

1

Tuesday, 17th November 2009

2 (10.00 am)

3

SCOTT PATTISON, recalled

4

Examined by MISS CARMICHAEL (continued)

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THE CHAIRMAN: Good morning, Mr Pattison. Thank you for
6 returning.

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MISS CARMICHAEL: Good morning, Mr Pattison.

8

A. Good morning.

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Q. I think I said just when you finished on Friday that I

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had two more matters for you. There is one matter I

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have been asked to clarify further with you arising out

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of the way High Court proceedings currently operate and

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the operation of the preliminary hearings system and the

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allocation of cases to individual deposes.

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It is really to try to clarify how some of the

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circumstances we know arose at an earlier stage of the

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preparation of the prosecution of Ms McKie might fit

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into the current system, if you are able to help us with

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that.

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I will set out my understanding of what we think may

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have happened here and then ask for your comment as to

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how matters might proceed today. What I've learned is

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that Mrs Greaves precognosed the case against Ms McKie

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before Ms McKie came to be placed on petition in the

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context of the perjury investigation and one of the

1 matters that Mrs Greaves raised in her note at the
2 beginning of the Crown precognition was that it might be
3 an idea to pursue whether Y7 could be considered by a
4 further expert.

5 The suggestion was taken up by Ms Climie who was
6 dealing with the matter within Crown Office and included
7 by her in one of her handwritten notes we have looked at
8 in the Crown Office file. The suggestion was also
9 picked up by Crown Counsel who instructed High Court
10 proceedings at that stage.

11 What then happened was that matters eventually
12 passed back to Mrs Greaves who corresponded with an
13 English Home Office expert, Mr Kent, who in the event,
14 while he was able to advise about certain matters, was
15 not able to consider whether he could match Y7 to
16 Shirley McKie's print because he wasn't a Fingerprint
17 Expert and, for whatever reason, there was no further
18 action on the point of a further particularly English
19 expert opinion on Y7 after that point. There is a point
20 where we lose track of some of the papers for reasons
21 that have been explored in correspondence, I think.

22 What I would like to try to explore with you is how,
23 if there was an issue of that sort that perhaps one or
24 more Fiscals had raised, had been picked up by Crown
25 Counsel and which may we think have come back to Crown

1 Counsel at a later stage although there is no way of
2 telling because the papers are not absolutely complete,
3 how a point like that might be followed through in the
4 new system and whether perhaps there's, if I can put it
5 this way, less chance of something like that being lost
6 sight of.

7 A. Okay. I'll do my best to try and deal with that. I
8 think it's important for me not to speculate in relation
9 to the particular facts of this case, given that I
10 wasn't involved in it in any way, and not assume that
11 there's something went wrong from the Crown's
12 perspective at that time but --

13 Q. Indeed, if I can stop you there, what I should say is we
14 do not know precisely what happened to that proposition
15 because we have an absence of information about it. We
16 know simply that the point was not taken any further.

17 A. Sure. The first thing that springs to mind is that, in
18 a case like this, it is very likely that responsibility
19 would have been allocated to an Advocate Depute pretty
20 much from the outset. Now, that would mean that once
21 Mrs Greaves' precognition was submitted to Crown Office,
22 even though it was a pre-petition precognition, if that
23 were to come in today an Advocate Depute would be
24 allocated it from the start and would, wherever
25 possible, retain responsibility through to trial, as I

1 think I said on Friday. So that would entail
2 responsibility for all key strategic decisions in
3 relation to the case and that would obviously cover
4 instruction of expert witnesses, precognition of them
5 and re-precognition, where appropriate. That's the
6 major change, I suppose.

7 I'm sure there was early allocation back in the '90s
8 too but it's, I think, more rigorous now and more
9 commonly found now in complex cases, in murder cases and
10 in certain other categories where it's felt that ADs
11 should be responsible from the start for the progress of
12 the investigation and the prosecution. That would be
13 the major change.

14 Q. In a case of this sort we know that it's an allegation
15 of perjury by a serving police officer. Into what
16 category of case would that fall that would mean that it
17 would be allocated to a Depute at an early stage?

18 A. It falls into a number of categories which would propel
19 it into early allocation: complex, high profile, the
20 fact that the individual was a serving police officer.

21 I think you heard from -- I think Lord Boyd gave the
22 Inquiry an overview of Crown Office procedures in
23 relation to decision-making in respect of allegations
24 against serving police officers and those procedures are
25 still in place in relation to decision-making. He

1 emphasised to the Inquiry that Law Officers are involved
2 in decision-making but in terms of the progress of the
3 prosecution, after the initial decision by a Law
4 Officer, the matter would be allocated to Crown Counsel,
5 a specific Crown Counsel, to take forward and work with,
6 the area High Court Unit in one of our 11 COPFS areas to
7 progress matters.

8 I know from cases that I've been involved in that
9 when that happens ADs are very involved and there are
10 regular meetings, regular instructions and in all
11 strategic matters in those cases the Advocate Depute
12 makes the call and it's the same Advocate Depute, which
13 is helpful.

14 It may also help to note that generally in those
15 cases, because there is interaction between Procurator
16 Fiscal's officers and the Crown Office in relation to
17 High Court matters and as well as there being a
18 nominated Advocate Depute as a point of reference for
19 decisions, advice, there generally is a nominated
20 indicter within the Crown Office High Court Unit so a
21 specialist member of legal staff there with experience
22 in indicting cases who would tend to follow the case
23 through as well.

24 Now, I think that that procedure is probably tighter
25 than it was in the late '90s perhaps or more commonly

1 found in terms of a single point of contact amongst
2 indicters, Crown Office and amongst the Advocate Deputes
3 for these categories of case.

4 Q. So should we understand in a high profile case there
5 could be three people with a continuing interest in the
6 preparation of the case, an allocated Advocate Depute,
7 the indicter who has been dealing with the case and
8 somebody within the Local Fiscals' office?

9 A. Yes.

10 Q. Thank you for clarifying that, Mr Pattison.

11 I would like to ask you now about current practice
12 and future proposals which we heard a little bit about
13 from Mr Nelson last week for the presentation of
14 fingerprint evidence in court.

15 We've heard that there aren't now large scale visual
16 representations used in court for fingerprint cases.

17 How does it work in practice, just at present, if a
18 Fingerprint Expert has to demonstrate his or her
19 conclusions to a court?

20 A. It's pretty much oral evidence with reference to the
21 report, which is lodged as a production. It's always
22 open to us to request enlargements in a case and if
23 fingerprint evidence was contentious or crucial in the
24 Crown case it would certainly be very useful to have
25 enlargements in that context but at the moment, pretty

1 much, it's oral evidence elicited by Crown Counsel on
2 the basis of the manuscript report which is available to
3 the court and before the expert witness.

4 Q. So it's simply really just the joint report, speaking to
5 the joint report?

6 A. It is really at the moment. As I say, there is and I
7 think from memory of materials that I've seen that there
8 was an understanding when there was a decision
9 enlargements would no longer routinely be used that it
10 was always open to the Crown to request them if the
11 circumstances of a particular case justified that or if
12 they would be helpful in a particular case and from my
13 perspective certainly if the evidence is challenged,
14 contentious or very significant, ie it's essential for
15 corroboration in the case, there would be a reason to
16 seek those enlargements.

17 Now I think we need to keep reminding Crown Counsel
18 that that's available to them and keep reminding
19 Procurators Fiscal who are preparing cases that that is
20 available to them. I think Mr Nelson spoke a little
21 about some of the work that we're thinking about doing
22 and, in fact, planning for from next year in relation to
23 perhaps more visual, more visuals being used on a
24 routine basis.

25 Q. I wonder if you could tell us a little more about that,

1 what you are discussing with Mr Nelson and I think you
2 mentioned the possibility of piloting some work?
3 A. We're due to meet again soon. We've had a number of
4 discussions over the past, I suppose, four or five
5 months about this and our thinking, I think, developed
6 for two reasons: Mr McGinnies gave a very helpful
7 presentation to Crown Counsel which was visual and used
8 examples of enlargements which Crown Counsel found very
9 helpful and we began to explore the possibility of doing
10 that and presenting on that basis in court as opposed to
11 simply in training sessions.

12 Secondly, we are exploring very much across the
13 range of expert evidence, but across evidence generally,
14 how we might best use media and visual representations
15 of the Crown case to make the case come alive to a jury.
16 Our developing thinking is -- and I think this chimes
17 with what prosecutors are doing in other
18 jurisdictions -- is that, in the modern world, it's
19 perhaps more effective to present in visual format when
20 you can. So we have examples of that across evidence
21 like DNA where we have experimented with a PowerPoint
22 presentation in at least one case and which we are
23 proposing to try and roll out too. But across those --
24 for those two reasons, the effective presentation to
25 Crown Counsel and our developing thinking on visual

1 representation of evidence generally, we began to
2 explore with Mr Nelson the possibility of looking at
3 fingerprint evidence in particular and although we're
4 due to meet again in a few weeks' time to assess the way
5 forward, what we are thinking about is in fingerprint
6 cases having a DVD presentation which SPSA are in the
7 process of finalising which gives and would give the
8 jury a general overview of what fingerprint evidence is,
9 what the techniques are. It gives them a general
10 understanding of process and then on the back of that
11 perhaps using some PowerPoint slides in which there
12 would be specific enlargements of the prints in the
13 particular case.

14 We have spoken about doing this on a pilot basis for
15 Glasgow High Court cases and by that I mean cases
16 calling in Glasgow High Court. I say that because cases
17 that call there are not just from Glasgow so we've
18 spoken about approaching Glasgow High Court cases in
19 that context.

20 However, we're pausing for a moment because we're
21 wondering whether that would give us enough cases over,
22 for example, a year to truly test it out and we're
23 thinking about developing the package and perhaps
24 rolling out to all High Court cases in which fingerprint
25 evidence is or requires to be led when it isn't agreed.

1 From the figures I was able to provide on Friday that
2 there aren't too many cases where it's actually led or
3 requires to be led so that's behind the thinking of
4 perhaps making a decision to start using this in any
5 case where fingerprint evidence is being led.

6 But it's a work in progress and certainly we would
7 want to take on board the conclusions of the Inquiry in
8 relation to that and I know that the Inquiry itself has
9 been using particular technology in relation to the
10 representation of fingerprint evidence and prints and
11 that's something we would be keen to explore if that's
12 better, frankly, than what we are currently working on.

13 Q. Finally, Mr Pattison, I would like to ask you just very
14 briefly about some of the papers that have been produced
15 to the Inquiry over time by Crown Office and I think we
16 adverted to it briefly in the discussion of the papers
17 that were passing between Ms Climie and Mrs Greaves.

18 Does it come to this really: that when we come to
19 the stage of considering the case that was being
20 prepared against Ms McKie, there comes a point where,
21 while we have some papers which we've managed to take
22 from, I think, essentially, the Glasgow side of that
23 correspondence, there is a portion where we are left
24 with a certain gap, a certain absence of evidence in
25 relation to what may have been within, I think, what

1 Ms Climie described as a separate file, a separate buff
2 file, that would have existed for Ms McKie's case?

3 A. I think that's right and I would refer to the
4 correspondence with the Inquiry in relation to the
5 comprehensive picture of that.

6 In relation to the Crown's position and provision of
7 papers to the Inquiry more generally, we wanted to and
8 we have done our utmost to provide as much as is
9 available to the Crown that falls within the Inquiry's
10 Terms of Reference. We regret any inconvenience to core
11 participants through the part of the Crown Office High
12 Court file which we haven't been able to provide. It
13 seems that over the years that file has become
14 fragmented and that particular part of the papers is no
15 longer available to us despite the extensive searches
16 that we have had taken place, both in Crown Office and
17 across the country.

18 If I may, the papers in both Asbury and the McKie
19 prosecution are extensive, as the Inquiry knows, and
20 we've been able to provide the vast bulk of them, as you
21 know. They have travelled across the country quite a
22 few times between Procurator Fiscals' offices and the
23 Crown Office. They have been through many hands,
24 perhaps a unique number of hands in terms of High Court
25 papers, because of the numerous proceedings that have

1 been undergone in relation to this matter and, against
2 that background, it's actually a testament, we think, to
3 those who have intramitted with them from the Crown's
4 side that so much is still intact. When one thinks of
5 the Justice 1 Inquiry, the civil case and all of the
6 many hands and minds who have had to focus on the papers
7 but, as I say, we do regret any inconvenience that has
8 been caused by the part of the Crown Office High Court
9 file which is or appears to be no longer available.

10 Q. The reason I ask is not so much to put any criticism --

11 A. No, I know.

12 Q. -- on yourself but because we have had witnesses and I
13 think particularly of Ms Climie and Lord Boyd whose
14 recollection has not been as assisted as it might have
15 been had all the papers been available, Mr Pattison.

16 A. I appreciate that. Forgive the rather longer answer, I
17 just wanted to express and set a context for that
18 because I know it has caused difficulty for some
19 witnesses.

20 MISS CARMICHAEL: Thank you, Mr Pattison.

21 THE CHAIRMAN: We will begin with you, Miss Galbraith.

22 MISS GALBRAITH: Thank you, sir. I do have an application
23 in respect of this witness. The issues that I would
24 like to ask questions about are, firstly, the steps that
25 were being taken in the move to the non-numeric

1 standard. I have a brief point in relation to
2 authorisation of experts. I am aware Mr Pattison has
3 already addressed that but I have just one more point to
4 make on that matter.

