

1

Friday, 13th November 2009

2 (Afternoon session)

3 (1.50 pm)

4

SCOTT PATTISON, sworn

5

Examined by MISS CARMICHAEL

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THE CHAIRMAN: Your full names, please.

7

A. It's Scott Pattison.

8

THE CHAIRMAN: Take a seat, please.

9

MISS CARMICHAEL: Good afternoon Mr Pattison. I think you

10

have prepared both a statement and a supplementary

11

statement for the Inquiry.

12

A. That's correct, yes.

13

Q. Subject to anything that you want to elaborate on or to

14

change in the course of your oral evidence this

15

afternoon, are you happy to adopt those as part of your

16

evidence?

17

A. Yes, please.

18

Q. You are the Director of Operations within the Crown

19

Office and Procurator Fiscal Service at the moment?

20

A. That's right.

21

Q. I wonder if you could tell the Chairman a little bit

22

about what that involves?

23

A. As Director of Operations I occupy a new post which was

24

created in August of last year in support to the Deputy

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Crown Agent and I report directly to the Deputy Crown

1 Agent.

2 Crown Office is the headquarters of the Prosecution
3 Service and has a number of different divisions and
4 groups within it. The Operations Group is the largest
5 of those and comprises six specialist units which are
6 essentially the main specialist units within the
7 Prosecution Service in Scotland, for example, the High
8 Court Unit which prepares and assists Procurators Fiscal
9 in preparing High Court cases for trial, the Appeals
10 Unit which prepares criminal appeals, our International
11 Co-operation Unit, our Press Office and our Civil
12 Recovery Unit and the National Casework Division.

13 With the Deputy Crown Agent I am senior operational
14 or adviser on operational matters to both Law Officers
15 and to the Crown Agent and we support and advise
16 Procurators Fiscal in the preparation of their cases.

17 Q. I would like to call, if I can, on your expertise and
18 knowledge of how High Court procedures currently work,
19 Mr Pattison, if I may. I think you were present in the
20 hall when the Chairman was asking the last witness,
21 Mr Nelson, about situations where expert witnesses
22 called by the Crown might be faced with defence evidence
23 which they might want to go away and examine for some
24 reason.

25 To explain a little bit about the background that

1 seems to have arisen in the Shirley McKie case, what
2 happened was that the defence counsel disclosed to the
3 Advocate Depute a few days before the trial was due to
4 start what the line of defence would be. There was some
5 opportunity for two of the Crown witnesses to view the
6 defence production and to speak to the Advocate Depute
7 about it and a third Crown witness it seems may only
8 have had the material by the time she got into the
9 witness box.

10 What I'd like to explore is whether there are any
11 procedures currently in play which may not have been in
12 play back in 1997 which would enable the Crown and
13 ultimately experts called upon by the Crown to become
14 aware of a line of defence based on opposing expert
15 evidence?

16 A. I think it's important to note that since the events in
17 the case that the Inquiry is considering took place
18 there has been a major programme of reform, particularly
19 in the High Court in Scotland. Lord Bonhomie led a
20 review in relation to that. There were significant
21 legal procedural changes as a result.

22 I think probably the most significant change, but
23 there have been a few and I will try and elaborate on
24 them, has been the introduction of preliminary hearing
25 in High Court business and the change to a situation

1 whereby cases are indicted to a preliminary hearing and
2 by that I mean that a trial is not yet fixed until all
3 matters are canvassed in terms of the Crown and the
4 defence's state of preparedness at the preliminary
5 hearing and thereafter a trial is fixed by the judge
6 after he is satisfied that both parties are prepared.

7 As part of that process, which has been very helpful
8 we think, there is a provision for managed meetings or
9 managed communication between the Crown and defence,
10 between the Advocate Depute and counsel for the defence,
11 and that process tends to draw out the work which the
12 defence are doing, the material they are still awaiting
13 in terms of their own preparedness for trial and there
14 is a legal provision that requires the defence to now
15 intimate their list of witnesses and list of productions
16 to the Crown and to all parties in the case if there are
17 co-accused seven days before the preliminary hearing.

18 I think there is still a degree of judicial latitude
19 given in relation to situations where the defence don't
20 manage to lodge by that seven-day period but where that
21 doesn't happen there can be a continued preliminary
22 hearing where the defence still await information or
23 productions and only when both parties say that they are
24 prepared are cases continued to trials and, as another
25 result of the Bonham reforms, in the main cases, are

1 continued to a fixed trial on a fixed date within a High
2 Court sitting, whereas previously they were continued to
3 a sitting which might have up to 20 cases within it.

4 So there are a number of procedural changes which I
5 think serve to focus the mind of both the Crown and the
6 defence and there is a focus on judicial management of
7 the preliminary hearing to get to a point where each
8 side knows what the other's position is, so far as is
9 possible.

10 Q. What we have heard happened back in 1999, by the time we
11 got to Ms McKie's trial, was that there had been a
12 thought that a fingerprint may have been planted and
13 then further experts were consulted by the defence whose
14 opinion it was that the fingerprint had not in fact been
15 correctly identified and it was at the point where these
16 further experts came up with their opinion that the
17 nature of the defence changed.

18 How would that be managed within the current system
19 because I suppose it could still be that a trial might
20 be set on the basis of one line of potential defence and
21 then another emerges, possibly based on expert evidence?
22 How would expert evidence emerging relatively late in
23 the day, perhaps close to the trial, be dealt with now?

24 A. I suppose it could arise either because the defence had
25 instructed an additional expert or because the existing

1 expert's opinion had changed or developed and in that
2 situation what we find happening -- and I'm not saying
3 it happens, I couldn't say it happens in every case,
4 there's a process of communication between defence
5 counsel and the Advocate Depute and in that scenario now
6 one would expect the Advocate Depute to be asking for
7 time for the Crown to consider the defence expert
8 report, if it's been revised or updated, and also in
9 that situation where the expert evidence is contested,
10 if you like, it's open to the Crown and we would
11 encourage, very strongly encourage, the Procurator
12 Fiscal to precognosce the defence expert and Advocate
13 Deputes do instruct that.

14 Q. What we've heard about in this case is there having been
15 some communication between the Advocate Depute and
16 defence counsel and about a production having been
17 brought forward which was really entirely visual in
18 nature. It had some annotations on it which perhaps
19 indicated or which did indicate that the expert saw
20 differences in the mark, but there was no, as I
21 understand it, formal written report or anything of that
22 sort.

23 Is there any provision to ensure that there might be
24 some further explanation in writing from a defence
25 expert of the position so that that could be put to a

1 Crown expert?

2 A. I think one would expect the Advocate Depute, as I said
3 earlier, to be -- if the witness is presented with that
4 on very short notice and you mentioned a potential when
5 they were in the witness box for the first time, we
6 would expect the Advocate Depute to be asking for time
7 for the witness to consider that and for perhaps a short
8 adjournment or an overnight adjournment to allow
9 precognition to take place.

10 I suppose that the procedures which have changed in
11 terms of the advent of preliminary hearings and managed
12 meetings have helped a great deal or have helped a great
13 deal in relation to the issues that you are suggesting.

14 In the scenario where a salient piece of evidence,
15 expert evidence, is brought to the fore at a very late
16 stage by the defence I would expect the judiciary to
17 have an openness to allow that to avoid a miscarriage of
18 justice but also to allow the prosecutor time to
19 consider a new document or a new statement and I think
20 if you spoke to Advocate Deps you would find that the
21 judiciary in Scotland allow that kind of time.

22 Q. I think a term "defence disclosure" is perhaps something
23 that comes from other jurisdictions whereby there might
24 be more of a compulsion on the defence to put forward
25 their productions in a formal way.

1 Is there anything you can assist us with in the
2 Scottish system that might be a parallel to that?

3 A. Only the provision under, I think it's section 74 as
4 amended of the 1995 Act which requires the defence to
5 intimate and lodge productions seven days before the
6 preliminary hearing. Now, that's a direction to the
7 defence but I couldn't go so far as to say that it's
8 absolutely -- they are required to absolutely adhere to
9 it and productions are frequently lodged at a later
10 stage than that and sometimes just before the trial so
11 that still happens as a matter of course.

12 When that happens we rely on the Advocate Depute
13 making clear that the Crown requires time to consider
14 the point and I think that the judge allowing equality
15 of arms in terms of preparation.

