.

Q. Right. Can I look at another document, please. This is minutes from a meeting on 14 May 2015. COPFS 04609. Now, these are handwritten minutes, we have heard evidence about these, it's dated 14 May, 2015, you can see at the top right-hand corner, and we have heard that these are -- were prepared by a Lindsey Miller. Now, we have not heard yet from Lindsey Miller. It was a meeting with the PIRC between the Lord Advocate. You

see the initials on the top left.

A. Yes.

Q. Lord Advocate, Kate Frame and John Mitchell, who both are from PIRC, Kate Frame was the Commissioner, and then yourself, Les Brown; do you remember this meeting?

A. Yes, I think I do.

Q. Thank you. Now, these are obviously minutes taken by Lindsey Miller, but at this stage there's no police statements been obtained by PIRC.

A. Yes.

Q. No operation statements, not as witnesses, no forms completed, no notebooks to assist.

So this is prior to them actually giving their statements on 4 June and we've heard evidence that during the meeting the Lord Advocate talked about it being a disgrace there were no statements. Do you see the first line there? And they should be suspended and Mr Mitchell had not disagreed with that approach.

And as we go down the page, there's a comment I'm interested in your view on and it relates to interview under caution. So we'll have to keep going down. Stop, please. Do you see just above the middle of the screen the initials "JM", that's John Mitchell on the left, just below the line that's coming down this, and it says:

"May need to detain and interview under caution."

Do you see that?

A. Yes.

Q. This is a carbon copy of the Duggan scenario. I am interested in your thoughts at that time about the status of the police, because obviously interviewing someone under caution they've moved from witness to suspect, as I understand it?

A. Yes.

Q. And we've heard evidence the police were treated as witnesses?

A. Yes.

Q. Certainly up until this point. Did you have a different view about the status of the police at this stage when this meeting was taking place?

A. No, I didn't, I -- I knew that that they were being treated as witnesses, that they had apparently been advised that they were being treated as witnesses. Everybody at that meeting was aware of that and I was in agreement on the information that I had that that they would be -- they should be treated as witnesses.

There was an ongoing investigation into what had happened and you might be asking me further questions in respect of this, but I have obviously given answers in respect of the status of the police and I have given

that some thought and I have reflected in my experience as well. But in answer to your question, I knew that they were being treated as witnesses and that was something that I was in agreement with, was comfortable with at that stage, because that would maximise the chances -- the opportunity at that stage to obtain the information that the investigation needed.

Q. You do indeed in your statement say the decision to treat officers as witnesses was made prior to me becoming involved?

A. Yes.

Q. And you agreed with that assessment and saw no reason to interfere it -- interfere with it?

A. Yes.

Q. I think we have also heard evidence that the status of the officers was something that was being kept under review and it could change depending on the investigation and the outcome of that investigation and information and evidence that was obtained by PIRC?

A. Yes.

Q. Was there anything on 14 May that you were aware of that caused you to think that their status had changed from witness to suspect?

A. No.

Q. When John Mitchell proposed interviewing under caution,

what was your view on that?

A. I have to say I don't have a detailed recollection of that meeting. I don't think I provided any notes that I had taken. It looks like as if Lindsey Miller --

Q. These are Lindsey Miller's minutes.

A. -- was the note-taker, but in reading through it, and I read through it before I provided my statement, my recollection was that various options were being discussed and considered because some of the comments would appear maybe to be contradictory.

But if you move to detain and to interview under caution, you're immediately -- you're immediately giving the officers the right to remain silent, whereas the focus of the Inquiry at this stage was to try to obtain the statements and that there was -- that the statements should be provided because the officers were witnesses at that time. And as I recollect it the Lord Advocate was in agreement that they should be -- that they should be witnesses and treated as witnesses for various reasons and that at the end of all of this, although he clearly was frustrated and, you know, Lindsey Miller has noted -- I can almost hear him saying it's a disgrace he considered -- I had better not speak for the Lord Advocate -- but he was frustrated because of the effect it was having on the investigation and that he

considered that there was no reason for them not to provide statements and indeed he wrote to the Chief Constable to that effect and that ultimately was the avenue that was pursued in order to try to secure the provision of statements by the officers.

But as I say, I come back to the point that if you move to change the status and to detain, you will immediately give the right to the officers to remain silent, whereas the focus of the investigation at that point, and I think subsequently, was that they should be providing statements.

Q. And in relation to the Lord Advocate, you said he wrote to the Chief Constable to -- about the fact the officers hadn't given statements.

Now, earlier when we were talking about PIRC going through Police Scotland to obtain statements, you said you didn't know if that was deferential. What about the Lord Advocate himself writing to the Chief Constable about the failure of the officers to give statements; do you have any comments about that?

A. I think I'm risking speaking for the Lord Advocate. What I would say is that that I obviously knew that the Lord Advocate had written. The Lord Advocate was I think approaching the Chief Constable as the head of Police Scotland to point out at an organisational level

the effect that this was having upon the conduct of this investigation and to some extent it had been the subject of comment. So as I say, I don't want to speak for the Lord Advocate, but he obviously felt it was appropriate at an organisational level and I would suggest that's different from the PIRC approaching officers or approaching senior officers in order to obtain permission. The focus of this was to point out to the Chief Constable I think as the head of Police Scotland what the Lord Advocate's perspective on this situation was.

Q. Thank you. Can we move on to the next page, please, so page 2 of these minutes, and you'll see, if we can move down the page, there's a reference to Baltimore that I'm interested in picking up. Here we are. So towards the bottom of the screen we can see there that there's a reference attributed to the Lord Advocate on the left; do you see "LA"?

A. Yes.

Q. They're keen to avoid another Baltimore?

A. I'm sorry. I had better find the correct --

Q. If we look at the screen as it appears, at the very top it's Kate Frame.

A. Yes.

Q. Then "JM" John Mitchell.

A. Yes.
Q. Then "LA", Lord Advocate.
A. Yes.
Q. And there's two lines noted by Lindsey Miller in the minutes.
A. Yes.
Q. And at the very end it says they are keen to avoid another Baltimore.
A. Yes.
Q. What was your understanding of that reference?
A. Well, looking at the passage in its totality, if you just give me a second I'll just read that. Yes, there's obviously reference to previous discussions, there's mention of the Cabinet, there's mention of AA that I think probably is Mr Anwar and it clearly has been previous discussions.

I think from recollection it's a reference to a situation in America where there had been actions by the police that had caused -- well, at the very least considerable unrest in relation to it and that that was something and as I recollect it was a situation whereby the police were viewed as behaving in a way that was towards -- I think there was -- there was an element of brutality and I think racial tensions, if I'm right.

Q. Thank you. And at that time, at that meeting, were you

and others at the meeting aware that there was a concern about racial tensions, because the police had been involved with Mr Bayoh and he had died and he was a black man?

A. Yes.

Q. And we've heard that the incident in Baltimore had happened the month prior to the death of Mr Bayoh?

A. Yes.

Q. And were you aware that the family had expressed concerns about whether the death of Mr Bayoh was racially motivated at this stage?

A. I can't recollect anything specific and I'm obviously looking back to that date and what did I know before, but I'm pretty clear that the whole circumstances where we had a situation where a black man had died following restraint, interactions with multiple police officers, a good deal of media attention by that stage and comment to some extent issued and an immediate instruction to the PIRC and an investigation that was ongoing and here we're seeing discussions with Cabinet, apparently with Mr Anwar, involvement by a law officer who was clearly very much engaged and actively engaged at this stage, that was one of the main issues. And it was -- I would suggest it was clearly an issue at that stage.

Q. Thank you. I'm conscious of the time. Would that be

...?

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

(1.00 pm)

(Luncheon adjournment)

MS GRAHAME: I would like to move on to 4 June, if I may. There's a bottle of water, just feel free to help yourself. It can get quite warm in here in the afternoon.

A. Thank you.

Q. So I'm going to move on to 4 June and that was the date that the officers gave statements to PIRC. I don't know if you were aware of that in advance but that's the date that statements were taken from the officers?

A. Yes.

Q. We've heard evidence that there was some discussion on 2 June, an agreement that the officers would provide statements, and we've heard that arrangements were made within PIRC and that for a number of the officers they gathered them together at the police college on 4 June, each was interviewed by two people from PIRC?