5 Thereafter I would like to ask a little about the
6 report that the Inquiry has heard from that was
7 completed by Bill Gilchrist and also I have some further
8 questions regarding precognition process and, in
9 particular, in relation to disclosure to the defence.

10 As always, sir, I will endeavour not to go over
11 matters that have already been addressed.

12 THE CHAIRMAN: I am sure you will not. Very good, if you
13 wish to ask about those matters you may.

14 **Cross-examined by MISS GALBRAITH**

15 Q. Mr Pattison, if I can deal firstly with the move to the
16 non-numeric standard, the Inquiry has heard evidence
17 regarding the timescale for the move towards the
18 standard that was introduced in 2006, for example,
19 Joanne Tierney from the SPSA said that the Project Group
20 was established in 2000 and I think you yourself have
21 stated that the proposed change was brought to the
22 attention of the Law Officers in June 2000.

23 Is that correct?

24 A. That's correct, yes.

25 Q. Thereafter, the draft Scottish Fingerprint Standard was

1 sent to Crown Office in 2002. That is a matter you deal
2 with in your statement.

3 A. Yes.

4 Q. Mrs Tierney also confirmed to the Inquiry that she had a
5 meeting with Mr Gilchrist who, at that time, was the
6 Deputy Crown Agent in August 2004. The purpose of that,
7 we understand, was to provide a draft non-numeric court
8 report which may thereafter have been passed to the Law
9 Officers for their consideration?

10 A. Yes.

11 Q. Thereafter, we understand without going into the detail
12 of it that that there was some ongoing dialogue between
13 the SPSA and Crown Office and the final version of the
14 standard report seems to have been provided to Liam
15 Murphy in February 2006?

16 A. That's my understanding.

17 Q. You confirm in your supplementary statement to the
18 Inquiry that the responsibility for the move towards the
19 new standard lay with the SPSA?

20 A. Yes, I think I confirmed that on Friday, although there
21 was obviously an involvement and discussion between the
22 Crown and SPSA in the lead up to that.

23 Q. They were really driving the process?

24 A. Again, that's my understanding from my reading the
25 materials that I have been able to see.

1 Q. Would you agree that what we see really since 2000 is a
2 gradual process that was moving towards the final
3 introduction of the new procedure in 2006?

4 A. I think so, although I think it's fairly clear to me
5 that in 2000/2001 that the view had crystallised that
6 this was the right thing to do, if I can put it like
7 that, and that, as I think I said on Friday, that in
8 terms of the current standard that was being applied in
9 Scotland, Scotland to some extent stood not alone but in
10 a minority because similar moves had been made on the
11 part of other jurisdictions to a different standard.

12 Q. I would like to read to you something, some evidence
13 that was given by Lord Boyd when he gave evidence to the
14 Inquiry on 10th November. For those of us with LiveNote
15 it is at page 87, line 17. This was when Lord Boyd was
16 being questioned by Mr Smith.

17 The question put was:

18 "I take it you would agree that for what we seem to
19 know now about a number of things regarding Y7 and Q12,
20 even if we just talk about the question of Crown
21 concerns about the lack of disclosure, all of that is
22 something that would not have happened if, frankly, Iain
23 McKie had not been tenacious, got the media interest and
24 pushed it forward and whatever else happens there is
25 considerable benefit from having to analyse the systems

1 in place. Would you agree with that as a comment?"

2 The answer was:

3 "Yes and no. I think I would agree that there was a
4 catalyst in terms of bringing this to the attention of
5 the public. Thereafter, it frankly froze any progress
6 until we got past the end of the civil proceedings and I
7 think that was a great tragedy."

8 The question was then:

9 "Why did that stop change? What was it that the
10 civil case prevented the Crown Office from saying,
11 'Well, we need to face up to this. We need to take a
12 position on it. We need to restore public confidence in
13 the entire system of fingerprints in Scotland'. Why did
14 the civil case inhibit that process?"

15 The answer was:

16 "Because quite simply there was no movement that
17 could be made to non-numeric without judgment being made
18 against the Shirley McKie case and, frankly, the
19 campaign that was waged by Mr McKie against the SCRO
20 officers made it very, very difficult for anybody to
21 move and I can quite see how you and Ms McKie may feel
22 they have brought it to the public attention and I
23 accept that but thereafter I am quite clear in my own
24 mind that it was impossible to get the kind of movement
25 that was required while that campaign was going on."

1 In light of what has been said about the gradual
2 process of introduction of the non-numeric standard
3 would you agree with that comment?

4 A. I don't feel I have a basis for disagreeing, if I can
5 put it like that. I wasn't working in this area at the
6 time that these decisions were being made. I wasn't
7 advising in relation to them. So in terms of -- I would
8 be reluctant to express a personal view on that, to be
9 honest, and I think I would just simply have to refer to
10 Lord Boyd's view. He was uniquely placed at the time in
11 relation to all that was going on on a number of
12 different fronts as he referred to in his evidence.

13 I don't mean to be unhelpful. I just don't feel
14 comfortable expressing a personal view on that. I don't
15 think it would add too much.

16 Q. I appreciate the difficulty personally but in terms of
17 your knowledge of the background and the work that you
18 have done to date, is there anything that you have seen,
19 either from documentation or your perception of the
20 process that has led you to the conclusion that the
21 non-numeric standard was delayed in any way by what may
22 have been going on with the civil case or any outside
23 media attention?

24 A. Again, I think I would have to refer to Lord Boyd's
25 answer to some extent. Certainly there was a decision

1 made to -- it appears there was a decision made to delay
2 the introduction pending the resolution of the civil
3 matters. So to that extent, yes, there was a delay
4 because of that decision but -- sorry, I'm not sure I'm
5 understanding the question.

6 Q. I am sorry, it is probably a bad question on my own
7 part.

8 Are you aware of there being any evidence that there
9 was a delay caused to the introduction of the
10 non-numeric standard because of the civil case?

11 A. I'm not personally aware of that from material that I've
12 read or seen.

13 Q. You explained to us on Friday that COPFS received copies
14 of a DVD and a leaflet from I think it was the SFS at
15 the time --

16 A. Yes.

17 Q. -- regarding the introduction of the non-numeric
18 standard. You explained to us in your role at the time
19 as Fiscal in Paisley what action you took in response to
20 receiving those materials.

21 Have you had a chance to look at the leaflet
22 recently? Can you recall what information it contained?

23 A. The leaflet was put to me on Friday in evidence. It
24 gives a general overview of the change and what is
25 involved in relation to the non-numeric standard. It's

1 quite basic information.

2 Q. In terms of the DVD, those of us at the Inquiry had the
3 benefit of watching it and I think also it's fair to say
4 that the DVD is not something that appears to be
5 specifically designed for prosecutors or for COPFS in
6 any way?

7 A. No, it's a general overview of the standard and
8 fingerprint evidence.

9 Q. Are we right to understand that when that was received
10 there was no system or guidance that was involved in the
11 dissemination of the DVD in that there was no way to
12 ensure staff saw it?

13 A. As I recall, it was distributed by the then Deputy Crown
14 Agent to District Procurators Fiscal. I'm just pausing
15 because I can't remember if there was a suggestion in
16 the covering minute to hold staff briefing sessions on
17 the DVD but certainly in my mind as a District
18 Procurator Fiscal that almost went without saying, that
19 staff had to be made aware that this existed and at
20 least provided with the leaflet and, as I think I said
21 on Friday, there already was guidance available to staff
22 in relation to expert witnesses generally and from our
23 perspective Fingerprint Officers/Examiners would come
24 into that category and a presumption in favour of
25 precognition of expert witnesses. But, yes, the short

1 answer is, yes, there was no specific direction to hold
2 a briefing session, if you like.

3 Q. Do you know in your own office whether anyone actually
4 saw the DVD?

5 A. No, I don't actually, is the straight answer to that.
6 My recollection is that the leaflet -- I scanned the
7 leaflet and e-mailed it to our legal staff and
8 precognoscers at the time and that the DVD -- and that I
9 told staff in the email that the DVD was available to
10 them if they were dealing with a case in which
11 fingerprint evidence was an issue and I then made the
12 DVD available to our Solemn Legal Managers.

13 Q. Obviously we have no way of knowing what approaches were
14 taken within the other --

15 A. No. No, we don't. I would say that the steps that I
16 took were probably the minimum you would expect to be
17 taken by Procurators Fiscal. But, no, I can't speak
18 from personal knowledge as to what others did.

19 Q. If I can move on now to ask you about authorisation of
20 experts and I think you have said in your statement and
21 I think, to be fair, in previous correspondence that the
22 COPFS plays no role in the authorisation of forensic
23 experts in terms of the section 280 procedure?

24 A. Yes.

25 Q. Sorry, section 280 of the Criminal Procedures Scotland

1 Act 1995.

2 Bearing that in mind, obviously you would agree that
3 the Crown must bear responsibility for the prosecution
4 of crime and the selection of appropriate witnesses on
5 behalf of the Crown?

6 A. Yes, that's right.

7 Q. Would you also accept that it's in the interests of the
8 Crown to ensure that they are satisfied as to the
9 competence and integrity of witnesses that they choose
10 to lead on their --

11 A. I think, yes, that is right and I think I said on Friday
12 that we have to be -- we certainly have an interest in
13 being assured that the training and competency testing
14 of experts is robust and thorough.

15 Q. Can you just remind us how the Crown is ensured of that?
16 What steps are taken to satisfy themselves as to the
17 training and competency?

18 A. I suppose, if we are focussing on SPSA and fingerprint
19 evidence then we rely heavily on the assessment of
20 competence by SPSA and their systems for checking
21 competence and for verifying work and we would certainly
22 feedback to SPSA any significant difficulty which had
23 arisen in relation to an expert in court to inform their
24 processes of review and assessment but for SPSA experts
25 we have to rely heavily on them. They are employees of

1 SPSA and we know that they have systems in place to
2 assess competency. So I suppose, from the Crown
3 perspective, we can certainly -- it is certainly open to
4 us to enquire into that and to discuss that with SPSA
5 but they are best placed to assess the competence of
6 there employees and to make representation to the
7 Scottish Government in relation to authorisation.

8 Q. Given this responsibility, would you see any role for
9 the COPFS in the authorisation process? While I
10 appreciate that doesn't happen at the moment would you
11 see there being a benefit to being involved?

12 A. I'm not sure there's a benefit for the Crown being
13 involved in actual authorisation, for a couple of
14 reasons, I think. Firstly, I'm not sure we have the
15 expertise to do that. I think that relates partly to
16 the answers I gave in relation to what extent should we
17 become involved in setting scientific standards or
18 quasi-scientific standards so, firstly, I'm not sure we
19 have the expertise on that front.

20 Secondly, it's traditionally been the position in
21 Scotland that expert witnesses are independent of the
22 parties so when the Crown calls a pathologist it's
23 tempting to think that that's the Crown's expert
24 pathologist but actually the position constitutionally
25 and legally is that that witness is independent and that

1 brings huge value.

2 For the Crown to be proactively or in any way
3 involved in actually authorising experts I think there
4 is a potential problem. I say "potential", I haven't
5 thought this through in detail but a potential problem
6 in relation to a later perception of a lack of
7 independence on the part of the expert and potential
8 challenges against their independence.

9 What I do think we can do and should do is feed back
10 problems that we experience, either in the course of our
11 interaction with an expert in the course of an
12 investigation because very often we are instructing at
13 the outset of, for example, a murder inquiry, forensic
14 biologists and pathologists and others will be at the
15 scene from the earliest point. So we can feedback any
16 difficulties that we have experienced if we think they
17 are significant and go to competence and we certainly
18 should do that when we pick up on that and if we
19 experience difficulties with a witness giving evidence
20 in court -- and, I'll be frank, I have experience of
21 doing that in various contexts as a prosecutor and our
22 role, I think, is to feed that back to SPSA senior
23 management for that to be fed into performance appraisal
24 and competency testing, further training, whatever is
25 required for SPSA to feel confident in presenting that

1 person as someone to be authorised and to give evidence
2 in court.

3 Q. Can you explain to us a little bit about how that would
4 happen? Say a Depute or an Advocate Depute, if they had
5 concerns about a witness giving evidence in court, how
6 could they feed that information back to the SPSA?

7 A. It generally would be done, I think in the past and at
8 present, through the Deputy Crown Agent's office in
9 Crown Office or through the Head of the High Court Unit
10 and in the Deputy Crown Agent's Office, that's where I
11 work, and we would receive a note, a report, an
12 expression of concern from the Advocate Depute or
13 sometimes from a Procurator Fiscal who had experienced a
14 difficulty perhaps and we would assess that and
15 determine whether it ought to be referred to SPSA.
16 Practically, that's how it would work.

17 Now, I don't want to give the impression that this
18 is happening daily, because it isn't, but in terms of if
19 a prosecutor in the High Court had a real concern with
20 how an expert had presented, either because of the
21 content or the simple way they had conducted themselves
22 in court, then that would generally be referred to the
23 Deputy Crown Agent's office and we would then determine
24 whether it ought to be referred to SPSA and that would
25 depend on what you were dealing with, what was the

1 degree of the fault, if you like, and what it actually
2 related to.

