

Transcript of the Sheku Bayoh Inquiry

Tuesday, 25 June 2024

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(10.00 am)

LORD BRACADALE: Good morning, Mr Logue.

A. Good morning.

LORD BRACADALE: May I remind you you're still subject to the oath you took on a previous occasion. Ms Thomson.

Evidence of JOHN LOGUE

Examination-in-chief by MS THOMSON

MS THOMSON: Good morning. You are John Logue and you are the Crown Agent and Chief Executive of the Crown Office and Procurator Fiscal Service and you gave evidence to the Inquiry on 23 and 24 April of this year.

A. That's correct.

Q. Thank you for returning to assist us further. You will be familiar by now with the blue folder.

A. Yes.

Q. I see you have already opened that up, Mr Logue, and we should find within it a second Rule 8 request that the Inquiry sent to you on 22 April of this year. We don't need it on the screen, but the reference number is SBPI 00590.

A. That's correct.

Q. Is that there?

A. Yes.

Q. And we should also have your response. This we will

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1 bring up on the screen, please. Your response is
2 SBPI 00605. And if we scroll to the bottom, please, it
3 appears that both your signature and the date that you
4 signed it have been redacted certainly from this
5 version, but I understand that you signed the statement
6 on 17 May of this year?

7 A. That's correct.

8 Q. And I'm hoping that the copy in front of you will have
9 both your signature and the date on it?

10 A. It does.

11 Q. And as with your previous Rule 8 response, you concluded
12 at the Inquiry's request with the words:

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

17 And so you prepared and signed your statement in the
18 knowledge that it would be evidence before the Inquiry
19 and would be published on our website?

20 A. That's correct.

21 Q. Did you do your best when answering the questions that
22 were asked of you to provide a true and accurate
23 response?

24 A. I did.

25 Q. This is strictly speaking a response to a Rule 8

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1 request, but for convenience and by way of shorthand I'm
2 just going to refer to it as your statement as we go
3 through your evidence.

4 You were asked in the Rule 8 request what is your
5 understanding of institutional racism and what makes an
6 organisation institutionally racist and in paragraph 2
7 of your statement, your Rule 8 response, you answer that
8 question. It's quite a lengthy answer, but what I would
9 like to do is read it out in full and then ask you some
10 follow-up questions. So you say:

11 "My understanding of institutional racism is
12 informed by the definition sets out in the
13 Macpherson Report 1999 which I regard as the definition
14 adopted by COPFS since it was first published. The
15 report defined institutional racism as follows:

16 "'The collective failure of an organisation to
17 provide an appropriate and professional service to
18 people because of their colour, culture or ethnic
19 origin. It can be seen or detected in processes,
20 attitudes and behaviour which amount to discrimination
21 through unwitting prejudice, ignorance, thoughtlessness
22 and racist stereotyping which disadvantage minority
23 ethnic people. It can be seen from this definition that
24 an organisation can be regarded as institutionally
25 racist if it suffers from such a collective failure to

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1 provide an appropriate and professional service to
2 people because of their colour, culture or ethnic
3 origin.'

4 "My personal understanding of this concept was
5 informed by the Jandoo Report 2001 which considered the
6 liaison arrangements between COPFS and the family of
7 Surjit Singh Chhokar who had been murdered in 1998. My
8 recollection is that Dr Jandoo's conclusion that there
9 was institutional racism in Crown Office was a very
10 difficult moment for staff who had, as it now appears to
11 me, until that point focused on racism as a
12 characteristic of individual behaviour and took pride in
13 their own individual commitment to a fair prosecution
14 and death investigation service. It was very
15 challenging for all of us to understand and accept that
16 we were part of an organisation which was
17 institutionally racist and reconcile this with our own
18 personal standards and behaviours. To this day, the
19 concept of institutional racism at an organisational
20 level is not well understood by the public or other
21 organisations, but I am proud that COPFS, led by the
22 then Lord Advocate Colin Boyd, reacted to Dr Jandoo's
23 assessment with openness and a public leadership
24 commitment to transform its approach to tackling
25 institutional racism. This work continues to this day

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1 and has evolved to take account of important
2 developments such as the Equality Act 2010."

3 So you explain in this paragraph, Mr Logue, that
4 your understanding of the concept of institutional
5 racism is informed by Mr Macpherson's definition, which
6 you regard as the definition that was adopted by
7 Crown Office and you also say that your personal
8 understanding was informed by Dr Jandoo's report.

9 Now, Dr Jandoo didn't adopt Lord MacPherson's
10 definition of institutional racism. He put forward a
11 different definition and for convenience so we can look
12 at the two definitions side by side I would like to
13 bring up a slide from a presentation given to the
14 Inquiry earlier in this hearing by a Professor Meer from
15 Glasgow University. I wonder if we can bring up his
16 PowerPoint, which is WIT100 and look at slide 22.
17 Sorry, I think I must have the wrong slide number. If
18 we can keep scrolling up and I will ask you when to
19 stop. Sorry, down a bit, there we are, thank you.

20 So I'm simply using this slide for convenience so we
21 can see Lord Macpherson's definition and Dr Jandoo's
22 definition of institutional racism side by side,
23 Professor Meer also included Lord Scarman's definition,
24 but that's perhaps less relevant for present purposes.
25 So the Macpherson definition is as per that that I read

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1 out and as set out in your statement. Dr Jandoo's
2 definition is subtly different:

3 "Institutional racism occurs wherever the service
4 provided by an organisation fails, whether deliberately
5 or not, to meet equally the needs of all the people whom
6 it serves, having regard to their racial, ethnic or
7 cultural background."

8 Now, the Macpherson definition of course dates back
9 to 1999, Dr Jandoo's definition is from 2001, and I
10 wonder why it was that Crown Office adopted the
11 Macpherson definition rather than the Jandoo definition,
12 given that Dr Jandoo's conclusions were specific to the
13 Crown Office in a way that perhaps Lord Macpherson's
14 were not?

15 A. It's very difficult for me to give evidence to the
16 Inquiry today about any consideration that the
17 difference may have been given by Crown Office in 2001.
18 I think all I can do is assist the Inquiry by giving a
19 personal view that any conversation I have ever been
20 involved in in the organisation where we have discussed
21 the concept of institutional racism has always referred
22 back to the Macpherson definition. I have always taken
23 that personally and I regard others in the organisation
24 to have taken it in the same way that that was the
25 definition and until you drew out this distinction for

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1 me, I am not sure that I could have told you that there
2 was personally a distinction between the Jandoo inquiry
3 and the Macpherson inquiry in terms of the definition.

4 I don't remember, as a member of staff in 2001, that
5 any great significance was put on the difference in
6 terms of the information that was given to the staff
7 about the conclusions of the Jandoo Inquiry. The
8 significance for staff was Dr Jandoo's conclusion that
9 aspects of the service provided to Mr Chhokar's family
10 demonstrated that the organisation had suffered from
11 institutional racism and that was the -- that was the
12 critical element for colleagues in the organisation to
13 understand and grasp.

14 Q. Thank you. That's helpful. Seeing those two
15 definitions side by side, to your mind is the material
16 difference between the definitions?

17 A. So I'm not sure I'm best qualified to explain the
18 significance of any difference between the two, the
19 Macpherson Inquiry definition talks about at the failure
20 to provide an appropriate and professional service, it
21 highlights that this comes through discrimination and
22 the factors that can amount to discrimination and then
23 provides for detail.

24 That to me has always seemed a very helpful way of
25 explaining to people and any time that we -- anytime

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1 that I have personally spoken to staff about the
2 organisation's commitment to inclusion and equality, the
3 reference is both to the Chhokar case and the
4 consequences of that, but also back to Macpherson to
5 route it in a wider UK perspective of an issue that had
6 a broader foundation throughout the UK.

7 Q. Thank you. It may be that nothing turns on any
8 differences that there may be between the two
9 definitions, but I hear you say that your professional
10 experience was that it was Lord Macpherson's definition
11 that was effectively adopted by the Crown Office, and
12 when Dr Jandoo's report was published, the
13 Crown Office's focus was on the failings identified,
14 rather than any semantics around the definition that was
15 put forward by Dr Jandoo and how that might have
16 compared to Lord Macpherson's definition of
17 institutional racism.

18 A. That's correct, and I think also in preparing to give
19 evidence today, I'm sure the first inspectorate report,
20 which I think might have been 2005, which -- and of
21 course the inspectorate was set up as a result of a
22 recommendation from Dr Jandoo in his report, but I'm
23 sure that report talks about the previous Lord Advocate
24 before Colin Boyd responding to the Macpherson Inquiry,
25 so there was a period of time between the

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1 Macpherson Inquiry and the Jandoo Report where the
2 organisation was focused on the Macpherson Inquiry and
3 taking steps to learn the lessons from the findings that
4 Macpherson had found.

5 Q. Thank you. Can we return to your statement, please.

6 We were looking at paragraph 2, perhaps a little bit
7 further down, please, the top of this page, perfect.

8 Thank you. You explain that:

9 "It was very challenging for all Crown Office staff
10 to understand and accept that you were part of an
11 organisation that was institutionally racist and to
12 reconcile that with your own personal standards and
13 behaviours."

14 Can you tell us a little more about the impact of
15 Dr Jandoo's findings on staff and staff morale within
16 the Crown Office?

17 A. Again, I can offer you a personal perspective on that
18 and my recollection which is that the Jandoo Report
19 brought home to us and I think made real in a very
20 practical way in the context of our work what might
21 otherwise have been something that was perhaps more
22 theoretical in relation to the Macpherson Report and to
23 deal with something that arises from the work of your
24 own organisation and to have someone then reach a
25 conclusion that the organisation in which you work was

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1 institutionally racist was a very difficult thing, a
2 very difficult time.

3 And staff, including myself, I think struggled with
4 how it could be possible to reflect on your own personal
5 values but then have someone determine that you were
6 part of an organisation that was institutionally racist
7 and that I think was a very necessary process to go
8 through, because it did help me -- I can't speak for
9 everyone in the organisation -- but it certainly helped
10 me and others that I spoke to at the time. It helped
11 bring home to us and make real in any way, that's
12 perhaps the best way I can describe it, what the concept
13 of institutional racism was and how, despite individuals
14 feeling that they in their own actions and values do not
15 act in a racist way, they could be part of an
16 organisation which has practices and policies and
17 behaviours which are institutionally racist and so it
18 was very much about that bringing home to us the
19 sharpness of that concept and as a result of that then
20 the need to do something about it and not to allow any
21 personal feelings of your own personal values and
22 behaviours to get in the way of on tackling the concept
23 at an institutional level.

24 And I highlighted that in my statement because
25 I think I see publically still to this day partly media

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1 commentary, partly what I see in relation to other
2 organisations that others still wrestle with that
3 difficulty that I remember from that time and so I think
4 it can be very difficult for organisations to overcome
5 that what I'm describing at a personal level in seeking
6 to recognise institutional racism and tackle it.

7 Q. Thank you. In relation to tackling institutional
8 racism, you were asked in your Rule 8 request about the
9 efforts that have been made within the Crown Office to
10 overcome institutional racism and you give your response
11 at paragraph 3 of your statement. Again, it's quite a
12 lengthy and detailed response. What I would like to do
13 is read it out and then ask you some questions about
14 your response:

15 "I have described in answer to question 2 the
16 circumstances in which Dr Jandoo judged COPFS to be
17 institutionally racist. This was accepted by the
18 organisation and very significant efforts were made to
19 overcome this through training, engagement with
20 community groups and increased diversity in our work
21 force and structural embedding of practices which are
22 designed to combat unwitting prejudice and bias. COPFS
23 has a very strong and popular set of staff equality
24 networks which raise awareness, promote improvements in
25 our processes and provide direct support to staff. We

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1 operate a successful two-way mentoring scheme to allow
2 members of the equality networks to mentor senior
3 leaders on issues associated with their network and, in
4 turn, senior leader mentor the members of the network on
5 leadership and career development. I have been involved
6 in this mentoring for six years and I'm this year
7 engaged in two-way mentoring with a member of a race
8 equality network, which is personally rewarding and
9 instructive. Our annual qualities conference is a very
10 popular event at which we celebrate the success of staff
11 in promoting equalities, review out progress and set
12 challenges for the year ahead. Our public speaking
13 competition for school pupils is always focused on the
14 promotion of equalities and is strongly supported by
15 staff and stakeholders as a visible public demonstration
16 of our commitment in this area. I have always believed
17 these efforts have been successful and that COPFS is a
18 very different organisation. It is now one in which we
19 speak to recruits as part of their induction about the
20 importance of equality, diversity and inclusion, a
21 process in which I personally will remind recruits of
22 Dr Jandoo's conclusion in 2001 and in which we are
23 vigilant to ensure we are never again judged to be
24 institutionally racist. We also benchmark ourselves
25 externally, currently through the Employer's Network for

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1 Equality and Inclusion, ENEI. In 2023 we achieved for
2 the first time the gold standard in the ENEI, Talent,
3 Inclusion and Diversity Evaluation (TIDE). This is a
4 benchmarking tool which is used to measure our
5 performance in diversity and inclusion across several
6 areas, including workforce, strategy and plan,
7 recruitment, training and development and procurement.
8 We were then compared to other organisations taking
9 part. Our overall score was 87 per cent, which placed
10 us as tenth out of 171 organisations. COPFS scored
11 particularly high in our workforce strategy and planning
12 and leadership and accountability."

13 So here you describe the crown's acceptance of
14 Dr Jandoo's conclusion that Crown Office and the
15 Procurator Fiscal Service was institutionally racist and
16 you set out the steps that have been taken in the past
17 20 years or so to eradicate institutional racism and
18 they're listed at the top of that paragraph, if we could
19 perhaps scroll back up to the top of paragraph 3,
20 please.

21 The first you mention is training, can you tell us a
22 little more about the training? What does it cover?

23 A. I think I spoke a little about this on the previous
24 occasion that I gave evidence, but the training has
25 evolved over time. In the 2000s the training was very

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1 much focused on raising awareness of the concept of the
2 institutional racism and the learning from the Chhokar
3 case, as well as a much broader attempt to raise and
4 promote equality.

5 And at that stage, my recollection is it was very
6 much focused on the question of race and as we began to
7 prepare for the implementation of the Equality Act in
8 2010, we then broadened that effort and training took on
9 a broader look at inclusion and equality, not just race,
10 and a range of other protected characteristics in the
11 2010 Act and it was an attempt to comply with our
12 obligations in the 2010 Act, but also begin to build a
13 much stronger awareness of the need for equality and
14 inclusion in our work and there were elements of that
15 training which were mandatory and, forgive me, I forget
16 the titles of the courses, but they were mandatory
17 training courses at the time for all staff. And as I
18 think I said on the last occasion, they were also
19 training courses targeted at managers and leaders to
20 ensure that they understood their responsibilities to
21 tackle any issues of equality and inclusion which they
22 came across.

23 Q. And these training courses include race?

24 A. Yes, in the -- my recollection is that in the 2000s

25 there was very much a strong focus on race because of

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1 the consequences of the Chhokar case and Dr Jandoo's
2 findings and, as I say, my sense is that after the
3 Equality Act, we broadened that focus to look at all
4 protected characteristics and the need for broader
5 inclusion and equality.

6 Q. Did the training courses cover Article 2?

7 A. From my own recollection, I can't remember. I would
8 need to check within the organisation on the detail of
9 what was included in the training. I don't know if any
10 of it has been made available to you or not, but whether
11 it was that training or whether it was training through
12 a focus on death investigations, I do remember at the
13 same time a strong focus in the organisation on the
14 consequences of Article 2 for our death investigations.

15 Q. What about Article 14, to your recollection, was that
16 covered in the training?

17 A. I can't -- I can't remember the specifics of the
18 training and the detail of the content, but I would be
19 surprised if it were not covered in the training, given
20 that we had very recently also undertaken a very
21 significant training exercise in relation to adoption of
22 the Convention in 1999/2000. Again, all staff were
23 trained in a mandatory fashion in relation to the
24 adoption of the Convention and I would be surprised if
25 the equalities training in the 2000s didn't make the

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1 connection with Article 14, but I just simply can't
2 remember personally at this stage.

3 Q. And how was the training quality assured?

4 A. That was done through a simple level assessment by
5 everyone who attended the training. There was a strong
6 focus on managers supporting staff who had attended
7 training and I think also through a group -- a steering
8 group I think which was led at the time they would
9 assess a range of information from across the
10 organisation, such as information from HR about
11 grievances or other staffing issues which might be
12 related to questions of race.

13 I can't remember when it started, but every year the
14 civil service across the UK carries out a staff survey
15 in October of every year. I can't remember when that
16 started, but that also has questions in relation to
17 equality and it also has direct questions about
18 individuals having suffered harassment or discrimination
19 and that became another dataset which was used to
20 evaluate the effectiveness of our overall approach,
21 including our training.

22 Q. Thank you. Was this training supported by guidance
23 materials?

24 A. Yes, I believe it was.

25 Q. Would they be on the knowledge bank? We've heard a lot

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1 about the knowledge bank from your colleagues.

2 A. So I think it's important to remember the period of time
3 that has passed. The knowledge bank didn't exist in the
4 2000s and if we are talking about training delivered in
5 the 2000s, that would very much have been delivered
6 face-to-face with material provided at the training
7 events for individuals, either in advance to read before
8 they came to the training events, to consult during or
9 to take away for reference after it.

10 Q. Turning to --

11 A. Just to be absolutely clear, there was -- I should be
12 clear, although the knowledge bank didn't exist, there
13 was an intranet, an internal website, but it was much
14 less developed than it is now and I don't remember the
15 knowledge bank being available in the 2000s.

16 Q. We've heard that there was a Precognoscer's Handbook,
17 guidelines on serious casework I think and the
18 Deaths Manual of Practice; are these the sort of places
19 that Crown Office staff might have been able to look for
20 guidance materials that touched on issues equality and
21 diversity back in the early 2000s?

22 A. Indeed, in relation to specific tasks and these are
23 sources that you're referring to which trace their roots
24 back to essentially hardcopy folders of guidance which
25 either every member of staff would be given or they

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1 would have access to within their office and the time
2 that you're asking about was a time that we were
3 transitioning away from hardcopy, which was hard to
4 ensure it was kept up-to-date and we were therefore
5 moving to try and digitise as much of our guidance as
6 possible.

7 Q. Returning to your statement, in addition to training,
8 you mention engagement with community groups. Can you
9 tell us a little bit more about that?

10 A. I wasn't personally involved in that at the time because
11 of the role that I occupied, but it was very clear to me
12 that Colin Boyd as Lord Advocate and his successor as
13 Lord Advocate Lady Angiolini placed great store on
14 procurators fiscal overcoming what you might have
15 regarded as a traditional distance from local
16 communities and overcoming that by engaging directly
17 with different community groups and, given the focus on
18 race at the time, a real effort was made to focus on
19 local community groups who supported minority ethnic
20 communities in Scotland and to work with them to help
21 them understand the work that we did, to build up
22 relationships with them and that would also allow
23 individuals to answer any the questions that the groups
24 might have.

25 We also sought to involve the groups in our work and

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1 to bring them into the organisation and I remember a
2 very strong focus on the -- at that stage, we were
3 divided into eleven geographical areas with an area
4 procurator fiscal in charge of each one and there was
5 very strong focus on the individual leader of the area
6 procurator fiscal building those relationships and
7 getting to know those groups and so I remember examples
8 in Glasgow and Lanarkshire where that was done quite
9 successfully.

10 Q. Thank you. You mention increased diversity within your
11 workforce, what steps were taken to increase the
12 diversity of your workforce?

13 A. My understanding of that from the time and it continues
14 to this day is very much about raising awareness of
15 careers within the Procurator Fiscal Service, targeting
16 that raising awareness at minority ethnic communities
17 and doing that alongside our other work to give them the
18 confidence that this was an organisation that wanted to
19 change and that prioritised equality and inclusion. So
20 it was very much about trying to engage with people
21 where they were, which would in terms of careers for
22 prosecutors would be at universities, but also going
23 into schools as well at a much younger age and raising
24 awareness and there have been examples over the last
25 20 years of individuals who have joined the service who

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1 have said they had joined directly because of engagement
2 like that. And that's why to this day I mentioned later
3 in the statement every year the public speaking
4 competition is targeted specifically on the subject of
5 equality.

6 Q. You say elsewhere in your statement that your data from
7 March 2023 says that 3.8 per cent of your workforce
8 identifies as being from an ethnic minority background,
9 which was broadly in line with the census data from
10 2011.

11 You may or may not be aware that the 2002 data have
12 been published very recently and 7.1 per cent of our
13 workforce or people of working age in the UK identifies
14 being from a black or ethnic minority background. Are
15 efforts ongoing within the Crown Office to continue to
16 increase the diversity of its workforce?