16 Q. Of course the Advocate Depute, if he had had the
17 opportunity, as we heard he did in this case, in asking
18 for time would be guided by the advice that he or she
19 had had from such experts as they had been able to
20 consult with?

21 A. Yes.

22 Q. You mentioned the Bonhomie Reforms as something that
23 might be relevant in the area we are talking about here,
24 expert evidence and the preparation of it for criminal
25 cases. In your statement you indicate there have been

1 some other developments in the area of solemn procedure
2 set in at least within your own offices.

3 Are there any areas you particularly want to draw to
4 the Chairman's attention that are relevant to the area
5 of fingerprint evidence?

6 A. I think over the last ten years there's been an ever
7 increasing -- this isn't directly related to fingerprint
8 evidence but I think it's helpful context so if I may,
9 there's been a real trend towards specialisation within
10 the Prosecution Service and that has in particular
11 focussed on our High Court work. For example, in each
12 of our 11 prosecutorial areas there is a specialist area
13 High Court Unit with legal staff and precognoscers
14 within it who are focused on High Court work with all of
15 its myriad complexity and to own cases from the time
16 they are marked, at the point at which the initial
17 decision is taken to take proceedings, right through to
18 trial and through to the appeal stage. That ownership
19 and our emphasis on High Court case requiring to be
20 prepared to the highest quality is something which we
21 really focus upon as an organisation.

22 I think also there's been in parallel with the
23 Bonhomie reforms a real focus by the Crown and by Crown
24 Counsel on early allocation of cases which are complex
25 and are less than routine and you could say that every

1 High Court case is complex and they are and getting ever
2 increasingly more so but there are some which are top of
3 the pile and at the moment there is a complex case list
4 within Crown Office and every murder case, for example,
5 is allocated to an Advocate Depute at a very early stage
6 after the initial report comes in from the Procurator
7 Fiscal. When I say "initial report", it's the report
8 that the Fiscal submits just after the accused has
9 appeared on petition for the first time. So the
10 approach is to allocate murder cases at a very early
11 stage and also certain other complex matters.

12 That means that you have the involvement of Crown
13 Counsel who will be doing the trial from a very early
14 stage and that adds to the quality of their preparation
15 and we do find Crown Counsel becoming involved in
16 decisions as to precognition and re-precognition of
17 appropriate witnesses.

18 So although it's not directly related to fingerprint
19 evidence as such I think it's perhaps helpful
20 background. The scenario within which we work is vastly
21 different from the scenario ten years ago.

22 Q. So it would be fair to say that the most complex cases
23 are allocated to individual advocates Depute very close
24 to the point at which the case is commenced --

25 A. Yes.

1 Q. -- when it comes to the attention of the Procurator
2 Fiscal.

3 Less complex cases will be assigned to advocates
4 depute but possibly at a later stage in their life?

5 A. That's right. The other thing that has changed though
6 that even for -- and I'll say a routine High Court case
7 guardedly because they all do have a degree of
8 complexity, there is much earlier allocation of the
9 routine to advocate deputes and much earlier involvement
10 by Crown Counsel by the virtue of the advent of the
11 preliminary hearings themselves and by preliminary
12 hearing preparation in the preparation of the cases so
13 whereas 10/15 years ago you could find advocate deputes
14 receiving High Court papers on quite short notice before
15 a sitting which might have many cases within it, most
16 cases will have been seen by Crown Counsel, in fact, all
17 cases will have been seen by Crown Counsel prior to
18 preliminary hearings. That doesn't mean that those who
19 prepare preliminary hearings also do the trials but it
20 does mean that Crown Counsel have seen the case, have
21 input into the preparation at a much earlier stage and,
22 as I say, there is earlier allocation of significant and
23 complex trial work.

24 Q. Should we understand that when Crown Counsel is looking
25 at a case at the preliminary hearing stage he or she

1 will be getting into the detail of the case, thinking
2 about which witnesses actually need to be cited and
3 sometimes even instructing further investigations at
4 that stage?

5 A. Yes, absolutely. That's frequent.

6 Q. I would like to move on, if I may, to the topic of the
7 involvement of the Crown Office and Procurator Fiscal
8 Service in the stages running up to the introduction of
9 the non-numeric standard.

10 I think in your supplementary statement you raise a
11 query about the extent to which it's really the Crown's
12 business to become involved in the detail of standards
13 employed by experts who may come to give evidence in the
14 criminal courts. I think you draw a parallel or perhaps
15 you are really drawing a distinction rather with the
16 situation where the Crown might on occasion call on
17 psychiatrists.

18 I think what you say is we wouldn't ask to be
19 involved in the psychiatrist's formulation of their
20 standards, their diagnostic manual and so on, perhaps
21 it's not appropriate for the Crown to be too involved in
22 the standards of the fingerprint community.

23 I would like you to elaborate on why you say that.

24 A. I think I should say that I wouldn't restrict it to the
25 comparison to psychiatric evidence or standards. I

1 think we are not the experts and prosecutions, on an
2 ever increasing basis, rely on expert evidence which is
3 of increased complexity. We do not get involved in
4 setting the particular standards, for example, for
5 forensic scientists in biology work, in dealing with DNA
6 evidence, in psychiatry, as I say in my statement, in
7 road traffic collision investigation. We rely on those
8 who have the expertise to tell us as a Prosecution
9 Service the standards that they feel are appropriate.
10 Our business is prosecution and in making decisions as
11 to prosecution in the public interest. That requires, I
12 think, the Crown to place a great reliance on those who
13 have expertise in terms of setting standards for their
14 work.

15 What I will say if there is an objective basis for
16 doubting the standard that is being applied, however
17 that might arise, then of course the Crown has an
18 interest in making sure there is significant review work
19 to review that standard but I do think that, as a
20 Prosecution Service, our position has to be to rely on
21 those who have the expertise and the detailed knowledge
22 of the subject matter to provide that to the court and
23 to set their own standards, if you will.

24 Q. I am going to try to draw a distinction and ask you for
25 comment on it. Just taking the example of psychiatry

1 but it may well apply to some of the other scientific
2 disciplines that you have described, psychiatry is
3 itself an independent clinical discipline and although
4 psychiatrists very often come to give evidence in court
5 their primary purpose in life is not to provide evidence
6 for courts. They spend most of their time treating
7 psychiatric patients.

8 I would suggest to you a potential distinction in
9 that fingerprint examination is an area of endeavour
10 that has grown up almost entirely in the forensic
11 context and Fingerprint Examiners carry out work,
12 leaving aside perhaps for immigration identifications,
13 almost entirely in the context of work that is
14 instructed by the police and the Crown.

15 On that basis, might there not be grounds for a
16 distinction in saying that this is an area where perhaps
17 the Crown has a more proper and direct interest in
18 looking at the underlying standards, partly because this
19 is not an independent scientific discipline in the way
20 that some of the other things that you are describing
21 are, but partly also because, you know, you are the main
22 customer and you are going to have to rely on the
23 evidence in court?

24 A. I can see the force in your question. I'm not sure that
25 the fact that we are the main customer of the service,

1 if you like, is the relevant factor, though. Expert
2 evidence is always important and can be crucially
3 important and I think the issue is who is best placed to
4 determine what the standard should be.

5 I come back to what I said: as a Prosecution
6 Service, we do not ourselves have the expertise to
7 determine scientific or quasi-scientific standards. We
8 are a customer of experts of all and the varied
9 descriptions that I mentioned earlier. So I'm not
10 convinced that just by being a customer of an
11 organisation that that would allow us to have a
12 sufficient basis or the expertise to intramurate with them
13 in relation to the detail of which standard they apply.
14 I hope that is clear enough.

15 Q. What is on my mind in this area as well is that some of
16 the material that you refer to in the course of your
17 statement, when you're talking about the Standing
18 Committee on Expert Evidence and the Lord Advocate's
19 guidance and the way these strands were being developed
20 through the 1990s, is that the Crown Office at that
21 stage did seem to be quite keen to become involved in
22 the development of standards and were themselves perhaps
23 trying to promote a situation where there could be
24 discussion about leading evidence to less than a
25 16-point standard.

1 I am wondering if there is not the expertise to
2 judge that how it could come about that that was the
3 line of discussion being promoted at that stage?