3 Q. That may be of interest to the Inquiry, as you may know
4 what happened after the acquittal of Shirley McKie is
5 that there was a meeting between the Advocate Depute who
6 prosecuted the case and certain representatives of the
7 SCRO at that time which didn't lead to any further
8 action being taken.

9 What may be of interest is whether there are any
10 formal procedures in place should such a situation
11 happen now where either a prosecuting Fiscal or an
12 Advocate Depute has a concern about expert evidence,
13 whether there is a formal procedure, if you like, for
14 them to draw that to the attention, firstly, to Crown
15 Office and thereafter to any relevant agency.

16 From the way you are describing it, it doesn't sound
17 like there's a formal process. It's a matter for the
18 individual concerned?

19 A. I was going to give an awful answer there and say it
20 depends on how you define formal but what I will say is
21 there's no specific guidance I'm aware of that says to
22 prosecutors, "Here is what you do when ...", in relation
23 to this particular matter. So to that extent it
24 probably is informal in the sense that it's not
25 formalised by guidance but it's still a referral to the

1 Deputy Crown Agent's office, which isn't a light matter,
2 if I can put it like that.

3 Q. Just to pick up one point you mentioned, an analogy with
4 pathologists and perhaps those familiar with the
5 prosecution of crime in Scotland will be aware that
6 pathologists can give or frequently give evidence,
7 perhaps, in one case on behalf of the Crown and then
8 quite similarly in another case on behalf of the
9 defence. They are independent in that sense, that they
10 frequently act for Crown and defence.

11 Are you aware whether that's a similar situation
12 with the SPSA officers? Do they ever act on behalf of
13 the defence?

14 A. I don't think they do. I couldn't categorically state
15 that though. That's something that ought really should
16 be raised with them. I'm aware certainly that all of
17 their work as an organisation does not come from the
18 Crown but I'm not aware of them giving evidence for the
19 defence in criminal cases and I think that would be
20 very, very unusual.

21 Q. Still dealing with the interest of the Crown in relation
22 to the competency and expertise of Fingerprint Experts,
23 during the course of the Inquiry a difference of
24 approach seems to have emerged regarding how different
25 officers treat unexplained differences within a mark.

1 Without going into the specifics, I think generally the
2 two approaches can be seen, firstly, that an unexplained
3 difference between a mark and a known print may not
4 matter if there's a sufficient other detail to enable
5 the officer to be content with the identification.
6 That's one approach.

7 The alternative approach seems to me that where
8 there is an unexplained difference then the process ends
9 there and there cannot be an identification.

10 Just using that as an example of a difference in
11 approach between Fingerprint Experts, while it may be
12 going into the technicalities of it, is that an issue
13 that you are aware of Crown Office having a particular
14 view on as to which is the appropriate approach to
15 follow?

16 A. I'm not aware of us having a view on that or having
17 discussed that with SPSA, no.

18 Q. Even within the SPSA if there is a differing view as to
19 the significance of an unexplained difference, how would
20 the Crown manage or become aware of the view of a
21 particular expert in relation to that sort of difference
22 of opinion?

23 A. I suppose there are a number of ways. Firstly, I think
24 the Crown is entitled to expect law enforcement
25 generally -- and I include SPSA within that -- to

1 provide the prosecutor with all relevant information
2 and, as I said on Friday, that would include information
3 which would undermine the Crown case or which would be
4 consistent with the innocence of the accused,
5 exculpatory. So that process is one I think we're
6 entitled to expect to take place and we are entitled to
7 expect law enforcement to be clear about their duties in
8 that regard.

9 Secondly, in relation to expert witnesses we have
10 had a presumption in favour of precognition for some
11 time and we've recently, as you know, with the Circular
12 in March, firmed up the instruction or introduced the
13 firm instruction that there should be precognition of
14 Fingerprint Officers wherever the evidence is not
15 clearly going to be agreed. That process is there to
16 draw out and to test the potential evidence of witnesses
17 and not just expert witnesses but witnesses in general.

18 I think I said on Friday that we accept that there
19 is more that we can do to ensure that our precognoscers
20 are sufficiently informed so that they can test
21 evidence, ask questions to bring out matters that ought
22 to be brought out into the light, so to speak, and I
23 referred on Friday to a particular piece of work which
24 we brought to an advanced stage in relation to
25 fingerprint evidence but which we are also doing in

1 relation to other streams of expert opinion and that is
2 to provide our precognoscers with an aide-memoire, lists
3 of specific questions, not that they require to
4 slavishly adhere to but which are there for them as a
5 resource in the context of precognition of experts
6 across the board.

7 So two things, and I apologise for the long answer:
8 firstly, the duty of law enforcement to bring relevant
9 matters to the attention of the prosecutor and,
10 secondly, in Scotland the role of precognition which I
11 think is still pretty unique to Scotland in terms of the
12 prosecutor conducting an investigation.

13 If I may though, I think it's important to recognise
14 that these aren't the only safeguards in the system. I
15 know the Inquiry will have heard this before so forgive
16 me, the defence have a right to precognosce, to
17 investigate, to instruct experts and to assess matters
18 in that context and, in addition to that, there is the
19 residual safeguard of a jury who is able to assess
20 expert opinion and determine their verdict.

21 So I think there are a number of safeguards within
22 the system in Scotland which are there to assist and
23 hopefully minimise the possibility of a relevant matter
24 being missed.

25 Q. The long answer was very helpful but can it be

1 summarised, certainly the second part, is that

2 precognition is the key?

3 A. No, no, it's not the key. Disclosure by law enforcement

4 and precognition would have to sit very much

5 side-by-side. I worry about saying precognition is the

6 key for reasons that I mentioned on Friday. It's not

7 happening in summary cases and we wouldn't at this stage

8 view that as a proportionate response to the context

9 that we are in Scotland in relation to fingerprint

10 evidence, nor is it happening in other jurisdictions so

11 I think, actually -- no, I wouldn't say one is more

12 important than the other. I think they sit together and

13 I also think that elements in the system combine to

14 minimise the possibility of risk and I was about to go

15 back to my long answer and I won't.

16 Q. I think I only took one arm of it perhaps. If we can

17 summarise it, if we can, by the disclosure by law

18 enforcement agency and precognition?

19 A. Yes, yes. That's fair, I think.

20 Q. I may come back to a few of the points you have touched

21 on but can I ask you, firstly, were you aware, either at

22 the time or now, about a report that was submitted by

23 William Gilchrist, Bill Gilchrist, to Crown Office in

24 June 2001?

25 A. I certainly wasn't aware of it at the time. I've become

1 aware of it in preparation for giving evidence, to be
2 honest.

3 Q. Have you had an opportunity to read Mr Gilchrist's
4 report?

5 A. I've read that report very briefly but I am aware of it
6 and it's conclusions.

7 Q. Would you agree that, aside from the position that seems
8 to be adopted in the report that there had been a
9 mis-identification, another point that was brought out
10 by the report of the investigations that Mr Gilchrist
11 carried out was that there had been officers within SCRO
12 who could not identify Y7 to the 16-point standard?
13 That was something that was brought out by the Gilchrist
14 report?

15 A. I think that's right. Would it be possible to see the
16 report if it is available?

17 Q. The reference is CO0003. The specific parts I am
18 referring to, if you would like to turn to page 11 of
19 the report. Obviously, Mr Pattison, if you would like
20 time to look at the fuller report --

21 A. Yes.

22 Q. -- I'd be happy with that.

23 The key points for my purposes in relation to the
24 heading halfway down the page we see identification of
25 Y7 by SCRO?

1 A. Thank you, yes.

2 Q. What is stated there, just in the second sentence of
3 that paragraph:

4 "We know from Alister Geddes that he was then asked
5 by Hugh MacPherson to verify his identification of Y7.
6 MacPherson informed Geddes that he had already
7 identified the mark as being the left thumb of Shirley
8 McKie, a serving police officer. Geddes carried out the
9 requested check using a magnifying glass but experienced
10 difficulty due to what he perceived as movement in the
11 mark. He then placed the mark and the elimination print
12 onto a comparator and managed to identify 10 ridge
13 characteristics in agreement in the lower part of the
14 mark."

15 Thereafter he remained of the view he could only
16 find 10 points.

17 If I can then move on, please, to page 13. This
18 part of the report explains what came to be known as a
19 blind test, which was a procedure where other officers
20 at that time on duty were asked to look at the mark and
21 in that respect it's noted in the second paragraph that:

22 "One expert, Terence Foley, found 10 characteristics
23 and indicated he would be willing to eliminate the
24 mark ..."

25 In the next paragraph Edward Bruce managed to

1 identify 8 characteristics. I think for the sake of
2 completeness it was also noted in an explanation of the
3 background that there were two other officers who did
4 not give a view one way or the other and asked for more
5 time to look at the mark.

6 Looking at matters today, would you accept that that
7 kind of information would be of relevance, perhaps, to
8 the Crown but certainly to the defence?

9 A. I think the defence would find that relevant, would be
10 my personal view.

11 Q. For example, it may encourage them to instruct their own
12 independent report if it was thought there may be, while
13 the officers were content to eliminate, to a degree that
14 it may show a degree of difference of opinion and may
15 encourage the instruction of an independent report by
16 the defence. Would you agree with that?

17 A. I could understand the defence taking that view, yes.

18 Q. While I appreciate I think you were not in Crown Office
19 at the time this report was submitted, which was in June
20 or July 2001 --

21 A. No, I would have been in Crown Office but in a very
22 different role.

23 Q. But it's not something you were personally involved in?

24 A. Not at all.

25 Q. From the information that the Inquiry has it would not

1 seem this point was flagged up in the wake of this
2 report. The fact that there had been a disagreement
3 within SCRO was not something that was specifically
4 mentioned or brought to anybody's attention. Just in
5 terms of the documentation that you have seen would you
6 agree with that, that this wasn't a point that was
7 picked up from the report?

8 A. I don't remember seeing anything which says that that
9 was communicated proactively by the Crown but I should
10 say that doesn't mean that it didn't happen because I
11 haven't seen everything that exists in relation to -- or
12 read everything which exists within Crown Office in
13 relation to that particular matter.

14 Q. Of course, I know it's a little unfair to ask you to
15 comment on something you were not personally involved
16 with but could I just ask you to accept in terms of
17 information that the Inquiry has received there would
18 not seem to be any action that was taken in response to
19 this particular issue at that time.

20 In terms of your knowledge of the procedures within
21 Crown Office, would you accept that there is no reason
22 in principle why, had this been raised as an issue, that
23 guidance or a direction could not have been given
24 directly to SCRO, that this kind of information should
25 be disclosed?

1 A. I'm just trying to --

2 Q. You're probably trying to work out what my question
3 meant. It was poorly framed.

4 A. No, not at all. Do you mean more broadly where there is
5 a disagreement between experts or specifically where
6 there has been an identification of the kind that was
7 made by these particular officers?

8 Q. I suppose I'm putting a hypothetical. Had somebody
9 looked at this report and thought, "Well, there was
10 disagreement in this case between officers. We didn't
11 know that that happened, that that was possible within
12 SCRO that different officers could come to a different
13 opinion. I would like to know that as a prosecutor and
14 maybe the defence would like to know that" and a
15 possible action could have been for the Lord Advocate or
16 for some discussion to have taken place between the two
17 agencies to ask for that information to be provided.

18 A. Yes, that would have been a possible action in relation
19 to that matter. I think I should say again that from
20 the Crown's perspective that -- and speaking in the
21 generality as opposed to in relation to the case
22 itself -- that where there is a dispute between experts
23 that that is something that we would, as I think I've
24 said already, view as relevant and something which
25 should be disclosed. It's something we can try and draw

1 out at precognition but it's much safer if it's
2 disclosed in report and statements because the report
3 and statements are automatically disclosed to the
4 defence and then they are obviously cited and in
5 possession of information which allows them to make what
6 they will of that.

7 Q. If I can move on from that, you said in your statement
8 and again you repeated it this morning, that from your
9 perspective law enforcement colleagues should be aware
10 of their duty and provide relevant information to the
11 Crown?

12 A. Yes, I think that's a long-standing duty in Scotland. I
13 think, as I said on Friday, the clarification that the
14 Inquiry has brought to the issue of disputes between
15 experts in the context of fingerprint evidence, albeit
16 ones which are resolved, is something that we and SPSA
17 will work together on to determine the appropriate
18 protocol for that and to ensure the information is
19 brought to the attention of the Crown.

20 Q. I think you talk in your statement about a protocol that
21 has been agreed with ACPOS?

22 A. There is a protocol with ACPOS in relation to disclosure
23 of some years old now and there is an ACPOS manual on
24 disclosure which I think is quite -- it was in draft for
25 some time and it has quite recently been published.

1 Q. Obviously, there is no similar protocol with the SPSA?

2 A. I think SPSA would be covered by the ACPOS protocol and

3 played a part in relation to that. I could be wrong and

4 I can check the detail of that. I'm specifically

5 referring to the ACPOS manual on disclosure. I think

6 there was a role and I'm sure there will be an

7 acceptance of the principles within it on the part of

8 SPSA.

9 Q. What you just said is that Crown Office or COPFS and the

10 SPSA will work together to determine an appropriate

11 protocol, I think what we are talking about is for

12 disclosure. Can we take it from that that it is

13 accepted that the current arrangement is not sufficient

14 to ensure that information of relevance is disclosed to

15 the Crown or the defence?