17 A. Very much so and I can perhaps speak about two different
18 aspects of that. So one is the need to move beyond
19 recruitment at the entry levels to ensure that in
20 promotion and career development that we continue to
21 reflect at all levels in the organisation, up to and
22 including the most senior levels, diverse communities in
23 Scotland.

24 And the second aspect is the continuing focus on
25 recruitment. So the updated census data indicates that

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1 as a proportion of the workforce as a whole, we still
2 have some way to go to match the population of Scotland
3 and that, therefore, will remain a priority for us. But
4 looking at the most recent data in 2022 as a year, taken
5 as a 12-month period, for our new recruits our -- of all
6 the recruits that year I think between 7 and 8 per cent
7 of our recruits that year were from black and minority
8 ethnic communities, Asian minority ethnic communities.
9 For promotion, the most recent data I have in relation
10 to promotion is that in a recent year within the last
11 year or so, 11 per cent of the staff who were promoted
12 were black, Asian or minority ethnical community based
13 on their own self-declarations of course.

14 So that is I take it to be a positive indicator that
15 while the overall proportion of the workforce continues
16 to change and the most recent data for 2024 is
17 marginally increased on the figures that you have in my
18 statement for 2023, I didn't have that data when I
19 completed by statement, but the figures for the
20 workforce as a whole for 2024 show a marginal increase
21 in the proportion of the workforce and those figures
22 that I have been able to give you today for recent
23 recruitment and recent promotion I think give me some
24 degree of confidence that we are succeeding in our
25 efforts, but still with a long way to go.

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- 1 Q. You also mention in your statement the structural
2 embedding of practices designed to combat unwitting
3 prejudice and bias, tell us about that?
- 4 A. There are different examples. So for example, for quite
5 a long time the organisation has operated in all
6 promotion and recruitment exercises, all details,
7 personal details, of candidates are removed from the
8 information which is provided to people who take
9 decisions so that we be confident that decisions which
10 are made either at the recruitment stage or at promotion
11 stage are made without any influence of unconscious bias
12 or such factors. So that is one example of that
13 structural practice which I was talking about there.
- 14 Q. Thank you. You mention various other initiatives, the
15 mentoring scheme, there's quite a lot detail about that
16 in your statement already; the annual equalities
17 conference and the public speaking competition for
18 schools. You touched on that already and you explained
19 that it has a particular focus on equalities.
- 20 A. That's correct.
- 21 Q. Can you tell us a little bit more about that
22 competition.
- 23 A. Yes. So the competition I think now has been running
24 for almost ten years and I can't quite remember the
25 number of schools which compete across the country, but

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1 it might be about a hundred. We recently, just in the
2 last month or so, had the final of the competition,
3 which is supported, I'm very pleased to say, by the
4 Scottish Court Service and we're able to host the final
5 of that at Parliament House, which gives the opportunity
6 for the children to come and speak in one of the courts
7 in Parliament House which they very much enjoy.

8 But each year it's organised through our geographic
9 structure, so each of our six sheriffdoms will work with
10 local schools and will run local competitions which I
11 think start around about October, November and through
12 the winter the schools compete in various heats and then
13 work their way through to national semi-finals and it
14 seems to be a very successful event which the schools
15 are very keen to promote and have young people engage
16 in. We set the topic for the debates and the topics are
17 always focused on issues of equalities.

18 Q. Does this competition give the Crown Office the
19 opportunity to raise awareness with a young audience,
20 tomorrow's lawyers potentially, that there are careers
21 to be had in Crown Office and that Crown Office is a
22 place that encourages equality and diversity and
23 inclusion?

24 A. It's exactly that, yes, yes.

25 Q. Thank you. So you've outlined in some detail in

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1 paragraph 3 of your statement the initiatives, the
2 efforts made by the Crown Office over the last 20 years
3 or thereby to eradicate institutional racism. And I
4 wanted to ask how would these efforts, how did these
5 efforts -- how would these efforts help a precognoscer
6 investigating the death of a black man in custody where
7 race was potentially a motivating factor?

8 A. So these are very much factors I was describing from the
9 point of view of workforce and employment. You're
10 turning now I think to the question of the actual work
11 which we do and there I think we -- we do benefit from
12 these broader issues because although they are focused
13 on the workforce, I think what they do quite
14 successfully, and I have seen this now particularly at
15 the annual conference, they raise a very broad awareness
16 across the whole workforce of the importance of
17 equality.

18 The fact that staff are given time to take part in
19 these efforts gives staff the confidence that equalities
20 and inclusion is something that is important to the
21 organisation and, therefore, I think that does provide a
22 general background to the actual casework and the
23 investigative work which I think is important. I think
24 it would have been wrong for the organisation simply
25 just to focus on the technical aspects of how we do our

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1 investigative work or our prosecution work and not have
2 tackled these broader issues within the workforce. And
3 it would have been wrong not to try and be clear for
4 everyone in the organisation and for the public about
5 the fact that equality is an important value in the
6 organisation.

7 You obviously then need different approaches in
8 relation to what I'm describing as that technical work
9 in relation to investigation and prosecution and there
10 we rely on the fact that we very much since 2010
11 embedded equalities across all areas of your work and I
12 therefore would expect that training in relation to
13 individual aspects of work would be the appropriate
14 place then to highlight important issues of equality and
15 if that is not there, then that would be something that
16 we would have to correct and change.

17 Q. Returning to the questions that you were asked in your
18 statement, you were asked whether Crown Office remains
19 institutionally racist and you give a response at
20 paragraph 4. Again, I would like to read it in full and
21 then ask you some questions:

22 "I do not believe that COPFS in 2024 is
23 institutionally racist in the way that it was in 2001,
24 but it is important to stress that the most important
25 assessment of institutional racism for an organisation

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1 is an external one and the shared priority of our
2 leaders is to do all that we can to ensure that the
3 public, including victims and bereaved families,
4 minority ethnic communities and stakeholders, judge us
5 by our actions and the way in which we engage with them.
6 It is their assessment as to whether we are
7 institutionally racist, together with external
8 benchmarking as described above, which guides and
9 motivates us. Our priority is to ensure that we do all
10 that we can to guard against the possibility that the
11 quality of our service we provide to a member of public
12 is impacted by that person's race, culture or language.
13 The ENEI TIDE guidance describes what I believe the
14 approach of COPFS to be in the following way:

15 "Full inclusion is a temporary state few
16 organisations will ever achieve. However, the best
17 recognise this and understand that a drive for
18 continuous improvement is in the best interests of the
19 organisation, their employees and stakeholders'."

20 So you begin that paragraph by saying:

21 "I do not believe that COPFS in 2024 is
22 institutionally racist in the way that it was in 2021."

23 Just to be clear, are you saying that institutional
24 racism has been eradicated or that it's a work in
25 progress and part of an ongoing drive for continuous

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1 improvement?

2 A. I'm saying that it's very much the latter point that
3 it's a matter of continuous improvement and vigilance
4 and to work in an organisation which has been previously
5 judged to be institutionally racist I think is such an
6 important reference point for the values that you wanted
7 to build in an organisation that I think it would be
8 foolish to say that you can ever eradicate it and that's
9 why I highlighted that quote from the ENEI guidance,
10 because I thought that was quite a good way of
11 describing how I personally and how I think other
12 leaders in the organisation feel about it, that I do not
13 believe we are institutionally racist as an
14 organisation, but I am not complacent and I'm trying to
15 signal in that answer that actually to some extent my
16 personal view of the view of my fellow leaders is less
17 important than the views that others form of us.

18 I often share with new colleagues in the
19 organisation my personal view that it's not the results
20 in the casework that we do -- these are not the things
21 by which people judge us. People judge us by the way we
22 treat them as an organisation. They remember how we
23 made them feel and they don't judge us by the outcomes.
24 People understand that we work in a system where it's
25 not our job to guarantee outcomes. And I think that's

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1 an important point to stress to particularly new members
2 of staff who join the organisation, because our work
3 drives us very much to prepare cases, investigate deaths
4 and to reach a conclusion. And I think if you didn't
5 take steps to guard against, it would be very easy for
6 us to fall into the trap of thinking that the way in
7 which we are judged is by the results of those cases or
8 those investigations and I think what comes through here
9 in this question is my view that actually what is more
10 important is the way that you treat people when you are
11 dealing with them.

12 Q. You quote the ENEI TIDE guidance:

13 "Full inclusion is a temporary straight few
14 organisations will ever achieve."

15 Is that statement essentially a warning against the
16 type of complacency that you have described, a warning
17 to remain vigilant?

18 A. It's very much how I interpret it and it's very much how
19 I see the Crown Office and Procurator Fiscal Service in
20 2024. We -- I don't see institutional racism in an
21 organisation which was judged to be institutionally
22 racist, I don't see that as being something that an
23 organisation ever says, job done, we're finished with
24 that, we can move on to something else. It has to be
25 something that you are seen to be constantly vigilant

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1 about, paying attention to, learning when you make
2 mistakes and you miss things and you get things wrong,
3 but learning for the best of reasons, which is that you
4 remain committed to getting it right and getting closer
5 to that state of full inclusion, as referred to in the
6 quote.

7 Q. You say in your statement that your priority is to do
8 all that you can to guard against the possibility that
9 the quality of the service that you provide will be
10 impacted by the person's race, culture or language. In
11 guarding against that possibility, do you continue to
12 develop the sort of initiatives that you set out in
13 paragraph 3 which we've already discussed, training,
14 engagement and so on and so forth?

15 A. Yes, and we have a number of ways of doing that and so
16 we have a mechanism within the organisation to ensured
17 that this issue is constantly being looked at. We bring
18 together the people in the organisation who are engaged
19 in this work, but we're also looking for gaps or new
20 things that we could do either in relation to learning
21 from inquiries such as this or looking at what other
22 prosecution or death investigation services do.

23 An example of that is after taking up my
24 appointment, I came to the conclusion last year that
25 there is a gap in our organisation, which is that we do

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1 not have data to tell us the impact of our
2 decision-making on different communities within Scotland
3 and so we do not have data which tells us -- I cannot
4 answer the question, because I do not have the data to
5 tell me whether, for example, a black man is more likely
6 to be prosecuted or not in Scotland. And that to me
7 when I realised that last year from seeing some work
8 that had been done elsewhere outside of Scotland, that
9 was something that I then started a process to make sure
10 that we could work towards filling that gap and
11 developing that better understanding.

12 So I think that continuous improvement, as you've
13 referred to, is something that I think all of the
14 leaders in the organisation understand, look for
15 opportunities and I think we are doing that.

16 Q. The example that you just gave, can you tell us a little
17 bit more about what you're doing to fill that gap --

18 A. Yes.

19 Q. -- where the data do not currently exist?

20 A. Yes, and it's -- unfortunately, it's not an easy thing
21 to fix, because it depends on having data at scale in
22 relation to the race or ethnicity of accused, but also,
23 having discussed it with other leaders in the
24 organisation, not just accused, but we think we should
25 also be able to answer these questions in relation to

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1 victims as well. Therefore, that data is not widely
2 available, as I understand it, having started to look at
3 this, either to the police or to the Procurator Fiscal
4 Service. So that we have started some conversations to
5 work out how we could do this and that would mean some
6 very significant changes.

7 Now, an early indication is that with the
8 implementation of the recent hate crime legislation
9 there may be a change on the part of policing and I
10 can't speak for them today, but I have been advised that
11 there may have been a change on the part of policing in
12 the last year or so in relation to the data which they
13 collect in relation to either accused people or victims.
14 And if that is correct and is of the right sort of data
15 and at scale, then my hope is in the near to medium term
16 we should be able to engage the sort of experts who can
17 assess that data and tell us whether or not --
18 essentially tell us what the data shows.

19 Q. Thank you. We're going to return to the theme of
20 institutional racism, but at this juncture I would like
21 to ask you some questions about the crown's approach to
22 the precognition process following the death of
23 Sheku Bayoh.

24 Now, do I understand correctly that you took a
25 conscious decision not to watch any of the evidence led

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1 before the Inquiry?

2 A. Yes, that's correct. I have not watched any of the
3 evidence of any other witnesses.

4 Q. That's helpful to know. What I can then do is read to
5 you passages from the evidence before inviting your
6 comment.

7 Firstly, however, can we go back to the evidence
8 that you gave in April of this year. You may recall at
9 one stage you were read a passage from the statement of
10 your colleague Les Brown, who was the Solemn Legal
11 Manager in the precognition process, in which
12 redescribed an incremental approach being taken by the
13 Crown to the precognition process and he said:

14 "In essence, what we were doing here was try to
15 reach as quickly as possible a stage where Crown Counsel
16 were able to exclude and otherwise criminality and then
17 allowed wider considerations to move forward in relation
18 to issues that were considered relevant to a fatal
19 accident inquiry."

20 So you were read that passage from his statement and
21 you were invited to comment and what I'll do is simply
22 refresh your memory by reading over to you the
23 transcript of your evidence. You made it known to the
24 Inquiry that you had been unaware that this approach had
25 been adopted in the circumstances of this particular

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1 case and when asked to comment on the idea of an
2 incremental approach, you said:

3 "What I would expect to happen is that an
4 investigation would identify a number of issues which
5 needed to be considered and it was clear to all of us
6 who were involved in those initial days that the
7 question of criminality was an immediate or obvious
8 issue which would need to be explored in the
9 investigation and, in simple terms, was an immediate
10 priority.

11 "There may be wider issues which relate to broader
12 learning which could come out of a fatal accident
13 inquiry or an inquiry of this nature, but the priority
14 would be to reach a decision on the criminal aspect as
15 quickly as possible. I would not expect that would mean
16 that those individual elements would be isolated off
17 from each other and dealt with one at a time. The
18 investigation would be trying to make progress on all of
19 them at the same time as perhaps identifying particular
20 priorities. I think our approach as much as possible is
21 to progress the whole investigation.

22 "You wouldn't want a team looking at a criminal
23 investigation and no one else dealing with the broader
24 aspects that I have referred to until that team had
25 finished. You would try to make sure there was sharing

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1 of information and progress on all aspects at the same
2 time."

3 So that's simply for the purposes of refreshing your
4 memory as to the evidence that was put before you and
5 the evidence you gave back in April.

6 Back in April, you were also asked questions by
7 senior counsel in response to which you agreed, as all
8 other crown witnesses also did, that the crown
9 investigation required to meet the requirements of
10 Article 2 of the ECHR, including the procedural
11 obligations which in turn include adequacy. And you
12 further agreed that where Article 14 was also engaged,
13 there was an additional duty imposed on State
14 authorities to take all reasonable steps to unmask any
15 racist motive and to establish whether or not ethnic
16 hatred or prejudice may have played a role in events and
17 to pursue that investigation with vigour. So that's my
18 summary of the evidence that's pertinent for today's
19 purposes that you gave back in April.

20 Finally, you were also asked by the Chair this
21 question:

22 "In relation specifically to the issue of race,
23 would you agree that in the circumstances of this case
24 the issue of race might have a bearing on the question
25 of criminality?"

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1 And you replied:

2 "I would agree that you could not consider the
3 question of criminality without considering the question
4 of race."

5 The Chair then said:

6 "So to that end, would you be expecting CAAPD to be
7 investigating the issue of race as part of their
8 exercise of investigating criminality?"

9 And you replied:

10 "Insofar as it was relevant to the question that
11 they were dealing with, yes, race was an issue that
12 would need to be considered at the criminal stage."

13 You were asked:

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

17 And you agreed. And the Chair then said:

18 "Would you see that as part of a thorough
19 investigation of the kind that you had referred to
20 earlier?"

21 "Yes.

22 "And that a thorough investigation of that kind
23 would in turn inspire confidence in the family?"

24 And you replied:

25 "That would be the hope, yes."

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1 So I appreciate I have given you quite a lot
2 information. It's really just for the purposes of
3 refreshing your memory of the aspect of your evidence in
4 April that are perhaps germane to the questions I want
5 to ask you today, the themes that I would like to
6 explore with you today.

7 So against the background of your evidence and
8 particularly your evidence in relation to Article 2 and
9 14 and your expectations of what CAAPD would have been
10 looking at as part of the precognition process and in
11 particular their exercise of investigating criminality,
12 I would like to share some evidence with you now as to
13 the approach that was in fact taken by those tasked with
14 carrying out the precognition and I do so because I
15 appreciate you haven't watched any of the evidence.

16 So again, I would like to give you quite a lot
17 information before inviting any comment.

18 Fiona Carnan was the fiscal depute who was tasked
19 with drafting the analysis and she was asked about the
20 approach that she took to race and she said that
21 essentially it was a two stage process, that she was
22 looking for evidence of criminality as if, and only if,
23 she found evidence of criminality would she then go
24 looking for evidence of a racial aggravation or
25 motivation for that criminality. And in a statement

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1 that she produced to the Inquiry she said this:

2 "If my analysis of evidence had established that
3 there was sufficient evidence to support criminal
4 charges against any of the officers, the question of any
5 racial motivation or intention would have been addressed
6 at that stage. Since the analysis of evidence did not
7 identify a criminality by any officer, the question of
8 racial aggravation did not arise since no offence had
9 been identified."

10 So that was the approach that she took. I then
11 asked her whether she had taken certain matters that may
12 have a bearing on race or racial motivation into account
13 given the approach that she had outlined to us and also
14 given the absence of any express analysis in relation to
15 race within the analysis chapter of the precognition.

16 So she was reminded that there was evidence
17 available to her at the time that she drafted the
18 analysis that some officers were concerned they were
19 attending a terrorist incident. First on the scene in
20 particular were Walker and Paton. Constable Walker
21 said:

22 "It did across my mind he was doing this to get the
23 police there, bearing in mind we're on a severe threat
24 level for an attack on the police."

25 And former Constable Paton said:

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1 "It also ran through my mind that this male could be
2 part of a terrorist plot."

3 And later in the statement he produced he said:

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

6 So Ms Carnan was reminded of what Constables Walker
7 and Paton had said in their statements and then she was
8 asked:

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

13 And she replied:

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

18 She was asked:

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

21 "No."

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

24 "No."

25 "And did you consider why Constable Paton thought

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1 about Lee Rigby in particular.

2 "I simply noted his position.

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

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

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

10 "I didn't ask that question.

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

15 "I did not make that assessment."

16 She told us in her evidence that she made no
17 reference to the use of racial tropes or negative
18 stereotypes used by the response officers in their
19 statements, because the use of racial tropes is not
20 criminal and evidence about negative attitudes would not
21 be relevant to the analysis, unless criminality was
22 identified. In her evidence I said to her:

23 "You'll be aware of racist stereotypes in society
24 that black men are more violent, unpredictable,
25 aggressive. You will have come across these, I would

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1 imagine."

2 She said "I have". I asked her:

3 "Did you examine the officers' statements for
4 language of that sort?

5 "No.

6 "Did you consider patterns of behaviour whether, for
7 example, they had used their sprays or drawn their
8 batons at previous knife incidents?

9 "No.

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

12 "No.

13 "Did you consider looking for comparator evidence,
14 for example looking at history of use of sprays or use
15 or force involving a baton, whether the officers had
16 used sprays or batons before?

17 "No.

18 "Or whether they had used sprays or batons when
19 detaining a white suspect?

20 "No."

21 She was asked questions around the speed of the
22 incident, did she consider whether the speed with which
23 the officers elected to use force was because he was
24 black. She said:

25 "That wasn't my understanding. I think I have

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1 explained my understanding of their perception was based
2 on a whole lot more than the colour of skin.

3 "Did you consider whether Constables Walker and
4 Paton opted for a hard stop may have been influenced by
5 race?"

6 And she replied again:

7 "We didn't cross the threshold into criminality so
8 that wasn't a consideration per se."

9 So Ms Carnan was candid in her evidence that these
10 questions were simply not asked by her as part of her
11 process of analysis.

12 Now, Stephen McGowan was taken through these
13 chapters of evidence in his own evidence and his comment
14 was invited and he said these are all relevant
15 questions. The same exercise was carried out with
16 Lindsey Miller and she agreed these were all relevant
17 questions.

18 Would you also agree with that? Is there anything
19 you would disagree with there?

20 A. There's quite a lot there, but, no, from what you read
21 out no, I don't -- there's nothing there I would
22 disagree with.

23 Q. Stephen McGowan was asked:

24 "With hindsight, did the crown investigation take
25 all reasonable steps to unmask any racist motive?"

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1 And he replied:

2 "I think there are further steps that could have
3 been taken."

4 Lindsey Miller was asked the same question and she
5 replied:

6 "On the basis part of Ms Carnan' evidence, no."

7 Would you agree with their sentiments?

8 A. It's very difficult for me to answer that question,
9 because, as I think I said on the last occasion,
10 I wasn't involved in the investigation and in preparing
11 to give evidence on the last occasion and today,
12 I wasn't asked or directed to that issue in this way
13 and, therefore, I neither have personal knowledge nor
14 have carried out any research in relation to the case
15 which allows me to form a personal view on the
16 appropriateness of the level of investigation.