4 A. I wasn't involved in that particular stream of work but,
5 as I read the papers and read the material that's
6 available to me, I don't think what was happening at
7 that time was that the Crown were trying to determine
8 whether the 16-point standard was the appropriate
9 standard or not to determine a positive identification.
10 My reading of the materials is that at that point the
11 Crown was keen to have expressions of opinion from
12 Fingerprint Examiners where less than 16 points were
13 achieved because of a potential view that that would
14 also be identification evidence, perhaps with less
15 weight to be given to it but which should be available
16 to the prosecutor to determine whether it would be
17 appropriate to lead that, for example, for whatever
18 corroborative effect it might have.

19 I think that is different from the prosecutor
20 saying, "That 16-point standard can't be right and I
21 want to get involved in trying to change it". I think
22 it's a different dynamic and, as I say, I'm looking back
23 at the papers that we have and the reports that we've
24 had access to in preparation for the hearing. I think
25 the work that was going on at that point was the

1 Prosecution Service wondering aloud, if you like, in
2 liaison with the scientific community and fingerprints
3 in particular as to whether it would be possible to have
4 expressions of opinion on identifications which did not
5 meet 16 points but which might have perhaps useful
6 weight in the prosecution.

7 Q. I will come back to the role of the Crown in dealing
8 with fingerprints and standards but I would like to
9 pursue that theme with you a little bit further because
10 we have talked about it in evidence this morning as well
11 with Mr Nelson.

12 If I understand rightly, part of the Crown's concern
13 which developed in discussions during the course of the
14 1990s was that there might be evidence which was
15 consistent with either an accused person or even
16 potentially with an identity of an incriminee that
17 wasn't at a standard where an expert would identify to
18 either of those individuals and for obvious reasons it
19 might assist the Crown as being evidence which would
20 perhaps be at least partially of assistance in a
21 circumstantial case pointing to guilt or which might
22 assist with exculpating somebody and there was a problem
23 in that these would just not be reported, with the
24 potential result that the court ended up thinking that
25 there was no potential for matching at all with any of

1 these individuals.

2 As to the current position, does the Crown still see
3 any potential benefit in obtaining this sort of evidence
4 which I think it might come under the category of
5 impossible to exclude a particular individual as the
6 donor of the fingerprint rather than identifying them?

7 A. Yes is the answer to that for two reasons and you
8 summarised them. It could be of assistance to the Crown
9 case. The law of corroboration in Scotland itself
10 provides a basis for that. Please forgive me if I
11 summarise badly but the way the law has developed is to
12 the point that where the Crown has a solid first source
13 of evidence that if there is a secondary source, and
14 that secondary source could be a seam of circumstantial
15 evidence, if it has a tendency to corroborate the first
16 source or is consistent with the first source then that
17 can have corroborative effect. It's quite easy to
18 foresee a situation where an identification -- or I use
19 the word identification advisedly in these
20 circumstances, but an identification as being consistent
21 with a particular accused person, suspect becoming
22 accused, if there is, for example, significant eye
23 witness evidence in the case and a solid eye witness
24 identification then it's not outwith the realms of
25 possibility that the Crown would seek to use that to

1 corroborate a solid eye witness.

2 Equally, from the perspective of disclosure and the
3 Crown's long-standing duty to disclose material which
4 undermines it's own case in the interests of all in
5 society and in the public interest, that type of
6 information would be relevant to the defence. They
7 would want to know it and we would want to make sure
8 that they had access to that.

9 Q. In terms of taking that potential strand of evidence
10 forward, are there any discussions going on that you are
11 aware of at the moment between yourselves and SPSA?

12 A. We're in close discussion with SPSA and I was fortunate
13 to hear the last half hour or so of Mr Nelson's evidence
14 this morning. He and I, with the Deputy Crown Agent,
15 John Dunn, are in liaison in relation to a number of
16 different work streams across forensic science and
17 across disclosure in the context of forensic science
18 too. So, yes, there is work ongoing. It's a work in
19 progress. We have to establish the principles that
20 should be applied. We have to look at the best way for
21 SPSA to disclose that information to us and some of the
22 information that's come out in the Inquiry has been very
23 helpful clarification in relation to that. But it is an
24 issue that we will have to give further thought to and
25 looking carefully at the systems to make it happen.

1 Q. I am not trying to trick you in any way here because, to
2 be quite clear, Mr Nelson's position this morning was
3 that he wasn't himself directly involved in any
4 discussions on this topic. Is it the position that that
5 is something that may be picked up from here or is it
6 the position that that is something that is currently
7 being discussed at any level?

8 A. Sorry, I should be clear. On that particular point
9 that's work for the future in relation to the
10 disclosure, disclosability of what you just mentioned
11 but there is significant liaison ongoing into many and
12 varied topics with SPSA.

13 Q. Just returning for a moment to the theme of Crown
14 involvement, if I may, in developing work with standards
15 on fingerprints, there are a couple of documents that I
16 would like to put to you perhaps for comment and the
17 first is CO4406.

18 What I understand this to be is a 1999 draft of the
19 Lord Advocate's guidance on fingerprint evidence and, if
20 we perhaps put the next page up as well, what we see
21 here is perhaps an introductory and historical first
22 couple of paragraphs. Then in the third paragraph we
23 see that:

24 "As a result of developments in England where it has
25 been decided to change to a non-numerical standard based

1 on the professional opinion of the Fingerprint Expert,
2 the Lord Advocate has concluded that it is time to
3 review the national standard."

4 This would tend to suggest that the Lord Advocate of
5 the day was himself taking an active interest in this
6 area of endeavour. We can perhaps take the image of the
7 paragraph down and take page 1 away and put page 3 up as
8 well, please.

9 As we see there at paragraph 4 which leads on to the
10 next page the Lord Advocate is there agreeing that:

11 "It is appropriate and desirable that Fingerprint
12 Officers of suitable experience and expertise should be
13 able to express conclusions as to the identity of marks
14 where they are satisfied of the common origin of
15 fingerprint impressions and known fingerprints and that
16 it is appropriate for the prosecutors to place the
17 same reliance on that evidence as they currently do on
18 such conclusions expressed in terms of the 16-point
19 standard."

20 Then it goes on to say:

21 "An appropriate training programme, required
22 standards of competence, auditing and quality assurance
23 must however accompany any departure from the 16-point
24 standard to ensure that the confidence that fingerprint
25 evidence has traditionally enjoyed is not compromised."

1 What we seem to be seeing there is a proposal for
2 the future which the Lord Advocate is backing but
3 subject to certain reassurances, I think, about
4 training, competence, auditing and quality assurance.

5 The suggestion which I would like you to comment on
6 is that this is perhaps an example of the Crown taking
7 an active interest but wanting to be satisfied about
8 training, competence, quality assurance and so on, which
9 might on one view be seen to be at odds from the
10 distance that you are indicating between the Crown and
11 involvement with the ins and outs of fingerprint
12 practice today.

13 A. I think -- and I have to qualify my lack of involvement
14 at the time and looking back with what is less than
15 perfect hindsight, the guidelines were at an advanced
16 stage of drafting, as I am advised, but were never
17 issued.

18 I think the background was, and I come back to one
19 of my earlier answers, that the Crown had a concern
20 perhaps evidence was being lost to an extent by the
21 hesitancy of Fingerprint Officers to express an opinion
22 which was on an identification that was less than the
23 16 points and that led to the Crown perhaps becoming
24 involved in prompting a review in that context.

25 I think that, again, that's a different thing from

1 the Crown saying that the 16-point standard itself was
2 not appropriate per se as a means to positive
3 identification and, again, I would come back to that's
4 really not our job and not something we have expertise
5 to do.

6 Now, the other thing I would offer is that from 1994
7 when I think this work started, if I'm remembering
8 correctly, to the present day there's been a vast
9 increase, I think, in the reliance that we place on
10 expert evidence generally. Trials are becoming more
11 complex, science has advanced and the myriad of experts
12 which are available to the Crown is much more
13 significant than it was at that time. I think that even
14 if you could read these documents as the Crown dipping
15 its toe in the water of prompting review of a standard
16 then that would not be the position we would find
17 ourselves in now, partly because of the broad range of
18 science and other expertise which is available.

19 THE CHAIRMAN: Surely the Crown has some responsibility in
20 ensuring that the evidence that they are going to call
21 will be acceptable to the court.

22 A. Certainly.

23 THE CHAIRMAN: Therefore, if they are going to change
24 standards you don't want to find that that takes away
25 from the way in which the court will receive the

1 evidence. I rather gathered from this that what was
2 being asked was really for the Crown to say what would
3 be acceptable if there was a change to the non-numeric
4 standard. Maybe I got that wrong.