16 A. I think the Inquiry has clarified that, on a routine

17 basis, that disputed identifications or disputes between

18 experts are not routinely being brought to the attention

19 of the Crown in the report or statements and I think

20 that has been helpfully brought out and I think we need

21 to look at that carefully and work together on it.

22 Q. Are you able to give us any indication of what work will

23 follow and any kind of timescale and what can be

24 expected from that?

25 A. I expect to have early discussions with Mr Nelson in

1 relation to the matter and to meet with relevant SPSA
2 colleagues, hopefully within the next few weeks,
3 certainly by the end of the year, and to reach agreement
4 pretty quickly, certainly within the next few months. I
5 would expect in relation to the precise issue of where
6 experts have disagreed to be able to resolve that issue
7 very quickly.

8 Q. Again, just on that point -- I will be corrected if I am
9 wrong -- but the issue of disclosure of this kind of
10 information of where there has been disagreement between
11 officers, this has been put to a number of witnesses
12 within the context of the Inquiry. I don't know to what
13 extent you have been following the evidence, but
14 certainly I don't think any of the Fingerprint Officers
15 have indicated that this is information that would be
16 volunteered to the Prosecution Service and indeed there
17 may be a failure to appreciate the value that this
18 information could have certainly for the defence.

19 I take it that is something that will be taken into
20 account by the Crown in terms of their ongoing work with
21 the SPSA.

22 A. Yes, I think we see that as relevant information. I
23 think from the extent to which I have been able to
24 follow the evidence that SPSA colleagues have accepted
25 that that would be useful in terms of provision and the

1 right thing to do in terms of disclosure and also that
2 it should be contained within either the report or
3 statements.

4 Q. You have already given us quite a lot of comment
5 regarding the precognition process and, in particular,
6 the precognition of experts. You have also been able to
7 provide the Inquiry with statistics for the number of
8 precognitions carried out after the Circular was
9 introduced in March of this year.

10 Can I ask are you aware of how many precognitions of
11 Fingerprint Experts were carried out between the
12 introduction of the non-numeric standard in 2006 and the
13 Circular being issued in 2009?

14 A. No, I don't have that information, I'm afraid.

15 Q. Can you perhaps explain why that information is not
16 available?

17 A. It's not something which we store electronically on any
18 database and to obtain it would require a manual trawl
19 of all High Court and Sheriff and Jury case papers back
20 to 2006.

21 In relation to the figures that I was able to
22 provide the Inquiry with on Friday, we obtained them and
23 I think in my statement I've qualified them to some
24 extent but they were obtained by asking all Crown
25 Counsel about their experience since March '09, just

1 following the specific questions that we were asked and
2 by asking Area Fiscals to do the same in Sheriff and
3 Jury cases.

4 Q. So you have been assisted in obtaining that information
5 by Area Procurators Fiscal; is that right?

6 A. Yes. In relation to Sheriff and Jury matters, yes.

7 Q. Can I ask, based on the information available to you,
8 are you content that Fingerprint Officers have been
9 routinely precognosed in the way that they should since
10 the publication of the Circular in 2009?

11 A. I think we have done all that we can to ensure that they
12 are and I'm not aware of anything which suggests that
13 they are not, if I can put it like that. The
14 instruction is to precognosce unless the evidence is
15 agreed and what I have picked up on, certainly from
16 speaking to prosecutors, High Court and in the lower
17 courts, and in terms of the feedback that we were
18 provided with, is that fingerprint evidence is pretty
19 routinely agreed and unchallenged in Scotland.

20 We have issued the instruction. We have asked Area
21 Fiscals to monitor it. We have reminded our Area High
22 Court Units in particular on a number of occasions about
23 the importance of the instruction. Also, we have asked
24 Crown Counsel if any cases do slip through the net and
25 they receive a set of High Court papers in which a

1 Fingerprint Officer or an expert witness generally has
2 not been precognosced to specifically instruct that work
3 of the Area High Court Unit ... sorry, that's it.

4 Q. Have you felt it necessary to instruct any kind of
5 reminder or encouragement to Fiscals to ensure that this
6 precognition is taking place?

7 A. We have issued, I think, two notes to Area Fiscals, as I
8 recall, in relation to fingerprint evidence but also
9 expert witness evidence generally. On the latter, there
10 has been for some years, as I've said, a presumption in
11 favour of precognition of expert witnesses.

12 Our discussions with Areas and with SPSA over the
13 last 6 to 12 months -- and I'm speaking about expert
14 witness evidence generally at the moment -- has brought
15 to light that experts have not been being precognosced
16 to the extent that they perhaps should have been and
17 that has led to the Crown Office and through our office
18 reminding Area Fiscals of that duty and relevant
19 guidance. That's something that we do as a matter of
20 course across our work. Although we have systems in
21 place at Area level to monitor compliance against
22 guidance and although that's for the Area Fiscal to do,
23 in an organisation of our size and complexity and with
24 the significant amount of guidance that's now available
25 to prosecutors for compliance with, we do have to draw

1 attention to specific matters from time to time.

2 Q. You say it's from what's brought to light in general in
3 terms of expert evidence in the last 12 months that
4 experts have not been precognosced to the extent they
5 should have been.

6 Have you had any information regarding specifically
7 Fingerprint Officers?

8 A. I've had some information from Mr McGinnies in the
9 context of the Crown Counsel seminar that I think he
10 mentioned and I've mentioned. That was in June of this
11 year and the Circular had been issued in the March but
12 he, in the context of that discussion with Crown
13 Counsel, did say that from his perspective precognition
14 was not as routine as he would like and he was
15 emphasising from his perspective the value of
16 precognition for his officers. That was information
17 which I'm sure -- I would have to check my records but
18 I'm sure that after that, and against the back of the
19 Circular in March, that I reminded Area Fiscals of the
20 guidance and of the need for precognition. But, as I
21 recall -- and again I would need to check -- I think it
22 was fingerprint evidence but also expert witnesses in
23 general because similarly at that seminar there were
24 presentations from a ballistics expert and, in the
25 context of DNA evidence, from a forensic biologist. You

1 know, it was not -- as I recall, it was not solely in
2 relation to fingerprint evidence.

3 Q. If I can move on now to deal with what we have been
4 talking about as the provision of this information to
5 the Crown, if I can ask now about that the Crown would
6 do with this information when they have it.

7 We have seen the Crown Office Circular and the
8 aide-memoire, which I think you said is just a draft.
9 It's not been finally issued as yet?

10 A. It's at a pretty advanced stage now, as I think I said
11 on Friday, because we've had I think most of the
12 comments back from SPSA that we had sought or at least
13 from the relevant colleagues there and Crown Counsel
14 have had a chance to comment on it but, as in every
15 other area of our work, if there's something missing and
16 something that has come out in the context of the
17 Inquiry which could inform that document we would be
18 keen to learn from that and improve it.

19 Q. Would you agree with me that while the aide-memoire
20 provides instruction for precognoscers to ask
21 Fingerprint Officers whether there may have been
22 disagreements between the Bureau or other views as to
23 the mark, there is then no specific instruction or
24 guidance that that information must then be passed to
25 the defence?

1 A. You mean in relation to, again, the issue of disputes
2 between experts?

3 Q. Yes.

4 A. There's nothing in that document which is designed to
5 assist with the precognition process, the actual
6 questions asked of the expert in the interview but there
7 has been a vast amount of guidance provided to
8 prosecutors and precognoscers over the last four to five
9 years in relation to disclosure and significant
10 training, protocols with the police, a disclosure manual
11 for prosecutors which is on our intranet but I think is
12 also in the public domain too, which emphasises the need
13 to disclose to defence not just the Crown case but
14 anything which would undermine the Crown case or assist
15 the defence case. So I would have, no -- I'm as certain
16 as I can that prosecutors and precognoscers are very
17 much aware of their disclosure duties at every level in
18 the system.

19 Part of why I say that this type of information is
20 best contained in the report or the statements or both
21 is because since 2005, I think after the **Holland** case,
22 these statements have been routinely disclosed to the
23 defence.

24 Q. I think to summarise, is the position that there is no
25 specific guidance, certainly in the Circular or nothing

1 in the aide-memoire, that says that information of
2 disputes or disagreements about marks should be
3 disclosed, the reliance is on the general instruction
4 given --

5 A. I think that's correct, yes.

6 Q. Do you --

7 A. Again -- sorry.

8 Q. I will let you finish.

9 A. This issue has come out during the course of the
10 Inquiry. It's one that we, with SPSA, will learn from
11 and it's certainly worthy of consideration that we set
12 in place a specific instruction on that, at least that
13 there should be consideration of disclosure of that
14 material to the defence.

15 Q. I guess that really answers my next question which was
16 going to be whether you consider specific instruction
17 would be necessary?

18 A. I think that's worthy of consideration, definitely.

19 Q. Of course, while this may be an issue that's perhaps
20 been highlighted during the course of the Inquiry, would
21 you accept that this issue really was known in a sort of
22 institutional way by the Crown, COPFS, when Mr Gilchrist
23 reported back in 2001?

24 A. Yes, I think I would have to concede that, the issue of
25 disputes between the experts was known in that sense.

1 Q. And really, it's not been picked up until now?

2 A. Not specifically as in this context, although I do come
3 back to the need for the Crown to be provided with
4 material on a case-by-case basis which is relevant and
5 material and that includes material which assists the
6 defence.

7 Q. Dealing with that point on the provision of information
8 to the Crown, the Inquiry has been interested to find
9 out the extent to which notes and records are kept by
10 individual officers. From the Crown's perspective would
11 you consider it to be something that would be useful or
12 important in the preparation of the prosecution of a
13 case for experts to be able to show their working and
14 their methodology.

15 A. I'm pausing because I think it really depends on what
16 the expert needs themselves. We wouldn't presume to
17 impose a particular way of working upon experts and I
18 refer to my earlier answers in relation to the Crown's
19 lack of expertise in that context.

20 Certainly I know from speaking to some experts
21 recently that when they know that their evidence is
22 going to be disputed or it is contentious in the
23 particular case they want their notes to be lodged as a
24 production in the case. Sometimes judges will have
25 experts to refer to their notes if they aren't lodged

1 but it's safer to have them lodged so they definitely
2 can. So I certainly see value in the lodging of notes
3 if an expert has them and they were contemporaneous and
4 they need them and in their evidence if it's disputed
5 but I wouldn't impose a particular way of working on the
6 expert.

7 I think the ACPOS manual on disclosure deals with
8 this point, I think, to some extent. It may be of
9 interest to the Inquiry. I think it's paragraph 7.57
10 where there's a clear statement that it's -- there is
11 the no specific need to provide notes to the Crown per
12 se in the context of case preparation because really our
13 capacity to do anything with them is very limited from
14 our limited knowledge of the fields of expertise but
15 that if a defence expert has been instructed because the
16 evidence is contentious there is a complete acceptance
17 on the part of SPSA and the police and the Crown that
18 there should be disclosure of the relevant notes to
19 inform the defence preparation. Again, I say that in
20 that context I think most experts would want their notes
21 lodged so that they could refer to them in the context
22 of their giving of evidence.

23 Q. I think even with the witnesses who have given evidence
24 to this Inquiry we have seen some who have taken notes
25 of their original assessment and some who have not.

1 Would you agree that the benefit of doing that is it
2 shows a transparency and a consistency of approach if an
3 expert is able to give evidence in court and point to
4 what they did at the time that that could be helpful?

5 A. Yes. I think from a prosecutor's perspective that could
6 be helpful, again especially and particularly when the
7 evidence is challenged.

8 Q. If I could just ask you about one point, Joanne
9 Tierney -- I don't think you heard Mrs Tierney's
10 evidence?

11 A. I didn't. I've reviewed her evidence to some extent but
12 I didn't hear it.

13 Q. I don't think this was a point that was made in her oral
14 evidence but in her written statement she suggests that
15 not having a full note of the initial analysis that was
16 carried out in relation to a particular mark will mean
17 that when an officer is giving evidence in court they
18 will be required to explain their analysis **de novo** and
19 she states that this provides the officer with a
20 challenge.

21 Would you think that that demonstrates a consistency
22 of procedure for officers to be doing their analysis of
23 new when they are giving evidence?

24 A. I think I would have some concerns about that. I'm
25 slightly hesitant because of my point about not wanting

1 to impose a particular way of working upon experts but I
2 can see difficulties in that.

3 Q. On the issue of notes, if I could ask you to have a
4 quick look at a document that has been provided to the
5 Inquiry. I don't think you have seen this before. It's
6 DB0768.

7 This is a record that is kept in certain cases by
8 the Fingerprint Service in the Netherlands. It's been
9 translated so in parts the explanation is perhaps a
10 little difficult to follow but I think it clearly shows,
11 certainly on the first page, the analysis process that
12 an expert will go through when first looking at a mark.
13 You will see that there are boxes which provide for the
14 expert to fill in a number of minutiae, characteristic
15 value, contrast, problem areas and suchlike.

16 Then if we go on to the second page -- I should say
17 the first page deal with the analysis process and only
18 once the expert is content there's sufficient detail
19 there they move on to the comparison phase, which is
20 shown on the second page. Again, there are boxes there
21 for notes to be made. The evaluation phase says veto.
22 That is a phase that involves discussion with others
23 experts and problems can be noted there.