A. Yes.

Q. That did not apply in relation to PC Paton or Nicole Short, they were dealt with at separate addresses, but the others were present at the police college and those statements were all taken on the one

day. And we heard some evidence from Mr McSporran, who was the lead investigator at the time, about the arrangements that had been put in place to take those statements. And we have also heard evidence that a witness interview strategy was prepared. There had been -- the strategy had not contained any specific questions about race and the strategy had not contained any specific questions about justifications on use of force.

We've heard a number of witnesses talk about the use of force with police officers is lawful or can be lawful in the course of their duties, but in order to be lawful, it has to be justified, and that relates to whether it was reasonable, necessary, proportionate.

A. Yes.

Q. It has to be the minimum force used to achieve their legitimate aims.

A. Yes.

Q. And they have to have either tried less forceful options and failed or consider those to have been inappropriate in the circumstances?

A. Yes.

Q. But the witness interview strategy didn't go into the justification in any meaningful way.

Hearing that now about the approach to the interview

of the police officers on 4 June, which was around over a month after Mr Bayoh had died, do you have any concerns about the absence of a witness interview strategy that contained questions about race?

A. Yes, I would have concerns about that.

Q. Tell us what those would be?

A. I consider that when an investigating authority is looking to ascertain the circumstances of an incident, especially an incident such as we were dealing with here, where there were concerns about the impact of race from a variety of points of view, but at its most basic when one considered the overall circumstances that occurred on 3 May that it would be -- it would be important, and very important, to explore issues of race in your investigative strategy when you were seeking to get an account from the officers, but also to examine not only what they did, but clearly that would be extremely important, but why they did it and what their perceptions were in their attendance and whether race played a factor in that.

Q. And equally, in relation to hearing that there was no specific questions directed to justification and the points I've mentioned, preclusion, absolute minimum force used, whether it was reasonable, whether it was necessary, whether it was proportionate, in the absence

of those types of questions in a witness interview strategy, would you have concerns about their absence?

A. Yes, I would and --

Q. Why?

A. My reason for saying that is to some extent the same kind of considerations, but when one is looking to examine the actions of police officers, especially where force has been used and it has resulted -- sorry -- I'll choose my words differently -- someone has died after that interaction, I would suggest it's absolutely critical to explore what the officers did, what techniques they employed, but also, I think equally importantly, to explore with them why they did that and what their justification and mindset was at that time, so look like looking to assess what their perception of the incident was and that -- that would be separate from what the actuality was because perception can be important.

Q. Thank you. I would like you to look at a briefing note. We have heard evidence about this. Now, this was prepared after you left your role as head of CAAPD.

A. Yes.

Q. But it's a comment on things that were happening during the time you were head of CAAPD. Could we look at the briefing note prepared by Alisdair McLeod, COPFS 02126A.

And you'll see that it was prepared by Alisdair McLeod who was in CAAPD and at that time it was sent to the then head of CAAPD, Justin Farrell.

A. Yes.

Q. Did he take over from you?

A. Yes, he did.

Q. And you'll see at the beginning the purpose of this note is in relation to detailing and time lining the work carried out between 3 May 2015, which was the date of Mr Bayoh's death, and November 2019, which was a later period of time relating to the VRR.

I'm interested at this stage, we'll come back to this later, but at this stage I'm interested in one aspect of the content of this document and it relates to page 6 and it's towards the bottom of that page and it's a chapter entitled "rib fracture". And just -- I don't know if you've ever seen this document. I'll go through it with you. And this says:

"During the analysis of the statements [that's the police statements] it was noted that three of the officers involved in the restraint had made reference to hearing the deceased fracturing a rib during the administration of CPR.

"The deceased's ribs appeared to be intact at the postmortem on 4 May [that's the date the postmortem was

carried out]. However, a fracture to his left first rib was discovered following a further examination by pathologists on 29 May 2015."

A. Yes.

Q. We've heard evidence from Dr Shearer that a subsequent further investigation allowed them to discover this fracture. That same day, Mr Brown, that's you as I understand it, advised Anwar & Company and PIRC about the deceased's rib fracture?

A. Yes.

Q. And was that -- is that correct, that you --

A. Yes.

Q. -- on that day advised Mr Anwar, or perhaps someone from his firm, and you also advised PIRC that a rib fracture had been discovered by the pathologist?

A. Yes, it was Mr Anwar I'm pretty sure.

Q. Right.

A. Yes.

Q. Thank you. And that was the same day as the pathologist discovered the rib fracture?

A. Yes.

Q. And then in his statement dated 4 June, 2015, so this is a few days later, PC Walker told PIRC he heard the sound of a rib cracking when he was carrying out CPR:

"At this time PC Walker handed over an undated

pre-prepared statement to PIRC."

We've heard from PC Walker that he had prepared a statement himself in the early stages after the events and handed that to PIRC on the day --

A. Yes.

Q. -- he gave his PIRC statement, 4 June. Notably, in this statement PC Walker made no reference to hearing a rib crack during CPR. So there was a situation where his pre-prepared statement had no reference to the rib cracking.

A. Yes.

Q. But on 34 June, when he's giving his statement to PIRC at Police College he made reference to it.

A. Yes.

Q. Then if we can move on to the next page:

"Two other officers, PCs Paton and Tomlinson, also made reference in their PIRC statements dated 4 June 2015 to the deceased's rib fracturing during CPR. Within the PIRC report medical experts instructed by PIRC put forward various scenarios as to how it could have occurred."

And I think this was an issue that the crown did go on to investigate --

A. Yes.

Q. -- at a later stage in the hope that they would provide

some clarity about when the fracture had occurred and the significance of the fracture?

A. Yes.

Q. "The crown carried out extensive further independent inquiries in relation to the deceased's rib fracture. Although the rib fracture did not lead to Mr Bayoh's death, the precognosers recognised that it's very existence may have illustrated the force and mechanism of restraint used by the officers. To that end in February 2017, the crown instructed Professor Anthony Freemont, an osteoarticular pathologist at the University of Manchester. In his report, dated 20 July 2017, Professor Freemont concluded ..."

And he came to some conclusions about the rib fracture I don't need to go into.

A. Yes.

Q. Moving on:

"The precognoscers found of interest that the information about the rib fracture, which was only made known to PIRC on 29 May 2015, was somehow potentially being explained away by three of the officers when they provided statements on 4 June 2015. After careful consideration of all the evidence, there was insufficient evidence to make any more of it, other than

to say it was suspicious and potentially called into question the integrity of the PIRC investigate at that point."

I'm interested -- it then moves on to another chapter. I'm interested in your recollection of the discussion around this rib fracture. Obviously, the timing was of significance to CAAPD at that moment. The rib fracture was discovered on 29 May and on 4 June three police officers are commenting on it in their statements that they're giving to PIRC.

A. Yes.

Q. Can you tell us a little bit about the concerns that you had about this element of the PIRC investigation?

A. Yes. Can I say right at the start that I recollect the discovery of the rib fracture and it might be of assistance to the Inquiry if I say a little bit about that. Obviously, this was some time after the initial postmortem examination and the body of Mr Bayoh had not been released at that point and the family and Mr Anwar had been kept up to date in relation to that and in the background there were inquiries by the family as well that were ongoing, but the fact that the body had not been released for that time was a matter of concern and I do recollect, and I think I said in my statement, the Lord Advocate took a particular concern in respect of

that as well. So there was -- there was -- there was an anxiety to get the body released as quickly as possible, but subject to all necessary and appropriate inquiries being carried out.

Now, my recollection in relation to the discovery of the rib fracture was that it was indicated that there was a further scan or procedure that could be carried out, but my recollection is that there was an indication that that was unlikely to reveal anything because of the extent of tests that had been carried out up until that point so that information was -- was there at that time. I recollect asking that that be done, because I took the view that it was another -- it was another legitimate part of the investigation and that even although the consensus of opinion was that it was unlikely to reveal anything, I was of the view that it should still be carried out. I did discuss it briefly with Dave Green to my recollection as well. So it was carried out, but I have to say in the expectation that it wouldn't or it was unlikely to reveal anything further.