5 A. It's not been my reading of the documentation that I've
6 reviewed, sir, but certainly the Crown has to be
7 satisfied that there is sufficient credible and reliable
8 evidence to prosecute and to safely seek a conviction
9 and, yes, if there was a fundamental proposed shift in a
10 standard you would expect to be told about it. I'm sure
11 we might be asked our view on it. I'm not sure at the
12 moment we would feel qualified to express a view.

13 I mentioned earlier that if we'd felt through
14 receipt of any information or through a development in a
15 case that there was an objective basis to doubt a
16 particular standard that at that point we might have --
17 would have a role in prompting review. I can see that
18 as being necessary and appropriate. I think we have to
19 get the balance right and the division of
20 responsibilities right, though.

21 MISS CARMICHAEL: Thank you, sir.

22 Can I take it you personally would not read this
23 document and I'm thinking particularly about the part in
24 paragraph 4 where it's indicating that appropriate
25 training and so on would be required to ensure that the

1 confidence that fingerprint evidence had enjoyed was not
2 compromised, you wouldn't read that as the Lord Advocate
3 taking a proper interest in ensuring the continued, I
4 suppose, reliability of fingerprint evidence for the
5 courts?

6 A. I think we would certainly and the Law Officers would
7 certainly wish to be assured that there is regular
8 competency testing, verification and training and proper
9 systems to allow experts working for an organisation
10 like SPSA to develop and enhance their expertise.
11 That's certainly something that comes within our frame
12 of reference and I wouldn't seek to demur from that. I
13 think my point was I don't really -- and I might be
14 wrong -- but I don't really see the document or the
15 other documents that I've viewed from around that time
16 as being indicative of the prosecutor service, the
17 Lord Advocate saying there's a need to review the
18 16-point standard and we are well-placed to assist in
19 that review, if I can put it like that.

20 Q. I see. There is another document -- well, perhaps
21 before I go to the other document, it's fair to say that
22 matters to some extent, and I think we heard this from
23 Lord Boyd on Tuesday, some potential developments fell
24 into abeyance during the course of some of the
25 litigation surrounding the McKie case and I think you

1 said yourself that this document that we see here never
2 came to be issued.

3 A. That's my understanding, yes.

4 Q. If we can jump to perhaps a piece of correspondence from
5 a later stage that you have provided us with and I don't
6 think it's a complete document, we seem to be missing
7 the end of it, but it is CO4330 and it appears to be a
8 draft from February 2004 going from someone within Crown
9 Office and Procurator Fiscal Service to the Justice 2
10 Committee.

11 What we see here in the second paragraph is that:

12 "Crown Office has previously been in discussion with
13 Fingerprint Experts about the move to a non-numeric
14 standard of fingerprint identification. Although the
15 decision to adopt such a standard would be a matter for
16 SCRO, clearly, any such move would require to be made in
17 close consultation with the Lord Advocate, who would
18 require to be satisfied that he would be entitled to
19 rely on fingerprint evidence prepared using that
20 standard."

21 Again, I'd suggest to you that this is a fairly
22 clear indication that the Lord Advocate takes an
23 interest in being satisfied that fingerprint evidence
24 prepared according to this new standard is going to be
25 something that can properly be relied on by the Crown,

1 obviously acting in the public interest, in the criminal
2 courts.

3 A. I can certainly see the force in that when there was a
4 move to a new standard proposed by those who have the
5 expertise themselves and I'm aware that there was a
6 process of consultation and interaction with the Crown,
7 I think commencing in 2000/2001 but I could be wrong
8 about that.

9 Q. Do you have any knowledge yourself as to how, at the
10 stage that the standard came to be introduced in 2006,
11 Crown Office had become satisfied that they were going
12 to be happy to rely on fingerprint evidence using the
13 particular standard?

14 A. From the materials that I've seen, I believe that there
15 was a series of discussions with SPSA and colleagues
16 there at that time that there was consultation on the
17 basis of those discussions and the material presented by
18 SPSA with area Procurators Fiscal and with Advocate
19 Deputes on what the new standard was, what it might mean
20 in the context of criminal trial work and that there was
21 no reason to doubt the move to the new standard and I
22 believe that there was consultation with the Law
23 Officers of the day in relation to that, in fact I also
24 believe the Lord Advocate was at a presentation made by
25 SPSA in relation to the new standard but that may not

1 have been in 2006. I think that may have been further
2 back. I don't have the chronology right at my
3 fingertips but there was consultation. There was
4 information provided about the new standard and there
5 was a contentment on the part of the Crown that the move
6 seemed appropriate. I think we were made aware that
7 there had been moves to this in other jurisdictions and
8 that to some extent Scotland had lagged behind and that
9 this was a more effective way, not just of examining but
10 of presenting the conclusions.

11 Q. I think possibly I have not assisted you because you
12 provided some further information to us in letter form
13 as well and I perhaps do not need to take you to the
14 letter. The reference for others is CO4428.

15 A. I'm afraid I don't have an encyclopaedic knowledge of --

16 Q. That's all right --

17 A. I wish I did.

18 Q. Perhaps that is my fault in not taking you directly to
19 the document but I think you have told us already that
20 by letter that the Lord Advocate indicated in 2005 that
21 he was content in principle with the non-numeric
22 standard and then there was no separate subsequent
23 decision to that or obvious signing off of it but
24 matters proceeded in 2006 in the light of that?

25 A. Yes. I think should be clear. I hope my earlier

1 answers have not been unclear but clearly if there's a
2 proposed change of standard between what has applied in
3 the past and what is proposed in a significant area like
4 fingerprint evidence or any of the forensic sciences we
5 routinely work with we would expect to hear about that
6 and to be assured about it and to be able to ask
7 questions about that and that process of consultation is
8 useful but I think there's a difference to us setting
9 standards and we don't feel that we can and have the
10 expertise to really do that.

11 Q. Just perhaps continuing on that theme, I know you were
12 asked about the Brandon Mayfield case and your response
13 was that nobody within SPSA had drawn that to your
14 attention.

15 Thinking perhaps more broadly about things like the
16 Brandon Mayfield case, perhaps something that arises in
17 a discipline in another jurisdiction but which may be of
18 fairly direct relevance, at least to practise in a
19 forensic expert discipline, I accept that it's not been
20 drawn to your attention by SPSA, is there anyone whose
21 job it is within your organisation to keep their eyes
22 open for something of that sort, accepting all you say
23 that there are many, many scientific disciplines out
24 there, but thinking to fingerprints in the context of
25 being a forensic discipline and perhaps something like

1 Mayfield being a very high profile international case?

2 A. There isn't at the moment an individual who would have
3 responsibility for looking out for developments in
4 forensic science within our organisation, is the direct
5 answer to that.

6 We do have a number of streams of work or work
7 ongoing in relation to expert evidence generally but,
8 no, there's no-one who is tasked with that. What we
9 would expect is that if any of our colleagues became
10 aware, either through formal notification or informal
11 notification by colleagues in forensic science or SPSA,
12 then we would bring that to the attention of Crown
13 Office in the first instance and promulgate any lessons
14 to be learned from it but, again, I think we have to
15 rely on those who are plugged into the forensic world in
16 a way we are not and probably couldn't be, given it's
17 not our primary focus, to bring these matters to our
18 attention.

19 Q. So what structures do you have in place, for example,
20 with SPSA or are you working on with SPSA to try to
21 ensure that things like that would come to your
22 attention?

23 A. I'm pausing because we don't have a particular piece of
24 work ongoing at the moment which is focused on that. I
25 think that the focus on the Mayfield case which has come

1 to be through the Inquiry itself is going to probably I
2 would venture to prompt SPSA perhaps into a more
3 proactive approach in bringing these matters to our
4 attention but it is something to think about. I'm happy
5 to take that away as something we can fold into the
6 other work that we've got ongoing.

7 Q. Still on the theme of discussions with SPSA that may
8 have taken place over time, we heard some evidence from
9 Mrs Tierney yesterday about a longer form of joint
10 report which was proposed at some stage. I think her
11 position came ultimately to be that she wasn't aware of
12 any active rejection of the longer form by Crown Office
13 but that the longer form of report had been in Crown
14 Office hands at some stage.

15 I would like to show you the example draft which is
16 MM0145 that she discussed in the course of her evidence
17 yesterday and perhaps ask for your comment as to whether
18 you think it's in any way a helpful document
19 potentially.

20 This is simply the cover and you see there that
21 Mrs Tierney's noted there that she submitted it to
22 Mr Gilchrist and assembled Advocate Deputes at Crown
23 Office in August 2004.