17 But from listening to the factors that you've read
18 out to me, as best as I can remember them, it appears to
19 me that the crown was carrying out two investigations
20 and I think it's always important to remember that in
21 some cases like this there are two investigations and
22 sometimes in our past it has been the practice
23 essentially for the same person to carry out both
24 investigations at the same time is.

25 At this time, because we had developed specialisms,

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1 my understanding, and it is only my understanding, is
2 that -- because I wasn't personally involved is that
3 different aspects of each investigation were being
4 carried out by different people and not in parallel,
5 they were in sequence, and that's one of the things that
6 we've changed since the investigation.

7 I've given quite a lot thought to this, to the
8 extent that it was raised with me on the last occasion,
9 because it seems to me from the text that you have read
10 out that Fiona Carnan was being asked about her
11 consideration. As I understand it, she was part of the
12 investigation considering criminality on the part of the
13 individuals or the police force and she was being asked
14 about her consideration of race as part of that. And it
15 has led me to wonder whether that separation and
16 specialisation is really what is at the root of the way
17 in which those questions were being answered and that
18 what it has exposed is whether or not, in the context of
19 a criminal investigation, some of the factors which
20 might be, for example, might not be admissible evidence
21 in any criminal matter, but may be relevant to the
22 broader questions you've highlighted and would therefore
23 be considered by a death investigation leading to either
24 a fatal accident inquiry or an inquiry like this, that
25 that approach to separation and specialisation did not

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1 help us here because these are all things that in my
2 view should have been considered, not least because
3 of -- in addition to the question of the evidential
4 value they might have, it also becomes an important
5 factor in building the confidence of the nearest
6 relatives that we ourselves in the way that we approach
7 our work understand issues of race and that we
8 understand the importance of the broader question of
9 establishing what happened.

10 And so it's -- if I can bring that back to your
11 original question and I make apologies for my lengthy
12 answer, but I think it is difficult for me, without
13 personal knowledge or research of the case itself, to
14 give you an answer today which is to say whether I
15 regard the investigation as satisfactory or not.
16 I don't think I can do that. But I think what I can say
17 is that there were factors in the way that this
18 investigation was set up and established that may have
19 led one part of the investigation not to consider a
20 broader range of information that may have been thought
21 relevant to a separate investigation and I use
22 "separate" in that sense of the way in which we were
23 structured at the time.

24 Q. Thank you. And there's no need to apologies. I think
25 your response was shorter perhaps than the question that

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1 I asked. You referred to there being two investigation
2 and to them being separated out, that is the
3 investigation in relation to criminality and the broader
4 investigation around -- around death. And I think you
5 said that perhaps they were being considered by
6 different people.

7 The evidence that we have heard is that there were
8 not two parallel inquiries running here. There was
9 simply the investigation into criminality which
10 culminated, as far as the precognition process is
11 concerned, in Fiona Carnan's preparation or drafting of
12 the analysis and the idea, as I understand it and I will
13 be corrected if I have misunderstood the evidence, was
14 that after a decision had been taken on criminality and
15 in the event the crown were to turn their minds to
16 whether there should be fatal accident inquiry and to
17 begin to prepare for any such inquiry, these broader
18 issues would be considered at that stage. They were not
19 being considered in parallel. It was very much a
20 sequential process.

21 Now, nothing may turn on that, but I wondered if
22 perhaps we were at slightly cross-purposes there.

23 A. No, no, I can assure you we weren't. I didn't mean to
24 give the impression that I thought there were parallel
25 investigations. My understanding from the way the

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1 questions were asked and my previous attendance at
2 the Inquiry is that there was a criminal investigation
3 and then there was going to be a consideration of
4 whether or not there should be, in the traditional way,
5 a fatal accident inquiry or something broader and deeper
6 such as this Inquiry.

7 Now, so I don't think for the moment that there was
8 a parallel set of investigations here and that also fits
9 with my experience of the time. There came about as
10 a consequence of us having established specialist teams
11 that where an incident gave rise to both a criminal
12 investigation and the need to consider the consequences
13 of the deaths, we did I think adopt a process of perhaps
14 understandably trying to conclude the criminal
15 investigation as quickly possible, but that was perhaps
16 was done to the exclusion of the wider investigation.
17 And I think that's one of the things that we have
18 changed and learned since 2015.

19 We now don't adopt that linear approach. We very
20 much try to replicate the benefits that I think I spoke
21 about on the last occasion of the traditional approach
22 where the local procurator fiscal would carry out all
23 aspects of the investigation and, therefore, I think we
24 have tried to recreate that but still maintain the
25 benefit of having specialist teams.

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1 Now, the difficulty that I've thought about since
2 giving evidence on the last occasion is this question of
3 race that I was being asked about and the extent to
4 which it should be considered in the criminal
5 investigation and that has made me think of, in the
6 context of a criminal investigation, our prosecutorial
7 approach to race has very much been driven I think by
8 the need to prioritise and tackle hate crime. And those
9 are cases in which there is very often obvious evidence
10 of racial hatred either before the incident or after the
11 incident or during the incident and that evidence is
12 admissible and, therefore, the prosecutor can't put it
13 before the court and seek a conviction for hate crime
14 under one of the legislative mechanisms that exists.

15 What I have begun to think about I think since
16 giving evidence on the last occasion is that a death
17 investigation without any criminal investigation may
18 have available to it evidence which doesn't fit that
19 category that I have just described that we are more
20 traditionally used to as prosecutors and that is I think
21 the sort of factors that you were highlighting that were
22 put to Fiona Carnan. And the question that was put to
23 me on the previous occasion was really the extent to
24 which we should use and rely on that information as part
25 of the criminal investigation and I still maintain,

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1 I think, my answer from the previous occasion that the
2 prosecutors should be looking at that.

3 There are two reasons for that. One is it is
4 important to build an understanding as to whether or
5 not, in the absence of any of the explicit evidence of
6 racism, whether that information provides a basis for
7 the prosecutor to seek a conviction which has an element
8 of hate crime to it. The second element is the one I
9 have already referred to, which is it's important to
10 demonstrate to the victims or the nearest relatives in a
11 death case that we are not -- that we understand those
12 issues and we have taken account of them. But the
13 difficulty is that that type of evidence and information
14 that you're referring to doesn't neatly fit in in the
15 criminal context into being admissible relevant evidence
16 for a criminal offence and I suspect that is the heart
17 of the issue that was ultimately being explored with
18 Fiona Carnan and, to my knowledge, that question in
19 Scotland is unexplored in a criminal trial, the extent
20 to which prosecutors could bring before the court the
21 type of information that you're talking about and rely
22 on it to seek a conviction, but that doesn't mean it
23 shouldn't be considered for the reasons I have talked
24 about and I think that's, to my mind, the importance of
25 considering it.

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- 1 Q. Thank you. That was a very full and detailed answer.
- 2 A. I'm sorry.
- 3 Q. No, please, don't apologise. It's a very helpful
4 answer, but, if I may, I'll and some follow-up questions
5 in relation to that answer. You gave evidence back in
6 April and I reminded you of it this morning that one
7 cannot consider criminality without also giving
8 consideration to race. And you've given evidence that
9 the sort of matters that Fiona Carnan told us she didn't
10 consider, the sort of questions that she didn't ask
11 herself, were all matters that in your view ought to
12 have been considered as part of the process of
13 considering criminality, and not parked until such time
14 as consideration might have been given to preparation
15 for an FAI, and you've put forward two reasons for that.
- 16 First, around building an understanding of whether
17 even absent explicit overt examples of racisms, slurs,
18 things of that sort, there might be a basis to invite
19 the court to convict of one or other of the hate crimes
20 and the second reason being that it inspires the
21 confidence of the family in the approach that the crown
22 are taking and I suppose the confidence of the public
23 more broadly.
- 24 A. Yes.
- 25 Q. You said too that there may be issues around

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1 admissibility and relevancy. We were looking primarily
2 at things said by officers in their statements and we
3 did have evidence from the allocated Advocate Depute,
4 Ashley Edwards KC, that she was of the view that the
5 statements would pass the test for admissibility. She
6 took us to a case called Johnstone and said that that
7 was her statement that these statements would be
8 admitted in evidence and that she would always take the
9 crown case at its highest.

10 So that may or may not have been an issue, but
11 regardless of whether there were concerns around
12 admissibility and relevancy, I hear you say that these
13 were matters that should have been considered as part of
14 the process. And are these matters that you would then
15 have expected not only to be considered in the
16 precognoscers or the analyst's head, but set out in the
17 analysis of the evidence to demonstrate that they had
18 been considered, irrespective of the conclusion reached
19 by the analyst following upon that consideration?

20 A. Yes, in my experience, all aspects of the case
21 preparation that are considered in that way should be
22 set out in writing, because that is how you reach a
23 well-informed decision for the decision-maker at a
24 subsequent stage because you're describing a process
25 which you and you others but not everyone might

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1 understand that the precognoscer is not the
2 decision-maker, the precognoscer is the investigator,
3 and it's their job to gather the evidence, to analyse it
4 and make recommendations.

5 So in my view there would be little value in
6 considering something but not recording the different
7 factors that you had looked at, the balancing that you
8 had performed and the conclusion that you had come to
9 and you do that in order to assist the person who then
10 takes the decision in the knowledge that they may
11 disagree with you, but they can only do that effectively
12 if they have had access to your thinking on the matter.

13 Q. Now, ultimately, it will be for the Chair to the Inquiry
14 to determine whether the precognition process was
15 compliant with Articles 2 and 14, but there is at least
16 a possibility that the Chair may take the view that the
17 crown's approach to race was inadequate.

18 If the Chair were to take that view, I would be
19 interested in your comments on this matter. In relation
20 to Fiona Carnan, who was candid in her evidence that she
21 simply didn't ask herself any of the questions around
22 use of language, patterns of behaviour, comparators and
23 so on, would you see those failings, if they are deemed
24 by the Chair to be failings, to be personal failings or
25 institutional ones, possibly both?

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1 A. I would regard them as institutional failings, not
2 personal failings and I say that because the individual
3 was working within a system that had been established by
4 the organisation. And given the factors that I have
5 described in my analysis and my thinking of this since
6 April, I think what was being described to the Inquiry
7 was something that arises from the way in which
8 the crown was structured to focus on specialism and,
9 therefore, it wasn't something about the individual's
10 approach to it. And if there are other factors which
11 led to it, such as a lack of clarity or a lack of
12 guidance on understanding the importance of race, then
13 those would be institutional as well, rather than
14 personal. So I would regard it as an institutional
15 matter.

16 Q. And what about the Solemn Legal Manager who ultimately
17 countersigned the precognition, and didn't identify
18 these failings, if indeed they are failings, would you
19 see the Solemn Legal Manager's endorsement of that
20 precognition as what might be thought to be an adequate
21 precognition or might be concluded to be an inadequate
22 precognition? Would you see the Solemn Legal Manager's
23 failing in that regard as a personal one or
24 institutional one?

25 A. So again, I have to address that I wasn't directed to

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1 this issue in either of the statement requests, but
2 I think my answer to that would be the same as in the
3 previous. If it's institutional for one person who is
4 part of a case, then those factors are relevant I think
5 for others. But I think it's important to say that the
6 factors that we're talking about here were not, as I
7 understand it, factors which were ignored altogether and
8 not considered relevant.

9 Having concluded the criminal investigation, my
10 understanding is that the organisation then -- not in
11 parallel, but then turned its mind to what the
12 appropriate outcome of the death investigation should
13 be. Now, I stand to be corrected, but my understanding
14 is that -- my understanding is that the organisation
15 came to the conclusion, ultimately it would be the
16 decision of Crown Counsel, that a fatal accident inquiry
17 would not be adequate in this case and the reason would
18 be that a fatal accident inquiry would have too narrow a
19 perspective and it was therefore the crown's assessment
20 that an inquiry of this nature was required and,
21 therefore, the crown's analysis in my ways led to the
22 establishment of this Inquiry by, as I understand it,
23 the Lord Advocate making representations to Scottish
24 ministers that the death investigation could not be
25 satisfactorily concluded by fatal accident inquiry.

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1 And I think that my perspective, having thought
2 about these issues that you have highlighted since
3 April, is that they must have been part of that
4 thinking, because what you're highlighting are very
5 relevant factors into the consideration of Mr Bayoh's
6 death, but there was a need for them to be properly
7 explored in detail in a way which could look at the sort
8 of issues that you're describing.

9 Q. Again, I stand to be corrected if I am wrong or mistaken
10 in what I'm about to say, but my understanding is that
11 the Inquiry has not heard any evidence of any further
12 consideration being given to these issues or any further
13 analysis of their potential import between the decision
14 that no proceedings should be taken against the
15 attending officers and this Inquiry being constituted.
16 I will be corrected if I'm wrong, but that's my
17 recollection of the evidence before the Inquiry to date,
18 that those matters have not been revisited.

19 A. So to help the Inquiry, I think there are two factors
20 that are relevant there. One is I am basing my comments
21 today on the way in which the information was put to me,
22 I think on the previous occasion, that it was described
23 by colleagues as being sequential and it was not for one
24 stage of the Inquiry, but it would be for the next.

25 But the second factor is also that the crown's

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1 criminal investigation did not just cease and then
2 Scottish ministers establish a public inquiry. That was
3 not, as I understand it, what happened. Now, I have to
4 preface that by saying I wasn't involved in those
5 discussions, but my understanding is that the
6 Lord Advocate at the time on the conclusion of the
7 criminal investigation then had to give very, very
8 careful consideration as to what the next steps should
9 be and one of those options would have been a fatal
10 accident inquiry and that was judged to be inadequate,
11 because of the limitations in the legislation and how a
12 fatal accident inquiry works and, therefore, my personal
13 view is the Lord Advocate judged it to be appropriate
14 that there should be a broader inquiry and made those
15 recommendations to Scottish ministers.

16 That, it seems to me, must have been based on a
17 broader analysis than would have been provided for
18 Crown Counsel in the criminal case. Any consideration
19 which I have ever been involved in relation to a death
20 investigation doesn't just look just at the evidence
21 that's relevant for criminality, but looks at a broader
22 range of circumstances.

23 Q. No, doubt the Inquiry, if it deems it necessary and
24 helpful, can explore why the crown took that position
25 and to what extent the issues that we have been

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1 exploring our evidence today around language, comparator
2 evidence, patterns of behaviour and so on were relevant
3 to that consideration.

4 A. And I should be very clear, I am not saying that I have
5 personal knowledge that they were, but it seems to me
6 from the way they were described on the previous
7 occasion that may have been the intention of what
8 Fiona Carnan was trying to describe.

9 Q. Thank you. But turning for present purposes to
10 consideration of the criminal aspects and the
11 possibility that a view may be taken that the
12 precognition process, that is the precognition process
13 that explored the possibility of criminality on the part
14 of the attending officers, was inadequate, we have
15 talked about Ms Carnan, the analyst, and your view is
16 that any failings on her part would have been
17 institutional rather than personal and you hold the same
18 opinion in relation to the Solemn Legal Manager.

19 I wonder if we can consider briefly the position of
20 the Allocated Advocate Deputy, Ms Edwards KC. She was
21 asked:

22 "When you said here race didn't really feature in
23 the examination of the actual restraint you were
24 focusing on the actions."

25 And she replied:

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1 "Yes, the actus reus as opposed to the mens rea."

2 She was asked:

3 "Right. So did race feature in the examination of
4 the mens rea, the state of mind?"

5 This is in terms of her own analysis and I should
6 say, before I say anything further, Mr Logue,
7 the Inquiry cannot probe the actual decision taken by a
8 Crown Counsel and I cannot and any questions around
9 that.

10 Ms Edwards replied:

11 "It did and you have asked me that already and I
12 have said absolutely. So the question that I'm asking
13 in my head, why did that officer do that? Why did he do
14 that at that particular time? What I needed to be clear
15 in my mind, first of all, was what was that? What was
16 the factual matrix? So once we had that and there might
17 have been points where we just couldn't say this
18 happened or that didn't happen, but that's what we were
19 trying to get through through the investigation of the
20 actual facts, what could we say were the elements of the
21 actual restraint.

22 "And once that was in place, I could and the
23 question, why did that happen? Why did that officer do
24 that? Why did that take place then? Why was something
25 else not done? Was that reasonable?"

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1 She was then asked:

2 "And in terms of this, you said it was going on, the
3 thought process was going on in your head?

4 "Yes.

5 "Was there any analysis that we could look at on
6 paper where we could follow that rationale, that
7 process? You have said that you were asking yourself
8 why did the police officer do that? Was that
9 reasonable?"

10 And she replied:

11 "So the thing that ultimately came to help me with
12 that, when I'm looking at a case, I'm reconstructing in
13 my head, I'm asking questions and if there's a gap where
14 I don't know where the answer is, it is either because I
15 am not understanding what's been told to me or I simply
16 don't have that information. That's when I look around
17 and say, okay, I need further help or information on
18 that or I need an expert to help me."

19 So that was her evidence. If I might read that
20 short, it appears that she was saying that she took --
21 took race into account when looking at the case and in
22 particular in her analysis of mens rea, but there was no
23 evidence that this was a matter that was committed to
24 paper in any sense.

25 And, again, if the Chair, looking at the hypothesis

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1 that the Chair may take the view that that process, that
2 approach, was inadequate, would you see that failing as
3 being an individual one or an institutional one?

4 A. I'm sorry. Can you be clear about the nature of the
5 failure that you're describing?

6 Q. Well, the evidence that she gave was that she did take
7 race into account in considering mens rea, but her
8 thought process does not appear to have been committed
9 to paper. I suppose that may raise an issue for
10 the Chair as to the extent to which she can be satisfied
11 those matters were in fact taken into account. I think
12 you said yourself in evidence there's little value in
13 considering a matter but not recording the factors that
14 you looked at and the conclusions that you came to.

15 If the Chair were to take the view, particularly in
16 the absence of any form of audit trail here, that her
17 analysis of race again was inadequate and so to the
18 extent that she failed to take into account to the
19 degree that might have been expected the matters that
20 were put to Ms Carnan which we've discussed this
21 morning, would you see that as being an individual
22 failing or an institutional one?

23 A. I think I would need to know more about the
24 circumstances of the decision-making and how it was
25 done. Was it done by -- it's difficult to say without

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1 knowing more about the way which the decision was done.
2 Sometimes these decisions can be informed by very
3 detailed discussion by all of the people who have worked
4 on the case. Sometimes they're taken by individuals who
5 base their decision just on the written material. It's
6 very difficult to say on this specific example without
7 being involved or knowing more about it.

8 Q. I appreciate that and I regret I can't help you further
9 with that because the Inquiry can't probe the decision.
10 The information that I have provided to you is really
11 the extent of the evidence that Ms Edwards was permitted
12 to give on that subject.

13 Perhaps finally and for completeness, we should also
14 consider the position of the Lord Advocate here. We've
15 heard evidence from both Ms Edwards and James Wolffe KC
16 that the process that was adopted here was that
17 Ms Edwards prepared Crown Counsel's instructions in
18 draft which were sent to the Lord Advocate effectively
19 for approval by him. And Mr Wolffe gave evidence that
20 he had a meeting with Crown Counsel at which her draft
21 Crown Counsel instructions were discussed. And he was
22 asked:

23 "Do you remember preparing for this meeting with
24 Crown Counsel and considering the papers that you had
25 available? Did you notice that there was an absence of

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1 analysis in relation to race? Was that something that
2 you were alert to, alive to, when you read the
3 material?"

4 And he replied:

5 "Well, I mean I was certainly alert to the
6 background of race. I mean I cannot now remember --
7 well, I think perhaps I could go as far as to say
8 I would be surprised if I didn't ask her about her
9 thinking in relation to the question of whether race
10 played into the question of criminality, but it would be
11 not fair either to her or to anybody else to put it
12 higher than that and, you know, she may have a
13 recollection that I don't have. I think I would be
14 surprised and disappointed in myself, if I can put it
15 that way, if I didn't ask her questions about that
16 aspect of the case, because it was clearly a core
17 question."

18 Now, with the caveat that the Inquiry cannot probe
19 the decision taken in this case and, therefore, has not
20 seen Crown Counsel's instruction, Mr Wolffe doesn't
21 appear to have a clear recollection of a discussion
22 around race and, again, the Inquiry does not have before
23 it any paper trail, any minutes from this meeting,
24 anything that would allow the Inquiry to be satisfied
25 that the issue of race was explored and discussed

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1 between Crown Counsel and the Lord Advocate.

2 In the absence of any paper trail, it would be open
3 to the Chair to give consideration to the extent to
4 which such a conversation took place and if the Chair
5 were perhaps to conclude that the matter of race was not
6 explored or was not explored adequately as between
7 Crown Counsel and the Lord Advocate, then, again, can I
8 invite your views as to whether you would see that as a
9 personal failing on the part of the Lord Advocate or an
10 institutional one?