It wasn't -- even although the scan was carried out, and I have also said something in my statement about that I took some steps to try to ensure that that procedure was carried out that so far as possible respected Mr Bayoh's dignity in respect of the movement

of the body and I did make inquiries with the pathologist as to how that could be carried out, but the procedure was carried out, the further scan, and there was an exchange of emails with the pathologist where they indicated that something had been found, but until they fully considered them, and I think also viewed the body, that it could have been what was termed a postmortem artefact, namely something that had not occurred at the time of the incident.

However, it was further investigated on that day and the information came in that day that you have referred me to that a rib fracture had been discovered, a rib fracture in a specific area, and that was the information that was available at that time so I became -- I was made aware of that and, as you've indicated, I took steps to advise a limited number of people at that time. I know that David Green was aware. I know that I advised the Lord Advocate of it immediately. I also took steps to advise Mr Anwar and PIRC were advised of it that day as well. So that is the background to the discovery of the rib fracture and, as I say, I mention all of that, because it was quite a late process and it was to some extent in my recollection unexpected that it was found.

In relation to this particular passage that was

written by Mr MacLeod --

Q. Mr MacLeod.

A. -- yes, I have seen this before, although not in this format. This was intended as a record of the work that the crown carried out so I have seen it and I was aware of this issue at the time. It had been noted I think by Mr MacLeod at a later date that there was this omission in the earlier statement provided by the officer and also the fact that it had been -- it had been mentioned after the discovery of the information. And I think that the Inquiry team as a whole considered it, I would say, puzzling that the description, which was quite a detailed description, including hearing a sound that was attributed to a rib fracture, was being mentioned in those circumstances and Crown Counsel were made aware of it as well and law officers were made aware of it as well for the reason that it was considered that it would be worthy of some investigation as to whether, and this was a hypothesis, whether there was the possibility that police officers had become aware of this by some improper provision of information and that's what I said in my statement in respect it.

So that was part of the reasons for the further investigations.

Q. In terms of your specific concerns in relation to the

PIRC investigation, and you talk about improper methods of police becoming aware, was this a concern that that improper method had been some sort of disclosure by PIRC or PIRC investigators to the officers at some stage during the process of their statement taking?

A. I said "provision of information". Clearly it would be speculation as to whether that had happened, that was the first hypothesis, and as to who. If that were to be at the case, that was a matter of speculation, but it is mentioned there because it did result in further investigation and inquiry because of the timing and because of the provision of that information at that point where it had not been mentioned in a previous statement.

As I said in my statement, it was fully explored and Crown Counsel did not consider that it was a matter that it could be taken merited further action at that stage but it was -- it informed further investigations by the crown to explore the timing and the reasoning for that.

Q. And those further investigations would have taken time of themselves?

A. They did take some time indeed.

Q. Thank you. I would like to move on to look at the cause of death. I would like to begin by asking you some questions about the framework in which cause of death is

considered by the crown?

A. Yes.

Q. And then we'll move on to the postmortem report. I will put some propositions to you and you can tell me if you agree with them. Let me just find the right page.

When the crown are looking at cause of death, they will be looking at whether there is a single cause of death or perhaps a number of causes?

A. Yes.

Q. And those causes would be said by lawyers to have materially contributed to death?

A. Yes.

Q. I think Dr Shearer gave evidence that a single stab wound to the heart will be the cause of death, a sort of straightforward one cause and that would go in her report. But there are other examples, other causes of death, which could be she described as multifactorial; you agree with that?

A. Yes, that would be the term I could use, yes.

Q. And that would be where there are maybe one or more, two, three, four, multiple potential causes which have all contributed to the individual's death?

A. Yes.

Q. And there will be another phrase that you will understand, a Latin phrase, de minimis and we have asked

a number of people about that and as I understand it, and you can tell me if you agree, de minimis is something that is completely trivial, or insignificant or not important in any way, it can be dismissed effectively?

A. No consequence I agree with that.

Q. Of no consequence and that's a concept that you will as a lawyer understand.

A. Yes, I hope so.

Q. And if something is trivial, of no consequence, insignificant, it can be dismissed and pushed out of consideration in relation to cause of death?

A. Yes.

Q. So where lawyers talk about something being de minimis it means it didn't play any part in the death, would you accept that?

A. It didn't play a significant part and I suppose can be discounted that would be.

Q. It doesn't play any significant part, it can be discounted, so it's trivial?

A. Yes.

Q. Thank you. And my understanding of the legal position is that -- and this will be a matter for legal submission. If anyone disagrees with me they can address this matter in the future.

A. The same applies to me as well.
Q. But there's a well-known case amongst lawyers called Bonnington Casting v Wardlaw where there was a claim of an employee who sustained an injury which was caused by exposure to dust and some of that dust was completely the fault of his employer. So there was a wrong there that was attributable to the employer.
A. Yes.
Q. But there was other dust and that was nobody's fault or certainly not the employer's fault, so there were two types of dust and the dust caused him an injury.
A. Yes.
Q. And the court looked at that situation where there's more than one possibly contributing factor: one is a wrong it's a fault and one isn't.
A. Yes.
Q. And it was not possible in that case scientifically to prove which one caused the injury?
A. Yes.
Q. They could never -- the medical science wasn't at a stage where they could say it was this dust and not that dust or vice versa?
A. Yes.
Q. And the court said the person claiming compensation didn't need to prove that fault caused if it was enough

that he could show that it materially contributed to his injury?

A. Yes.

Q. So if the pursuer could show that the faulty dust materially contributed, that was enough for him to win his case?

A. Yes.

Q. In terms of causation in Scotland, it's a sole cause or material contribution. That's the sort of test.

A. Yes.

Q. A contribution to a harm which is more than de minimis will be material?

A. Yes.

Q. So if it's more substantial, more than the de minimis side, which is just trivial and you put aside, then it's considered material and that could be a material contribution?

A. Yes.

Q. And that's enough for the pursuer in that case to win his case?

A. Yes.

Q. And then that legally evolution of causation was developed in a case called McGhee v National Coal Board. You'll remember that from university and beyond.

A. I do.

Q. Where there is an injury caused by two or more factors operating together, one of those, there's a breach of duty or a wrong or a fault and one isn't and it's impossible to ascertain the proportion in which either factor was effective in cause of death and in the injury, then all the person has to prove is that the faulty contribution was a substantial cause of injury.

And to make life a little bit easier for you, I have also given you a case called Johnstone v HMA, which is a Scottish criminal case. There's a copy of that on your table.

A. Yes.

Q. It's a case from 2009 from the Appeal Court and it was an authority at that time in 2015. It remains in the bench book today actually.

A. Yes.

Q. It's not necessary for a death to have only one cause and this was a murder actually. Can we look at page 247 and is I'll read it out, I'll tell you what this says. There's reference to an English case, Court of Appeal case, and a decision by Lord Justice Beldam. I am going to read this out to you.

Do you see it at the top of page 247?

A. Yes, I do.

Q. "It's not the function of the jury to evaluate competing

causes or to choose which is the dominant, provided they are satisfied that the defendant's acts can fairly be said to have made a significant contribution to the victim's death."

A. Yes.

Q. "And we think the word 'significant' conveys the necessary substance of a contribution made to the death which is more than negligible."

Do you see that?

A. Yes, I do.

Q. And then further down at paragraph 56, so halfway down that page, the Scottish Court of Appeal said:

"This English decision which we have cited are consistent with the approach to the law of causation adopted in [a Scottish case that they're mentioning]."

Then towards the middle of that paragraph, top of that paragraph, the court said:

"In the present context, the law's requirement that the wrongful act of the accused should have materially contributed to the death of the deceased is not in doubt."

A. Yes.

Q. So it's all about material contribution.

A. Yes.

Q. And then if we look at the next page, and this is

paragraph 57, halfway through and beginning with the words "the only criticism"; do you see that, paragraph 57?

A. Yes.

Q. Halfway down the page, 248?

A. Yes, I see it sorry, yes.

Q. "The only criticism which might be made of these direction ..."

It's talking about the directions the trial judge gave:

"... is that the judge did not specify that the contribution to death must be material or significant."