24 If we can take that page away and perhaps show the
25 next two pages, please.

1 What we heard from Mrs Tierney yesterday is really
2 what this documents more fully is what she described as
3 the analysis phase of what we have heard is the ACE-V
4 process in fingerprint identification and perhaps tells
5 us more about the development medium and composition but
6 also makes some notes about what's been seen by way of
7 the clarity of the mark and any impression of movement
8 in the mark.

9 What I am wondering is whether you would take any
10 view as to whether it is useful to have that for the
11 Crown in the form of a joint report in that sort of
12 format?

13 A. I think this format is useful. I think the greater
14 amount of information which is available is useful to
15 the Crown; it's useful to defence; it perhaps prompts a
16 more detailed discussion at precognition than the
17 current report does and I think it's certainly worthy of
18 further thought and discussion with the SPSA in relation
19 to how reports are submitted.

20 Q. Because one of the things we have become aware of
21 through the Inquiry, and I will ask you a little bit
22 more about it, is that your organisation in association
23 with SPSA have in recent weeks been formulating a guide
24 for precognoscers which is still at a draft stage and it
25 sets out -- and I think the draft is now available for

1 Core Participants to see, but the question that was in
2 my mind was as to how useful it was necessarily going to
3 be to have that in the form of a precognition rather
4 than having some of the detail in a report which is, the
5 report, being of course immediately disclosable whereas
6 perhaps a precognition, albeit you might disclose the
7 contents in some format to the defence, you wouldn't
8 automatically hand on to the defence in the form of a
9 precognition?

10 A. Yes, I think it's important to say this would be a Crown
11 view, I suppose, that precognition is not the complete
12 answer. It can't be because it doesn't take place in
13 summary cases in Scotland nor does it take place in many
14 other jurisdictions and to ensure that the defence have
15 as much information as possible or as is helpful and, in
16 particular, information that might undermine the Crown
17 case or show weaknesses in it, I think it's absolutely
18 essential that relevant and material information is
19 within the report submitted and in the statements
20 submitted to the Crown because of course these are now
21 routinely disclosable at an earlier stage now.

22 Also relevant and material information which comes
23 out through the precognition process is disclosable to
24 the defence and the Crown has a continuing duty of
25 disclosure throughout the history of any criminal case

1 right up to the conclusion of an appeal and beyond, but
2 certainly a strong view from the Crown would be that
3 relevant and material information should be within the
4 report and the statements. That's the best and most
5 effective place for it.

6 Q. Just touching on something you said there, you indicated
7 that information that might become available during the
8 precognition process would, if necessary for disclosure,
9 be disclosed to the defence.

10 Can you tell the Chairman just how that takes place
11 in practice, given that the precognition document itself
12 wouldn't normally be handed over as a document to the
13 defence?

14 A. It would generally be by letter to the defence
15 solicitor. That would be the most obvious and routine
16 way of doing it and directing their attention to the
17 particular elements which came out and which they may
18 wish to further explore and that's a proactive duty upon
19 the prosecutor.

20 Q. If it came to be that in the process of examining a
21 fingerprint -- and we've heard some evidence about
22 this -- if it came to be that there was a particularly
23 complicated mark that had come to require perhaps
24 special note-taking or something of that nature, in a
25 case of that sort, would it be useful to the Crown to

1 have information about that in the form of the joint
2 report?

3 A. I'm sorry, do you mean access to the notes taken by the
4 expert at the time --

5 Q. No, I'm sorry. I put the question badly. If it were to
6 come to pass that there was a complex mark which
7 demanded particular examination with particular care and
8 if it came to be that procedurally it was thought
9 appropriate for particular notes to be taken in relation
10 to such a mark, would the fact that that had happened in
11 the first place and some indication of the reasoning in
12 relation to the mark be matters that you would think
13 would usefully be recorded at the joint report stage?

14 A. I think so is my instinctive response to that. Clearly,
15 if we were looking again at the style of the joint
16 report we do that in close consultation with SPSA and we
17 would take their views on board, but my tendency to
18 think is that the more information that can be in the
19 report that might benefit the Crown and the defence the
20 better and that's the type of information which might
21 prompt activity on the part of the defence to further
22 explore the matter.

23 Q. I don't know if you will be able to answer this
24 question, Mr Pattison, coming from the Crown background
25 but if you can assist with this I would be grateful for

1 any guidance to the Inquiry.

2 In terms of the defence instructing experts and
3 obtaining Legal Aid sanction to do so, does there
4 require to be anything that has been obviously wrong
5 with the Crown case? I put that too strongly.

6 Obviously requiring particular investigation in the
7 Crown case to enable them to obtain Legal Aid or would
8 they routinely on a request to, for example, get a
9 different Fingerprint Expert to look at the matter
10 obtain sanction for that?

11 A. I'm sorry, I wish I could speak with some authority on
12 that but I can't. I'm sure we could get that
13 information for you.

14 Q. That may be helpful. It was a matter that Senior
15 Counsel had brought to my attention as something that
16 might be potentially relevant in this context.

17 A. I would be more than happy to try and explore that.

18 THE CHAIRMAN: I can understand Legal Aid isn't a matter
19 that the Crown is usually experienced in.

20 A. I'm afraid I'm not one of those who hasn't worked on the
21 other side, unhelpfully enough. I wish I had at some
22 points but, sorry, I wish I could help you further.

23 MISS CARMICHAEL: I am sorry to have asked you a question
24 that is outwith your field, Mr Pattison.

25 Moving on to the question of authorisation of

1 experts, we understand that is a matter of statute (that
2 is something that falls within the remit of Scottish
3 Government), but if it were to be proposed, for example,
4 that authorisation by the Scottish Government ought to
5 be linked to any particular qualification or
6 accreditation on the part of the individual expert, is
7 that a matter on which the Crown would take an interest?

8 A. I think our interest would be in being assured that the
9 processes were robust enough in relation to training and
10 the assessment of competency. I think there is --
11 certainly we would have an interest, certainly. I think
12 there is a danger in the Crown becoming the authoriser,
13 if you like and I don't think your question is driving
14 really at that. The danger in that, of course, would be
15 that expert witnesses are independent and if the Crown
16 had a significant role in relation to the authorisation,
17 then that could lead to the perception of a lack of
18 independence on the part of the experts themselves.
19 Certainly our interest would be in ensuring that
20 training and, as I say, competency testing and the
21 authorisation process was sufficiently robust.

22 Q. You are quite right to apprehend that I am not
23 suggesting that the Crown should be the authorisation
24 body or anything of that sort. The question is directed
25 at the Crown being satisfied that the experts whose

1 evidence comes to have potentially a statutory status
2 under the 1995 Act are experts who are appropriately
3 qualified?

4 A. Certainly we have a strong interest in that being the
5 case in terms of current processes. We again heavily
6 rely on the assessment by others who have the expertise
7 to do that and to make the authorisation. But certainly
8 in the public interest the Crown has an interest in that
9 process being as robust and thorough as is appropriate.

10 MISS GRAHAME: Excuse me, Mr Chairman, unfortunately the
11 LiveNote has stopped again. **(Pause)**

12 THE CHAIRMAN: I was not planning to rise now as I was
13 planning on rising at 3.45 today, but if we can't
14 resolve it fairly rapidly -- perhaps we will rise until
15 3.00 to see if it can be cured.

16 **(2.51 pm)**

17 **(A short break)**

18 **(3.05 pm)**

19 MISS CARMICHAEL: What I am going to turn to ask you about
20 now, Mr Pattison, is about the Crown Office Circular
21 that came out in March this year, number 8 of 2009. We
22 can have that on the screen as CO4109 and perhaps pages
23 2 and 3 could be substituted. I think this is
24 essentially a cover sheet for it.

25 This is a document that was issued in March of this

1 year and perhaps you could explain in the first instance
2 just what a Crown Office Circular is for those who might
3 not be familiar with the idea.

4 A. It's one of the ways that Crown Office communicates with
5 Procurator Fiscal Service and, in particular, is used to
6 communicate changes in policy or any significant
7 communication really would be in the first instance by
8 means of Crown Office Circular. We have other means of
9 communication too obviously but it is a pretty standard
10 way of communicating a change to policy and practice.
11 The Circulars are consolidated, indexed and are
12 available on our departmental intranet and available to
13 all staff online.