24 I appreciate you perhaps are seeing this for the
25 first time today but would a document similar to that

1 that shows fairly briefly what process has been gone
2 through and there is an indication of there being any
3 discussion or difference of opinion, would that fairly
4 straightforward document be something you think would be
5 of value to a precognoscer or a prosecutor conducting
6 a case?

7 A. I can certainly see value in that. I would be
8 interested in the SPSA view of it as to what would be
9 most useful for their examiners in relation to capturing
10 information and prompting in the right direction.

11 Certainly, as a generality, a simple document which
12 also captures relevant information is what you really
13 want in the context of reporting on a routine basis to
14 the prosecutor. So I think both with that document and
15 also with one that I was shown on Friday which I think
16 was referred to as a longer style report which Joanne
17 Tierney had referred to and which I viewed as
18 potentially helpful to, there certainly is a basis for
19 discussion with SPSA over.

20 Q. Another possible advantage to something that is
21 completed routinely of this nature would be that this
22 could be something that could be fairly easily disclosed
23 to the defence, suitably redacted as necessary, but it
24 would provide information that may be of relevance
25 without the full precognition process being required?

1 A. Yes, although I can imagine a number of different styles
2 of report which could do that but it does look
3 potentially useful.

4 Q. As a general idea?

5 A. Yes.

6 Q. Specifically on that point, you mentioned earlier that
7 in summary cases, the Crown Office Circular that came
8 out requiring precognition of Fingerprint Officers, that
9 does not apply in summary procedure?

10 A. It doesn't, no. It's always open to the prosecutor to
11 precognosce in a summary case but, as a matter of
12 routine, it isn't done. It would be the exception.

13 I should say though if I was prosecuting a summary
14 case and I knew that fingerprint evidence was essential
15 and that it was disputed, as a prosecutor dealing with
16 the case, I would want to speak to the Fingerprint
17 Officers and, in effect, precognosce them and I would
18 expect that most prosecutors in summary courts would be
19 of that mind too. That's really the type of thing that
20 you would do with any expert in a summary case where you
21 knew that the evidence was important and was going to be
22 disputed where a defence expert was coming in soon.

23 Q. Form what we discussed earlier the information regarding
24 disputes or disagreements regarding the identification
25 within the Bureau, that is not information that would be

1 disclosed to the Crown unless there was precognition?

2 A. Unless it was included in the report and statements,
3 yes.

4 Q. If there was no proactive disclosure of that by SPSA
5 then that information would not come to light unless
6 there was precognition?

7 A. Yes, I would include in that either Crown or defence
8 precognition because either could bring that out.

9 Q. Would you not accept that the defence may not consider
10 making a challenge until they get that information.

11 There may be a risk that -- certainly, if the defence
12 were to find out that there had been a disagreement or a
13 dispute within SPSA regarding an identification then
14 that may trigger the instruction of a defence expert
15 where it may not have happened before then?

16 A. I suppose, equally, it's in the public domain in
17 Scotland that issues arose in this particular case and
18 we have had a number of public proceedings which have
19 brought these issues out. So I suppose -- the defence
20 should be alive to the issue too, on one view, and the
21 defence have a duty to investigate their case and the
22 defence will have an indication of their client's
23 position and if the client's position is that that is
24 not his or her print, then I would have thought that
25 triggered a defence duty to pursue that proactively.

1 Equally, I completely accept the Crown's duty of
2 disclosure. I completely accept that it is best if this
3 information is within the report and the statements and
4 is automatically disclosed but even when it's not, I
5 still think there is a duty on the part of the defence
6 and that in general in Scotland defence lawyers should
7 be alive to these issues too.

8 Q. But I don't think you would be suggesting that the Crown
9 obligations of disclosure are diminished in any way?

10 A. Not at all.

11 Q. But what may be --

12 A. Not at all. But there is a broader context and I think
13 in Scotland when you are looking towards the safety of
14 any proceedings, prosecution, conviction and minimising
15 the possibility of an unsafe conviction. There are a
16 number of residual safeguards that work together in the
17 Scottish context and one of those is the role of the
18 defence and the capacity to test the evidence on the
19 part of the defence.

20 Q. I appreciate it's not an area, I think you have already
21 said, that you have any particular knowledge in but you
22 will be aware that the defence in the main will require
23 to seek and obtain sanction from the Legal Aid Board to
24 pay for a defence expert and it may be that there simply
25 being fingerprint evidence would not be sufficient to

1 allow the instruction of that independent defence
2 expert. There may be requirement for additional
3 information such as a dispute within the SPSA regarding
4 the identification?

5 A. I'm not aware. I did volunteer on Friday and I'm still
6 happy to try and facilitate that level of information
7 for the Inquiry but I'm not personally aware of whether
8 there an actual difficulty there or not.

9 Q. The point I started out with, if you like, is that if
10 some sort of written record were kept in perhaps the
11 manner of the document that you have just been shown and
12 if that were to be something in a form that could be
13 disclosed to the defence, would you agree that that
14 could apply equally in summary cases so the Crown could
15 be sure that this information was disclosed to the
16 defence, not only in solemn cases but in summary cases,
17 without additional resource being required in terms of
18 precognition?

19 A. Yes, absolutely.

20 THE CHAIRMAN: What would happen if the solicitor for the
21 defence wrote a letter in a fingerprint case, for
22 example, to the Crown and said, "Can you inform me if
23 any expert within the authority that was conducting the
24 examination had disagreed with the finding that it was
25 the fingerprint of whoever it may be"? Surely then the

1 Crown would have to reply and say, "Yes, there is
2 someone" or, "No, no-one disagreed"?

3 I am thinking about that if you did that, then you
4 could then apply for Legal Aid perhaps because there had
5 been disagreement between experts but it wouldn't cost a
6 lot to the defence to write the letter?

7 A. No, certainly. I suppose it's something which could
8 trigger an enquiry by the Crown to the SPSA as an
9 organisation. It could equally trigger a request for
10 revised statements from SPSA on the matter.

11 THE CHAIRMAN: Well, it might trigger them to go and
12 precognosce the expert who disagreed.

13 A. Yes, it could do. I suppose equally though the defence
14 will have the original statements from the SPSA officers
15 and will have Legal Aid to -- I'm assuming it's been
16 granted at least to precognosce them and to ask them in
17 their precognition was there any dispute so that itself
18 would bring --

19 THE CHAIRMAN: I am simply trying to think of the simplest
20 method for the defence to discover, without having to go
21 to the extent of precognosing witnesses, to discover
22 was there somebody who disagreed and merely to write and
23 ask was there any expert in the SPSA who did not agree
24 with this finding. I mean, going on from that, I assume
25 that, as in the jurisdiction I'm familiar with, that

1 to my statement.

2 Q. It wasn't that there was another alternative committee
3 set up or that their role was delegated to somebody
4 else, it was just that they had run their course?

5 A. That's my understanding, although what happened at that
6 point was that the responsibility for policy on
7 fingerprint matters and the other matters that the
8 Committee was dealing with, because it wasn't confined
9 to fingerprints, transferred to a member of our Policy
10 Division and that person -- our Policy Division is
11 structured in a way that individuals have particular
12 portfolios, as I'm sure everyone would understand, and
13 my point is that work didn't stop and the policy
14 responsibility then transferred.

15 Q. You indicated when you gave evidence on Friday that the
16 reason for the two and a half year delay in the issuing
17 of the Circular was due to administrative error and that
18 it had not been possible to ascertain a definitive
19 answer for the delay. That was your position on Friday?

20 A. Yes, yes.

21 Q. I appreciate your position is that it's not helpful or
22 appropriate to speculate what went wrong with the
23 Circular, but what I would like to do is to set out the
24 background as it may be perceived from an outside
25 observer or the public, which is that after the

1 acquittal of Shirley McKie no independent expert was
2 engaged by the Crown in relation to establishing the
3 true identity of Y7 and the only investigation that was
4 carried out in the wake of the acquittal was a meeting
5 between the AD who prosecuted the case and certain
6 officials, including SCRO officers, and after that
7 meeting no further action was considered necessary.

8 It was not until the Frontline Scotland programme
9 that any action was taken. This point was put to
10 Lord Boyd when he gave evidence on 10th November. If I
11 could just refer you to an excerpt of his evidence,
12 which is at page 86, line 17 of the LiveNote.

13 Again, this was in questioning from Mr Smith. The
14 question was:

15 "We have seen some correspondence from Mr McKie
16 which appears to have resulted in a response saying, I
17 think, very shortly, 'Business as usual. We have looked
18 at this. We will carry on. These people will give
19 evidence', but the Frontline Scotland comes along and it
20 was then the catalyst, as I think you put it."

21 Lord Boyd answered:

22 "That's fair."

23 The question was then:

24 "Why would there be a greater reaction to Frontline
25 Scotland than concerns presented by Mr McKie?"

1 The answer was:

2 "Well, I think there are a number of reasons for
3 that. To be blunt, Mr McKie is one individual. He was
4 not unnaturally concerned about the prosecution of his
5 daughter and upset about the way in which she had been
6 dealt with. I mean, to be honest, it's not unusual for
7 Crown Office to get a complaint of that kind. I think
8 that it was at the point where I said publicly in a
9 lecture that I gave that I paid tribute to the media
10 when they went after cases where there had been either a
11 miscarriage of justice or some injustice and Frontline
12 Scotland was an example of that and I think it is right
13 to say that the work that they did brought together the
14 McKie strand and also I think it is fair to say that
15 Mr McKie's campaign highlighted publicly concern and a
16 greater public concern than just one individual."

17 It may be thought that that comment shows that it
18 was really only the media campaign which brought the
19 Frontline Scotland to bear that highlighted the wider
20 public interest in the identification or the fingerprint
21 procedures in place at that time.

22 Would you agree that that was a fair interpretation
23 of what was said?

24 A. I think it's certainly one interpretation of Lord Boyd's
25 comments but I would hesitate to interpret them. I'm

1 not sure that's for me.

2 Q. I think it may be, on reading that excerpt back, that
3 there may be a confusion between what was interesting to
4 the public and what was genuinely in the public
5 interest. I take it you would accept these are
6 different things?

7 A. Yes.

8 Q. In 2001, as I put to you earlier, the Gilchrist report
9 made it or -- whether it made clear or not but it
10 certainly contained the information that the view of
11 Mr Gilchrist was the prints had been mis-identified and
12 there were issues regarding differences of opinion
13 within SCRO. I think you agreed earlier that that point
14 wasn't flagged up at that stage and no action was taken
15 in the light of the Gilchrist report?

16 A. In relation to that particular point?

17 Q. Yes, in relation to that particular point but, again, I
18 will be corrected if I am wrong, but I understand that
19 no further action was taken in respect of Crown Office
20 after Mr Gilchrist's report was received?

21 A. I'm not sure about the statement no action at all was
22 taken but in the papers I have seen I think I can say I
23 can confirm the first part of the question, which is in
24 relation to the particular point about disputed
25 identifications, et cetera, that nothing was done at

1 that time in relation to issuing an instruction to
2 Fiscals, for example.

3 Q. Then after that you have explained that in 2006 a DVD
4 and leaflets were provided to COPFS regarding the
5 non-numeric standard but at that stage no system was put
6 in place to ensure that the information was given to
7 members of staff. While it may have been sent to
8 individual officers thereafter, to an extent, they were
9 left to get on with it and there was no central
10 procedure to make sure that this information was
11 disseminated.

12 A. The material was circulated by Crown Office to all
13 District Procurators Fiscal. That's what happened at
14 that time.

15 Q. Finally, against that background we have the non-numeric
16 standard being introduced in September 2006 and the
17 Circular being issued to staff in March 2009.

18 Would you appreciate that it may be thought that
19 this Inquiry was the catalyst for the issuing of that
20 Circular?

21 A. Yes, I could see why some would think that.

22 Q. Is that the case?

23 A. No.

24 Q. Why is it not the case?

25 A. Because it was a piece of work which was in train since

1 2006 when an advanced draft was available, as I said in
2 my earlier evidence. I think I said that my post was
3 created last year to support the Deputy Crown Agent and
4 when I took up post in August/September of last year
5 this was one of the pieces of work which was there to be
6 taken forward and, as part of me settling into the job,
7 there were a number of things which were immediately and
8 obviously required to be done and this was one of them.

9 Now, I think the Inquiry gives the particular focus
10 in relation to fingerprint evidence, that's certainly
11 true, but this was a piece of work which should have
12 been brought to a conclusion in 2006 and wasn't. It was
13 clear when I took up post in August '09 that that hadn't
14 taken place and we needed to push it on and get it out.

15 We were comforted by the fact of course that
16 materials have been provided to Fiscals in 2006 and also
17 comforted by the fact that fingerprint evidence is not
18 routinely challenged in the context of the Scottish
19 courts.

20 I suppose if I may and, again, please forgive
21 another longer answer from what your question perhaps
22 was seeking but it's not a case that nothing had been
23 done by the Crown in the context of fingerprint
24 evidence.

25 The Inquiry has heard that in 2000 and 2001 there

1 was a peer review system set up by SCRO and that I'm
2 sure, although I could be corrected if I'm wrong, that
3 the Lord Advocate of the day was instrumental in
4 requiring that to be done and that around 1,700
5 comparisons and analyses were peer reviewed and found
6 not to be wanting. Now, if I'm wrong about that I'm
7 happy to be corrected but that provides some level of
8 comfort to the Crown and to the system in general, I
9 would venture to say.