A. Yes.

Q. So if a contribution to death is material?

A. Yes.

Q. It's not de minimis?

A. Yes.

Q. And if it's material, it's significant?

A. Yes.

Q. Would you agree with that? Thank you.

Let us look, please, at the final postmortem report. It's PIRC 01445 and I am interested in the page 17, which is page 18 on the PDF. And this is the final postmortem report from 18 June?

A. Yes.

Q. Can we look at the sort of middle -- below the middle and it gives us the cause of death here and it says:

"Sudden death in a man intoxicated by MDMA (ecstasy) and alpha-PVP whilst being restrained."

Do you see that?

A. Yes.

Q. And if we can go back, I would like to look at the preceding paragraphs and I would like to start look at:

"Taking everything into consideration, death here was sudden in nature. In summary, there was no evidence of gross or histological natural disease that would account for death."

We have heard evidence there was no natural illness that would have accounted for the sudden death of Mr Bayoh?

A. Yes.

Q. "Toxicology revealed MDMA and alpha-PVP and these drugs could potentially have caused sudden death at any time due to a fatal cardiac arrhythmia."

My understanding is that these types of drugs could cause you to drop down dead at any stage?

A. Yes.

Q. "That said, it is recognised that restraint in itself can be a cause or contributing factor in some deaths, and given the circumstances in that this man was

restrained at the time of his respiratory arrest and postmortem examination showed petechial hemorrhages, that may represent a degree of asphyxia and it cannot be completely excluded that restraint has also had a role to play in death here."

A. Yes.

Q. I would like to go through this. That is a long sentence. I would like to go through it.

So the drugs themselves could have caused sudden death at any time. You have agreed with that, and then it says:

"Restraint in itself can be a cause of death."

So restraint can cause death of itself?

A. Yes.

Q. And it can also be a contributing factor?

A. Yes.

Q. Restraint in itself could be the sole cause or it could be a contributing cause, a contributing factor?

A. Yes.

Q. And it says here:

"At the time, given the circumstances, in that this man was restrained at the time of his respiratory arrest and postmortem examination showed petechial hemorrhages that may represent a degree of asphyxia... "

A. Yes.

Q. "It cannot be completely excluded that restraint has also had a role to play in death here."

So the pathologist is noting that at the time, in the circumstances of this case, he was restrained at the time of his respiratory arrest?

A. Yes.

Q. And restraint cannot be completely excluded, so it cannot be completely excluded as de minimis or trivial or insignificant or of no consequence; do you follow?

A. Yes.

Q. Do you agree with that?

A. I -- I -- I -- what I take is that the pathologists are making it absolutely clear that it cannot be completely excluded that restraint has also played a role in the death here, yes.

Q. And if it's not being excluded --

A. Yes.

Q. -- then it is a factor contributing to death?

A. It's a factor that has to be considered, yes, as to cause of -- as contributing to the cause of death.

Q. As contributing to the cause of death.

A. Yes.

Q. And if it's a factor contributing to the cause of death, which is being included as -- by the pathologists as a factor contributing to cause of death, that must be a

material contribution to death?

A. Yes.

Q. Thank you, and then it says:

"overall it is not possible to be sure what has been the most significant factor in death here and as such the cause of death is best regarded as being sudden death in a man intoxicated by MDMA and alpha-PVP whilst being restrained."

Now, as we've also heard evidence and as I understand it, it would never be possible for a pathologist to say the alpha-PVP was 50 per cent the cause of death and the ecstasy was 20 per cent the cause of death and the restraint was 30?

A. Yes.

Q. They cannot provide those sorts of numerical exactitudes in terms of a cause of death?

A. Yes.

Q. That's just not possible, but what is possible is for them to identify the material factors and what contributes materially to the cause of death?

A. Yes.

Q. And they have done that here?

A. Yes.

Q. Thank you. We have heard evidence from a number of witnesses, but before I turn to that, I would like to

ask you what was your understanding of the role that restraint played in the cause of Mr Bayoh's death?

A. Clearly the passages in the -- I'm sorry. Could we keep up the --

Q. Oh, yes. Do you want the final postmortem report kept up?

A. Yes, thank you.

Q. It was page 1718.

A. Sorry. Just when we got to it, just the conclusion that we were referring to.

Q. Here we are.

A. Thank you. That's it there. Just a little bit further, thank you. Thank you very much.

Q. If we can have the actual cause of death on the screen I think. Is that or were you wanting the --

A. Absolutely. Thank you. Thank you very much. Thank you.

Q. I think that's everything on the screen.

A. Yes, that was seen by me, considered by me, considered by the -- I was going to call it the investigative team, and also considered by the Lord Advocate at the time and was considered carefully. Reference to restraint is obviously there. It is in the cause of death.

Now, the cause of death at that stage, what I recollect in relation to that was that it was considered

what's sometimes called a narrative cause of death in that there are a number of factors multifactorial in relation to this, but that restraint was one of those factors. And what I do recollect, and I think I referred to this in my statement, was that the Lord Advocate, and I was in agreement with this, he was keen to try to separate out, so far as possible, whether it was possible -- sorry I'll rephrase that. He was keen to see whether it was possible to separate out the extent to which each of those factors had played a part. So all of those, whether it was the extent of the drugs or the extent of restraint and also and associated with that, as I recollect it, exploring whether the -- how the cause of death could relate to the actions on the police at the time of the incident and, in particular, whether the deterioration in Mr Bayoh was likely to be sudden and without apparent warning or gradual. And that the Lord Advocate was clear that he wanted further expert opinions sought on doing that.

Although I don't want to speak, you know, for Mr Anwar here, I do I think recollect some correspondence where he also considered it important to try to separate out the various elements in the cause of death, including obviously restraint and pointing that out. So that was the focus of the start of the further

investigations in respect of this, because it was, as I say, a narrative cause of death. There were factors in relation to that that further -- further opinion or the seeking of further opinion appeared to be of assistance in determining the way the investigation was going to go and also with particular reference to the actions of the police, what they did at the relevant time.

And so that is -- that is my recollection in respect of the cause of death and the explanation that was very fairly stated by two -- I would say two very well-respected pathologists. It wasn't as if anybody was, certainly on the crown side, seeking to revise or discredit that opinion because the report fairly states a number of factors and, as they put it, it cannot be completely excluded that restraint has also had a part to play in the death here and that the petechial hemorrhaging may have been an indicator, may have been an indicator.

So all of these factors required to be in the opinion of the Lord Advocate and the investigative team to be further explored. I think it's also fair to comment that one of the drugs in particular, alpha-PVP, was relatively unknown at that time and that it was considered that some expert opinion on the effects of those drugs as regards both behaviors, or potential

behaviors, as well as the effect on the body was -- merited further consideration.

But I should also add that in respect of the causation in relation to -- in relation to the consideration by Crown Counsel, it was always expected that the consideration of proceedings in criminality should accept that the de minimis test was met and that restraint had played a part in death. They made that assumption. Clearly that would, if ever there had been proceedings, that would required to be proved to the requisite standard, but Crown Counsel specifically accepted that as a given and in fact they referred to the case of Johnstone that you've kindly put in front of me and which I was aware of because it was referred to by Crown Counsel.

Q. All right. There was a lot in that answer. Let me go over some of the points.

A. I am sorry.

Q. No, not at all. The respected pathologist you were referring to were Dr Shearer and Dr Bouhaidar who had prepared this postmortem?

A. Yes.

Q. And you said it was always accepted that the de minimis test had been met so that restraint played a -- had a material contribution?

A. Well, I should maybe rephrase that that when it came to the decision-making it was -- Crown Counsel proceeded on the basis that the causation test had been met.
Q. So in terms of the view that the causation test had been met that restraint played a part in the death of Mr Bayoh, and that the crown could lead evidence at least that that was the case, why was it necessary to separate out the various factors?
A. I think as one of the primary reasons for that was to have opinion on that as it related to the behaviour of the police officers and, as I said earlier, as to whether the deterioration in the condition of the Mr Bayoh was likely to be sudden or otherwise as that related to the actions of the police officers so far as they were discovered during the course of the investigation.
Q. I wonder if you can explain that a little further, because obviously the cause of death is given as "sudden death". So it's recognised that his death was sudden in that sense. So why was there a need to look for further evidence to show that it was a sudden death?
A. Well, for the reason that it would be -- it was considered important to relate it to the behaviour of the -- of the police officers, and also the -- to relate it to the behaviour of the police officers and the

actions of the police officers involved in the restraint, involved in the restraint process, so that, you know -- for instance, to give an example, were the police aware that his condition was deteriorating but continued with the restraint beyond that point?