14 Q. Are they normally things that would be made public?

15 A. They are not normally made public at all. They are
16 generally viewed as confidential guidance within the
17 Prosecution Service.

18 Q. This is a document that is about the non-numeric
19 standard and gives certain instructions in relation to
20 precognition of experts in the context of the
21 non-numeric standard. We have heard that the
22 non-numeric standard or approach started to be used on
23 4th September 2006 and, indeed, that date is referred to
24 in the document.

25 How does it come to be that this instruction is only

1 issued in your own organisation in March of this year?

2 A. I think the first thing is to say that obviously ideally
3 this Circular should be issued a lot earlier and, after
4 I came into post in August, we were aware that there was
5 an advanced draft available to us. We've looked back to
6 ascertain why it wasn't issued earlier and we can't find
7 a definitive answer to that. It seems to have been an
8 administrative error within the Crown Office. Certainly
9 there was an advanced draft available in 2006 which was
10 consulted upon with SPSA.

11 I don't want to speculate on why it wasn't issued at
12 that time. I don't think that would be helpful or
13 appropriate. What I should say though is that it's not
14 the case that no information was provided to the
15 Procurator Fiscal Service in 2006. There was a DVD
16 outlining the changes and giving an overview of the
17 non-numeric standard. There was a helpful leaflet which
18 gave a similar overview and which was provided to all 49
19 District Procurators Fiscal around the country. I was a
20 District Fiscal at that time in Paisley in a prior job
21 and received that from the Crown Office at that time.
22 So that information was provided.

23 There was also a continuous process of consultation
24 with SPSA as I'm advised as to how fingerprint evidence
25 was developing in relation to the non-numeric standard

1 after its introduction and what the perception of it was
2 at court, and I'm told that the Deputy Crown Agent of
3 the day was keen and was trying to obtain feedback from
4 Advocate Deputes at that time.

5 But certainly ideally the Circular would have been
6 out a lot earlier.

7 Q. We watched the DVD in the course of the proceedings just
8 the other day, Mr Pattison. I think you mentioned a
9 leaflet as well and I think for completeness I should
10 just show you CO4105 to make sure we are talking about
11 the same item. That was the leaflet I think that you
12 are referring to?

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

14 Q. You have said that all the way it the District
15 Procurator Fiscals got it?

16 A. Yes. It is important to be clear a copy wasn't given to
17 every individual lawyer or precognoscer within the
18 Service but a copy was provided to each Procurator
19 Fiscal Office via the District Procurator Fiscal. So
20 49, in essence, went out at that time and were available
21 within offices for briefing sessions and just to raise
22 awareness locally of the change.

23 Q. Do you know whether briefing sessions on the DVD took
24 place?

25 A. I can't speak for others or other Procurator Fiscals.

1 The material was issued by Crown Office I'm pretty sure
2 with that in mind. Certainly from my own perspective in
3 Paisley, my memory is that I circulated the leaflet to
4 all staff by e-mail, having had it scanned it in, and
5 drew their attention to the fact that the DVD was
6 available for their use if they were dealing with a
7 fingerprint case and, if memory serves me properly, I
8 provided to team leaders or Solemn Legal Managers within
9 the High Court and Sheriff and Jury Unit at that time
10 for the purposes of them raising the awareness of their
11 teams.

12 I would really expect every Procurator Fiscal to
13 have done at least that. I would like to be able to say
14 that we had had feedback that everyone had a distinct
15 briefing session, but I would expect that all members of
16 legal staff would have had their attention drawn to the
17 leaflet and the availability of the DVD at the very
18 least.

19 Q. As I say, we saw the DVD for ourselves and it certainly
20 contains information about how Fingerprint Examiners go
21 about their task and how the non-numeric standard
22 differs from the 16-point standard and provides
23 information of that sort, but I would be right in saying
24 that it does differ from the content of the Circular --

25 A. Yes.

1 Q. -- perhaps in the important respect that there is no
2 instruction there to Fiscals about precognoscing
3 Fingerprint Examiners?

4 A. That's right. That's not within the DVD or the leaflet.
5 The instruction within the Circular, of course, is to
6 precognosce Fingerprint Examiners in all High Court
7 cases unless it is absolutely clear that the evidence is
8 going to be the subject of agreement and is not
9 challenged and there is a presumption in favour of
10 precognition in Sheriff and Jury cases.

11 It may be helpful to know, though, that for some
12 time the guidance within the Crown Office and Procurator
13 Fiscal Service in relation to expert witnesses
14 generally -- and I'm going to paraphrase -- has
15 essentially been there is a presumption in favour of
16 precognition of expert witnesses and we would certainly
17 view Fingerprint Examiners with appropriate experience
18 and training as coming within the definition in Scots
19 law of expert witnesses.

20 What we have found is that Fingerprint Examiners
21 have not been routinely precognosced. I say "routinely"
22 precognosced and I'm speaking before the Circular was
23 issued in March 2009 because, the Circular having been
24 issued, the number of precognitions have, we think, gone
25 up in relation to that. Feedback from colleagues in

1 SPSA though our liaison has told us that and has told us
2 that there was not routine precognition in the years
3 before the Circular.

4 I do want to say though -- and I think it is
5 important to note the context -- that the instruction is
6 to precognosce unless the evidence is agreed. What we
7 find as prosecutors is that fingerprint evidence is
8 almost routinely agreed in Scottish courts. It's very
9 rarely challenged. In fact, other than the case that
10 the Inquiry is dealing with, we can't find a case where
11 it has been challenged in relation to the identification
12 of a suspect over the past years. When it is led, it is
13 generally led yield an inference from the position of
14 the fingerprint and it is led in very few cases, as I
15 say, because in the vast majority it's agreed between
16 the Crown and the defence. So that is the context
17 within which we work.

18 But when fingerprint evidence is contentious, either
19 because of the issue of identification of the suspect --
20 and we haven't had that -- or because of an inference
21 which can be drawn from the print or where it's
22 important to the Crown case, then we would have been
23 expecting Fingerprint Experts to have been precognosced
24 anyway.

25 I know from personal experience that has happened

1 and was happening, even as far back as 1997/98. At that
2 time, I was working as a Procurator Fiscal Depute in the
3 Hamilton Procurator Fiscal Office and I had at least
4 three High Court cases which I was personally preparing
5 in which fingerprint evidence was important. It wasn't
6 the sole evidence but it was important evidence for the
7 Crown case and I received instructions from my Solemn
8 Legal Manager, the person who was supervising my work,
9 to precognosce the Fingerprint Experts and I did so,
10 both experts in all three cases. I'm speaking
11 personally, but I don't think that was unusual at that
12 time and even over the last years where fingerprint
13 evidence was either crucial or very important in the
14 Crown case or where we knew it was contentious for some
15 reason.

16 Q. There was just a question perhaps that arises from what
17 you have just said that I would like to ask you about:
18 the proper reading of the instruction about
19 precognition. We should perhaps take this document now
20 and go back to CO419, page 3. It arises from what you
21 said about cases where the fingerprint evidence is
22 clearly going to be agreed.

23 If we look to paragraph 12 there, what we see is
24 that:

25 " ... all Fingerprint Experts in High Court cases

1 should be precognosced and there is a presumption that
2 the same applied to Sheriff and Jury cases (unless it is
3 clear at the time of precognition that the fingerprint
4 evidence in the case is agreed)."

5 I know whoever drafted this wasn't expecting it to
6 parsed, but should we read the passage in brackets as
7 qualifying both High Court cases and Sheriff and Jury
8 cases because on one reading it may be an instruction
9 that in all High Court cases the Fingerprint Experts
10 should be precognosced whether or not there's likely to
11 be agreement, which on one view doesn't make a great
12 deal of sense, with the qualification about it being
13 clear about agreement applying only to the Sheriff and
14 Jury cases.

15 I just want to be quite clear what the proper
16 reading of this instruction is.

17 A. The intention is to apply to both High Court and Sheriff
18 and Jury cases. When I look at the wording again, in
19 particular, unless it is clear at the time of
20 precognition that the evidence is agreed, obviously it
21 can be clear at a much earlier stage occasionally that
22 the evidence is non-contentious in that particular case.
23 In that scenario, where you learn that the defence were
24 not going to contest at least the fingerprint evidence
25 in the case -- and sometimes that's clear from the very

1 earliest weeks after an individual appears on
2 petition -- at that point you would realise that in
3 terms of this guidance you don't have to precognosce at
4 all.