11 A. I'm afraid my answer to that is very similar to the last
12 one. I wasn't part of the discussion and I don't think
13 I can properly and fairly help the Inquiry by offering a
14 view as to whether I think that would be a fair or
15 proper criticism of the way in which the decision was
16 taken.

17 Q. That's very fair. Thank you.

18 Can we just before we conclude, we ordinarily take a
19 break at around about half past 11, perhaps return to
20 paragraph 2 of your statement.

21 In paragraph 2, here we are, you set out
22 Lord Macpherson's definition of institutional racism:

23 "The collective failure of an organisation to
24 provide an appropriate and professional service to
25 people because of their colour, culture or ethnic

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1 origin. It can be seen or detected in processes,
2 attitudes and behaviour, which amount to discrimination
3 through unwitting prejudice, ignorance, thoughtlessness
4 and racist stereotyping which disadvantage minority
5 ethnic people."

6 Now, perhaps leaving to one side Crown Counsel and
7 the Lord Advocate, because I appreciate the limitations
8 of the information before the Inquiry upon which I can
9 ask you to express any view, but focusing perhaps on the
10 failures or potential failures of the analyst and the
11 Solemn Legal Manager, if the Chair were to take the view
12 that the precognition process was inadequate insofar as
13 it didn't consider or did not adequately consider the
14 question of race, do you have a view as to how those
15 failings might measure up when read against the
16 definition of institutional racism?

17 A. Well, both of those aspects I think would fall to be
18 treated as failures in processes, I think, from the way
19 that we've described them. And I think your question is
20 if the Inquiry determines that that -- I think your
21 question is if the Inquiry determines that that amounts
22 to institutional racism?

23 Q. No, sorry. If the Inquiry were to take the view -- if
24 the Chair to the Inquiry were to take the view that the
25 precognition process was not adequate as required by

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1 Articles 2 and 14 of the Convention, insofar as it did
2 not properly consider race or a racial motivation, then
3 when we look at that failing against the definition of
4 institutional racism, I'm wondering whether we might
5 find ourselves in the territory of not only an
6 institutional failing but institutional racism?

7 A. It's a very difficult question. It's a very difficult
8 question to answer. And I say that not because of -- I
9 say that because, as I mentioned earlier, I wasn't party
10 to the broader consideration that followed after the
11 conclusion of the criminal investigation and I think
12 I would really need to know more about that part of the
13 crown's duties really to be able to provide a definitive
14 answer to the question that you're asking, but what I
15 can say is this. That there is no doubt that the
16 factors that I think led to those failings that you're
17 describing I think are factors that have been recognised
18 and I think some work has been done and more work still
19 needs to be done to ensure that those -- those are
20 institutional elements that I have accepted do not
21 recur.

22 But I would -- I would think it's a very fair
23 question for the Inquiry to consider in terms of this
24 definition and the question of process, the extent and
25 impact of the failures that you have described.

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1 Q. Thank you. Can you bear with me a moment, please. I'm
2 conscious, sir, that --

3 LORD BRACADALE: We'll take a 20-minute break at this point.
4 (11.34 am)

5 (A short break)

6 (11.59 am)

7 LORD BRACADALE: Ms Thomson.

8 MS THOMSON: Thank you.

9 Mr Logue, I would like to move on to ask you some
10 questions now about training and guidance and perhaps an
11 easy way into this would be to read you a short chapter
12 from Lindsey Miller's evidence. I asked her:

13 "Had guidance been published within Crown Office as
14 to how to recognise racial bias in an investigation of
15 this sort?"

16 We were concerned with the period during which this
17 precognition was undertaken, so roughly 2015 to 2018,
18 and she replied:

19 "There's certainly considerable guidance in relation
20 to the investigation of racially motivated crime and the
21 use of the then racial aggravations when preparing cases
22 for prosecution."

23 And I said to her:

24 "We have looked at what was chapter 44 of the
25 Precognoscer's Handbook which deals with section 50(a)

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1 in an investigation, whether that's a criminal or a
2 death investigation, to identify these broader factors
3 that you're describing. And I think what would have to
4 go with that guidance would be an addition to our
5 training on factors that you've identified such as the
6 use of language and such like in the context of an
7 investigation.

8 Q. Can I ask you to have a look at some guidelines that
9 have been prepared by the PIRC. If we can bring these
10 up on the screen, please, they're PIRC 04724. Now,
11 Michelle MacLeod, who is the Commissioner, gave evidence
12 last week and she approved these guidelines and had a
13 hand in the drafting of these guidelines. They were
14 published in November of 2021, but they're based on or
15 an adaptation of guidelines issued by the IOPC back in
16 2015.

17 So we see on the first page here:

18 "PIRC guidelines for dealing with allegations of
19 discrimination when undertaking investigations and
20 complaint handling reviews."

21 Have you seen these before?

22 A. No, I haven't.

23 Q. All right. What I would like to do is take you on a
24 whistle-stop tour through these guidelines just so that
25 you have the a sense of what they contain and then

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1 simply invite your comment as to whether it might be
2 helpful for the Crown Office to consider introducing
3 something similar.

4 So I wonder if we can begin -- we can skip through
5 that preliminaries and turn to page 6, please, which is
6 headed up "What is discrimination?" and we can read this
7 short, but this chapter begins by looking at the
8 Equality Act which defines unlawful discrimination and
9 prohibits discrimination relating to the protected
10 characteristics which are then listed and they include,
11 of course, both race and religion.

12 If we scroll to the bottom of the page, this is
13 relevant perhaps more in context of policing, but
14 there's a reference to the standards of professional
15 behaviour required for police constables to the effect
16 that they must not discriminate unfairly. And then
17 building on that framework on the next page, that's
18 page 7, there is a heading "Discrimination and human
19 rights" and a paragraph or two on Article 14:

20 "Article 14 of the ECHR also provides protection
21 from discrimination. This protection only applies where
22 it is alleged this discrimination has effected a
23 person's ability to enjoy one or more of the other
24 rights set out in the Convention. For example,
25 Article 14 would apply if an allegation was made that

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1 discriminatory actions led to a death in custody as a
2 death in custody would engage Article 2. For the
3 purposes of Article 14, discrimination is where a person
4 is treated less favourably than another person in a
5 similar situation and the treatment cannot be
6 objectively and reasonably justified."

7 So this chapter gives the framework around
8 discrimination, the Equality Act, Article 14 and there's
9 a reference too to the standards of professional
10 behaviour that apply in policing.

11 If we move to the bottom of that page, there's a
12 section headed "Tests for discrimination" and a
13 definition is given of "direct discrimination" as being:

14 "When someone is treated less favorable than another
15 person because of a protected characteristic or
16 characteristics."

17 And if we scroll to the top of the page 8, it is
18 said that:

19 "Less favorable treatment suggests a comparison,
20 less favourably than who? The who is a person in the
21 same situation who does not have the same protected
22 characteristic. For example, you might compare the
23 treatment of a black person to how a white person would
24 have been treated in the same circumstances (making this
25 comparison is a key part of the investigation or

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1 review)."

2 And there's a little text box further down that
3 says:

4 "In determining whether there has been direct
5 discrimination, the question to ask is would the person
6 be treated in this way but for their protected
7 characteristic."

8 If we could perhaps scroll now to page 16, where
9 there's a heading "Understanding the allegation of
10 discrimination":

11 "Discrimination can be overt and expressed as open
12 hostility or use of offensive degrading language.
13 However, it is more than just these things. Direct
14 discrimination includes actions that are informed by
15 biased assumptions or prejudice in respect of a
16 protected characteristic, even if this is done
17 unconsciously."

18 And focus is brought in the next paragraph to the
19 need for an investigating officer to have an
20 understanding of what discriminatory assumptions might
21 be.

22 And if we can just look in passing at the various
23 headings on this page:

24 "The investigating officer should consider what does
25 the complainer say and take time to understand why the

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1 complainer feels he's been discriminated against."

2 And I skipped over an earlier passage, Mr Logue,
3 that made clear that in the context of a death we simply
4 substitute next of kin for complainer.

5 There is then a heading:

6 "What do you know? Are there any stereotypes or
7 common assumptions made about at the protected
8 characteristic group that you are aware of which might
9 be relevant to consider?"

10 Ms Macleod in her evidence last week said that the
11 PIRC recognise that they perhaps should not assume that
12 all of their investigating officers will have a good
13 working knowledge of stereotypes around discrimination.
14 Her focus of course on race. And I understand that
15 these guidelines are either being reviewed or expanded
16 upon or supplemented in some way and that a list of
17 illustrations is to be provided to ensure that it's not
18 taken for granted that investigators will recognise
19 stereotypes when they come across them.

20 There's then a heading "What do you need to find
21 out?" and the suggestion is made that:

22 "In more serious cases it may be appropriate to seek
23 external expertise, for example, from an advisory group,
24 a community advocacy organisation or from a legal or
25 academic expert."

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1 If we carry on a little bit further, there's a
2 heading "Racism":

3 "In the context of complaints of race
4 discrimination, it includes any discrimination relating
5 to race, ethnicity or nationality."

6 And an example is worked up involving a black man.
7 Let's read it short. It concerns a 19-year-old Asian
8 man who suffers from Asperger's Syndrome and autism who
9 says that he was arrested by police and questioned about
10 why he had come to the United Kingdom from Pakistan and
11 was assaulted when he was arrested and he considers that
12 the questioning was motivated by racism and that his
13 conditions meant that he was unable to effectively
14 engage with the police.

15 And then the example works through how such an
16 allegation might be handled by an investigator and we
17 see that:

18 "The investigator should ask themselves what types
19 of assumptions, prejudices or bias might lead to an
20 Asian man with Asperger's Syndrome and autism being
21 treated differently due to his race and resulting in the
22 use of excessive force. Would a white man with similar
23 issues acting in the same way be treated by these
24 officers in the same way?"

25 And if we move on to the next page, I'm just picking

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1 out the parts of this example that appear to be
2 pertinent here:

3 "So drawing on background information and the
4 details of the discrimination allegation provided, the
5 investigating officer identifies questions to be
6 addressed through the investigation and these include,
7 were the officers aware or could they have been
8 reasonably expected to be aware that Mr A had difficulty
9 engaging because of his conditions? What assessments
10 were made to take account of his conditions? How was
11 this reflected in the actions taken? In light of his
12 challenges, was it appropriate for him to be arrested
13 and taken to a cell?"

14 And again the comparative question:

15 "Would a white man with similar challenges have been
16 arrested in these circumstances? Where assumptions made
17 that his behaviour was as a result of drug taking,
18 aggression or criminality, rather than symptoms of
19 Asperger's Syndrome and autism and a reflection of
20 vulnerability? Would similar assumptions have been made
21 if he was white? And is there any indication that the
22 officers involved hold negative views of Asian people or
23 that he was targeted because of his race?"

24 So these are the sorts of questions that an
25 investigator should look to answer through the course of

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1 the investigation.

2 If we could turn to page 32, which is a section
3 headed "Conducting the investigation." This section
4 highlights the importance of the understanding acquired
5 at the beginning of the investigation and how this will
6 inform key lines of inquiry. And reading short the text
7 that we see on the page here, it stresses the importance
8 of looking not only at the lines of inquiry that you
9 would expect to be followed in any case involving
10 statements, CCTV, and so on and so forth, but to take
11 cognisance on the fact that in discrimination cases
12 there may be little or no direct evidence to support an
13 allegation, particularly the case if the allegation is
14 about discriminatory actions arising from prejudice,
15 assumptions or attitudes and so the investigation will
16 need to consider whether there is other evidence which
17 supports the allegation of discrimination and this might
18 include looking at the officers' complaints history,
19 patterns of behaviour.

20 I think we can read this short. And over the page,
21 on page 33, there's also a suggestion that:

22 "Comparator evidence should also be considered.
23 This will involve comparing how the complainer was
24 treated against a person in the same situation who does
25 not have the same protected characteristic."

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1 And finally, on page 34, there's a section headed
2 "Discriminatory Language":

3 "As part of the consideration, the investigator
4 should assess the language used, including language used
5 in any records relating to the incident in question or
6 arising from the complaint investigation. This includes
7 any use of obviously discriminatory language, but also
8 more subtle indicators that a person may have acted or
9 made a decision based on prejudicial assumptions. There
10 are terms that are commonly recognised as being
11 offensive and officers and police staff members should
12 be expected not to use them. However, there are other
13 words and phrases which are inoffensive in themselves,
14 but when heard in context can reasonably be thought of
15 as being discriminatory."

16 So that was a very quick run through the Guidelines,
17 but hopefully will have given you a flavour of the
18 guidelines that have been in force within the PIRC since
19 2021.

20 And I'm interested to know simply whether you feel
21 that guidelines of this type, not identical guidelines,
22 but guidelines of this sort might help to correct the
23 gap that we have identified in your current training and
24 guidance provision within Crown Office?

25 A. I do, but I think if I could make a couple of points

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1 just to put it in context.

2 Q. Yes.

3 A. One is that the early part of the guide which you showed
4 me, which I would describe as having very general
5 material, I think is well available to colleagues in the
6 Procurator Fiscal Service in what I would describe as
7 our more general guidance and training material in
8 relation to equalities. The more specific parts of the
9 guidance, the later part of the document, I think we
10 have begun to take steps to develop and implement
11 guidance of that nature, but I would not describe it as
12 complete. So for example, I think I said on the last
13 occasion I gave evidence that there was specific
14 guidance focused on Article 2, but also Article 14
15 I think in relation to some of the more specialist teams
16 that now investigate categories of deaths. So, for
17 example, we've established since 2015 a team which deals
18 with deaths in custody and they have -- if I remember
19 correctly, it was back in April I last looked, they have
20 specific guidance in relation to deaths which deals with
21 the issues through the question of the Convention
22 articles.

23 What I think is helpful in this guidance that
24 I don't think we have enough emphasis on is the broader
25 look at, for example, I think it's described as being

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1 language which may give an indication, the less overt
2 language and the language which gives rise to
3 considerations of assumptions that may be discriminatory
4 of such -- I think I see in this guidance quite a
5 helpful way of linking that to the investigative role
6 and I think in the past I think we have perhaps relied
7 too much on it being available as a general source of
8 guidance for all aspects of our work and not focused it
9 in this way on the investigative and prosecution
10 functions which we perform.

11 Q. Thank you. It wasn't -- I didn't mean to suggest that
12 you might import these guidelines wholesale. I simply
13 wonder whether guidelines of this sort might potentially
14 inform or inspire bespoke guidance within Crown Office?

15 A. As I say, I think we started that process. I think
16 these guidelines -- as always when you do something like
17 this, you learn from others who have gone ahead of you
18 and you develop your own features and I think there is
19 something here for us to do in that area.

20 Q. Thank you. I would like to move on to another topic now
21 and ask you some questions concerning the murder of a
22 man called Simon San.

23 Now, to get our bearings, I'm going to ask you to
24 look, firstly, at a review of the way that the police
25 investigated his murder, but the end point is going to

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1 be that I will take you to a Crown Office press release
2 that has your name on it and I'm particularly interested
3 in asking a question or two around your knowledge of the
4 press release.

5 A. Okay.

6 Q. And the Crown Office position as set out in that press
7 release.

8 But I wonder if we can begin, largely for the
9 benefit of the public listening to this case, by getting
10 our bearings by going to the Operation Waymark executive
11 report. This is PS18902. And we see this was what's
12 now the legacy force Lothian and Borders Police,
13 Operation Waymark and inquiry into the questions and
14 complaints raised by the San family. This was an
15 internal investigation carried out by Lothian and
16 Borders Police. And on page 3 there is a little
17 background about at the case that will set the scene.

18 We are told here that:

19 "On 11 August 2010, Simon San, a 40-year-old male of
20 Chinese origin, was attacked and assaulted by a group of
21 youths in the street in Lochend, Edinburgh. He died the
22 following morning from the injuries he sustained."

23 In paragraph 1.2 it is explained that he was
24 employed as a delivery driver at his sister's takeaway
25 premises close to the place of the attack.

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1 At paragraph 1.4:

2 "On the evening in question, he was working for his
3 sister delivering food from her shop and at about
4 10 o'clock at night, after making a delivery, he
5 returned to the shop and parked his car on the road near
6 to the premises."

7 1.5:

8 "Prior to alighting from his vehicle, a group of
9 youths, males and females, approached Simon's motor car
10 and started to rock it. As Simon exited the vehicle and
11 telephoned 999, he was attacked and punching, causing
12 him to fall to the ground and strike his head rendering
13 him unconscious. His mobile phone and car keys were
14 subsequently stolen."

15 At 1.6 we are told that the emergency services
16 arrived, he was taken to hospital by ambulance but did
17 not recover consciousness and life was pronounced
18 extinct on the morning of 12 August.

19 At 1.7:

20 "Lothian and Border Police instigated a major
21 investigation, Operation Millennium, into the attack.
22 Four males between the ages of 14 and 16 were arrested
23 and reported to the Fiscal and one accused, John Reid,
24 plead guilty to culpable homicide less than two months
25 after the death of Simon San."

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1 So that is the background. If we might turn to page
2 4 now, please. Allegations made by the family at 3.1.
3 It is said that 39 allegations, all non-criminal, and 11
4 questions were identified from the initial statement
5 noted from the family. For the purposes of the report,
6 they were summarised into areas of concern. And I
7 simply wish to note here, the third bulletpoint, the
8 concern raised by the family of a failure by Lothian and
9 Borders Police to recognise that at the attack on Simon
10 was racist and denial that that this was a motive at an
11 early stage.

12 If we can turn to page 7, this is the outcome of the
13 investigation in this regard. 6.1 "Racist motivation":

14 "The police failings on this specific element
15 throughout the investigation into the attack on Simon
16 have been one of the key sources of distress,
17 frustration and anger for the family. The first
18 question asked is why the police are not taking account
19 of the family's perception that this is a racist
20 incident."

21 And this was a letter written 12 days after the
22 death.

23 6.2:

24 "The Stephen Lawrence Inquiry report defines a
25 racist incident as being any incident which is perceived

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1 to be racist by the victim or any other person. This
2 definition was adopted by the Police Service in Scotland
3 and guidance for officers had been issued."

4 And at 6.4:

5 "The Complaints Inquiry concluded that Lothian and
6 Borders Police failed to recognise that the attack on
7 Simon was racist. This was not only at the outset of
8 the investigation but also as it progressed. Key
9 elements contributed to the collective failing included:

10 "A misguided assessment that the motive for the
11 attack was robbery."

12 And towards the bottom of the list:

13 "Little emphasis placed on racist language used by
14 the accused shortly after they attacked Simon and not
15 establishing the perception of the family."

16 And if we might look at page 11, please, these are
17 the findings in relation to language that had been used
18 by the accused:

19 "The Operation Millennium investigation team placed
20 little emphasis on racist language used by the accused
21 shortly after they attacked Simon. Although several
22 members of the investigation team claim to have read the
23 statements, they state that the statements contained no
24 or only limited evidence or information to suggest the
25 crime was racially motivated. Information from

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1 witnesses shows that a short time after the attack on
2 Simon the group responsible were directly referring to
3 him as [and that's a racial term there]. It is crucial
4 to highlight that the group were taking directly about
5 their attack on Simon and the references are made in the
6 presence of independent witnesses.

7 "The four accused were very quickly identified and
8 all were subsequently traced, interviewed and arrested.
9 An interview strategy was prepared and applied during
10 the interview of each accused. This strategy had a
11 number of questions relating to robbery, but none
12 regarding any racist element or language. There are a
13 large number of references to the term [and it's the
14 same racial slur] being used by the group, several
15 relating to one accused. During his interview he was
16 asked about witness evidence claiming he had used this
17 word. He denied that he would used this word and stated
18 that he knows it to be racist. This is significant and
19 the link between this and the language used by him
20 others does not appear to have been made.

21 "Following the interview and arrest of the accused,
22 the investigation team continued to interview witnesses
23 and all statements and resultant inquiries were
24 submitted to the Crown Office and
25 Procurator Fiscal Service. This included the statements

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1 of the significant witnesses who had heard language used
2 where Simon was referred to by a racial term. It is
3 evident that the investigation team placed little
4 emphasis on the language used by the accused and this
5 additional information did not feature in the management
6 policy filed."

7 And beneath that:

8 "This lack of emphasis could be interpreted in
9 several ways as a lack of understanding of the
10 importance of language used by the accused immediately
11 after the crime or of the racist nature of the language
12 used or that a single strand of evidence is sufficient
13 to libel a racist aggravation. Whatever the reason, it
14 is clear that this inaction had an impact on the
15 direction of the Inquiry and fundamentally led to a
16 critical failure to meet the needs of the family."