Q. That's not the question that a pathologist is going to be able to help you with, or any medical expert, were the police aware that his condition was deteriorating, they will not be able to give assistance in relation to awareness of the officers. And what -- you would accept that?

A. Yes. Well, a pathologist can't comment on what the police knew or -- at the time, but the crown would be able to compare that evidence with the other evidence that was available to set out the actions of the police officers.

Q. And certainly the cause of death says "sudden death whilst being restrained" so it recognises that whilst he was restrained his death occurred?

A. Yes, indeed. But there is also the consideration as to what restraint means and "restraint" to many people means something that is done to somebody, typically in this case it would be the actions of the police officers, but in the wider sense restraint is also, as I think some of the other pathologists commented,

struggling against restraint as well. So that has got to be a factor as well in relation to restraint, so restraint to that extent is an event.

Q. I think we'll come on to the struggle part. I think Dr Carey recognised that when he did a report that the struggle against restraint either by officers or with leg restraints or handcuffs could -- could be a significant part of the consequences for Mr Bayoh.

But in relation to the restraint itself, the crown would have needed to look at the timeline of events and look at what was happening and we've heard evidence certainly that he became unconscious at the point he was being restrained and so to what extent was that distinction required by the crown to pinpoint exactly when he became unconscious?

A. My own view was that that was relevant in considering whether the actions of the police officers in all the circumstances could be considered criminal and whether the restraint constituted a crime and the actions of the police officers during the course of that could constitute a crime.

Q. Right. I'm interested in -- we've obviously talked before and we've heard other evidence about how use of force such as restraint can be lawful, but it must be justified to be lawful and there are various factors

that have to be considered if it's justified, so whether -- is it reasonable, is it necessary, is it proportionate, was it the minimum force necessary to be used in the circumstances, were there less forceful options open to the officers.

None of those factors require, as I understand it, the crown to consider what the pathologist is saying. Those factors could be looked at -- in terms of seeking a justification that would come from the officers, rather than from a pathologist?

A. Yes.

Q. So why if you've said whether the restraint was criminal, why would it matter? Surely it would be more significant to look at what the officers were saying in terms of justification, instead of looking at what the pathologist could help you with?

A. Yes. The crown has to consider and the decision that Crown Counsel ultimately had to make was whether the behaviour of the officers in all the circumstances and taking into account all of the relevant factors, including the assessment of risk, whether that could constitute a crime and obviously there were further investigations and expert opinions sought in respect of the behaviour of the officers and that was the focus of the further investigations and that was one of the main

considerations by Crown Counsel in assessing whether criminality could be established, but as I say, they were -- they made the assumption and proceeded on the basis that causation was not going to be an issue and rather looked at the whole circumstances and the expert evidence in relation to the behaviour of the officers that was obtained from the restraint expert.

Q. If the justification for a use of force is absent, completely, or if it does not cover all of the individual elements of the use of force by an officer, would you take it from that, in the absence of justification or without a complete justification, that the use of force is excessive? Is that not sufficient for the purposes of the crown?

A. In order to consider whether there was a crime, in these particular circumstances, my understanding and belief is that there is -- there is a mental element in the crime and to constitute a crime of say assault there has to be an intention to do harm and that whilst all of these elements will be relevant considerations, the crown still has to satisfy itself, Crown Counsel would still have to satisfy themselves, that there was evidence from which it could be reasonably be inferred that there was intention to do harm in all the circumstances.

So all of these elements are considerations and

I know the restraint expert looked at those, but there still is the concept in the police world of excessive force where that is a complaint of excessive force but it is accepted that it does not constitute an assault in all the circumstances. In order to constitute an assault, as I say, there are various elements and there has to be, from the case law as I understand it, an element of intention to do harm, an element of bad -- bad intent.

Q. And this is not something that you could exclusively look at the intentions of the officers in relation to, you needed support of the pathologist to assist with that assessment, did you?

A. Well, potentially the pathologist would have assisted and that was at the consensus of the team and that certainly was the view of the Lord Advocate who was clear that he should wished further medical expert opinions sought of the various elements of the cause of death.

Q. Was this aspect necessary for the crown's purposes?

A. The -- are you referring to the further --

Q. Seeing if there was any further assistance, medical assistance available that could help with your assessment of intent?

A. It would -- it would assist or potentially assist in

separating out the various causes and the extent to which, in the light of the fact that the original pathologist said it cannot be completely excluded, whether a further opinion could be sought in relation to clarifying that.

Q. Whether it could be excluded?

A. The extent to which restraint had -- had contributed to death.

Q. Right. If you could give me a moment, please. I'm conscious --

LORD BRACADALE: Will we take a break at that point, a 15-minute break.

(2.57 pm)

(A short break)

LORD BRACADALE: Ms Grahame.

MS GRAHAME: Thank you. I just wanted to take a step back for a moment and check which period of time we're talking about, obviously I'm interested in the first period of time, and we're talking specifically about the postmortem, the final postmortem report, and that arrived on 18 June, 2015. And you've said in your statement and we know from evidence that the dedicated advocate depute in the crown investigation was Ashley Edwards then QC now KC.

A. Yes.

Q. And I'm interested in when was she appointed to assist CAAPD in relation to Mr Bayoh's death?
A. It was at the time of the submission of the final PIRC report, to the best of my recollection, round about that put.
Q. So round about August 2016?
A. Yes.
Q. So any comments that you are making in relation to Ashley Edwards taking a view on whether the test for causation had been met or -- I think you said she gave you the Johnstone case herself -- are they in relation to that latter period?
A. Yes.
Q. Post August 2016?
A. Yes.
Q. Thank you. Well, we will maybe come back to that at that stage.

So at the stage the final postmortem report has been made available to you and you've sent that on to PIRC, you've emailed it to PIRC for them to consider, you had not had any discussions with Ashley Edwards at that time?

A. No, but as I said, I'm confident that the Lord Advocate was cited in the final postmortem report, not Ashley.
Q. Right. So insofar as I understood your evidence before

the afternoon break where you talked about the causation test having been met or a given it's a restraint is a material contribution to the death of Mr Bayoh, and you've talked about wishing to embark on further inquiries in relation to whether those inquiries with medical experts may assist the crown in considering intention or matter of state of mind of the officers?

A. Actions -- I would say actions of the officers, their behaviours.

Q. Their behaviours?

A. Yes.

Q. Nothing to do with their state of mind at that point?

A. Not -- I think mainly in relation to their behaviours. Mention of petechial hemorrhaging, to what extent was that consistent with, for instance, asphyxiation in the sense of crushing or compression of during the incident and also, as I say, in assisting -- potentially assisting the actions of the officers in relation to criminality as to whether their behaviours met the test for a crime such as assault or culpable homicide and the -- whether there was any assistance to be obtained in respect of the medical evidence as to whether the deterioration in Mr Bayoh was likely to be sudden or otherwise in that should -- was there evidence that the officers should have realised that he was in

difficulties and behaved accordingly or otherwise, that those kind of considerations when it refers to restraint, but also what was being done during the restraint and what were the medical consequences of that.

Q. What may have been open to officers to be observed during that period of the restraint which may have implicated their -- had consequences for their own actions?

A. Yes. And what could the medical assistant -- what could the medical evidence assist with in relation to what the likely action of the officers were. For instance, was there evidence of officers piling on top of him and remaining in that position for long periods of time whereby the medical evidence was consistent with those kind of actions or otherwise and that's why I refer to was his deterioration likely to be sudden or otherwise.

Q. Thank you. So you've received the final postmortem report. You've told us that you were aware of Johnstone, the decision Johnstone in relation to material contribution. Did you read the final postmortem report when it came in?

A. I would -- yes, I was aware of the final postmortem report. I think I probably should say that I think I was aware of Johnstone at a later stage when all of

the evidence was being considered. I didn't particularly Johnstone at that point.