10 Again, I think, and please correct me if I am wrong,
11 that the Lord Advocate was instrumental in that.
12 Thereafter, there was a presumption in favour of
13 precognition of expert witnesses, although I have said
14 in my evidence that we accept that was not routinely or
15 not taking place as much as we would have felt it
16 appropriate. We have had to reemphasise that over the
17 last year.

18 So it wasn't the case that there was no guidance in
19 relation to precognition. There was guidance in
20 relation to precognition of experts within which
21 Fingerprint Officers would come in our estimation and,
22 again, we have a scenario where, according to our
23 records and, again, we could be wrong, there appears to
24 have been no challenge to an identification since this
25 particular case. So the overall context is important.

1 Q. I think we can agree that what you said earlier as was
2 critical to the process is a combination of adequate
3 disclosure by the agency, be it the police or SPSA,
4 coupled with precognition.

5 A. Yes.

6 Q. Earlier this morning.

7 A. Yes.

8 Q. I think it was accepted that in relation to the former
9 that, at the moment, sufficient relevant information is
10 not being provided by SPSA and that's a process of work
11 that the Crown Office is going to develop in conjunction
12 with Mr Nelson in order to ensure that full information
13 is provided?

14 A. Yes.

15 Q. We know that up until at least March this year
16 precognition of Fingerprint Officers was not instructed
17 and we have no way of knowing whether it was happening.

18 A. It wasn't a mandatory instruction. I think if you look
19 at -- I refer back to my answers in relation to
20 precognition of experts generally. There was and I
21 think there has been for some years an understanding, a
22 presumption in favour of precognition of experts,
23 although I accept that that hadn't always been happening
24 in relation to expert witnesses generally but there
25 wasn't a complete absence of guidance in relation to

1 that.

2 Q. Quite simply, for the two and a half years between the
3 introduction of the non-numeric standard and the issuing
4 of the Circular there is no way of knowing what impact
5 that may have had on the prosecution of cases and, in
6 particular, on the ability of the defence or the
7 disclosure of information to the defence within that
8 period. That is information that can never be
9 available?

10 A. I'm not sure it could never be available but it would be
11 a very significant task to retrieve and would I think
12 require SPSA and the Crown to do a significant, what
13 would, in essence, be a research exercise, looking at
14 all High Court, Sheriff and jury and possibly summary
15 cases over that period.

16 I did refer in my earlier evidence to the fact that,
17 come what may, where expert evidence is contentious or
18 crucial to sufficiency or crucial to the quality of the
19 final Crown case that we would expect precognition to
20 take place in those circumstances and I know from my own
21 experience -- and this is back in 1996/97 before any
22 issue had arisen -- that I precognosced at least three
23 High Court cases, two murders and one drugs case, where
24 I precognosced both Fingerprint Officers just precisely
25 because of those reasons. The fingerprint evidence was

1 really important. It wasn't essential to sufficiency in
2 those cases but it was really important and that's good
3 practice and we would expect that of prosecutors and
4 precognoscers as a generality.

5 I think that probably sits well with what the
6 existing guidance was before the Circular, which is the
7 presumption in favour of precognition of experts
8 generally. I don't think -- I doubt that I am unique as
9 a Procurator Fiscal Depute in Hamilton in 1996 and '97,
10 in the country, precognosing Fingerprint Officers when
11 the evidence was important. I doubt I was unique in
12 that, but I do see that it was in a case where it was
13 important, crucial to the Crown case, but I should
14 probably also say there was no indication in those cases
15 that it was contentious in the context of the actual
16 identification of the individual.

17 Q. While I do not doubt that your own diligent approach to
18 the precognition process, it was essentially down to you
19 as an individual to choose to precognosce those
20 Fingerprint Officers and what the Inquiry may be
21 interested in is the systems in place --

22 A. Sure, yes, I understand that.

23 Q. -- to ensure a consistent approach throughout the
24 service.

25 A. But, again, I would come back on that slightly, if I

1 may, and say that there was general guidance in place in
2 relation to precognition of expert witnesses generally,
3 a presumption in favour of that, and that to precognosce
4 experts where evidence was important to the Crown case,
5 where it was contentious, in that kind of scenario is
6 completely consistent with good practice both in
7 relation to the allocation of precognition work by
8 Solemn Legal Managers over the years and by
9 precognoscers themselves.

10 Q. You mentioned, I wouldn't put it as highly as a
11 possibility but to obtain information I asked about,
12 which was the impact on the prosecution of cases between
13 the introduction of the non-numeric system and the
14 Circular being issued this year, there would have to be
15 an audit, a fairly extensive piece of work carried out
16 in terms of establishing what had happened in individual
17 cases.

18 Would I be correct in saying that if such a piece of
19 work were to be carried out and if it were to transpire
20 that there had been a disagreement between Fingerprint
21 Officers which had not been disclosed because there had
22 been no precognition, would I be correct in thinking
23 that is information that would now be passed to the
24 defence in a case that has already led to fruition?

25 A. The Crown's duty of disclosure is a continuing one that

1 flows through to the conclusion of trial and to the
2 conclusion of an appeal. So if the Crown, speaking in
3 the generality, came into possession of information now
4 in relation to a concluded case, which was material in
5 terms of potentially undermining the conviction, then
6 that would have to be considered for disclosure, yes.

7 Q. Who would make the decision as to whether it was
8 material or not?

9 A. Well, that's something that's for the prosecutor to do.
10 It's the prosecutor's duty to consider that. In
11 relation to within our organisation who would make that
12 decision, it would depend on the nature of the case, I
13 think, and the nature of the material which was
14 uncovered. I'm sorry, I'm hesitant to speculate too
15 much.

16 In relation to your question and the impact of that,
17 again I'm not sure that we could conduct an exercise
18 which would determine the impact or the potential impact
19 of what you're suggesting. It would be extremely,
20 extremely difficult to do an exercise such as the one
21 that I have suggested but all I suppose it could do in
22 the first instance would be to determine whether
23 witnesses should have been precognosced, identify were
24 they or were they not and for SPSA to contemporaneously
25 do a review which would look at, in those particular

1 cases, was there dispute between experts and of what
2 nature was it.

3 Q. Can I just clarify a point, something you have just
4 said, that the information would only be passed to the
5 defence if it was considered by the prosecutor to be
6 material. Is that --

7 A. I'm speaking generally in relation to the Crown's
8 continuing duty of disclosure when I'm speaking at the
9 moment and in that answer that's what I was setting out.
10 If the Crown came into possession of information which
11 was considered to be material in the sense that it
12 undermined the Crown case, supported the defence, was
13 exculpatory then that information would be disclosed to
14 the defence as part of that ongoing duty.

15 Q. Just bear with me for a second.

16 A. Not at all. **(Pause)**

17 Q. In relation to your position that the failure to issue
18 the Circular in a finalised form until March of this
19 year, that that was due to administrative error, can I
20 ask you does it cause you concern that it's possible for
21 there to be an administrative error in relation to the
22 dissemination of a policy of this importance?

23 A. I think it's concerning that the Circular was not issued
24 in 2006. I think that would have been our preferred
25 position. It's a matter of regret that it wasn't issued

1 at that time.

2 I should say that it's very unusual for there to be
3 a delay in relation to the issuing of policy guidance
4 like that policy guidance, but I do qualify it by
5 indicating that the guidance which was in place already
6 in relation to expert witnesses was to the effect that
7 there is a presumption of precognition.

8 Q. Have any steps been taken to ensure that such an
9 administrative error cannot happen in the future?

10 A. I think we feel pretty confident, generally, in relation
11 to our systems for policy review and dissemination of
12 guidance. I'm pausing to think if there is anything
13 more that we could do in relation to that.

14 Q. Is the answer then no, that no change has been made?

15 A. Yes.

16 Q. Given the background that I've highlighted of action or
17 reaction over the years since Shirley McKie's acquittal,
18 would you not accept that the perception may be quite
19 simply that the issue of fingerprint evidence was not
20 treated with sufficient gravity within COPFS?

21 A. No, I don't think so. I can see why others might take
22 that view. I think one has to bear in mind the overall
23 context that I've referred to in earlier answers and I
24 won't repeat them, the steps that were taken at the time
25 to check the SCRO analysis, the guidance which was in

1 existence, the understanding that we would have that
2 fingerprint evidence, where important or essential or
3 challenged would be precognosced. I can understand why
4 others would take a different view but I don't think
5 it's as simple as that.

6 Q. Would you accept that over the intervening ten years, as
7 an institution, COPFS has failed to take proactive and
8 robust measures to ensure there's public confidence in
9 the treatment of fingerprint evidence?

10 A. No.

11 Q. Can you explain why not?

12 A. I think I would have to refer to earlier answers in
13 relation to that.

14 THE CHAIRMAN: I don't think we can really go over all the
15 steps that have been taken again.

16 MISS GALBRAITH: Thank you very much, Mr Pattison.

17 THE CHAIRMAN: Now, Mr Holmes?

18 MR HOLMES: Sir, there is one brief matter I would like to
19 cover as a result of my learned friend,
20 Miss Galbraith's, questions and it relates to
21 disclosure.

22 THE CHAIRMAN: Yes.

23 **Cross-examined by MR HOLMES**

24 Q. Mr Pattison, you were asked about the situation where
25 there is a dispute between experts or a difference of

1 opinion between experts and this was done by reference
2 to the Gilchrist report.

3 Does the reference to the Gilchrist report that was
4 made not make it clear that there was no difference of
5 opinion as to identity between the officers who are
6 named in that report.

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

8 Q. So the SCRO officers, along with I think Sergeant
9 Halliday who is also named in the report who was a
10 police officer but also a Fingerprint Expert, it's
11 accepted that they all identified Y7 as having been made
12 by the left thumb of Shirley McKie. Is that correct?

13 A. I'm sure that's right from my memory of the report yes.

14 Q. Albeit they would have identified using a differing
15 number of characteristics?

16 A. Yes.

17 Q. Under the non-numeric system now in place you would not
18 necessarily be informed of that, would you?

19 A. Not necessarily, no.

20 Q. Without the encouragement that is said to have been
21 provided by disclosure, both defence teams in the Asbury
22 case and in the McKie case instructed defence experts
23 who did review the fingerprint evidence and in the case
24 of Mr Graham for Mr Asbury and Mr Swann for Ms McKie
25 both those experts confirmed the findings of the SCRO.

1 Is that something of which you are aware?

2 A. I am not specifically aware of that. I probably should
3 be but I don't have that -- on some matters of detail in
4 relation to the original prosecutions I'm unclear but
5 I'm happy to accept that that's the position.

6 MR HOLMES: Thank you, Mr Pattison.

7 THE CHAIRMAN: Miss Grahame?

8 MISS GRAHAME: Thank you, sir. There are a number of
9 matters that I do wish to raise. They have arisen as a
10 result of questions and answers over the course of
11 Mr Pattison's evidence.

12 THE CHAIRMAN: Yes.

13 MISS GRAHAME: I am happy to give a list.

14 THE CHAIRMAN: Perhaps you should just give me the headings
15 that you want to cover.

16 MISS GRAHAME: There's a matter in relation to whether
17 there's any conflict at all between Mr Pattison's
18 evidence and an answer given by Lord Boyd in his
19 evidence to the Inquiry.

20 THE CHAIRMAN: Yes.

21 MISS GRAHAME: There's an issue regarding disclosure of a
22 print. An example has been used during the course of
23 the Inquiry of a print to be found on a murder weapon
24 and I would like to clarify with Mr Pattison where that
25 information would be made available to the Crown.

1 One small matter regarding precognition.

2 Mr Pattison has given evidence regarding that being
3 disclosed to the defence by way of letter but I would
4 like to draw out the fact that it is given to the
5 defence in other ways as well depending on those
6 circumstances.

7 THE CHAIRMAN: Yes. That is the issue I raised about the
8 letter. Is that the point you are making?

9 MISS GRAHAME: No, it is a slightly different point.

10 THE CHAIRMAN: All right.

11 MISS GRAHAME: The issue regarding the training and
12 awareness of SPSA regarding disclosure and the Crown
13 precognition and I'd like to draw out some miscellaneous
14 issues regarding the aide-memoire, the anticipation of
15 Crown Office in the future, if the training in SPSA
16 improves and the defence position and a couple of minor
17 matters that arise as a result of --

18 THE CHAIRMAN: Well, if they are minor matters you needn't
19 go into those. You can deal with those as you go along.

20 **Cross-examined by MISS GRAHAME**

21 Q. Mr Pattison, can I ask you just one very minor question
22 to begin with. You said in an answer to Miss Galbraith,
23 just at the end of your evidence there, that you took up
24 post in August 2009. Did you mean 2008?

25 A. Yes, I did. Thank you.

1 Q. I would like to ask you a question about Lord Boyd's
2 evidence. He gave evidence to the Inquiry on
3 20th November. He was asked a question and it may be
4 quicker if I just simply read the question and his
5 answer to you. What I am going to ask you is whether
6 you consider there to be any conflict between his
7 evidence and your evidence. He was asked:

8 "One thing I would like to ask just again, I started
9 by asking you about the function of Law Officers in
10 relation to prosecution. It might be thought that since
11 this is a matter of expert evidence that the content of
12 the evidence and, indeed, the standards to which the
13 evidence is addressed are a matter for the witness or a
14 matter for the witness's discipline. Why would you have
15 any involvement in relation to this particular matter as
16 Law Officer? Perhaps more generally, why would the
17 Crown Office have any involvement in this?"