17 Is this a case that you remember at all, Mr Logue?

18 A. I indicated I think in the last evidence session in
19 April that I had a recollection of the case and it was
20 very general. I remember I think in the summer of 2011
21 dealing with the consequences, I think, of this report.
22 I should stress I wasn't asked to address this in my
23 witness statement either for the last session or this
24 session, but because it was raised with me on the last
25 occasion and I mentioned it I have been able to look at

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1 a number of documents to refresh my memory of the case.

2 Q. What I would like to do now is take you to the press
3 relief that bears your name. That is COPFS 06498. If
4 we scroll down a little, please, so we see this is
5 dated -- sorry, just up a tiny bit -- Thursday,
6 25 August 2011 and it's addressed to the Private
7 Secretary for the Lord Advocate. And it sets out the
8 detail of a statement issued by the Crown Office on
9 Monday, 23 August:

10 "Death of Simon San, HMA V John Reid, statement
11 attributable to a Crown Office spokesperson.

12 "Lothian and Borders Police have today apologised
13 for mistakes they have made in this case. In light of
14 this apology, the Area Procurator Fiscal has offered to
15 meet Mr San's family again to discuss any questions
16 which they might now have."

17 Am I right in understanding that you were the APF
18 for Lothian and Borders at that time, so that would be a
19 reference to you?

20 A. That's correct.

21 Q. "The crown was alert to the question of racial
22 motivation from the beginning of the investigation and
23 raised the issue with the police at an early stage.
24 After careful consideration of all the available
25 evidence provided to the crown by the police,

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1 Crown Counsel concluded that there was no evidence to
2 show that the attack on Mr San Was racially motivated.
3 For a racial aggravation to be proved there must be
4 evidence to demonstrate the motivation for the
5 commission of the crime. There was no evidence in law
6 to support this and this remains the case. There was
7 evidence of a racial term used by the accused sometime
8 after the crime, but this was not evidence of motivation
9 for the crime. Notwithstanding this, the Advocate
10 Depute advised the High Court when John Reid pled guilty
11 to culpable homicide that it was at the strongly held
12 view of Mr San's family that the offence was racially
13 motivated."

14 And if we can scroll down a little, and there's
15 reference to a further part to the earlier statement
16 attributed to a Crown Office spokesperson:

17 "We can confirm the Lord Advocate will not be
18 instructing an inquiry and is satisfied with the crown's
19 prosecution of the case. Mr John Logue, the area
20 procurator fiscal for Lothian and Borders, has offered
21 to meet with Mr San's family to discuss any questions
22 which they might now have."

23 Now, are you aware of this press release? Do you
24 recall this press release?

25 A. Only in very general terms. My recollection is

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1 supported by some of the material I have been able to
2 look at since I last gave evidence. And so to put it in
3 context, this was a press release which was issued
4 because there were lots of media questions being
5 directed to COPFS in light of the statement which
6 Lothian and Borders Police had issued about their
7 conclusions about their work on the case and, in light
8 of the media questions, it was felt appropriate after
9 discussion to issue a statement clarifying our position
10 and that's why the statement was prepared.

11 Q. It's apparent from the Operation Waymark report that we
12 have looked at that Lothian and Borders recognised that
13 their officers had failed to attach sufficient weight to
14 racist language used after the attack and had failed to
15 properly consider the possibility of a racist motive.
16 It's also clear that the statements that were available
17 to the police were made available to the crown and here
18 we see that the Lord Advocate would not be instructing
19 an inquiry and was satisfied with the crown's
20 prosecution of the case.

21 I wonder if you can help us to understand, in light
22 of the position taken by Lothian and Borders Police, the
23 crown's reluctance to review its decision-making, its
24 handling of the case, with a view to potentially
25 learning lessons?

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1 A. I'm not sure that's an entirely accurate way of
2 describing. It wasn't a reluctance to review the
3 matter. It was as a consequence of reviewing the matter
4 that the Lord Advocate reached a conclusion that the
5 scope of the police review was a narrow one. It looked
6 at the police investigation and, as you'll appreciate,
7 the crown's investigation is separate and independent
8 from that and the Lord Advocate was satisfied that the
9 crown had not made the mistakes which the police
10 accepted they had made and that the crown had taken a
11 different approach.

12 I should stress this was a case which, if I remember
13 correctly the case, Mr San was murdered I think in 2010
14 or killed in 2010 and I think the criminal case
15 concluded at the end of that year. I was appointed in
16 the early summer of 2011 and first became aware of it
17 I think when this when the then Deputy Chief Constable
18 advised me that he would be issuing a public statement
19 about the conclusion of the police review and,
20 therefore, that was my first awareness of the issue and
21 that therefore allowed us to review the matter.

22 My memory of it is that we continued to look at the
23 matter sometime after the statement in discussions with
24 Mr San's family's representatives and looked at some
25 detail, for example, in relation to the circumstances in

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1 which the statements of the use of clearly racist
2 language were used and I have to say that in looking at
3 it in detail, I do not agree with the some of the
4 characterisation in the police report about the use of
5 the language or the apparent certainty. There were --
6 when one looked at the detail of the statements
7 available, it was clear that racist language had been
8 used, but it was clear to us it was not clear
9 necessarily about the circumstances and precisely who
10 had used the language, but it was absolutely clear and
11 accepted by us that the language had been used and that
12 was taken into account when the decision about
13 prosecution was made.

14 There was a prosecution in this case and it was
15 clear to me in reviewing the case over that summer and
16 into the autumn that the crown did not make the same
17 mistake that the police made in discounting the
18 possibility of this being a racially motivated killing.
19 Mr San's family had been very clear with us at the very
20 beginning that they regarded it as racially motivated
21 and my perspective in reviewing it was at that time that
22 we therefore treat it on that basis as a racially
23 motivated killing which needed to be examined and
24 determined on the evidence what could be put before the
25 court and that's what was done.

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1 So this was a case in which there was consideration
2 of the issues raised by the police and whether they
3 impacted on the crown's investigation but the conclusion
4 was that they did not and it was for that reason a
5 decision was taken not to instruct an inquiry of the
6 nature that was being sought, but that's not to say that
7 there was no review and learning from it.

8 Q. Your evidence is that there was not a reluctance to
9 examine these issues and there was in fact a review
10 within the Crown Office and so to the extent that the
11 press release says "we can confirm the Lord Advocate
12 will not be instructing an inquiry" to the extent that
13 that phraseology might give the reader the impression
14 that there hadn't been a review and there wasn't going
15 to be a review, is it perhaps misleading?

16 A. I will accept that that was not -- that was not issued
17 without anyone considering the case or the
18 circumstances. You would never issue a public statement
19 of that nature without having first considered in some
20 detail what the underlying issues were, but it was quite
21 clear to us that this was case where in all of the
22 meetings that the prosecutors had had with Mr San's
23 family and up to and including the conclusion of the
24 case in court, where I think the Advocate depute
25 represented to the court Mr San's families views, the

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1 crown had at the forefront of its thoughts the scope to
2 identify evidence which could identify motivation.

3 The issue which was drawn out in the police report
4 is the distinction between evidence which can
5 demonstrate motivation and other evidence which is
6 clearly offensive and difficult to understand, but
7 demonstrates use of racist language, but the difficult
8 question at the heart of that is the extent to which
9 that can be relied on to demonstrate motivation and that
10 was fully considered in the analysis of the case for the
11 final decision.

12 Q. Thank you. Finally, I want to ask you about learning
13 lessons in the context of the death of Mr Bayoh. Has
14 there been a review, lessons learned, debrief, anything
15 of that sort following the death of Mr Bayoh with a view
16 to looking at how the case was handled by Crown Office
17 and perhaps learning lessons?

18 A. So there hasn't -- we haven't commissioned a formal
19 group specifically to do what you are describing.
20 Partly that was because we, as I described earlier this
21 morning, at the conclusion of the criminal
22 investigation, it was very much our view that there
23 needed to be a public inquiry of this nature and,
24 therefore, first of all, that would be our focus in
25 preparing for that and supporting the establishment of

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1 the Inquiry.

2 And secondly, I think it's a widely held view that
3 our lessons learned should be informed by the lessons of
4 Inquiry. So there will be, and I am very happy to
5 confirm in my current position, there will be at the
6 conclusion of this Inquiry a much more formal and
7 structured approach to the learning the lessons as
8 identified by the Inquiry, but that's not to say that we
9 haven't since 2015 incorporated changes which I think
10 are informed by our own experience of dealing with the
11 investigation.

12 So I think those are important and first amongst
13 them would be the establishment of the Death in Custody
14 Unit. That's within the specialised field of death
15 investigations we have identified over a number of
16 years, and Mr Bayoh's case was part of that
17 consideration, that deaths in custody, whether in police
18 custody or in prison, bring very specific challenges and
19 we've therefore established in the last few years a
20 dedicated team which guarantees that all of these cases
21 are going to be investigated by the same small group of
22 people who will then quickly build up their own personal
23 experience, but also, for example, will become very
24 familiar with all the legal issues and have
25 well-established relationships with all of the key

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1 parties. So I think that is one factor that has changed
2 since the death of Mr Bayoh.

3 I think we can also point to general work to improve
4 our deaths investigations. We've since 2019 undertaken
5 a piece of work to try and expedite and reform the
6 way -- expedite the speed with which death
7 investigations are carried out and reform the way in
8 which they are done and that has included the shift away
9 from serial investigations to parallel investigations in
10 the way that I talked about earlier.

11 So I think those are two factors and then I would
12 add to those the personal I think learning which I have
13 taken from my involvement with the Inquiry thus far and,
14 although I haven't discussed this with colleagues who
15 have given evidence, I suspect they are doing the same,
16 but I know that in giving evidence in April and
17 preparing to come to give evidence today, there are a
18 number of factors which I have begun to think about and
19 focus on which I think the question will be, can we make
20 progress with those in advance of the Inquiry
21 concluding? And I would certainly not intend to wait
22 until the Inquiry is finished before we made progress
23 with those.

24 Q. Are you able to share with us what those factors are?

25 A. I can share my personal views and I stress I haven't

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1 discussed these with anyone in the organisation, but
2 I think in a death investigation of this nature, while
3 it was obvious to us at the beginning that the need for
4 criminality needed to be considered as a priority, as I
5 have said before, that the question of race was
6 absolutely at the forefront of our minds, I think for me
7 there is something about the way in which we have gone
8 about it and the extent to which we were aware from
9 other jurisdictions, and I'm principally considering
10 England and Wales here, issues which had arisen.

11 I think I might have said on the last occasion I
12 gave evidence that this was the first case of this
13 nature that I was aware of in Scotland. I think it is
14 clear to me that we could have learned perhaps more by
15 2015 from other investigations in the United Kingdom.
16 I think the question of having access to an appropriate
17 expert in a death investigation on questions of race
18 seems to me to be an issue that I'm not aware of us --
19 and I could be wrong about this because, as I say, I'm
20 just sharing personal thoughts at this stage -- I'm not
21 aware of us having done this and if we have, then I'm
22 mistaken in my view, but if we haven't done it then
23 I think that is something we could look at in future.

24 The issues that we've talked about in terms of
25 having a complete and full understanding of what it

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1 means to be a member of a minority ethnic community in
2 Scotland and all of the ways in which that impacts on
3 your life, I think there is something there we can do to
4 help build up that knowledge and understanding and begin
5 then to also look at another area, which is the guidance
6 issue you have touched on this morning. When I look at
7 the PIRC guidance you should me, I can see how those
8 issues would come together.

9 So I think I hopefully have been able to explain the
10 context of the way in which we are treating our learning
11 from this and give the Inquiry the confidence that it's
12 both an ongoing process, but one which will be very much
13 informed by the results of the Inquiry.

14 Q. You said that at the conclusion of this Inquiry there
15 will be a formal and structured approach to learning
16 lessons. Can you share with us what that will look
17 like?

18 A. Yes, well, there are changes underway in the structure
19 of the organisation at the moment but I would intend
20 that the Equality Board, which is chaired by
21 Stephen McGowan who has already given evidence, should
22 directly and formally take on the responsibility for the
23 analysis of the report and providing recommendations to
24 the law officers and myself on what changes are needed
25 and thereafter I would look to all of the leaders in the

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1 organisation, not just those involved in the Equality
2 Board but all leaders, to implement the changes which
3 are required. It's very much a similar process to the
4 one that we would use, for example, in relation to a
5 report from the inspector to prosecution, so there was a
6 report in April of this year in relation to domestic
7 abuse and we have adopted a similar structured formal
8 approach which highlights the report to staff, raises
9 awareness of it, identifies of the actions we're going
10 to take and then monitors progress with those.

11 Q. Thank you, can you bear with me a moment, please?

12 I have no further questions, thank you.

13 THE ARBITRATOR: Are there any rule 9 applications?

14 Mr Logue, would you mind withdrawing to the witness room
15 while I hear an application?

16 (Witness leaves room)

17 LORD BRACADALE: Ms Mitchell.

18 Rule 9 Application by MS MITCHELL

19 MS MITCHELL: The questions that I seek to ask this witness
20 relate to the Simon San case. Evidence in relation to
21 Simon San case was disclosed by the Inquiry on Friday
22 and I was able to look at that over the weekend and this
23 morning, so these questions arise as a result of that.

24 Before I explain what the questions are, I explain
25 the reason that it is said that Simon San is important

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1 and it's because this Inquiry has heard that lessons
2 were learnt after the case of Chhokar and that things
3 were put in place to try and ensure that when the crown
4 looked at issues of race they were being properly
5 considered. Mr San's case came only a short period of
6 time, I think a number of two years before Mr Bayoh died
7 in police custody. And at the time Mr Anwar had called
8 upon the crown to have an investigation so that in the
9 future another family is not forced to fight for answers
10 from the authorities. So it's against that background
11 that the following questions are asked in relation to
12 Simon San.

13 The first is that the evidence that's been heard
14 this morning is that the Crown Office did carry out a
15 review of the matter and as said by the witness the
16 Lord Advocate reached a conclusion that the scope of the
17 police review was a narrow one, it looked at the police
18 investigation and as you'll appreciate, the crown's
19 investigation is separate and independent and the
20 Lord Advocate was satisfied that the crown had not made
21 the mistakes when the police accepted that they had made
22 and the crown had taken different considerations in the
23 analysis of the case.

24 So firstly what I would like to ask given the date
25 of the report being issued by the police and the date of

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1 the Crown Office saying they weren't going to conduct a
2 review where the same date, what time -- when did this
3 review taken, were they given a copy of this document in
4 advance and undertook it.

5 Secondly, the document that the crown -- secondly,
6 the document that the crown received the police report
7 indicated that the police had failed to take into
8 account the import of the use of racist language; the
9 history of the abuse that the family had suffered at
10 their place of work and had been reported as racist and
11 also non-racist abuse; previous convictions of the
12 accused and racist sentiments expressed in general terms
13 by one of them; a previous assault of Mr San's cousin --
14 sorry, of his nephew -- at the same place of work; and
15 the view of the family that this was a racist attack.
16 So my question is: did the crown take these matters into
17 consideration and still conclude that the matter was not
18 racist? The reason in particular that I ask this was
19 that it's clear that as a result of the review the
20 police accepted that they hadn't looked into various
21 things that they ought to have looked into and as a
22 result of that, they could not have passed on to the
23 crown the information that the crown would have needed
24 to conduct a review in order that decision could be
25 taken.

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1 So that's the second question.

2 The third question relates to a second press release
3 on the day that the press release comes out which
4 refuted the suggestion made by Mr Anwar that there was
5 evidence of a racial term used by the accused sometime
6 after that night as described by the crown and that
7 press release says that it was not made seconds after
8 the incident as the statement issued by Mr Anwar states
9 and to point out that when the review took place the
10 view of the police in this regard was that the racist
11 language was used by the accused immediately after the
12 crime and asked whether or not any consideration was
13 given to the way the police had described this before
14 releasing that report.

15 The next question, which would be question number 4,
16 or the next area that I would like to explore with this
17 witness is his view about the difficulty in capturing
18 and presenting evidence of racist motive to the court.
19 And he mentions that twice in his evidence today where
20 he says:

21 "The type of information that you're referring to
22 doesn't neatly fit in the criminal context into being
23 admissible, relevant evidence for a criminal offence and
24 I suspect that's at the heart of the issue that was
25 ultimately being explored with Fiona Carnan."

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1 And it's to put to him that if the question is one
2 of whether or not there's a racial motive, could the
3 crown or should the crown not simply consider raising
4 evidence and taking any -- taking any arguments in
5 respect of relevancy that may arise because if it's
6 relevant it should be allowed and in circumstances where
7 they think there will be any difficulty in that regard
8 obtaining expert evidence so expert evidence can be led
9 in that way.

10 The fifth issue that I would like to read --

11 LORD BRACADALE: That last one is not really related to
12 Simon San, is it, it's more related to his evidence?

13 MS MITCHELL: That's correct, as a generality, yes. The
14 fifth matter going back to Mr San is, does he accept
15 that it was in fact the family that first raised and
16 pressed the issue of public inquiry with the
17 Scottish Government and that in all the meetings with
18 the family the crown spoke of a fatal accident inquiry
19 and never a public inquiry and in that scope of those
20 issues, was the existence -- what was the public concern
21 that the crown had that it thought that a public inquiry
22 was required instead of an FAI if it supported that
23 proposition?

24 Those are my questions.

25 MR DUNCAN: (Inaudible - microphone turned off).

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1 LORD BRACADALE: Yes, very well.

2 MR DUNCAN: Thank you, sir. I have a concern about certain
3 of the questions that are proposed to be asked in
4 relation to the Simon San Case and in particular
5 questions -- the second and the third and the fifth
6 questions. The starting point is of course that the
7 Simon San Case is not part of the terms of reference
8 which are before the inquiry but I accept that there has
9 been evidence in relation to that matter and that indeed
10 your lordship may see some of that evidence as being
11 relevant to the issues that he has to consider so
12 therefore the first question it seems to me is
13 unobjectionable but it does seem to me that the second
14 and the third and indeed the fifth questions take
15 the Inquiry towards being -- considering the question
16 that the prosecutorial decision and in particular the
17 question of the basis upon which it was taken and
18 whether it was soundly taken, which is of course
19 something that is carved out of this inquiry in relation
20 to Mr Bayoh's death and it really ought not to be before
21 the inquiry in relation to Mr San's case so I would take
22 issue, sir, with the second, third and fifth questions.

23 LORD BRACADALE: Thank you, I'll adjourn to consider the
24 these issues.

25 MS MITCHELL: Sir, I ... (Inaudible - microphone is off)

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1 LORD BRACADALE: Just come to the table.

2 Submissions by MS MITCHELL

3 MS MITCHELL: Sir, the prosecutorial decision had already
4 been made. The question that I'm asking this witness
5 about is the decision which he says was taken of the
6 analysis of not making the same mistakes as the police
7 had so that could only have been done after the
8 prosecution and after the reading of the report.

9 LORD BRACADALE: Very well, I shall adjourn to consider
10 these issues.

11 (12.52 pm)

12 (Luncheon adjournment)

13 (2.04 pm)

14 LORD BRACADALE: In relation to the first matter arising out
15 of today's evidence, namely the approach of the crown to
16 certain evidence which could have a bearing on racial
17 motivation, I do not consider that I would be assisted
18 by further exploration of that matter with this witness.
19 It can be developed in submission. I shall refuse that
20 aspect of the application.

21 All the other issues relate to at the case of Simon
22 San. For a number of reasons, I propose to take the
23 following course in relation to these. Ms Mitchell
24 should submit a written document setting out precisely
25 the areas which she wishes to explore and the reasons

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1 for doing so. That will allow me more clearly to
2 understand the issues which are raised, to consider
3 whether I will be assisted by exploration of them and
4 whether there is force in the submission of Mr Duncan.

5 In the event that further evidence will be required,
6 that will be done by issuing a supplementary Rule 8
7 request to the witness.

8 Could we have the witness back, please?

9 (Witness back in room).

10 LORD BRACADALE: Mr Logue, that completes your oral
11 evidence. If the Inquiry requires any further evidence
12 from you, it will issue a supplementary Rule 8 request.
13 So thank you very much for coming back to give evidence
14 today. Again, I'm grateful for your time.

15 I'm going to adjourn briefly to allow the next
16 witness to be introduced and you'll then be free to go.

17 A. Thank you.

18 THE ARBITRATOR: We'll adjourn briefly for that purpose.

19 (2.06 pm)

20 (A short break)

21 (2.13 pm)

22 LORD BRACADALE: Good afternoon, Dr Jones. Would you say
23 the words of the affirmation after me.

24

25

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1 Evidence of DR PETER JONES

2 Examination-in-chief by MS THOMSON

3 LORD BRACADALE: Ms Thomson.

4 MS THOMSON: Good afternoon. You are Dr Peter Jones?

5 A. I am.

6 Q. How old are you, Dr Jones?

7 A. 63.

8 Q. And am I right to understand that you are a chartered
9 psychologist and also a former police officer?

10 A. That's right.

11 Q. Before I ask you any questions, can I invite you to open
12 up the blue folder in front of you and within that
13 folder there should a copy of your Inquiry statement,
14 which is SBPI 00526. We'll bring that up on the screen.