Q. In terms of the postmortem report that we're talking about, was it clear to you from the point at which you read it that restraint had been a material contribution to death?

A. It was clear to me that restraint required to be considered and that restraint was specifically mentioned in the sense that it could not at that stage in the opinion of those pathologist be -- I think the phrase was completely excluded.

Q. In terms of the opinion of two respected pathologists, Dr Shearer and Dr Bouhaidar, it was a material contribution to death?

A. It was mentioned in the cause of death, in the terms of restraint and of course restraint I have suggested means -- can mean different things to different people, but it would be the actions of the officers that you would have to consider, what did they actually do in restraining Mr Bayoh, so their actions in restraining him.

Q. Yes, but there was no suggestion it wasn't the officers who restrained him?

A. Not at all, no.

Q. No. So the officers or a number of officers have

restrained him. By 18 June when the report comes in you have the police officer's statements, they were available on 4 June, so you know the identity of the officers who were involved in the restraint and you know that restraint is now specifically mentioned as part of cause of death?

A. Yes.

Q. And you understand the concept of material contribution?

A. I do. In respect of the statements, I know the statements were apparently obtained at that time, I don't have a recollection that they were submitted at that point.

Q. So perhaps you didn't have copies of the officers' statements when the postmortem report came in?

A. Possibly, yes.

Q. Do you remember?

A. I don't remember. No, I don't remember reviewing them.

Q. Had you had --

A. I was awaiting the PIRC report.

Q. You were waiting for the PIRC report?

A. Yes.

Q. Had you had any sort of briefing from PIRC about the contents of the officer's statements at that stage?

A. I don't recollect a briefing, no.

Q. And so you forwarded the postmortem report to PIRC.

There's an email in the papers sent to the Inquiry where you've forwarded that by email to PIRC and was it -- what were your expectations of PIRC in relation to what they would do with the postmortem report?

A. Well, I expected that it would be factored into their eventual report. It was clearly evidence that required to be considered.

Q. Right. And we've heard evidence that in relation to this period, so we're talking after the postmortem report in 18 June and before the first PIRC report is sent to Crown Office, that during that period between June and August there was a process entered into whereby the crown asked PIRC to start identifying experts and giving -- obtaining CVs of experts and providing those to the crown, is that -- do you remember that?

A. I think that that would have been triggered by the arrival of the postmortem report and the consideration of the report by the crown and in particular by the Lord Advocate. That would -- that probably would fit, yes.

Q. Did you have a role to play in relation to speaking to PIRC or instructing them in that process, the process whereby they would start to identify suitable experts?

A. I don't recollect playing a direct role in that personally. My understanding and -- is that there

were -- there were consultations. As I said, the Lord Advocate was engaged in that and, as I recollect it, PIRC and the Commissioner indicated that they would prepare -- they would prepare a submission in respect of those experts whom they had identified for the approval of the Lord Advocate and that that was the way that that was being approached.

Q. Let's look at your statement, please. I'm interested in question 131 to 132 or the answers to questions 131 to 132 and I think it's PDF page 80. You've got it. That's perfect.

"The Lord Advocate had clearly indicated at an early stage of the PIRC investigation that the instruction of further experts was necessary to explore the cause and mechanism of death."

When you say there "at an early stage of the PIRC investigation", would this have been after the final report had been obtained?

A. Yes, I think so, yes.

Q. "It was necessary to explore the cause and mechanism of death and to clarify the significance of the role that drugs and restraint played in the death and the extent to which they interacted."

It appears there that the Lord Advocate wanted further investigation in relation to the cause of death,

was that your understanding of the Lord Advocate's wishes at that time?

A. I have said cause and mechanism and I am referring to the interaction, because we obviously had a cause of death, we had a cause of death at that stage, but to separate out the elements.

Q. Right. Thank you.

"It was also important that the cause and mechanism of death were not considered in isolation but that proper consideration was applied to how they related to the accounts given by eye witnesses and police."

Is that partly what you were saying earlier a moment ago?

A. Yes.

Q. "With a particular focus on whether the deterioration in the condition of Mr Bayoh was likely to have occurred suddenly and without warning or otherwise."

Again, what you have been talking about?

A. Yes.

Q. "I suggested specific questions in relation to the significance of the continued application of handcuffs and leg restraints and whether that could have affected resuscitation efforts."

And is this the latter part of restraint, still part of restraint with the handcuffs and leg restraints, but

not necessarily involving multiple officers --
A. Yes.
Q. -- engaging in a physical restraint?
A. Yes, it was -- it was a particular concern of mine to explore that because there was evidence that after he became unresponsive, after Mr Bayoh became unresponsive, that the handcuffs were being continued to be applied and that was something that I considered was worthy of an investigation as to why that was, but also as to whether it could have affected resuscitation efforts. That was something I considered should have been explored.
Q. And then carry on, please. If we can move down the page:

"The rationale behind instruction of experts was to bring expertise in relation to potentially significant areas of specialisms that could bring clarity in relation to these critical questions. For my part, I was aware that the Lord Advocate had taken a personal interest in the selection of experts with and expressed desire to use the experts from the international community. The identification of experts was informed by two key considerations: do they appear to possess the necessary skills, qualifications and experience to comment on a particular issue and does it appear that

expert opinion on that particular issue will be of material assistance to the decision-maker or the court in determining a crucial issue?

"For the crown it is an overriding and important principle that the identification of experts must be carried out independently. Expert witness will also have an overriding duty to report their opinions in a balanced and professional manner. To fulfil the requirement of independence an expert must not be instructed with a view to obtaining a predetermined view or to advance a particular theory. The instruction of an export is the beginning of a process rather than an end."

So this -- if we move to the top of where we were, page 80, please. So the Lord Advocate has expressed an interest in further exploring the cause and mechanism of death, there's a number of elements that are of interest to the crown and, as I understand it, that was then -- PIRC were then asked to identify certain experts.

I'm interested in why the PIRC were asked to do that and why Crown Office didn't do that?

A. As I said, the Commissioner was involved and indicated to the crown and to the Lord Advocate that she would prepare a briefing on experts that they had identified. It was a PIRC investigation, that is to state the

obvious, but it was a PIRC investigation and the investigation was still resting with the PIRC at that point. Certainly the Lord Advocate considered that it was appropriate to ask the PIRC to identify experts and I don't recollect that there was any indication from the PIRC that they would have difficulty in doing that.

It's -- in my experience it's not entirely -- it's not without precedent that an investigating authority would identify an expert. There are occasions where the police will do that typically where they are preparing a case for submission to the crown. The process in this particular case, as the Inquiry will be aware, is that the PIRC, and I think the Commissioner herself, to some extent reviewed the recommendation and then submitted the proposed expert to the crown which was forwarded for consideration along with a CV and according to those considerations there was approval given to seeking an expert report from that person.

Q. Which person are you specifically --

A. Sorry. From the experts I should have said, from the experts, yes.

Q. You've said it was not without precedent. We've heard evidence that the investigators with PIRC and in particular Mr McSporran, the lead investigator, did have experience of seeking expert opinion in relation to

forensic matters, no experience or less experience in relation to instructing medical experts in relation to issues of causation.

In relation to the -- you say it's not without precedent. The precedent that you are thinking of or precedents you're thinking of, were they in relation to medical -- the instruction of medical experts?

A. Any kind of expert I suppose I was thinking of in relation to that comment, but as an organisation, PIRC had a range of I suppose experience and skills, and that -- I do come back to the point that the Commissioner was asked, and I think in dialogue with the Lord Advocate in relation to the instruction of experts, and there wasn't any indication that this was considered either too difficult or inappropriate, the -- it was the Commissioner involved, rather than I thought John McSporran.

Q. Were there any other concerns expressed by anyone on behalf of the PIRC as to the ability of the investigators to identify and instruct medical experts in relation to matters pertaining to cause of death?

A. Not that I recollect, no.

Q. Did you personally have any concerns about leaving that matter to PIRC investigators?

A. I didn't have any concerns in respect of that because of

the additional factors in relation to this, namely that they weren't instructing the experts without reference to the crown, they were simply identifying those and forwarding information, including CVs and the expert's track record, as it were, to be able to speak to the things that were considered to be of assistance in the investigation.