5 Now, it may be helpful to say that this is the
6 instruction and the instruction that the Law Officers
7 think is important at the moment, but we have to
8 constantly review whether precognition is adding value
9 to the preparation of the Crown case. While I think we
10 will always have a presumption in favour of all expert
11 witnesses, and at the moment we're pushing that as an
12 organisation, we have to constantly review whether it
13 generally is adding value. We have to pause in relation
14 to the position we're in in Scotland at the moment where
15 fingerprint evidence is routinely unchallenged and
16 determine whether at some point in the future, if that
17 position remains the same, is precognition truly added
18 value to the process?

19 Now, at the moment you referred to the aide-memoires
20 where we're calling it that we're working up to assist
21 our precognoscers in the process of precognoscing
22 fingerprint witnesses. We're using precognition to
23 tease out the number of issues for our purposes and for
24 the purposes of disclosure.

25 If we, in our workings with SPSA, achieve a

1 situation where issues in relation to expert disputes or
2 issues which might weaken the identification are within
3 the report and/or the statements, then that is -- it's a
4 more complete answer than precognition purporting to be
5 the complete answer.

6 So I apologise, that's a long-winded way of saying
7 we need to keep our processes under review and our
8 instructions to prosecutors under review. This feels
9 and seems like the right instruction at the moment and
10 is one which we will -- we can't see departing from an
11 early course but if the position remains that
12 fingerprint evidence is routinely unchallenged and to
13 that extent there is a confidence on it within the legal
14 profession or the justice system we might have to review
15 that and determine whether precognition is necessary in
16 every case.

17 THE CHAIRMAN: Would it be too late to precognosce once you
18 knew that the evidence was going to be challenged by the
19 defence? In other words, instead of having a
20 precognition in every case, having it where you know
21 there's a challenge.

22 A. Certainly, that's another way of approaching the
23 situation, where you know that the evidence is
24 contentious then to focus in and use precognition as a
25 tool in that context and I think that it's not just

1 about precognition, it's about information we are
2 presented with in the report and the statements.

3 It's also about the prosecutor who is taking the
4 trial consulting with the expert before the trial and
5 Crown Counsel are encouraged to do that by the Law
6 Officers and do do that. So not just relying on the
7 precognition but engaging with the expert before they
8 take the expert's evidence in the course of the trial.

9 That's helpful not just from the perspective of
10 Crown Counsel becoming more familiar with the evidence
11 to come, but also establishing a rapport with the
12 individual expert.

13 MISS CARMICHAEL: One of the areas that's become a focus of
14 discussion in the Inquiry, Mr Pattison, has been the
15 disclosure to the Crown, with the potential, obviously,
16 for disclosure to the defence, of issues that might
17 arise in a fingerprint identification such as examiners
18 initially being of a different view from each other but
19 perhaps that view becoming resolved by some internal
20 process.

21 Knowledge of that on the part of the Crown is
22 something that the Crown would want to be fixed with, I
23 suppose, whether or not there came to be any active
24 dispute which might only emerge at a very much later
25 stage; would that be fair?

1 A. Yes, that's right.

2 Q. So that would be a reason for seeking the information
3 whether in the form of precognition or in some other
4 form at a relatively early stage of a case?

5 A. Yes, absolutely, I would agree with that entirely.

6 Q. It is fair to say also I think that it's emerged in the
7 course of the Inquiry that, although people seem to be
8 open to discussion on the point, it has not been the
9 understanding necessarily of those within SPSA that
10 issues of that sort would be of interest to the Crown.

11 Your position, as I understand it, or your
12 organisation's position from what I read in your
13 statement, was that you would be expecting issues like
14 that to be disclosed by way of joint report or of
15 statement. Again, what we have heard from the SPSA
16 witnesses is that, well, to them these are fairly formal
17 documents that they wouldn't be using for that purpose.

18 Insofar as there may not have been a meeting of
19 minds to date on that matter, what has been done to
20 break that impasse, if anything?

21 A. We will be speaking to SPSA in a formal and -- well
22 formal and informal way in relation to this issue. You
23 are right to say that the Inquiry has provided helpful
24 clarification of, I think, the position which pertains.
25 So we will have to make progress on that in very early

1 course and that's something that I will be taking
2 forward with Mr Nelson and I mean in very early course.

3 I think from the Crown's perspective in an
4 engagement with law enforcement and SPSA, who come
5 within that banner, there's been a long-standing duty on
6 the part of law enforcement in Scotland to not just
7 bring to the attention of the prosecutor information
8 which suited the prosecutor's theory of the case or
9 supported the prosecutor's version of events but
10 material which undermined that, which pointed towards
11 the innocence of the accused. That goes back to the
12 **Smith** case in the '50s and there is a seam of authority
13 which re-emphasises that and which has done to a
14 significant extent in the last five/six years. So I
15 suppose we view it that that's quite a basic requirement
16 and it's obviously one we have to do some further work
17 with SPSA on and I come back to the point that it's
18 helpful the Inquiry has brought that clarification to
19 bear.

20 In relation to our involvement with the police, we
21 would expect that type of information to be in reports
22 submitted by them and statements submitted by police
23 officers and material which is undermining of the Crown
24 case or is exculpatory to be provided. Our view would
25 be that where there has been a dispute between experts,

1 even where resolved -- and we're happy to discuss this
2 further with SPSA but we would view that as something
3 which should be disclosed.

4 Q. It is something that perhaps would show that there was
5 at least room for doubt or the possibility of room for
6 doubt about a conclusion, the fact that somebody at some
7 stage had not been convinced of that conclusion?

8 A. I think so and I think it's just consistent with
9 long-standing duties of disclosure to the Crown and the
10 Crown disclosure to the defence and that kind of
11 transparency, openness, is something the justice system
12 should welcome and I know that the Law Officers welcome.

13 Q. Does it come to this: effectively it's only fairly
14 recently in the course of the Inquiry that your
15 organisation may have come to appreciate that SPSA
16 examiners might actively need to be asked about
17 something of this sort?

18 A. Yes, it is.

19 Q. If we look at CO4437, do we understand this to be a
20 current working draft, albeit a work in progress, of
21 your guidance for precognition of Fingerprint Examiners?

22 A. Yes, it is. It's a fairly advanced draft now in that we
23 have had the benefit of some comments from SPSA and also
24 from Crown Counsel in relation to the draft.

25 Q. If I can look at page 4, please, of this document, what

1 we see there is perhaps a series of questions designed
2 now to elicit information just on this very sort of
3 topic.

4 Would that be fair?

5 A. Yes.

6 Q. We see a question asking, about halfway down the page:

7 "Were there any differences of opinion regarding the
8 identification between you and your colleagues?

9 "Did a facilitated meeting or any other quality
10 assurance process take place?"

11 Then some further follow-up questions arising from
12 those?

13 A. Yes.

14 Q. So for the moment at least should we take it that the
15 proposal is that precognition with questions actively
16 being directed at these topics is the means for
17 disclosure?

18 A. I think we would view this as a resource for
19 precognoscers, not a list they would have to go through
20 in terms of using every question in every precognition.
21 The process could become rather stilted if it were like
22 that and less dynamic than we would wish but we would
23 view it as a means to draw out those issues in light of
24 the clarification that the Inquiry has brought to that.

25 It might be helpful to know that this type of

1 document is being currently developed as part of work
2 we're doing on expert witnesses generally so we're
3 developing similar guidance or aide-memoire prompt lists
4 for our precognoscers across the range of expert
5 evidence for forensic pathologists, for psychiatrists,
6 for road traffic collision investigation and the like,
7 as part of the training, further training and enhanced
8 training for our precognition officers but also to
9 recognise that we need a system given the ever
10 increasing complexity of the range of experts that they
11 need to interact with. But, yes, the questions are
12 there to draw out the information that you suggest.

13 Q. Just on the theme of precognition practice and
14 precognition of Fingerprint Examiners, I think you
15 provided some statistics in your supplementary statement
16 and I understand you may have carried out some further
17 research yourself as to numbers of trials and numbers of
18 Fingerprint Experts giving evidence and being
19 precognosced even since you gave that statement and I
20 wondered if there was anything you wanted to add on
21 that?

22 A. We had some further information from the Court Service
23 in relation to trials which were fixed between the
24 relevant period, which is in my statement, between April
25 and September 2009, and I am able to update paragraph 6

1 of my statement in light of that. There were, in fact,
2 228 trials of cases indicted in the High Court. 185 of
3 those were trials which went the distance, if I can put
4 it like that, and 43 were trials but trials which
5 resolved either on the first day or pretty quickly.