15 So here is your statement, the statement of Dr Jones
16 taken on 23 March 2024 and if we can go to the very
17 final page, we should see that it was signed by you on
18 11 April of this year. Your signature has been are
19 redacted from the version on the screen, but hopefully
20 will be showing in the hard copy in the folder in front
21 of you.

22 Your statement concludes with the words:

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

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1 Inquiry's website."

2 So you signed this statement. You prepared and
3 signed the statement in the knowledge that it would
4 become evidence before the Chair to the Inquiry and that
5 it would be published on the Inquiry's website?

6 A. I did.

7 Q. Did you do your best to answer as fully and accurately
8 as you could all of the questions that were asked of you
9 in interview?

10 A. I did.

11 Q. I want to begin by asking you some questions about your
12 career in fairly short compass. Am I right to
13 understand that you were a police officer between 1979
14 and 2001?

15 A. Yes.

16 Q. And that all of your service was south of the border
17 with England?

18 A. Yes.

19 Q. And that your rank at the time that you left the police
20 in 2001 was inspector?

21 A. Yes.

22 Q. Can we look at paragraph 3 of your statement, please.
23 Here you explain that you left policing in 2001 when you
24 got a doctorate and set up your own business, Shire
25 Professional Chartered Psychologists. You spent the

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1 next 22 years mainly carrying out research, training
2 consultancy around implicit bias and working with
3 specialist bias tests, although you also maintain a
4 small part of the business relating to assessment and
5 evaluation.

6 So you explain that you got a doctorate in 2001.

7 What was your, doctorate in?

8 A. It was in psychometric test development.

9 Q. Okay. How long did that take to complete?

10 A. Four years.

11 Q. Was that a full-time or part-time course?

12 A. It was two years full-time and two years part-time.

13 Q. Okay. So when did you graduate with your doctorate,
14 relative to when you left policing?

15 A. I graduated in 2000 and I left the following year.

16 Q. All right. So had you taken time away from policing in
17 order to complete your studies?

18 A. I worked part-time for two years while I did my PhD
19 full-time.

20 Q. Okay. All right. And with which university did you
21 undertake your PhD?

22 A. Wolverhampton Business School.

23 Q. Can we look at paragraph 4, please. You explain that
24 you are professional qualifications relevant to this
25 field of work are that you are a chartered psychologist,

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1 chartered scientist and Associate Fellow of the British
2 Psychological Society. You also have a police trainer's
3 certificate and you attended a ten-week residential
4 course for police trainers and you're well versed in the
5 process of and practices of policing. So these are your
6 professional qualifications that sit over and above the
7 doctorate that you hold.

8 A. Yes.

9 Q. With your doctorate being a PhD, did you require to do
10 undergraduate study and a master's before you embarked
11 on the PhD?

12 A. Yes, I did an undergraduate degree at the
13 Open University and a master's degree at Goldsmith's,
14 University of London.

15 Q. The Open University degree, what was your subject for an
16 undergraduate degree?

17 A. Psychology.

18 Q. And when did you graduate?

19 A. 1993.

20 Q. Was that again a full-time or part-time course?

21 A. That was full-time.

22 Q. Did that require you to take a time away from policing
23 or did you have a very busy schedule?

24 A. I just had a very, very busy life for seven months.

25 Q. Okay. And what was the subject of your master's?

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1 A. Psychological assessment in organisations.

2 Q. And your PhD you said was in psychometric testing.

3 A. Hm-hmm.

4 Q. Paragraph 5 you say:

5 "I retired and closed the business in June 2023. I
6 have continued doing some work in Canada, predominantly
7 around bias testing and I still administrator and
8 research around bias testing in the UK. I still carry
9 out some work relating to setting testing for one of the
10 big UK police forces and bias testing police recruits in
11 a smaller police force. My work is now exclusively
12 around bias testing. I no longer carry out any training
13 or consultancy, but I obviously have to keep my finger
14 on the implicit bias pulse for bias testing."

15 So after a career of approximately 22 years within
16 this particular field, you've retired and closed your
17 business.

18 A. Hm-hmm.

19 Q. But it seems you still seem to be doing quite a lot of
20 work?

21 A. Nothing that requires travel is my rule there.

22 Q. I see. So today I want to focus on asking questions
23 about unconscious bias, bias testing and training in
24 relation to unconscious bias.

25 At paragraph 6 you were asked to explain what

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1 unconscious or implicit bias is. Are those two terms
2 interchangeable, unconscious and implicit bias?

3 A. Implicit bias is the more accurate description. It is
4 the one which is used in the academic world. I think
5 "unconscious bias" was coined as a phrase probably by
6 Harvard University which has sort of picked up its --
7 the main use is now "unconscious bias" but the correct
8 term is "implicit bias". They are the same thing.

9 Q. Let's look at what you say about the concept in
10 paragraph 6:

11 "We often talk about it simply being our unintended
12 people preferences, our preference to see particular
13 groups of people positively or negatively. The research
14 on implicit bias goes back to the early 1970s and there
15 is quite a long research history. Fundamentally,
16 implicit bias is about the way we make judgments about
17 people and it is fundamentally embedded in our
18 neurology. The idea is that we have processes in the
19 brain which are fairly instinctive, automatic and which
20 get activated without our conscious control. There are
21 other neurological processes which are the opposite of
22 implicit processes. These processes are conscientious,
23 they're much slower in their operation than implicit
24 processes and require attentional resources. They
25 contrast with implicit processes, instinctive very fast

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1 and automatic processes of the brain which are partly
2 based upon our anthropology of how our brains developed
3 and all animals have these implicit processes. They are
4 instinctive responses based in the ancient neurology in
5 the brain's amygdala, as the neuroscientists talk about
6 it our fight or flight response."

7 So you give an overview in paragraph 6 of what is
8 meant by implicit or unconscious bias and in paragraph
9 and in paragraph 7 you describe these processes as:

10 "A cognitive shortcut that allow you to make
11 judgments in the blink of an eye without engaging your
12 conscious thinking."

13 A. Yes.

14 Q. In paragraph 8 you explain that these judgments or
15 decisions can be positive or negative, so you can create
16 either positive or negative attributions to particular
17 groups, often based upon experience. And if we look
18 about half way down this paragraph, you say:

19 "Although we might consciously reject a stereotype
20 about a particular group, our implicit brain may have
21 already wired and continued to wire that stereotype into
22 our brains."

23 Can you explain a little bit more about that, the
24 concept of wiring a stereotype and the competition
25 between the conscious rejection of the stereotype and

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1 the implicit bias?

2 A. So repeated exposure to a particular pattern, whether
3 that's from our own experiences or whether it's from the
4 media or whether it's from what society tells us about
5 particular groups, if we get repeatedly exposed to those
6 associates, we start to create a neural pathway in the
7 brain between the group and these positive or negative
8 constructs. So even though we believe ourselves to be
9 fair and equitable and to reject a stereotype about a
10 particular group, those neural pathways are still there,
11 we still make the association implicitly and
12 unconsciously between a positive or negative attribute
13 and a particular group and it's really the job of the
14 conscious to intervene in that and to convert that
15 impulse into fair and equitable behaviours and we have
16 some specialist neurons in the brain designed to do
17 that, they are called von Economo neurons, and what they
18 do is stop those waves of impulse that are coming from
19 the amygdala from breaking through into behaviour.

20 Q. Thank you. If we can stroll down a little bit to the
21 top of the next page, the second half of this paragraph,
22 you explain that:

23 "When we're stressed, when we are rushed or when we
24 are overworked, and that [you note] is the kind of
25 environment a lot of people work in, we fall back onto

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1 these shortcut neural pathways from making the judgments
2 we need to make and that's why implicit bias affects the
3 behaviour that we exhibit and the decisions that we then
4 make."

5 Why does it happen when we're stressed or rushed
6 other overworked?

7 A. It's to do with processing capacity of the brain so the
8 neocortex, the new part of the brain that we've
9 developed as human beings, is relatively limited. It's
10 got a fraction of the processing power of our old brain
11 that we've had for millennia. It can only process a
12 certain amount of information at any one time and I
13 often talk about it -- give you an analogy. It
14 processes about 40 bits of information at any one
15 moment. So if I gave you a picture in your head of that
16 as a table tennis ball, I have then equated that to the
17 processing power of the unconscious mind, the implicit,
18 it's a ball about 2.4 metres across, it's about 200,000
19 times the processing power.

20 So when we overwhelm the frontal lobes of the brain,
21 they fall back on to this massive resource that they
22 have in the background. The problem with it is is that
23 emotional or cognitive load eats up those resources of
24 the frontal lobe, so when we are stressed, in danger,
25 rushed, we tend then to fall back onto those implicit

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1 connections for making the rapid judgments about people.

2 Q. Thank you. I wanted to ask you some questions about the
3 development of training in this area and if we can
4 scroll to paragraph 10, you explain that:

5 "This has been an iterative process. To start with
6 it was very much about awareness. People didn't know
7 what this notice of implicit bias was."

8 If we skip a few lines you say:

9 "Within a couple of years people started to say
10 that's really interesting, but so what? How can we do
11 something about it?"

12 So should we understand that there was a shift away
13 from a focus on having an awareness of unconscious bias
14 towards what can we do about this? How can we correct
15 this?

16 A. Absolutely, that shift from awareness to action.

17 Q. You explain at paragraph 11:

18 "I don't think we can eradicate it [that is implicit
19 bias] because it's part of that process which we need to
20 live our lives so what we can help people do is mitigate
21 the effects as best we can."

22 So it's not about eradicating this process. On one
23 level is this almost a live-saving in extremis? Is it
24 that part of the brain?

25 A. Yeah, every time we need to make a judgment about new

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1 people, if we didn't have that capacity to fall back
2 onto those really fast neural pathways, the very first
3 person we meet in the day and we had to make a judgment
4 about how they stood, how they dress, their voice, the
5 frontal lobes would be overwhelmed and we would come to
6 a grinding halt. So we pass a lot of that routine
7 processing back into the unconscious, into all those
8 wired pathways that we've acquired in the course of our
9 lives.

10 Q. Okay. So it's not something that you can eradicate.
11 It's part of the process you need to live your life.
12 It's about mitigating the effects of the bias.

13 A. Hm-hmm.

14 Q. And you explain at paragraph 12, I'll read this short,
15 if we look about halfway down the paragraph. You say
16 that.

17 "If we slow the thinking down by putting little
18 barriers in the way, little pauses in the thinking, we
19 can mitigate bias by giving the conscious processes time
20 to engage."

21 Can you say a little bit more about that?

22 A. Yes. So we know that the unconscious operates somewhere
23 between 30 and 100 milliseconds, which is actually
24 faster than the eyes can even fully perceive the image,
25 but the conscious brain doesn't cut in until about 400

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1 milliseconds, four tenths of a second, so we're never
2 able to get in soon enough. So all we can do really is
3 to delay the thinking to introduce those little thinking
4 spaces between the impulse and the action in the hope
5 that we can get people then to rethink the situation.
6 So would I be thinking the same if this person was
7 different on this occasion? Am I really thinking about
8 this in the right way? And organisations have worked to
9 put those little thinking spaces, even if it's just a
10 three or ten second space into people's thinking.

11 Q. Can you give an example of how an individual might
12 introduce a thinking pause into their day-to-day life or
13 their working life?

14 A. So if you just take a performance management or
15 recruiting scenario, the little gap might be the next
16 time I am sifting CVs for a job as a junior lawyer, I
17 will stop for ten seconds and ask myself the question
18 whether I have allowed the school that they've come
19 from, for example, or I have allowed the university that
20 they have gone to have an adverse impact. So all it
21 does really is give them a bit of a thinking space.

22 And organisations have started just to introduce
23 that little opportunity. I think Oakland Police did
24 something very similar with pursuits where they insisted
25 on people having the thinking space, so they were not

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1 allowed to do a pursuit on foot unless they had another
2 officer with them and that wasn't done just for safety.
3 It was done to give them the thinking time, so while
4 that officer was catching up, that red mist of the chase
5 was able to die away, but it's just producing those
6 little opportunities.

7 And I think Jennifer Eberhart, who's the professor
8 of psychology at -- I think she's at Madison now,
9 Wisconsin Madison, she talks about a website which is a
10 little bit about Facebook. I think it's in the UK.
11 I think it's called "Front Door" where people discuss,
12 for example, local crime and she had a problem with
13 racial profiling on that website and you can see it on
14 Facebook groups all the time, can't you? There's some
15 kids hanging around at the end of the road and they
16 start to make assumptions about those people based upon
17 ethnicity, age, et cetera and she suggested that they
18 introduced a little break in that, so before you could
19 post something, you had to answer a couple of questions,
20 which is, is what you're reporting got the descriptions
21 properly and are you being very specific about what it
22 is that they're doing wrong? And she coined the phrase,
23 if you're going to be suspicious, you have to be
24 specific.

25 And that's something which we try to introduced to

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1 police intelligence in one police force by asking them
2 not to pass information, intelligence information, out
3 to operational frontline officers without a certain
4 degree of detail, so that you didn't just give people a
5 very vague description, you gave them three or four
6 descriptors, so they would not automatically assume that
7 just because that guy was a particular ethnic group that
8 he was the one who must be talked about.

9 So those were the kind of thinking gaps that we
10 tried to get them to think and put into policy and
11 practice.

12 Q. You explain, however, at paragraph 13, an irony perhaps,
13 that the requirement on an individual to introduce this
14 thinking gap actually increases the cognitive load. You
15 explained here:

16 "I think one of the issues around the actions around
17 implicit bias is that if we heap more load onto
18 individuals, we ask people to be personally responsible
19 for their biases, but it's yet another load. We know
20 that emotional and cognitive load causes people to fall
21 back onto their biases."

22 Can you explain a little bit more about that tension
23 between the need to impose the thinking time as a way as
24 way to mitigate bias but that thinking time, or the
25 requirement to introduce thinking time, actually

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1 increasing the cognitive load that can lead to these
2 biased shortcuts?

3 A. Yes. I think the cognitive load comes not necessarily
4 from trying to introduce the thinking time, because that
5 has the opposite effect. It comes from organisations
6 inserting things into process.

7 The thing that springs to mind in some respects is
8 policing uses a national decision-making model, where it
9 has steps through which the officer is supposed to go
10 when they're making a decision. Well, that just
11 cognitive load, especially when you're making a decision
12 in the blink of an eye almost. You place additional
13 cognitive load onto people then while they're thinking
14 about following policy and procedure, rather than
15 dealing with the situation and hopefully looking to
16 mitigate their biases in the scenario, but, yes, what we
17 do effectively by introducing that is introduce
18 something else for them to think about.

19 And I think if you're going to do it, what you need
20 to do is to take away some of the other demands from it,
21 so get away from loading people with procedures and
22 policies that they have to follow which are complex,
23 because people do not do complexity well, especially
24 when they're stressed and they're rushed. They fall
25 back onto those implicit biases for decisions.

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1 Q. Thank you for clarifying that. That was my
2 misunderstanding. I had understood that it was the
3 requirement to impose a thinking break that was
4 increasing the cognitive load, but it's not the break,
5 it's the procedure that has to be gone through, the
6 following of a process or a policy, that adds to the
7 cognitive load.

8 So what I think you were saying is if this can be
9 simplified it's more likely to be effective?

10 A. Yes, a bit like designing a website, isn't it? Just two
11 clicks, not 22 clicks to get to where you want to go.

12 Q. You have spoken about introducing thinking time, is
13 there anything else that an individual can do to
14 mitigate bias?

15 A. There's actually a host of things. I did a review some
16 years ago with two other psychologists on behalf of
17 the -- trying to think of the organisation now --
18 Quality Challenge Unit at the Department of Education.
19 And we know quite a bit about what we can do to mitigate
20 things like, you know, not reinforcing stereotypes in
21 the first place, because we know that when people are
22 exposed to stereotypes they tend then to use those
23 stereotypes because it rehearses the neural pathway. So
24 trying not to reinforce those.

25 I'll give you a good example of that by the way. I

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1 went to the Metropolitan Police website, and this must
2 be about five years ago now, onto their Twitter feed and
3 I did a very quick analysis, it took me about 20
4 minutes, of the faces that appeared on the website on
5 the Twitter feed for people who either wanted, who were
6 sought for identification, were missing people and what
7 we found with that was that black people were much more
8 likely to appear on the Twitter feed if they were wanted
9 or committing an offence, disproportionately to the
10 proportions in the population and within the criminal
11 population.

12 Well, every time my Twitter feed went past, although
13 I reject the stereotype about young black men and crime
14 myself, my unconscious mind is wiring that stereotype
15 into my neural pathways all of the time. And although
16 they didn't like it very much when I pointed it out to
17 them, I have been back since, and I did the same for
18 West Yorkshire Police and Greater Manchester Police, and
19 there was no disproportionality in what they were doing.
20 It was very much in line with their local populations.
21 But that constant reinforcement, we can avoid doing
22 that. And I think the Metropolitan Police have had
23 issues recently with taking down the photographs of gang
24 members, for example, in the briefing rooms, because
25 every time you walk past them your unconscious mind

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1 wires that connection between black men and crime into
2 your neural pathways to make them stronger for later on
3 so you end up using them.

4 So I think there's some things which we can do and I
5 did produce a list of, you know, ten things that we can
6 better do, which includes not reinforcing them, creating
7 the thinking gaps in it, and other things which we can
8 do which don't require massive amounts of resource or
9 time, because that's what people don't have, they don't
10 have time or resource.

11 Q. I think that list might actually be included in a
12 PowerPoint presentation that you prepared for.

13 A. It likely is. If it not, in the handout that went with
14 the course, yes.

15 Q. Perhaps we can revisit this issue then when we go
16 through the PowerPoint, which is something I would like
17 to do with you today.

18 So we were talking about the shift in training from
19 awareness to action, as you put it, and you also explain
20 in your statement that there was then another shift in
21 training away from the individual approach to an
22 organisational approach. Can you say a little bit more
23 about that?

24 A. I think although some organisations wanted personal
25 responsibility to be reinforced with the individual,

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1 which I think is important, you know, at the end of the
2 day it's down to individuals to try and mitigate their
3 biases, a lot of what organisations did and do
4 reinforces that. It creates the systems around which
5 people struggle then to mitigate their bias, whether
6 it's the intelligence system that's deployed, whether
7 it's the recruiting process that's being deployed.

8 So organisations have been really slow to do this,
9 because if you have got people who are under a lot of
10 load and are falling back on to their biases, one way
11 around it is to take the system that's feeding those
12 biases and redesign it not to do it. And I'll give you
13 an example in a simple recruiting scenario. If when
14 you're sifting CVs for a job you take the names off, you
15 are much less likely to see people's gender and race
16 biases coming through in the decisions they take to
17 either accept or reject. Now, that's not necessarily
18 within the gift of the recruiter, but it is in the gift
19 of the organisation to say the system that we use no
20 longer has names and dates of birth, for example, or
21 even schools on the CV, because that triggers these
22 biases in people. So that was a kind of organisational
23 fix.

24 But organisational fixes in terms of how they run
25 their meetings, you know, who gets to contribute in a

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1 meeting was another one. That's systems that said we do
2 not start with the senior person's comment, we start
3 with the junior person's comment and work our way up,
4 because people tend to fall in with the opinion of the
5 senior person. So it's lots of little strategies that
6 organisations needed to build into their systems to make
7 it less likely that individual biases would break
8 through into the behaviour and into the decisions that
9 were taken.

10 Q. You explain in your statement at paragraph 14 that you
11 then took a final step in the sort of iterative
12 development of your training programme and move towards
13 offering train the trainer courses. You explain in
14 paragraph 14:

15 "There was only one me, even though there were other
16 people working in the field. It was quite an expensive
17 option to have a subject-matter expert come in multiple
18 times to deliver training across the staff group."

19 So you developed a train the trainers course with a
20 licensing arrangement back in 2015 and the idea was you
21 would come in and do three days with the trainers and
22 then go away, you would write materials, context
23 specific, and there was a licensing arrangement in
24 place.

25 So that was the sort of the endpoint of the

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1 development of your training package?