Q. Given the subtleties in relation to the questions you were interested in hearing from the experts about, so you had the cause of death in the final postmortem report, but you were interested in what further assistance be gleaned from other expert evidence in relation to medical matters, causation, use of restraints, did you have any concerns about whether PIRC understood the purpose that these further medical experts were being sought for?

A. No, I don't recollect having -- having those concerns, and as I recollect, the process was quite interactive with PIRC where once the Lord Advocate or anybody else was satisfied that it was appropriate to seek an opinion that there was dialogue in consultation about the instructions and the areas that required to be set out.

Q. We have heard evidence from Mr McSporran in relation to a policy log that he prepared at the time where he noted an entry:

"PIRC are to identify medical experts who can provide opinion on cause of death, including the effects of drugs, restraint, medical or drug misuse history of deceased and present CVs to Crown Office so they can select experts whose opinions can be sought. The reason is to attempt to establish the exact cause of death."

And you're raising your eyebrows there.

A. Sorry.

Q. Do you feel that that is an accurate reflection, establishing an exact cause of death, of your intentions in looking for experts who could help?

A. I would have thought it was clear and it was clear to me that the purpose was to separate out the various factors that had been mentioned by the original pathologist.

It is my recollection, and there's some support from that I think in some emails, that at the time that the initial experts were being considered that PIRC were very content to try to identify experts in relation to the field of drugs. To some extent I think there were some consultation or interaction in America whereby some experts could be identified, but that the crown would try to identify experts in relation to asphyxiation and there are emails and I can recollect seeing that the crown team and myself as part of the crown team would make efforts to identify somebody with particular

expertise in relation to asphyxiation in the sense of any crushing or restriction by mechanical means and I do recollect approaching one particular pathologist who appeared to possess the relevant expertise.

They couldn't take it on, but they suggested a couple of others, one of whom was Nat Carey and, obviously, Nat Carey couldn't because he had already being instructed by the family, but he did make another suggestion and that was a pathologist who at a later time was the reviewing pathologist in respect of that pathologist had experience of the Hillsborough disaster and that came through crown enquiries and through enquiries with pathologists who appeared to be in a position to comment in relation to that.

Q. And that would be Dr Lawler and we will talk about him in relation to the slightly later period, but coming back again to this period between the postmortem, final postmortem report coming in, and August when you got your first PIRC report, during that period when PIRC were seeking to identify experts and to share CVs with the crown, were you aware of PIRC having been instructed to do that type of work prior to the Sheku Bayoh Inquiry?

A. No, I wasn't and I'm not aware of any case where they would have so to that extent this was -- this was new,

was a new approach, but it was obviously following upon, you know, the appointment of the Commissioner with experience within the crown over a number of years so, you know, that may have been a factor in the way that that approach was made between the various officials and law officers.

Q. Because Kate Frame had been in Crown Office before she became Commissioner?

A. Yes, and I appreciate that she was performing a different role there and you can't just simply say, oh, well, you know it better than some sort of -- you have had more experience, but that could have been a consideration in the approaches that were made and in particular the apparent discussions between the Lord Advocate and the Commissioner in respect of the instruction of the experts. But I suggest that, you know, it's important to bear in mind, as I have said, that they weren't doing it in isolation, they were doing it to some extent in consultation with the crown and then later on at least some form -- some consultation with the family.

Q. Why did the crown not simply wait until they had the first report and then proceeded to look for suitable experts once they had the chance to properly consider the evidence that was available and consider the

postmortem report?

A. My recollection is that the Lord Advocate saw medical evidence and further exploration of the cause of death as critical.

Q. But as I understand the position, until you got the first PIRC report in the August, you were not fully appraised of the factual background when you were looking at the postmortem report?

A. Yes.

Q. Did that hinder your ability to determine what the critical issues were that you would need further assistance upon?

A. I don't think it hindered the ability because the focus was on the terms of the principal, the original postmortem report, the nature of the cause of death with which was multifactorial and the comments by the pathologist about being uncertain as to the extent to which each played a role and the extent to which they interacted, because, as I think you have said during the start of this series of questioning, there was the possibility that one factor was the sole cause of death depending on one interpretation of the explanation provided by the pathologist, drugs were important, but overall the narrative cause of death included all of the factors which did of course mention restraint so it was

separating out all of those.

Q. Are you suggesting that the pathologists were saying in the final postmortem report that one factor could have been the sole cause of death?

A. No, perhaps that's -- I don't have the report in front of me. I don't want to go that far, but there was the phraseology "not possible to completely exclude" and to that extent that seemed to invite some further explanation and exploration.

Q. And did you speak to Dr Shearer about that phrase?

A. I personally didn't speak to her, no.

Q. And --

A. But there were subsequent consultations with Dr Shearer at a later stage, including consultations with Crown Counsel.

Q. Well, we'll look at those at that later phase, rather than mixing them all together, but at this stage you have the final postmortem report, you do not yet have the PIRC report, but you are determining what may be of material assistance to the crown?

A. Yes.

Q. Without the benefit of knowing the full circumstances?

A. Well, prior to the arrival of the PIRC report, which clearly would be of assistance, but even prior to that the Lord Advocate, as I recollect it, was clear that

further investigations in relation to the cause of death were necessary and were appropriate.

Q. In terms of identifying where you could get some assistance, was that not going to be made more difficulty because you didn't know all the factual circumstances because you didn't have the PIRC report yet?

A. I don't know that it would be made more difficult. It allowed some progression in respect of that and clearly when the experts were instructed information that had been obtained by the PIRC was put before the experts, so it wasn't, I would suggest, premature in that respect.

Q. What were your expectations of PIRC in terms of identifying the appropriate experts to help the crown?

A. The expectation I think was that they were in a position to put forward experts as suggestions with accompanying materials that would allow the crown to either approve the instruction of those experts or otherwise.

Q. Did you have any concerns that PIRC may not be in the best position to identify those experts compared to experienced crown practitioners?

A. I didn't have those concerns because of the -- because of the approval process.

Q. Did you instruct PIRC to look into questions of the independence of experts, possible bias, possible

complaints, or was that something that was going to be done by crown at a later date?

A. I don't recollect any specific instruction although I would suggest that it would -- in relation to the instruction of any expert by an investigating authority that experts should approach the consideration of the questions entirely independently and, as I think I said in my statement, that the function of that and it's a very onerous responsibility but it certainly is -- have regard to it, the requirement not to try to seek an opinion before an instruction is given, but rather to approach those who appear to possess the necessary expertise and take it from that point, but at all times accepting that once the opinion is received that the crown -- neither the crown nor anybody else is obliged to accept it and will also seek to test out that opinion with reference to others and that was always considered to be an element in the part of that process of instructing experts.

Q. And in terms of identifying any possible conflicts of interest, was it your expectation that PIRC would flush those out or the crown would flush those out?

A. Sorry, you've referred to conflicts of interest, what --

Q. When you're instructing an independent expert --

A. Yes.

Q. -- you want to make sure that there's no conflicts of interest?
A. Yes.
Q. That might impact on their independence, their ability to be impartial and not biased or prejudiced about any particular view?
A. Yes.
Q. And in terms of flushing out whether there are any potential conflicts, did you see that as being the role of PIRC when they were identifying suitable experts or did you see that as something that the crown would flush out prior to their instruction?
A. I saw it as part of the process of the selection of experts that there was an expectation there shouldn't be a concern that their independence was in some way compromised, but there was also an obligation on the experts themselves to ensure that they provide an opinion that is independent and that that is part of the process of instructing an expert.
Q. And as part of that process, where you are considering possible conflicts or issues that may arise that impact on independence, was that part of the process going to be done by PIRC or by the crown?
A. I think if there was -- my own view on that is that if there was a concern that that is something that the PIRC

would identify, I think it's fair to say that the PIRC knew that experts should be instructed on the basis that they would be in a position to provide an opinion that was of assistance in respect of the questions that were going to be asked of them.

Q. You expected the PIRC to be able to identify the questions that would be asked and that would help them identify the right expert?