18 His answer was:

19 "I think there might be two answers to that. The
20 first is that in Scotland the Lord Advocate's role goes
21 beyond the simple prosecution and has a role in
22 directing the investigation of crime and often that is
23 done through the issuing of guidelines to the police.
24 But I suppose more generally it is important that the
25 Crown are satisfied that if the evidence is presented in

1 such a way that it will be accepted by the court. So
2 these, I think, are the two reasons that I would suggest
3 there was a role for the Lord Advocate."

4 So, Mr Pattison, do you consider that answer from
5 Lord Boyd conflicts with anything that you have given in
6 your evidence?

7 A. I don't think so at all. I think I was keen to say in
8 my evidence that I didn't think it was a matter for the
9 Crown to say what the standards should be or determine
10 what the standards should be because of our lack of
11 expertise and indicated that, of course, if there was a
12 shift to a new standard that we would expect to be
13 consulted and assured by those who had expertise that
14 this shift, this change, was correct, was consistent
15 with their views and what was appropriate and with
16 developments in that field of expertise in other
17 jurisdictions and also that if there came to be an
18 objective basis for doubting the standard, perhaps
19 because of another leading expert taking a different
20 view, then in that kind of scenario we would expect to
21 at least be prompting our own experts, if you like, to
22 be doing review work and expect to receive assurances
23 and to be part of that, or at least consulted about it.
24 But I still say it's not for the Crown to say what the
25 standard should be.

1 I don't think Lord Boyd was saying that either, on
2 my hearing and my reading of the evidence. I think that
3 the two do sit together.

4 Q. I would like to ask you some questions about disclosure
5 in relation to when a print is found on a murder weapon.
6 There has been a number of examples used during the
7 course of the Inquiry.

8 Can I ask you to confirm, first of all, in relation
9 to information which is in the joint report, is it
10 correct that positive identifications relating to the
11 accused are contained within that report?

12 A. Yes.

13 Q. In relation to the annex, what is contained in that?

14 A. Any other prints which were found and where
15 identifications have not been finalised or made.

16 Q. If there was a print found on a murder weapon which has
17 not been linked say, for example, to the accused, would
18 that fact, that a print had been found on a murder
19 weapon, be within the annex?

20 A. Yes.

21 Q. And the annex is something that is automatically
22 disclosed to the defence, is it not, subject to
23 appropriate redactions?

24 A. Yes.

25 Q. So would it be fair to say that through the annex, the

1 defence would always be made aware if a print of unknown
2 origin had been found on a murder weapon?

3 A. That should be the case, yes.

4 Q. If the Crown were aware that there was a print of an
5 unknown origin on a murder weapon which has not been
6 positively identified as the accused's, so it's not in
7 the report but it's in the annex, is that something that
8 would be of interest to the Crown and, if so, could you
9 explain why?

10 A. Yes, absolutely. The Crown has to present the
11 prosecution case to the court. It has to be satisfied
12 that the right person is being prosecuted and also has
13 to prove that the accused is the perpetrator beyond a
14 reasonable doubt and that means that the Crown would
15 have to present the case -- well, firstly, it would have
16 to do whatever work could be done to identify that mark,
17 if the experts, at the end of the day, after everything
18 which could be done had been done were saying, well, it
19 simply can't be identified, the Crown would still have
20 to present the case and each conviction beyond a
21 reasonable doubt which would mean dealing with that
22 particular mark. So it's highly relevant to the way the
23 Crown would present the case and, obviously, highly
24 relevant to disclosure to the defence in the interests
25 of all relevant information coming out.

1 Q. If, for example, there was an incriminee and the defence
2 had lodged a notice of incrimination, for example, is
3 that something, again, that would be open to the defence
4 to explore with the relevant expert?

5 A. Yes, yes, of course. It's not unknown for the Crown to
6 commission that type of work as well though in relation
7 to trying to rule out or rule in the incriminee being
8 the owner of the particular print or DNA or whatever.

9 Q. Is that because of the onus which is on the Crown in
10 relation to incriminees?

11 A. Yes.

12 Q. Could you explain what that is?

13 A. Well, I guess it's part of excluding the special defence
14 of incrimination to the appropriate standard. That's
15 for the Crown to do in the interests of a proper
16 prosecution and a safe conviction.

17 Q. Just to be clear, if there is an incriminee mentioned as
18 part of the defence case, it's not for the defence to
19 prove that the incriminee did it, the onus is on the
20 Crown to prove beyond reasonable doubt that the
21 incriminee did not do it?

22 A. Yes, that's right. It's for the Crown to exclude the
23 incriminee on the evidence.

24 Q. You mentioned in your evidence that the Crown have a
25 continuing duty of disclosure to the defence and they

1 would intimate material issues by way of letter.

2 Is it also the case, Mr Pattison, that, for example,
3 if the matter is urgent, say there's an appeal pending,
4 that they will not simply stand on ceremony but they
5 will provide that information to the defence by other
6 means?

7 A. Yes, yes, absolutely. The Advocate Depute could convey
8 it to defence counsel orally and would it would be open
9 to us to confirm that in writing as soon as we possibly
10 could. We have also in the past provided a summary of
11 the relevant evidence in a summary document, for
12 example, a summary of the relevant precognition and the
13 salient features of that which were material for the
14 purpose of the defence's position. I think that's what
15 took place in the Holland and Sinclair case actually.
16 So certainly my own experience perhaps where matters
17 have been less urgent has been to convey the issues, the
18 information, in a letter to the defence solicitor but
19 equally, as you suggest, the information could be
20 conveyed to counsel orally or via a summary of the
21 precognition.

22 Q. It was suggested to you at one point during the course
23 of cross-examination today that it was down to
24 individual precognoscers, prior to March when the
25 Circular was issued, to decide whether to precognosce an

1 expert. You made the point about guidance prior to
2 March being a presumption in favour of precognition,
3 whereas now it's mandatory.

4 Can I ask you to just give a little bit more detail
5 about the way in which precognoscers are instructed to
6 prepare a precognition. Is it not the case that Solemn
7 Legal Managers also have a role?

8 A. Yes, I could perhaps have highlighted that earlier, that
9 High Court and Sheriff and Jury cases, any case which is
10 to be precognosced, as we put it, are allocated by
11 Solemn Legal Managers who are experienced lawyers and
12 experienced in solemn work and precognition work
13 themselves. They assess the case and what is necessary
14 in terms of further investigation and they allocate the
15 cases to precognoscers within their teams using an
16 allocation note, which is a template form that we use
17 but which they expand upon and adjust for the purpose of
18 the specific case that they are dealing with, so that
19 the first assessment really is by the Solemn Legal
20 Manager as to whether particular witnesses require to be
21 precognosced and for what purpose. That would include
22 an assessment of expert witnesses in the case, do they
23 require to be precognosced and for what purpose. Again,
24 I would expect that if it was known, likely, obvious
25 that the expert evidence was crucial to the case,

1 important to the quality or contentious or likely to
2 be ... that there would be an instruction to
3 precognosce.

4 Q. That is something that would be check by the Solemn
5 Legal Manager who would co-sign the precognition before
6 it goes to Crown Office?

7 A. That's right, whether the allocation note has been
8 complied with, et cetera.

9 Q. You have been asked a number of questions in relation to
10 the issue which has arisen regarding the, perhaps, lack
11 of disclosure from SPSA about certain material
12 information and the precognition of Fingerprint Experts
13 and how those could perhaps better work together to fill
14 any gaps between the two.

15 Could I ask you to look, please, first of all, at
16 the aide-memoire, again CO4437. I wonder if we could
17 turn to the final page, please.

18 You were asked a number of questions regarding there
19 being no reference to disclosure to the defence. I
20 wonder if you could just take a moment to read the
21 section headed, "Other matters".

22 A. Yes, I see that.

23 Q. Does that help you in perhaps giving further detail
24 regarding disclosure?

25 A. It does. There's obviously in that particular document

1 the statement in brackets at the very end which is
2 indicating to the precognoscer that there should be a
3 specific consideration as to whether anything raised in
4 the precognition process is disclosable and should be
5 disclosed. Apologies for forgetting that earlier.

6 I think on disclosure generally, I'm just so
7 conscious that since 2005 there's been a vast amount of
8 guidance and training provided to lawyers and
9 precognoscers, not just nationally provided, in which we
10 have colleagues come into our Prosecution College to be
11 trained but also specific local briefing session by
12 District Fiscals to all those -- and I mean all staff
13 within the office, not just lawyers and precognoscers,
14 on the Crown's duty of disclosure and the fact that
15 relates to all material information, that is what suits
16 the prosecutor and which is exculpatory and also the
17 fact that that duty of disclosure pertains throughout
18 and beyond the life of the case.

19 So, as I say, I feel pretty confident that COPFS
20 employees and colleagues are aware of our duties of
21 disclosure and it is obviously helpful that in the
22 particular document there is reference to it also.

23 Q. Perhaps it is fair to say we shouldn't see this document
24 in isolation?

25 A. No, not at all -- not at all.

1 Q. You mentioned in your evidence on Friday that
2 potentially in the future the Crown will be reviewing
3 whether precognition is the most appropriate use of
4 resources as a mandatory requirement in every case, with
5 every expert.

6 Is it anticipated that if the level of training and
7 understanding in SPSA as to the duty of disclosure is
8 improved and perhaps there is much more recognition that
9 that information should be contained in either the
10 statement or the joint report that there would be less
11 need for the Crown to rely on precognition as a
12 safeguard?

13 A. I think that's a possibility and I should say that
14 although -- my comments on Friday were very much in the
15 general context. We always need to review whether what
16 we are doing in terms of our precognition role is truly
17 adding value to the prosecution case and we don't have a
18 formal review of this particular instruction planned at
19 the moment but it would not be -- it wouldn't be right
20 for an organisation like ourselves to say we're never
21 going to review this instruction. It's always right to
22 assess whether it is right in the context of ongoing
23 developments and remains right for the time that we're
24 working in.

25 Q. But at the moment, as things presently stand, the

1 information available to the Crown comes from the joint
2 report to the annex, the witness statement and
3 precognition?

4 A. Yes, that's right.

5 Q. That is the basis on which decisions are taken and
6 disclosures made?

7 A. That's correct.

8 Q. Can I ask you briefly about the Criminal Justice Bill.

9 Is it correct to say that that will introduce new
10 procedures regarding disclosure of the defence line to
11 the Crown?

12 A. That's correct and I think that particular Bill is at
13 stage 1 before the Scottish Parliament with a view to
14 potential commencement next summer. I'm not totally
15 informed as to the detail of how it will work out in
16 practice but the thrust is for earlier disclosure to the
17 Crown by the defence of what the defence line generally
18 is, which will of course inform the work that
19 prosecutors are doing and inform the precognition
20 process and perhaps allow it to be even more targeted
21 and informed, I suppose, in a general sense.

22 Q. You have also been asked about information regarding
23 disputes of identification not being disclosed to the
24 Crown and how that could possibly be provided to the
25 defence.

1 Can I ask you, you have given a number of details of
2 the statistics of how often fingerprint evidence is
3 dealt with in the courts and it would appear that since
4 the McKie case you have already said there haven't been
5 any cases, as far as you are aware, of disputed
6 identifications.

7 Can you see any reason why, if the defence perhaps
8 admit the crime and decide to plead or don't wish to
9 take issue with fingerprints or where they admit the
10 accused's prints were at the **locus** but have an innocent
11 explanation, that there would really be any need for
12 further detailed information from the Fingerprint Expert
13 to be required?

14 A. If you know all of that and it's been freely provided at
15 an early stage, then it's difficult to see what could
16 usefully be required of them in that context, yes, or
17 what more could usefully be added.

18 Q. You were asked questions about Mr Gilchrist's, Sheriff
19 Gilchrist's, report in 2001 and the information that at
20 that point became regarding Mr Geddes's involvement and
21 the blind test which had been carried out.

22 You were asked about the Crown not being told at the
23 time or prior to the McKie trial about the involvement
24 of Mr Geddes and the blind test. Part of your answer
25 was it doesn't mean it didn't happen and I want to ask

1 you something about that.

2 Where no-one has suggested in evidence to this

3 Inquiry that the Crown was told prior to the McKie trial

4 about Mr Geddes or the blind test, by giving that answer

5 you're not suggesting that the Crown knew?

6 A. No, I'm not. Sorry, if it came across that way.

7 Q. I just wanted to clear that up just in case there was

8 any question about it later.

9 A. Thank you for that.

10 Q. You have also been asked a number of questions about

11 there not being precognition in summary cases. Just in

12 case there's any doubt, would you say it was or was not

13 the norm for experts to be given evidence in summary

14 cases?

15 A. It's unusual.

16 Q. Finally, in relation to the DVD and the leaflet which

17 were disseminated, you indicated in evidence they went

18 to the District Fiscals from Crown Office.

19 Was that the role that you were in at the time?

20 A. I was a District Fiscal at the time, yes.

21 Q. You have told us what you did and you spoke about you

22 passing that on to Solemn Legal Managers. Again, could

23 you explain to us what you would anticipate them doing

24 with the material District Fiscals sent to them.