2 A. Yes.

3 Q. Okay. I want to ask some questions about evaluation of
4 training. You say at paragraph 15:

5 "The one shortcoming I see in the training is that
6 nobody wanted to do the evaluation. Nobody wanted to
7 say, well, is this working? What are the processes by
8 which we work out whether that half day of training is a
9 good investment? And that's typically what it looked
10 like. It was typically three hours of training.
11 Awareness was about an hour, but the full course was
12 about three hours split between application, context and
13 action. I called it the three As; awareness,
14 application and action. There was very little interest
15 in evaluation beyond the simple evaluation sheets at the
16 end of the session, which organisations often hand out
17 to delegates. That can be things like was the lunch
18 okay or what was the room like? They didn't often ask,
19 well, what have you done? I have seen very little or no
20 robust evaluation."

21 And you go on to say at paragraph 16 that:

22 "Even if you put evaluation into a bid, it will be
23 taken out by the organisation. They want to do the
24 training, move on and tick the box. I think there's an
25 element of saying, oh, unconscious bias training, we've

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1 done that, we are moving on from that. There has been
2 very little good evaluation."

3 And you say elsewhere in your statement that:

4 "Often there's no commitment after an event to
5 continuing unconscious bias training. It is to tick box
6 exercise, zero evaluation or desire to see what the
7 impact might be."

8 And you conclude later in your statement by saying:

9 "You have put this one into the too difficult box,
10 because people just don't put to put money into creating
11 a robust model where you have the data coming in in such
12 volumes that you can say something robust."

13 And you suggest that you would need to see hundreds,
14 if not thousands, of the evaluations and there just
15 isn't the interest or the budget for that.

16 So what are the implications of organisations
17 choosing not to evaluate the effectiveness of this sort
18 of training?

19 A. Well, they just keep repeating the same mistakes, don't
20 they? First of all, they have spent an awful lot of
21 money usually in putting their trainer into position.
22 So you would never buy a new fleet of vehicles and not
23 test it out to see if it did the job that you thought it
24 was going to do, but with training we seem quite happy
25 to take the word of somebody at the end of it to say how

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1 much they enjoyed the course, how useful they thought it
2 was, as some kind of indication of effectiveness, but
3 we've seen very little in terms of actually following
4 people up after the event.

5 Because the fundamental of this is, what is it
6 you're setting out to achieve? A lot of training that
7 you see, the short ones in particular, want to do
8 awareness. They want to say you should know a little
9 bit about this because it might be impacting your job,
10 but the really difficult stuff is, well, have we
11 affected behavioural change? Have we made people do and
12 see things differently? And that's a really difficult
13 one to measure and to disentangle from all the other
14 stuff that's going on in an organisation. And if you go
15 back to the kind of academic model, people are asking,
16 well, where's the control group?

17 And when we actually did have a study some years ago
18 where we started it with a control group where we ran
19 half of them through and half of them not through, and
20 very quickly the organisation decided it was too much
21 like hard work and they weren't going to do it, but that
22 was the basics, you know. People have had the training,
23 people have not had the training, do we see differences
24 in the outcomes later in the day?

25 And we've got a similar study running at the moment,

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1 it's actually within clinical psychology training, where
2 they are not just testing people and giving them
3 training, but they're then looking at the outcomes of
4 the selection decisions they made before and after the
5 intervention. But they've really struggled to get
6 people to participate. You know, they only wanted 40,
7 I think they got 33 at the last count and it's been two
8 years in the making. It's a really difficult one
9 getting people to do really powerfully evaluation,
10 rather than just taking people's word for whether they
11 did or didn't like it.

12 Q. You explain at paragraph 17 that you've had two studies
13 in Canada where you've actually bias-tested delegates
14 before and after training and:

15 "It suggests the training does have an effect on
16 people's bias levels. What it does to people's
17 behaviour is still a bit of a mystery. I think we have
18 got no firm evidence in terms of behavioural change."

19 Is that because of a lack of data from evaluation
20 because evaluation processes simply aren't --

21 A. This is behavioural problem again, isn't it? What's the
22 metric for the behaviour? What do we hope to change?
23 Now, we know the bias test scores have fallen, but has
24 that led to fewer complaints. I think this was actually
25 among -- either a probation or a prison setting. So has

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1 it led to reduced complaints from the inmates? Has it
2 led to better relationships? Has it led to more women
3 being promoted? We don't know those behavioural
4 outcomes.

5 We just know that as a result of the training, with
6 a control group who didn't have the training, that the
7 bias test fell in the group who had had the training.

8 Q. Can you tell us a little bit about bias testing, what
9 does that involve?

10 A. So it's an online test, developed by Harvard originally
11 in 1998, and then we've developed a version in about
12 2009 and it's based upon that notion of the association
13 between groups and positive and negative attributes for
14 the groups.

15 So if you take two groups, a black group and a white
16 group, the test throws an individual a series of
17 photographs and it asks them to sort them according to a
18 rule. It gives them the rule. So the first rule is if
19 it's a black face, hit the right key, sort it right. If
20 it's a white face, hit the left key, sort it left.

21 It then starts to mix words in between the
22 photographs and they're good words, "peaceful, calm,
23 helpful, cooperative," versus bad words, "aggressive,
24 uncooperative, demanding", and it asks you to sort them
25 and it gives you a rule. It says if it's a good word,

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1 I want you to sort it right with the black faces. If
2 it's a bad word, I want you to sort it left with the
3 white faces.

4 What it then does is when you have done about 60 of
5 those it changes the sorting rule. Now it wants you to
6 sort the good words with the white faces and the bad
7 words with the black faces. It gives you time to adjust
8 for the change over. What it then does is it compares
9 the two halves of the test. It wants to know where did
10 you slow down, where did you make mistakes, where did
11 you speed up, because if you have those positive or
12 negative associations about a particular group and
13 particular positive or negative constructs or ideas, it
14 interferes with your capacity to sort. So you want to
15 put it over there because the rule says so, but your
16 implicit biases are hardwired and what they do is say,
17 they're quicker and faster than the conscious mind, it
18 wants you to put them on the other side and whilst your
19 correcting for that, it slows you down and it makes
20 mistakes so it calibrates that into the likelihood that
21 you would not or wouldn't let those biases impinge on
22 the decisions that you take.

23 Q. Gosh. And you explain at paragraph 17 that you have two
24 studies in Canada, these studies that you've personally
25 carried out, you have made it clear that you work in

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1 Canada as well as in the UK, where you have bias tested
2 delegates before and after training and those studies
3 suggests that the training does have an effect on
4 people's bias levels.

5 So should we understand then that there's a
6 difference in the results you got from the bias testing
7 before and after the delegates had undertaken training?

8 A. Yes, so there was a significant drop off in the bias
9 test scores. I mean they were more neutral after the
10 training than they were before the training.

11 Q. And when they're not neutral, are they indicative of a
12 bias in one direction or another?

13 A. Yes, so generally speaking, and we have got 120
14 different bias tests on the platform, the data always
15 tends to be skewed against the minority group. So if
16 it's a black-white test, it tends to be skewed that
17 there are way more people with a bias against black
18 people than white people. The gender tests tend to be
19 skewed against women. The LGBTQ tests tend to be skewed
20 against LGBT groups and so it goes on. The minority or
21 more suppressed group tends to be the group for whom
22 more negativity is associated.

23 Q. You say at paragraph 17:

24 "What it does to people's behaviour is still a bit
25 of a mystery. I think we have got no firm evidence in

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1 terms of behavioural change."

2 And elsewhere in your statement, I think at
3 paragraph 29, you say:

4 "We don't know if unconscious bias training works
5 because we have never evaluated it."

6 Is that because of the lack of interest in
7 evaluation?

8 A. It's a really difficult one and I mean training is not
9 well evaluated generally, is it? You go on the course,
10 they send you a sheet to say what you think of it.
11 Nobody comes back to see if your skill set has improved
12 three, six, nine, 24 months later. We just blindly
13 think that since we dedicated half a day to training it
14 will have made a difference, but we don't really have
15 the mechanisms for following it up and we often don't
16 want allocate the budget for following it up.

17 Q. I wonder if we can turn to paragraph 21 of your
18 statement where you talk about the value of training of
19 this type of in the context of policing and you say at
20 21:

21 "I have been asked how unconscious bias training
22 functions as a tool when it comes to policing. I think
23 there's two things. The first thing is that there is
24 some research suggesting that awareness of our biases
25 can help us to mitigate their effects. So if I know,

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1 for example, that I have a particular bias based on race
2 or gender, it gives me the opportunity to create
3 mitigations and barriers. Sometimes it's just a little
4 script in their head which say, would I be reacting in
5 the same way if this was man rather than a woman, a
6 white person rather than a black person."

7 And again, is that about building in these
8 opportunities for thinking time?

9 A. It is, yes, but it's one of the simplest checks, isn't
10 it, of any kind of biases? Would I be reacting in the
11 same way if a disabled person had said that? Would I
12 react in the same way if somebody from the LGBT
13 community said it? It gives us insight into how our
14 thinking works.

15 Q. Continuing on to paragraph 22 you say:

16 "I think that there's the element of awareness of
17 people and certainly my experience of dealing with
18 test-takers is that if you increase their awareness of
19 their biases then there are certain people who will
20 reflect and act on that. It actually makes them feel
21 bad as people. There is some research suggesting that
22 about 25 per cent of people, regardless of having
23 insight, will just carry on as normal. I think that we
24 remain positive because about two-thirds of people, if
25 they are given insight into their biases, actually do

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1 something about it. Whether they do that because
2 they've got some kind of moral compass or whether they
3 do that because they know the organisation is very
4 attentive to that aspect and there might be censure if
5 we get on top of their bias, we don't know. They do
6 seem to be able to be motivated. Trish Devine in her
7 research talks about it as the motivation to control
8 bias."

9 So you're saying here that an awareness plus
10 motivation has the potential to bring about changes in
11 behaviour?

12 A. That certainly seems to be what Trish Devine's work had
13 suggested and I think that the numbers in that
14 particular piece come from an overlaying of
15 Trish Devine's work with some work by a psychologist at
16 Sussex University some years later from the British
17 Social Attitude Survey when he asked the question, if
18 you have a bias, are you motivated to control it? And
19 he started to get a picture of what the motivation and
20 control was.

21 So there's about one in four people who even if they
22 know they have a bias, they don't care. As far as
23 they're concerned, they're going to do what they want to
24 do. But most of the people either are already motivated
25 to control their biases or they can be motivated, even

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1 if that is a threat censure on occasions.

2 Q. So should we understand that of those who are
3 susceptible to motivation and don't fall within that 25
4 per cent who are not, some might be motivated because they
5 have a strong moral compass, so the motivation is
6 internal to them if you like? Others are not so
7 motivated, but external factors, such as the
8 possibilities of sanction or censure, might be
9 sufficient to bring the behaviour back on track?

10 A. Yes, and the norms of the organisation are part and
11 parcel of that. It isn't always necessarily they might
12 know that they are not going to be censured by the
13 organisation, but to know that it's not an attitude that
14 colleagues would tolerate, for example, that they will
15 be seen badly by colleagues if they speak in a
16 particular way or say or do particular things.

17 I can't remember the exact numbers, but about one
18 third of people have got an internal motivation anyway,
19 about one thirdly of people can be motivated if they
20 know they have a bias, and it leaves us then within, you
21 know, 7 per cent of people who can be motivated by the
22 censure and 25 per cent who don't care.

23 Q. You explain in paragraph 24 that:

24 "The effect of this motivation can be short-lived if
25 it's not reinforced. If you commit to doing specific

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1 things to mitigate bias and start to embed that within
2 processes, there's a better chance of long-term change."

3 A. Yes.

4 Q. Tell us a little bit more about the need to reinforce?

5 A. This comes from Trish Devine's work, where she
6 bias-tested people, gave them the result of their bias
7 tests and then some of them went through a training
8 package on implicit bias and some of them, I think, were
9 given a health and safety training package and they then
10 revisited them a couple weeks later and they found that
11 there was still a residual for the people who had done
12 the training and had the testing and she could still
13 detect that about two years later. But what she did in
14 the intervening period she actually gave them some
15 diaries to keep, so they had to keep a diary of what
16 they were doing to mitigate their biases and that was
17 what reinforced it. It was that embedding it into
18 practice.

19 And what we think is that after a while that gets
20 passed back into the unconscious. You no longer have to
21 consciously think about that three second gap. The
22 thinking is doing it for you, but if you just expect
23 people to roll out of the training course and you have
24 inoculated them, I think you're probably on a hiding to
25 nothing.

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1 Q. So reinforcement means practice and you explain
2 elsewhere in your statement, I think at paragraph 71,
3 that if a person isn't motivated, doesn't practice, then
4 they will revert back to their old attitudes and
5 behaviours?

6 A. Yes.

7 Q. Can we skip back up to paragraph 23, please. You talk
8 here about an awareness at organisational level:

9 "Organisations often don't necessarily want to look
10 inside themselves and ask the question about their
11 process. I know there's a lot of discussion about
12 institutional racism and chief constables saying that we
13 are or we are not institutionally racist, but I think
14 the unwillingness to look at our systems and processes
15 is one of the indicators of that institutional racism
16 that we're not prepared to look at our processes, we
17 want to foist the problem onto individuals. Whereas in
18 actual fact a lot of it is based in our systems, what
19 calls do we attend, what calls do we not attend, what
20 information is an operational officer given in response
21 to a call there's. Quite a bit organisational
22 responsibility there, which often gets abdicated back to
23 the individual."

24 Can you say a little more about that, the concept of
25 organisation responsibility being passed back on to the

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1 individual?

2 A. I think there's -- certainly in England the reluctance
3 of chief officers to admit that their force is
4 institutionally racist and I think that they don't
5 really understand it well. They seem to think it's some
6 kind of a personal attack on every single one of their
7 officers. In actual fact, what it is it's a personal
8 attack on the systems of that organisation, that we have
9 not got the systems in place that don't prevent
10 happening.

11 And the classic example I think of it is and, again,
12 this is England and Wales, but I have been monitoring
13 the data in the national recruit process for about
14 13 years. There was adverse impact in the national
15 recruit process every single year and to me, when you're
16 told that of that and you know it and you do nothing
17 about it, except blame the communities, which is what
18 they did -- they said, well, you know, it's the Asian
19 community or the Pakistani community don't speak good
20 English or there's an educational issue or there's a
21 motivational issue without actually looking inside for
22 the systems that you have that cause that in the first
23 place.

24 And when they finally did it last year, you know,
25 the results show that they narrowed the gap. Not

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1 entirely, there were still some groups who were
2 struggling, but the gap narrowed significantly when they
3 actually went through their materials. They have still
4 got the same system, but they actually went through the
5 materials looking for these places, these hotspots,
6 where bias might come back into the process and
7 sometimes it was just nuances of language, it was the
8 way things were structured.

9 And they're starting to do it now with
10 neurodiversity. They are now looking at the recruiting
11 and promotional processes and saying, well, how does a
12 person with dyslexia or ADHD cope with this process and
13 how we can adapt that? They have never done that, as
14 far as I know, with race or gender.

15 Q. I would like to ask you about training that you gave to
16 Police Scotland and I suggest that we do this by looking
17 at a PowerPoint presentation that you prepared and
18 delivered in June of 21. And if we could bring this up
19 on the screen, it's WIT00063. There are, I think, 39
20 slides, so this is going to be quite a quick trot
21 through.

22 But I understand from your statement and I think
23 what I would like to do, Dr Jones, is just keep the
24 slide show on the screen and if I need to refer back to
25 your statement, I'll give you the paragraph number and

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1 I'll read from the hard copy, but you explain, I think
2 in paragraph 36, that this came about as a result of a
3 call that you received from Inspector David Bradley who
4 had responsible for officer safety training within
5 Police Scotland at that time and you record that
6 Inspector Bradley mentioned the death of Sheku Bayoh as
7 being one of the motivations for introducing this type
8 of training.

9 You also explain that it was three hours of training
10 and it was delivered remotely because of the lockdown
11 restrictions that were in place in 2021 and a passage
12 from Inspector Bradley's statement was read to you in
13 the course of your interview, in which Inspector Bradley
14 explained that the cohort were full-time officer safety
15 training instructors so that's who you were speaking to.
16 It wasn't probationers or constables, it was OST
17 instructors.

18 I'm conscious of the time. I wonder if before we
19 get into the meat of the presentation, if that might be
20 a good opportunity ...

21 THE ARBITRATOR: Yes, that's a convenient point. We'll take
22 a 15-minute break.

23 (3.00 pm)

24 (A short break)

25 (3.19 pm)

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1 LORD BRACADALE: Ms Thomson.

2 MS THOMSON: Thank you. I wonder if we can bring up the
3 PowerPoint presentation again, please, Dr Jones. So we
4 see that this was commissioned by -- the training was
5 commissioned by Police Scotland or for their benefit and
6 it concerns the subject of implicit bias in policing.
7 There are, I think, 39 slides in this pack, so we won't
8 be able to go through all of them in the time available
9 to us, but I'm going to pick out a few and invite your
10 comment on them.

11 Let's look at slide 2, please, the session plan,
12 just to see what your training covered. You have
13 explained already this was a three-hour session. So it
14 looked at what is unconscious or implicit bias, how can
15 it affect people, decisions and policing; how might it
16 affect officer decision-making around use the force; how
17 might it affect the training we design and deliver, and
18 what does the research say we can do about it in
19 generating actions and advice. Those were the themes
20 you were looking to cover in the course of the
21 presentation.

22 There's a nice quote on the following slide, slide
23 3:

24 "There are no bad people, just bad thinking habits.
25 Unconscious bias is a thinking habit we have learned

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1 which we can unlearn."

2 Is that a statement that you would endorse?

3 A. Yes, Trish has denied saying that now, but I now claim
4 that statement as mine so ...

5 Q. All right. Can we go to slide five, please. Can you
6 talk us through this one?

7 A. Yes. This comes from a book called "Thinking, Fast and
8 Slow" by Daniel Kahneman and it explains the principle
9 behind implicit and explicit thinking, conscious and
10 unconscious thinking so it's fairly well known I think.
11 The only thing we've done is change it from a baseball
12 to a tennis ball for the English and Scottish audiences.

13 But if you ask people to calculate the answer to
14 that question, so a bat and a ball costs £1.10, the bat
15 costs £1 more than ball, how much does the ball cost?
16 Most people say that the answer is 10p because it feels
17 seems like 10p, doesn't it? But it can't possibly be
18 10p, because if the bat is one pound more than the ball
19 and the ball were 10p, then the bat would have to be
20 £1.10. There is only one correct answer and that's 5p.
21 So the ball is 5p, the bat is one pound more than that,
22 so that makes it £1.05, add the two together and it's
23 £1.10.

24 So it's not a surprise when people give that wrong
25 and I have given that, by the way, to professors of

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1 maths and they sometimes get it wrong as well so don't
2 feel bad if you get it wrong. It's not the fact that
3 people get it wrong, because we instinctively it feels
4 like 10p, but the reality of it is, is that even if you
5 say to people it's not 10p it's 5p, they don't seem to
6 able to rethink it. Once they have got that 10p answer
7 in their head, they don't seem able to dislodge it from
8 their minds. And that's the thing about implicit
9 biases. Not only is it instinctive, but once it has
10 made a decision for you, getting it to unpick and
11 reverse that decision is actually very, very tricky.

12 So I use it to basically introduce the idea of
13 implicit thinking and we also then cover the difference
14 between the instinctive fast operating and the slow and
15 conscious mind in terms of the conscious mind will get
16 you the answer to that question and usual engineers are
17 quite good at it, because they have got an X minus Y
18 divided by two formula in their head. Most other groups
19 really struggle with it, but it's to highlight the
20 nature of implicit bias and most people get that wrong
21 if they haven't seen it before.

22 Q. This is an example designed to illustrate the difference
23 between the way that the unconscious mind works and the
24 conscious mind works?

25 A. Hm-hmm.

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1 Q. Let's look very briefly at the next slide. For the
2 benefit of anyone who might have been struggling with
3 this example you have done the sums and set out the
4 correct answer there.

5 Can we skip through to slide number 9:

6 "Implicit biases develop and are maintained from
7 your culture, our experiences and from the media we
8 absorb."

9 So you're explaining here where these biases come
10 from. Are they learned then essentially our biases?
11 Are we something that we're born with or are they to do
12 with our lived experience and our learning through life?

13 A. Yes, some of them obviously our learned experiences, the
14 patterns that we absorb. So, for example, male leaders
15 is a pattern we see in lots of places, women cleaners is
16 a pattern we often see, but the culture also does that.
17 It tells us what groups are the valuable groups in
18 society and what groups are the less valuable groups and
19 then, finally, you have got the media themselves. What
20 are the messages that you get from various media
21 sources? The Metropolitan Police website is a classic
22 example of that, how it reinforces those biases.

23 Q. You say:

24 "Being biased is part of who we are. We are all
25 biased and we have a bias blind spot."

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1 A. Yes.

2 Q. What's -- sorry.

3 A. Research would suggest that we -- it's other people who
4 have the biases, it's not us, that we can see it in
5 other people, but we really struggle to see bias and
6 prejudice in our own behaviour, in our own words. And
7 it seems to be some kind of defence mechanism that we
8 don't want to be able to see it, so we cut ourselves off
9 from it and we see it as somebody else's problem.