A. Well, the questions were submitted to the crown, as I recollect, for amendment or otherwise, so that process was incorporated into the --

Q. So the PIRC --

A. -- instruction.

Q. -- drafted the questions they thought that the crown might want to ask and the crown then had a chance to review that?

A. Yes, where the PIRC -- yes, where the -- where the -- where they drafted the questions. I am not clear that that happened in every case as to whether the crown assisted in drafting questions. What I do recollect is that I instructed that a question be inserted in relation to the application of handcuffs, so to that extent I inserted a question.

Q. Right. Do you remember revising any questions that may be didn't quite match the crown's expectations?

A. I don't have any specific recollection of revising a question, no.
Q. Was that part of your role in having oversight or was that task given to one of your staff?
A. No, I would look at them, but I think I -- there probably would be the case that I would -- I would ask for comment from other senior colleagues in respect of them, but, no, I didn't delegate that to anybody else.
Q. And who were these senior colleagues that you asked for comment?
A. Principally it would be Stephen McGowan and Lindsey Miller, probably later on in the Inquiry. Lindsey Miller and Stephen McGowan.
Q. Did they both check over the PIRC questions as drafted by PIRC that were going to be sent to experts?
A. I couldn't say in respect of each that either Stephen or Lindsey did.
Q. Okay. And as part of this process, was it left in the hands of PIRC that they would form a view regarding whether the expert was independent and could give an opinion that was not biased in any way and was impartial?
A. I regarded that as part of the process when the Commissioner made a recommendation to the Lord Advocate in respect of the experts that they had

identified that they considered would be of assistance, yes.

Q. Did you think that that was clear to PIRC that you expected that they would check that these were experts who could give an independent opinion?

A. I would be surprised if they weren't aware of the importance of selecting appropriate experts that were -- that wouldn't be readily criticised from whatever particular point of view.

Q. So your expectation was that PIRC would consider that as part of the process?

A. I certainly didn't expect that PIRC or the Commissioner would be recommending experts to the Lord Advocate that they considered were either compromised or unsuitable, yes.

Q. Did you assure yourself that none of the experts put forward by PIRC were and did you reassure yourself that they were independent and they weren't compromised in some way?

A. What I did and what I think others would do would be they would look over the materials that were submitted by PIRC, they would look over the CV, and they would look at the history and the experience that the expert had and look at things like, you know, academic publications that they contributed to, memberships of

society, but also whether they had given evidence elsewhere in respect of -- in respect of matters which were relevant to the particular issue that they were going to be asked about.

Q. Now, not all CVs will mention possible conflicts or issues where they have given evidence before, was that something you expected PIRC to look into before they submitted an expert and recommended it to Lord Advocate or was that a task that you carried out yourself?

A. I looked and considered the CVs of those experts who were instructed at the initial -- the initial stages shortly following the first PIRC report, as did others. I think for all other experts that the CVs were shared with the family. That's my recollection that some of the others -- certainly some of the others were shared with the family and there was a request for input in relation to those because, as the Inquiry will be aware, there was some disquiet and concern about some of the experts that had been identified.

Q. We'll come on to some concerns. But in terms of the -- this process that -- that was entered into between PIRC and crown about the -- identifying the experts and obtaining their CVs, was it the task of PIRC to consider things like conflicts or independence or was it going to be the task of the crown or are you now saying it was

actually left to the family to raise issues?

A. I don't want to suggest it was up to the family to raise issues, but that process was undertaken. The responsibility would rest at all times I think with the investigative agency, but in relation to those initial experts, I would say that the -- that it would be -- that it was not considered conceivable that the PIRC would put forward experts that would be likely to be compromised and, to that extent, the fact that the Commissioner was suggesting experts at that stage to the Lord Advocate and to others was something that -- was something that was relied upon.

Q. Right. Did you, as this process was entered into, say to PIRC, or anyone from PIRC, "I want you to check that there were no conflicts with any of the experts that you're sending to the Lord Advocate"?

A. I don't recollect any such specific direction to PIRC. That is not something that I do recollect.

Q. And do you remember saying to PIRC or anyone from PIRC, "I want you to check that none of the experts you recommend to the Lord Advocate have been criticised by sheriffs or judges or judges down south, magistrates in any cases"?

A. No, there was no specific direction to that extent, no.

Q. Did you expect PIRC to do that check?

A. I expected that -- I -- I expected that PIRC would not put forward any experts with whom there was a -- there was a cloud hanging other them or that were likely to attract significant criticism.

Q. And do you have any thoughts about how you expected PIRC to do that, to see whether there were any clouds hanging over any -- any of the experts they were trying to identify?

A. That might be quite a challenging thing to do at the stage of instruction because you -- in the selection of an expert you are relying on the fact that to some extent they are experts, they put themselves forwards as experts, there can be consultation with a book of experts and all that will do is set out who claims expertise in those areas, but that's a different consideration. Unless there was -- there was something overt and somebody had been discredited and that that was something that was -- that was obvious, then that might not be an easy -- an easy task to undertake.

Q. We have heard evidence that the PIRC approached bodies such as the College of Policing to look at whether there were experts or lists of experts, suitable experts, who they could maybe identify. Is that the type of approach that Crown Office staff would have taken if they were looking for experts?

A. From my experience the crown would adopt a similar approach in relation to the identification of an expert. If you're completely at a loss as to how -- as to what -- how to identify an expert, you would go to a directory of experts and start the process from that.

Having said that, in relation to this particular case, the crown expert, Professor Freemont, that expert was identified because of previous experience in a case so that was another avenue whereby you could identify an expert. As I recollect it at least, I think it was Professor Mary Sheppard who was approached. My recollection was that she was suggested by Dave Green in relation to that. In relation to Professor Eddleston, I think that he had been involved in some crown inquiry before and was approached because he appeared to possess expertise.

As I say, one of the critical is do they appear to possess the necessary expertise to comment on the issues that you want to ask them about and that is -- to some extent that is your first consideration in relation to the instruction of an expert.

Q. Certainly in terms of Crown Office and the ability of staff within Crown Office to identify a suitable expert, you could rely on the head of SFIU, you could rely on prosecutors who had maybe taken evidence from good

experts, you could rely on the staff in Crown Office who have built up a body of experience of instructing experts, testing them out at trials and such like?

A. Yes.

Q. Obviously PIRC are not in the position of the legally-qualified members of staff in Crown Office. Did you think that they would have equal access to advice and assistance in relation to instructing an expert?

A. Well, as I've said earlier on, in hindsight and looking back, there was never any suggestion by PIRC that they were struggling or would have difficulty in doing that. That didn't surprise me because of the range of experience and in particular experience that the Commissioner had had in our organisation and also in relation to investigating criminal allegations against the police. So I have to say that that wasn't really a consideration that PIRC were not in a position to do that and, as I say, my recollection is that they did undertake that and engaged with senior people at Crown Office in doing that and in producing suggestions and a briefing in relation to experts.

Q. Given we have heard that PIRC had limited experience in instructing medical experts and we've also heard evidence they didn't have any training in instructing experts and given they may not have been in as good a

position as Crown Office staff were in identify experts, looking back now with hindsight, which is a wonderful thing, do you think that perhaps it would have been better if crown had taken on the role of instructing -- of identifying experts itself or have provided more guidance in support to PIRC investigators in that task?

A. I think with hindsight there is a benefit in including as many considerations in respect of that as possible. That would be difficult to gainsay. There is also -- I think in learning from this particular experience there is also advantage in including the -- the family or the solicitor representing the family of the deceased in relation to those. That's not to suggest that they've got a veto or a right not to approve, but whether there is any comment. Because in relation to some aspects, and I'm talking quite generally, there can be, you know, some academics that disagree very strongly with other academics on whatever -- in whatever field, but that includes the medical field, and that's not to say that one is inexpert. It is just that they do disagree in respect of that and I think that the more information you might have in relation to that is of benefit so that would be my comment in respect of that.

Q. Right, thank you.

I'm conscious of the time. Would that be an

appropriate place?

LORD BRACADALE: We'll stop there and sit tomorrow morning at 10 o'clock.

(4.10 pm)

(The hearing was adjourned to 10 am on Wednesday, 18 April 2024)

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1LES BROWN (sworn)

1Examination-in-chief by MS GRAHAME

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