6 In terms of fingerprint evidence within those, there
7 were 12 trials within that period in which fingerprint
8 evidence was either led orally or by joint minute of
9 agreement. In only 3 of those was oral evidence led
10 from Fingerprint Examiners and in those cases it wasn't
11 a matter of a challenge to identification, the evidence
12 was led generally because the prosecutor wanted to take
13 an inference from the position of the print or some
14 other factor which was of relevance to the presentation
15 of the case. So in the vast majority of cases in the
16 High Court our research -- which is feedback from
17 Advocate Deputes, as my statement says -- suggests that
18 fingerprint evidence is, in the main, agreed within the
19 High Court in Scotland. I think my statement touches on
20 Sheriff court cases too, on Sheriff and jury cases.

21 Q. It does, yes.

22 A. In that context we asked Area Procurators Fiscal for
23 feedback over the same period and I think in only three
24 cases was fingerprint evidence led at Sheriff and jury
25 level or oral evidence was led from them at Sheriff and

1 jury level. So, again, really in quite a small
2 percentage of cases was the evidence actually led in
3 court.

4 Of course the defence have an opportunity to
5 precognosce the examiners. I'm not sure to what extent
6 that is taken up but I am sure SPSA would be able to
7 provide input on that and that, you know, can put them
8 in a position where they can make a decision on
9 agreement of the evidence or whether there is a
10 challenge there on any part of it.

11 Q. We have heard some evidence from Mr McGinnies and from
12 Mrs Tierney who currently work within SPSA.

13 Mr McGinnies said that he thought there had been an
14 upturn in precognition of Fingerprint Examiners since
15 about June and he dated it to a time when he had given a
16 presentation to Advocates Depute and I think yourself
17 there at the presentation as well. I think he was
18 essentially saying that was an example of better
19 communication taking place between your two
20 organisations. He certainly seemed to see some link
21 between that particular event and an increase in
22 precognitions being taken.

23 Can you comment on that?

24 A. I can see why Mr McGinnies would say that but I think we
25 have to -- the guidance went out in March and

1 precognoscers would be applying the guidance to ongoing
2 cases and I would have expected there to perhaps be a
3 slight gap between the circular and precognitions
4 kicking in because precognoscers would get to that part
5 of the process in relation to their individual cases.
6 They wouldn't immediately begin to precognosce the
7 Fingerprint Examiners that they had on their list of
8 witnesses in all their cases at that point. They would
9 do it in a staged way over the period and I think it's
10 really just an indication of the ongoing throughput of
11 the work and precognition officers responding to the
12 guidance at an appropriate stage.

13 I should say Mr McGinnies's presentation to Crown
14 Counsel was very well received. He presented a
15 PowerPoint presentation covering fingerprint evidence
16 generally but with some particularities to it which, in
17 themselves, led to Tom Nelson and I discussing the
18 possibility of looking again at electronic presentation
19 of fingerprint evidence in High Court cases. I think
20 Mr Nelson touched on a particular project that we aim to
21 start early next year on that.

22 Q. I will ask you a little bit more about that. First
23 though, I should say also from Mrs Tierney who gave
24 evidence yesterday, who works in the Edinburgh Bureau of
25 the Fingerprints for SPSA. She spoke to one

1 precognition having been taken from her staff in the
2 period April '08 up to date and that by telephone and I
3 think in the very recent past, I think she said in the
4 last week or the last month.

5 How does that fit with your picture of how
6 precognition is taking place?

7 A. It's difficult to comment without knowing the overall
8 context in Edinburgh and Lothian & Borders generally in
9 relation to their casework because of course the
10 guidance is to precognosce unless it's clear that
11 evidence is being agreed and the overwhelming context in
12 Scotland is on the evidence being agreed. It is also
13 not clear whether the cases or the case in which she was
14 precognosced or her colleague was was a High Court
15 matter or a case calling within a different court.

16 It is something we need to look into. It is a
17 change in practice. We have been reminding our area
18 High Court units and Area Procurators Fiscal of the need
19 for precognition of Fingerprint Examiners in particular
20 and expert witnesses in general. That's something from
21 a Crown Office perspective we will continue to do. I
22 will look into the position for Lothian & Borders cases
23 but I think it's a more complex picture than perhaps
24 allows me to make an off-the-cuff comment about that.

25 As I say, the context is of evidence generally being

1 agreed and the instruction is precognition unless it's
2 clear that evidence is being agreed. So I don't think
3 it's helpful if I speculate any further on that.

4 Q. Still on the theme of precognition, I have a couple of
5 propositions, I suppose, to put to you for comment, if
6 you feel you can comment.

7 I hope I am paraphrasing Mrs Tierney fairly when she
8 gave evidence yesterday but, if I understood her
9 rightly, partly in the light of the expertise of the
10 individual examiner but also in the light of the comfort
11 that they gained from verification within their own
12 office, by the time they are passing information out to
13 the Crown they are confident of the rightness of their
14 own conclusion.

15 How is that to be tested in the precognition
16 process, if at all?

17 A. It can be tested by asking the examiner the type of
18 questions that are set out in the aide-memoire in
19 relation to: have there been disputes; is there any
20 weakness in your conclusion; is there any possible other
21 explanation?

22 These types of questions are the types of questions
23 that we would have been expecting precognoscers to be
24 using anyway before we developed this draft list because
25 precognition has always been about assessing and testing

1 the evidence of a witness. That is what it is there
2 for, and for expert witnesses to ask them where they
3 think any witnesses may lie in relation to their
4 own opinion or where there is any other possible
5 explanation.

6 So if you back that up with Fingerprint Examiners
7 disclosing in advance via statements and reports that
8 there have been discussions in relation to the
9 identification and with the perhaps greater information
10 that's provided in the other style report that you
11 referred me to earlier, that provides a much more
12 informed basis for the precognition process. But,
13 equally, we would be expecting our precognoscers, after
14 they receive the appropriate training, to be asking
15 these type of testing questions in any event.

16 Q. What I suppose I am concerned about in the light of what
17 we heard is if a Fingerprint Examiner, with the
18 confidence that they have perhaps become accustomed to
19 have in the rightness of their conclusion, is asked, "Is
20 there a weakness", the automatic answer may very well be
21 no and I am wondering whether there's any proposal
22 for further probing in terms of the particular features
23 on which they rely, whether they have particular
24 confidence in features in the mark or not?

25 A. I think there must be scope for some of that. That will

1 require or would require our precognoscers to have a
2 familiarity with their techniques and we have to do
3 more, I think, in relation to assisting colleagues with
4 that but certainly I think that the material we're
5 preparing at the moment is a very good basis to enable
6 precognoscers to test Fingerprint Officers.

7 Q. I am also concerned as to whether it's necessarily
8 always going to be proportionate to carry out the sort
9 of questioning I am suggesting in cases where there
10 isn't going to be dispute about identification and I
11 wonder if you can perhaps comment on that concern?

12 A. I think if you know that the evidence is contested and
13 you know that there is a defence expert report either
14 already available or about to be available, then that
15 will, I think, cause you to not change the approach but
16 develop the approach and if, for example, you have the
17 other expert report available then you would want the
18 Fingerprint Examiner for the Crown to have access to
19 that, to be commenting on it, to be commenting on
20 whether any aspects of that undermine his own
21 conclusions or expose a weakness and to be commenting on
22 what his rebuttal would be to those points. So, yes, I
23 think when evidence is contested it does call for a
24 different type of approach, an enhanced approach to the
25 process.

1 MISS CARMICHAEL: I am conscious of the time, sir, and that
2 might be a useful point at which to break.

3 THE CHAIRMAN: If this is convenient. We are obviously not
4 going to finish Mr Pattison's evidence now.

5 I understand the arrangement is we are asking you to
6 come back next week but not on Monday.

7 MISS CARMICHAEL: Not on Monday but at 9.30 on Tuesday.

8 THE CHAIRMAN: There are some matters I think you said you
9 might be able to look up and that might give you an
10 opportunity to do that.

11 A. Certainly.

12 THE CHAIRMAN: Very well, it's Monday this coming week.

13 MISS CARMICHAEL: It is Monday for everybody else but
14 Tuesday for Mr Pattison.

15 THE CHAIRMAN: At 9.30, please.

16 **(3.40 pm)**

17 **(Adjourned until 9.30 am on Monday, 16th November)**

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