10 Q. "Biases are easily triggered under cognitive or
11 emotional load... "

12 You spoke about that this morning, but you add:

13 "When tired or deplete of glucose."

14 A. Yes, so effectively the brain is just a machine, isn't
15 it? It runs on glucose, so when the glucose levels
16 fall, we are more likely to fall back onto our bias
17 levels and you often hear people talking about them
18 being "hangry" with an H, because they're hungry and
19 it's a lack of glucose, which takes away our emotional
20 regulation.

21 The study I often quote for that is a study in
22 Israel with judges and what they found was the decisions
23 that judges made on parole decisions tended to be more
24 harsh just before coffee breaks and just before lunch.
25 As the glucose levels in the brain fell, they tended to

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1 be more likely to refuse a parole application at those
2 times.

3 Q. Thank you. Can we move on to slide number 14, please.
4 Can you talk us through this slide?

5 A. Right. It came about I guess because we were contacted
6 by a police force who had had some problems inside their
7 Professional Standards Department, so these are the
8 people who investigate complaints against police. In
9 particular, one black officer had been suspended for a
10 period of two years on what turned out to be a
11 misunderstanding between him and a complainant. But it
12 got us thinking about the impact on the investigation of
13 complaints against police and internal professional
14 standards investigations.

15 And if you remember when we spoke about the testing,
16 we talked about groups, black people, white people, men,
17 women, and we talked about the constructs, so what is it
18 that we're associating a group with? And we developed a
19 specific test for professional standards in policing and
20 what we wanted to know was, do investigators in
21 professional standards more strongly associate white
22 people, black people, Asian people, and men or women
23 with some of the more negative constructs around
24 investigation? So do they see them as helpful and
25 cooperative and open and honest or do they see them as

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1 deceitful, dangerous, predators, for example?

2 And we took the test out to professional standards
3 departments in three police forces and what we did we
4 administered them to their investigators and we were
5 interested in, firstly, obviously, the proportions of
6 people who have bias against particular groups, but also
7 which groups they were biased against. And so if you
8 move to the left from right from Asian, what it tells us
9 is that there are a small percentage of people -- and
10 the coloured bars by the way represent the three police
11 forces involved. The reason there's four bars on the
12 right-hand side is we did revisit one force two years
13 later and retest them. And what you can see is there is
14 a small amount of what I'm calling pro-Asian antiwhite
15 bias, so they were more likely to associate white people
16 with being uncooperative, with being predators, with
17 being liars, and a much larger proportions of them,
18 between 15 and 20-odd per cent, more likely to associate
19 Asian people with that.

20 You see the same but a more pronounced effect where
21 you used the black test and now they have got black and
22 white faces and this idea of whether people were being
23 honest and cooperative and you can see it's even more
24 pronounced. Only two or three per cent of them, which
25 equates possibly to one or two people in each sample,

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1 associated white people with the negative constructs,
2 but around about one in five associated the black people
3 with the negative constructs.

4 And then for gender we see something similar, which
5 is that men are more likely to be associated with the
6 negativity around professional standards. The point I
7 often make is you do not want to be a black man in the
8 professional standards investigation. You get the
9 double whammy of both the race bias and a gender bias
10 and it is fairly consistent across the forces. You
11 know, from West Yorkshire down to South Wales we were
12 getting very similar proportions and we revisited, by
13 the way, on the final bar, which I think is the yellow
14 bar, we revisited one force two years later and
15 retested, not the same people, just the people who
16 worked in the department two years later, some of them
17 maybe the same, and you can see again the results are
18 very similar over time.

19 Q. And this bias testing was that the sort of testing that
20 you described to us earlier on with the photographs, so,
21 for example, black and white faces and the descriptive
22 words that either had a positive or negative
23 association?

24 A. Yes. All we did was change the words to be more
25 reflective of the investigation process than we did with

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- 1 the original test.
- 2 Q. Okay. You said a moment ago in your evidence that you
3 wouldn't want to be a black man subject to an
4 investigation by professional standards and in paragraph
5 40 of your statement, and we won't bring this up on the
6 screen, I would rather keep the slide show up, but I'll
7 read it out to you. You explain this slide and you
8 explain that what really got you into this training in
9 the first place was that a number of forces had that
10 disparity in the outcome of their professional standards
11 processes. Black officers were more likely to end up in
12 trouble and the National Black Police Association over
13 the years had done research and presented an opinion
14 that black police officers, in particular, are subject
15 to discipline more often and more harshly than other
16 officers might be and so you have developed a particular
17 version of the bias test in order to explore that.
- 18 A. Yes, the National Black Police Association are saying
19 that that's an effect that's merged since the Couzens
20 case where professional standards have started to really
21 crack down on standards for police officers that more
22 black and Asian officers are being put forward for
23 misconduct now than they were and they are saying, well,
24 we're seeing it again now.
- 25 Q. Thank you. I wonder if we can move on to slide 20.

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1 This is the concluding slide in a series of slides that
2 came under the heading "Implicit bias and perceptions of
3 criminality" and looks to be the conclusions of the
4 slides that precede it.

5 So you have recorded here:

6 "The results of seven studies showed that people
7 have a bias to perceive black men as bigger, taller
8 heavier, more muscular and more physically threatening,
9 stronger, more capable of harm than young white man.
10 Biased formidability judgments in turn promoted
11 participants' justifications of hypothetical use of
12 force against black suspects of crime, thus perceivers
13 appear to integrate multiple pieces of information to
14 ultimately concluded that black men are more physically
15 threatening than white men, believing that they must
16 therefore be controlled using more aggressive measures."

17 And does that conclusion come from the study that
18 you refer to in the bottom right or is that the
19 conclusion that you have drawn based on all of the
20 research that was listed on the previous slides?

21 A. That's from the study.

22 Q. That's from the study.

23 A. That was their conclusion of all the studies that have
24 been looked at, which I then went back and looked at.

25 Q. Okay. And we see that this study is reported in a

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1 journal called the Journal of Personality and
2 Sociability Psychology in 2017. Can you tell us
3 anything about that journal? Is that a UK journal or US
4 journal?

5 A. It's an international journal. It is one of the more
6 highly regarded journals around personality.

7 Q. Okay. I am being reminded by my colleagues that we
8 heard evidence at the beginning of this hearing on race
9 from a Professor Meer, a university professor from
10 Glasgow, who I understand also referred to this study in
11 the research paper that he prepared for the Inquiry.

12 Now, you give an illustration here, can you tell us
13 about the illustration that you have included on this
14 slide?

15 A. So at that time PC Monk, Benjamin Monk, was a patrol PC
16 sent with a colleague to deal what effectively was a
17 domestic dispute in terms of Dalian Atkinson, who I
18 think people may know used to be a footballer, a
19 professional footballer, I think for Aston Villa in his
20 day. He had been through some difficulties and he had
21 gone to his father's house in Telford and threatened to
22 kill him and PC Monk and his colleague arrived on the
23 scene and Mr Atkinson appeared on the doorstep.

24 And in the evidence given by PC Atkinson at his
25 trial he said "He was enormous." That's not the reality

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1 of the physicality of Dalian Atkinson. He was a little
2 bit overweight, he was 5'9", he had a heart condition,
3 he was far from a being a peak physical subject, but he
4 was then subjected by PC Monk to being kicked in the
5 head whilst on the floor and being tasered three times
6 and he was convicted and sent to prison for manslaughter
7 for doing that.

8 Q. Can we move on to slide 30, please. Here you list a
9 number of different types of bias. I wonder if you
10 could perhaps pick out, say, half a dozen of the better
11 known and tell us, just in a few words each, what they
12 look like, how we might recognise these different types
13 of bias?

14 A. I think there's, like, 122 in the literature, but these
15 are the ones which we see most frequently in
16 organisations. The kind of underpinning one is affinity
17 bias: if you look like me, sound like me, share my
18 background, share my skin colour, I'm more likely to see
19 you as one of those groups positively, which conversely
20 means that people who are not like you tend to be seen
21 less positively and it underpins a lot of the other
22 biases. So the other biases which then come in are
23 driven by affinity bias, the fact that we like people
24 who look like us.

25 Attributional bias is we explain the causes of

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1 behaviour differently. So if somebody who is similar to
2 us has a piece of positive behaviour, we tend to
3 attribute that to them internally, so they're a good
4 person. If they do something wrong, we attribute
5 externally, so we blame the situation of the
6 circumstances. People less like us we often see the
7 opposite, which is if they do something good, we
8 attribute that to good luck or the circumstances,
9 whereas if they do something bad, we blame them for it.
10 We say it's their fault that they did it.

11 Confirmation bias, we see what we expect to see. So
12 we start off with a view of the world and then we seek
13 out information that confirms that view and we ignore
14 information that contradicts that view of the world or
15 that set of circumstances.

16 Source bias is an interesting one. So some sources
17 of information are regarded as more valuable, so you're
18 more likely to believe information that comes from
19 certain sources without challenging it, whereas other
20 sources you will not believe. But the affinity bias
21 sits underneath that, which is if sources are more like
22 us are more likely to be believed than sources that are
23 less like us.

24 And the final one I think of interest is possibly
25 conformity effects so we often don't want to do things

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1 that are different. We go with the flow, especially if
2 somebody more senior is the person who's suggesting it.
3 People do not like to be the odd one out, particularly
4 when they have a very senior person in the room or in
5 the situation.

6 Q. What is halo and horns effect?

7 A. So people have an attribute that you really like or you
8 really dislike and then that colours your whole
9 perception of them. So, I don't know, they're a smoker
10 and you then attribute that their intelligence is not so
11 good or they have poor health or something like that, so
12 it effectively colours your whole perception based upon
13 one thing that either really, or you dislike. So they
14 went to a certain school or university, then they get a
15 positive vibe versus a negative vibe from other
16 universities.

17 Q. If we can move on to slide 32, please, headed up "System
18 Actions" and this continues on to the following slide,
19 so there are 11 system actions that are put forward for
20 discussion in that context of this particular training
21 exercise. Again, I wonder if might invite you just to
22 identify those which are most prominent or perhaps have
23 the broadest application and tell us just a little more
24 about them.

25 A. I think the first one on the list is know your data.

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1 Too often organisations don't know the nature of the
2 problem they have, because they haven't got the data. I
3 will give you an example of that. If you look at the
4 dataset that West Yorkshire Police have got around use
5 of force, it's very, very detailed. You know, they know
6 exactly what force was used against which particular
7 people based on gender, based on ethnicity, so they're
8 able to say which groups are more likely, for example,
9 to be the subject of Pava spray or a spit hood or
10 something like that. And if you haven't got that data,
11 you really don't know what the problem is. If it's a
12 recruiting problem, if you haven't got a problem on your
13 recruiting process of who's getting through who's
14 failing, then you really can't solve the problem, so
15 it's the kind of underpinning one.

16 Reviewing key decision-making processes. I mean
17 this example of that is the College of Policing have had
18 a review done and they have unpicked their process and
19 they've -- it goes into number 5 really, looking for
20 marginal gains. There's no magic silver bullet in all
21 of this. What there is often is small gains, small
22 tweaks in the system, that little by little erodes the
23 opportunity for bias to actually get into the decision
24 and into the behaviour that people have got.

25 And sometimes just sitting down with those

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1 decisions, and I did some work for a large sports
2 company about two years ago where we reviewed, I think
3 it was 60 or 70 job applications, looking specifically
4 for the kind of triggers that might induce certain jobs,
5 putting them through software that could actually
6 identify the kind of words that they were using. Very
7 minor changes on occasions, just a word here and a word
8 there, but it's that kind of approach you might not be
9 able to find the one of my wonderful idea that actually
10 cracks this, but you can erode it with these little
11 steps.

12 Q. Shall we move onto the next slide perhaps and look at
13 the additional points there.

14 A. Yes.

15 Q. There's another five points. Are there any there that
16 you would like to highlight?

17 A. Some of this is actually what we talked about earlier on
18 in terms of things like promoting positive role models,
19 which came to the stereotypes. So when we see a good
20 example, bring it to people's attention, because that
21 tends to erode people's capacity to fall back on to
22 those stereotypes.

23 Avoiding pejorative media releases. You know, the
24 Metropolitan Police Twitter feed is a good example of
25 that. There's also a couple of things within this about

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1 the perspective that we have. Asking white men to
2 review stuff which is really designed for black and
3 minority ethnic groups, for example, or women is
4 unlikely to come up with the magic answer to it when the
5 perspective is very much that and I'll give an example.

6 RBS won't mind me saying this. When they were
7 designing their new automatic telling machines, it was
8 somebody who said, what about people with disabilities?
9 Who actually got certain functionality put into it which
10 was not going to be put in, because it was complex and
11 expensive, but that person spotted the glitch in the
12 system that allowed them then to put that right before
13 they installed the machines. That's because they
14 involved the people who were going to be the end users,
15 if you like, in the process and I think sometimes white
16 men design lots of stuff without necessarily asking
17 other people what it should look like.

18 Q. Let's move on to the next slide. Personal actions. We
19 touched on this earlier in your evidence when we talked
20 about the thinking pauses and I asked whether there were
21 other steps that you could take on an individual basis
22 and you said that there were many and we agreed that we
23 could come back to this because the slide was in the
24 slide show. I'm not sure I can read this, it's very,
25 very small, but can you perhaps talk us through at least

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1 a handful of these personal actions.

2 A. So this is much about what we found out when we did the
3 review. So obviously we've talked about the insight
4 that getting bias tests can do. Once we know what our
5 biases are, if we are motivated to do something about
6 them, we have an opportunity to intervene. Having
7 contact, so this is known as the contact hypothesis,
8 which is the more you have contact with a group for
9 which you have a bias, the less likely you are to be
10 able to maintain that bias because nobody fits the
11 stereotype perfectly. The more people you meet, the
12 more you realise those pigeonholes into which you put
13 groups just don't work and that enables us to break
14 those down.

15 Use of role models, we touched upon that, didn't we,
16 which is the more that we have people who contradict the
17 role model or are positive role models for a group, the
18 more likely we are to mitigate our biases.

19 Counterstereotype, so that's the kind of flip side
20 is to say -- there is some slightly perverse research
21 saying by the way that sometimes thinking of
22 counterstereotypes makes it worse not better, but most
23 of the research says that if you think the opposite of a
24 stereotype, saying I'm going to reject that stereotype,
25 then it does have an effect, but you run the risk of

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1 triggering the stereotype for use, which is the worry.

2 Perspective taking. So this has been widely rolled
3 out, I think, asking people to stop for a minute and
4 think how would I like to be treated in those
5 circumstances? Can I understand why that person is
6 where they are at this moment in time?

7 Avoiding reinforcement. We have talked a little bit
8 about that, but even things like jokes. We often say,
9 "it's just a joke", but the unconscious doesn't know
10 that, it just wires that joke into the big ping-pong
11 ball of our brain for later use.

12 Avoiding reinforcement. We've touched upon that,
13 haven't we, but even if it's a question of making sure
14 that the kind of media that you is not pejorative about
15 particular groups.

16 Avoiding the triggers. So we've spoken a little bit
17 about how things like being rushed and stressed and
18 angry and hungry can cause us to fall back on our
19 biases. We can't always avoid the triggers, but when we
20 can build it in to try not to make important decisions
21 at times when those conditions are most prevalent, that
22 gives us a chance. I'll give you an example. I did
23 some work for one of the ombudsmen and what they decided
24 to do was rather than making a complex decision at
25 quarter to 4 on a Tuesday, they would always sleep on

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1 it, they would put a delay on the email going out to
2 give them a chance to think it through overnight, and
3 that was just a question of them saying, "You know what,
4 perhaps quarter to 4 at the end of a really long day
5 when people have been shouting at me all day is not a
6 great time for making critical decisions. I'll make
7 that one tomorrow morning when I'm refreshed, when I've
8 had something to eat and I'll get on with some admin for
9 tonight". And that was a simple saying, if we can avoid
10 the triggers. You can't always do it, can you, because
11 sometimes you have got to do it, you have got to do it
12 now, but avoiding the triggers is one thing certainly in
13 a more office-based role is really easy.

14 Slowing things down. So just trying to create those
15 little thinking gaps along the way. And saying
16 something about it. I thought it was really interesting
17 the other day that people were saying, "Well, I knew
18 that about that guy", but you never said anything, you
19 never did anything in all that time. Nobody ever said
20 "that's wrong". And the research would say that the
21 best person to make a challenge on bad behaviour is a
22 white man, somebody in the dominant, more powerful
23 group, because people don't think that I have got a
24 vested interest, they don't think, ah, well, he would
25 say that because he's a woman, he would say that because

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1 he's gay, he would say that because he's black. So when
2 we say it, (a), because we're the more powerful group,
3 secondly, because we have no vested interest in making
4 the challenge often, then that's why it's more important
5 that people in actual fact step up and say, "You know
6 what, that's out of order, that's not right".

7 So I can't see number 10. There's got to be a list
8 of 10 or 11, hasn't there?

9 Q. I think it's actually 9. I have a smaller version on my
10 screen. If we scroll down, there we are. I think it is
11 just 9. Thank you.

12 You say elsewhere in your statement, I think at
13 paragraph 70:

14 "If you want people to do this kind of stuff and do
15 it instinctively, it has to be easy to implement, it has
16 to be really, really low on demand and they have to have
17 the time to practice it."

18 A. Yes, so we don't really want to be giving people load,
19 extra load, at times when they actually need all of
20 their thinking power to deal with the situation in front
21 of me, but you have to give them the time to practise
22 it, to pass it back. There was a piece of research in
23 the States on the police use of firearms that found that
24 well-trained firearms officers were able to at least
25 overcome in part some of the biases around race simply

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1 because they practiced and practiced and practiced and
2 they passed that training back into their unconscious,
3 they didn't have to think about what to do now, it was
4 automatic.

5 Q. Finally, can we look briefly at slide 39, please. So
6 we've looked at the advice that might be given at an
7 organisational level to counteract unconscious or
8 implicit bias, steps that an individual can take and now
9 you have a slide headed "Organisational and Leader
10 Actions". Again, I wonder if you could very quickly
11 talk us through this, perhaps highlighting key points
12 for leaders.

13 A. Yes, I mean leaders are quite good with data, but they
14 have to have the data. They have to gather the data and
15 I know the Bank of England, when they started off on
16 their journey, they spent 12 months just getting the
17 data right before they started to implement anything,
18 they need to have the data. But I often talk to leaders
19 about being brave and not fragile. Sometimes they
20 inside organisations they have got a lot of people
21 whispering in their ears, "We can't do that", "We
22 shouldn't do that". Sometimes they just have to not
23 listen to those people. I call them the boss
24 whisperers. Stop listening to the boss whisperers and
25 get on and do it. So I think that sometimes there is a

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1 kind of call to arms for leaders to say, "You're a
2 leader, you're paid to be a leader, get on and do it,
3 don't be having this second guessing all the time".

4 Reviewing processes. Usually leaders in
5 organisations, the people who have got the gift, they're
6 the people saying, "I own this process, I can tell you
7 we need to review it". The person operating the system
8 often doesn't. They have just got the front end.

9 Using diverse panels and having somebody there to
10 challenge the decision. Sometimes it's just having
11 somebody as the devil's advocate, if you like, to say,
12 "Well, can we look at that in a different way? Why are
13 we doing that?" Sometimes just having somebody with
14 that role to push back can stop people doing that and
15 across the organisation that idea of creating the
16 opportunities for the stuff we've said they should be
17 doing, rather than making it difficult to do that,
18 having contact, for example. If you make it difficult,
19 they're not going to get the contact.

20 Q. Anything else you would like to highlight from this
21 slide?

22 A. Right, okay.

23 Building accountability. We're certainly seeing
24 that with the Police Race Action Plan that's going in
25 England and Wales. If the senior leaders are not asking

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1 people, "What progress are we making? Where are we with
2 it?" nothing gets done. If they don't actually -- the
3 crime commissioners have not been asking chief
4 constables, "Well, where are we making progress with
5 this?" If nobody is asking if it's getting done, nobody
6 is going to get done. So accountability I think is
7 really important. And there's a system change around
8 things like creating space in the stop-search
9 situations.

10 Q. Thank you. Can you bear with me for just a second,
11 please. I have no further questions. Thank you,
12 Dr Jones.

13 LORD BRACADALE: Are there any Rule 9 applications?

14 Dr Jones, thank you very much for coming to give
15 evidence to the Inquiry. I'm very grateful for the
16 time. The Inquiry is about to adjourn for the day and
17 you'll then be free to go. Adjourn until tomorrow
18 morning at 10 o'clock.

19 (3.53 pm)

20 (The hearing was adjourned to 10.00 am on Wednesday 26 June

21 2024)

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