25 A. I would have anticipated them briefing their teams on it

1 and making the DVD available to members of their team,
2 at the very least in cases where they were dealing with
3 fingerprint evidence.

4 MISS GRAHAME: Thank you very much. I have no further
5 questions.

6 THE CHAIRMAN: Have you any questions?

7 MISS CARMICHAEL: Just one, please, sir. It is in relation
8 to the form from Holland.

9 **Re-examined by MISS CARMICHAEL**

10 Q. Mr Pattison, Miss Galbraith showed you a form, DB0768,
11 we will put it up, again, I think because that would
12 have been the first time you had seen it.

13 A. Certainly.

14 Q. I should say the Inquiry's understanding about the
15 precise use of this is still being clarified to some
16 extent but if I can let you know a little bit more about
17 the further information that has become available to us
18 and then ask you some questions leading on from that.

19 What we think we know at this stage, Mr Pattison, is
20 that this is not a form that is used in the case of
21 every fingerprint examination and where there was a
22 straightforward case that provided examiners with no
23 difficulty, it wouldn't be used, however, it might be
24 used where an examiner or a verifying expert thought a
25 mark of borderline quality for comparison or where an

1 examiner found anything questionable in the course of
2 the examination and also where examiners had differed in
3 their conclusions.

4 With that background in mind, might it be that if
5 one had a procedure of that sort where a form of this
6 was brought into use in those slightly more complex
7 situations, the very existence of form might be
8 something that would alert both Crown and defence to the
9 potential for further investigation or precognition?

10 A. Yes, I think I can see the value in that as a system
11 which flags the issue up and takes it away from the
12 routine.

13 MISS CARMICHAEL: Thank you, Mr Pattison.

14 THE CHAIRMAN: There is very little I wanted to ask you but,
15 just from your general experience, I take it that it
16 would be unusual for the Crown to seek a further opinion
17 from another expert?

18 A. Yes, it would be the general -- it would be very unusual
19 actually. It's not infrequent and not unusual for there
20 to be a Crown expert, a defence expert and for matters
21 to be there at large in the case for the jury to reach a
22 view on.

23 THE CHAIRMAN: I mean, I can see it, for example, has
24 happened indeed in the McKie case where there was a
25 question as to whether the fingerprint had been planted

1 and that was outwith the expertise of the Scottish
2 Criminal Record Office experts and so was given to an
3 expert, Mr Kent, outside but generally speaking, from
4 what you have just said, if your own -- if I say your
5 own -- it's now SPSA, if they say their experts are
6 confident about a particular thing you would have no
7 cause to go outside?

8 A. No, no, I don't think so. There would have to be a
9 basis for doubting --

10 THE CHAIRMAN: Yes.

11 A. -- from wherever that came.

12 THE CHAIRMAN: That is what I was wondering. Would it be
13 another reason for you to know whether there has been
14 some difference of opinion among the experts would be an
15 advantage because you could then see, particularly if
16 you heard an outside expert for the defence was going to
17 be called and you knew that there was some division of
18 opinion, however minor, in the SPSA experts' view of it
19 then that would alert you, perhaps, to finding an expert
20 outside to confirm, if necessary, the evidence
21 depending, I imagine, on the circumstances of the case.
22 If it's critical evidence to the case, that's one
23 position. If it's merely some supportive evidence, that
24 might be another.

25 A. Yes, I can see that and would tend to agree with that.

1 The first thing to do of course would be to assess the
2 SPSA evidence account during the precognition process
3 and allow that process to inform whether we take the
4 unusual step of seeking a further expert opinion from
5 outwith that organisation.

6 THE CHAIRMAN: This Bill that you mentioned that is before
7 the Scottish Parliament, it would be an advantage to the
8 prosecution, in the sense of the proper administration
9 of justice, to know if there is an expert on the defence
10 side who disputes what is being said by the experts that
11 you have, in whatever field --

12 A. Yes.

13 THE CHAIRMAN: -- that you are going to call?

14 A. Absolutely. From a prosecutor's perspective that is a
15 very welcome provision and I think a healthy one for the
16 system as a whole in Scotland, although, as I said on
17 Friday, I think there is a rule on the statute which
18 requires the defence to list their witnesses and
19 productions seven days before the preliminary hearing.
20 So there is a system there already so that we know which
21 witnesses are going to be called by the defence. Then
22 it's a matter for the Crown to precognosce those experts
23 and conduct that element of the investigation. But
24 early notice of the defence line and earlier notice of
25 defence experts and specifically what they are perhaps

1 likely to say and the line they are likely to take would
2 be very helpful in crystallising the issues for the
3 trial at a very early stage.

4 THE CHAIRMAN: Just on a slightly different topic, I am not
5 quite sure how the funding works but does the Crown
6 Office, as it were, have to pay fees for the work that's
7 done by, say, the SCRO or its modern equivalent, the
8 SPSA?

9 A. Not routinely, not routinely, as I understand it. I
10 have to say this is not my precise field either but ...

11 THE CHAIRMAN: The reason I was asking you really is
12 twofold: one is the more administrative work, more
13 paperwork that experts have to do, the more time they
14 take up and, therefore, there is somewhere a charge has
15 got to be met for that but a second point is that the
16 Crown also has an interest in expert evidence being
17 produced as quickly as a proper examination permits
18 because you have time limits to meet and so on.

19 Therefore, it's another factor in deciding how much
20 paperwork and administration should be introduced if
21 it's going to have a knock-on effect in taking more time
22 and, therefore, delaying possibly the progress of
23 a prosecution.

24 A. Yes. My understanding is that we do not routinely
25 transfer funds to SPSA for casework and that their

1 funding comes from the Scottish Government, ultimately,
2 in the same way as our own budgetary settlement would
3 come. I'm hesitant really to go beyond that because I
4 would be speculating. I'm sure Mr Nelson would be happy
5 to clarify.

6 THE CHAIRMAN: No, I don't want you to at all. It is just
7 in this modern world, departments charge each other and
8 things that didn't happen in the past and I was just
9 curious to know whether, in fact, it would add to the
10 immediate expenses of the prosecution but the short
11 answer is the cost has got to fall somewhere on the
12 public wherever it be.

13 A. Yes.

14 THE CHAIRMAN: Thank you very much and I am sorry your
15 evidence had to be interrupted.

16 A. Not at all.

17 MISS GRAHAME: Mr Chairman, sorry, there's one matter that
18 arises and it may assist the Inquiry if I raise it with
19 Mr Pattison, just out of the questions that were asked
20 there.

21 THE CHAIRMAN: Yes.

22 **Further cross-examined by MISS GRAHAME**

23 Q. It relates to the Criminal Justice Bill and the new
24 proposals regarding intimation of the defence line.

25 You gave an answer which indicated that at the

1 moment the defence have to intimate names of experts, if
2 they intend to use them at trial, and lodge productions
3 within seven days.

4 Is it correct, Mr Pattison, that -- I am reading
5 this -- the new Bill will introduce or intends to
6 introduce a provision that any expert who is instructed
7 by the accused with a view to preparing a report,
8 whether they intend to rely on that report later or not
9 at the trial, their name and address would have to be
10 intimated to the Crown?

11 A. That's my understanding, yes.

12 Q. So in a situation like the McKie trial where Mr Swann
13 had been instructed to prepare a report, if that was to
14 happen now the defence would have to intimate his name
15 and address to the Crown?

16 A. Yes, that's right.

17 MISS GRAHAME: Thank you very much.

18 THE CHAIRMAN: Thank you very much.

19 **(The witness withdrew)**

20 MR MOYNIHAN: Sir, there is no further witness for today.

21 In any event, Mr Chamberlain, who is England, the
22 arrangement was that he would come tomorrow.

23 The only other matter that I flagged up yesterday
24 that I could conveniently deal with -- and it will not
25 take more than the 5 minutes available -- is just simply

1 to record, as a matter of housekeeping, a number of
2 witnesses from whom we have secured statements and it is
3 not proposed to lead in evidence but their statements
4 will be made available on the web, with two exceptions.
5 These are individuals who were mentioned in a letter to
6 Core Participants dated, I believe, 6th November.

7 If I proceed through it the witnesses are, firstly,
8 David Halliday who has been mentioned today; Ewan Innes;
9 John McGregor; and William O'Neill.

10 Gary Dempster has been mentioned and a statement has
11 been obtained from him. It covers a number of matters,
12 only one of which is of direct relevance to the
13 evidence, so far as my interest is concerned and,
14 therefore, what I would be putting up on the website
15 would be an edited version of Mr Dempster's statement
16 restricted to the matters that are germane to the Terms
17 of Reference.

18 Beyond those witnesses we also have a number of
19 other witnesses from whom statements have been secured:
20 Raymond Brown; Lynn McNally (who was formerly Lynn
21 Nicol), a police officer; Collette Orr; and from the
22 Scottish Government relating to the question of
23 authorisation a civil servant, I believe, called
24 Christie Smith.

25 Since the hearing in June and July, sir, we have had

1 further information from Crown Office which has been
2 made available to Core Participants for some time and
3 there's been no adverse comment.

4 We have secured a further statement from Denise
5 Greaves who, of course, gave oral evidence.

6 We also have recovered from Crown Office a further
7 contemporaneous note by Sheriff Murphy relating to the
8 McKie trial. That note has been put on the database.
9 It is CO4416. We also entered into correspondence with
10 Sheriff Murphy just to make sure that that note did not
11 alter the evidence he gave to the Inquiry and that
12 correspondence with Sheriff Murphy will be put on the
13 website. It's not proposed to recall either Sheriff
14 Murphy or Mrs Greaves to speak to the matters that I
15 have just referred to.

16 Beyond that, sir, we have secured a statement, at
17 his own request, from an individual called David
18 Fairhurst who was mentioned in evidence by Martin
19 Leadbetter. We have also this week secured a statement
20 from Donald Findlay QC and that will be made available
21 on the website. It is not intended to call David
22 Fairhurst or Donald Findlay to give evidence.

23 There are three other witnesses I should mention who
24 have already given evidence: Allan Bayle who you may
25 recall, sir, gave evidence and his evidence was

1 incomplete at a point where he was, on my advice, going
2 to seek legal advice if a certain question was being
3 pursued with him. Turcan Connell -- it was my learned
4 friend, Mr Holmes, who was asking the question at the
5 time and, in consultation, there is no longer seen to be
6 a need to pursue that line of question and, therefore,
7 Mr Bayle is not being recalled to complete his evidence.
8 So Mr Bayle's evidence is now complete.

9 Plainly, sir, we have still to conclude arrangements
10 to complete the evidence of Mr Wertheim and discussions
11 in relation to that are proceeding.

12 The third witness is Mr Swann and you may recollect
13 at one point there was a mention made in the public
14 hearing of an e-mail that had been received by
15 Mr Russell concerning an inconsistency that there was in
16 Mr Swann's evidence and seeking to clarify that
17 inconsistency. We are still in correspondence with
18 Mr Russell to have that matter resolved and I will
19 report back as soon as I can.

20 That, sir, would otherwise complete the information
21 that I have and updates us. That then means, on that
22 basis, subject to the uncertainty relating to Mr Swann
23 who may or may not be recalled to address the
24 inconsistency and resolving the matter concerning
25 Mr Wertheim, there are now three witnesses left.

1 Mr Chamberlain will give evidence tomorrow and he is
2 from the Forensic Science Services in England and will
3 be speaking to fingerprint practice in his organisation
4 and will touch on the question of probability analysis.

5 We will then have Mr Pugh on Tuesday of next week
6 and he is the Director of Forensic Services in the
7 Metropolitan Police. He has provided a report that is
8 available. Because he is the general manager, albeit a
9 senior scientist, he is not a Fingerprint Expert, he
10 will bring with him two colleagues who could answer more
11 directly any practical questions, though he will be the
12 principal witness. He is available for Tuesday of next
13 week. Sir, with apologies to all concerned, he and his
14 team are only available on Tuesday, the suggestion would
15 be that we sit at 9.30 on Tuesday morning just to ensure
16 we finish his evidence.

17 The final witness will then be on Wednesday of next
18 week and will be Professor Champod. Again, nearer the
19 time we can discuss whether it is necessary to begin at
20 9.30 or 10.00. So, with apologies to all concerned,
21 that would, in a sense, tie together the various loose
22 ends and leave us simply with the three witnesses I have
23 mentioned as giving evidence on the three available days
24 for evidence.

25 I continue to be in discussions with individuals in

1 the hall and those who are not in the hall about closing
2 submissions. I have made it clear that because the hall
3 is not available beyond Friday of next week, the
4 preference would be to begin closing submissions on
5 Thursday just in case we spill over and Friday is
6 available for that purpose.

7 The order of closing submissions and their duration
8 is what I will discuss and if there is any issue
9 concerning that then no doubt it can be raised with you
10 tomorrow.

11 That is all I would propose to say, sir.

12 THE CHAIRMAN: Very good. I am sure having a little time to
13 think about submissions will not go amiss. We will rise
14 now and sit tomorrow at 9.30. Is that what you just
15 said, 9.30 tomorrow?

16 MR MOYNIHAN: Because I don't know quite how long
17 Mr Chamberlain's evidence will take, it is probably
18 safer to err on that side.

19 THE CHAIRMAN: 9.30.

20 **(1.02 pm)**

21 **(Adjourned until 9.30 am the following morning)**

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25