

Thursday, 26th November 2009

1

2 **(Morning session)**3 **(10.05 am)**

4 THE CHAIRMAN: I think the arrangement was Mr Macpherson is
5 going to begin. Is that the plan?

6 **Submission by MR MACPHERSON**

7 MR MACPHERSON: Sir, on behalf of the Chief Constable my
8 closing statement will be brief.

9 On looking back, sir, to the opening statements for
10 the core participants there was much reference to rumour
11 and innuendo. The Inquiry has, for example, heard the
12 evidence of Mr Brown about Ms McKie and you, sir, may
13 have formed a view as to the truth of what was said. If
14 it was mere rumour without any substance, Mr Smith was
15 right to say, as he did on Ms McKie's behalf, that it
16 was hurtful and outrageous.

17 The Chief Constable wishes to distance himself from
18 all rumour. The Chief Constable has never advanced the
19 view that Ms McKie lied nor does he seek to malign her.
20 In Mr Smith's opening statement he did suggest the
21 contrary about, as he put it, many officers of
22 Strathclyde Police. The Chief Constable wonders whether
23 this idea might also have been distilled from rumour.

24 The Inquiry heard little in the way of evidence that
25 might place Ms McKie within the house when she should

1 not have been there, by the same token the Inquiry did
2 not hear evidence from police officers who insisted that
3 she was.

4 The Chief Constable's interest, sir, is ensuring his
5 officers perform their duties to the best of their
6 abilities and that they maintain their integrity and
7 trust with the public. The investigation at the scene
8 at Irvine Road in January 1997 has been examined by this
9 Inquiry in some detail. It has been an investigation
10 into an investigation.

11 Nobody would suggest that every element of the
12 murder inquiry and every action taken was perfect.
13 However, the Chief Constable submits that no evidence
14 has emerged of a serious failures or omissions.

15 It should be remembered that 1997 is not today. The
16 world has moved on and one should not look too closely
17 at those events through a lens from 2009. The Chief
18 Constable recalls the evidence given by David Thurley on
19 the fifth day of this Inquiry. He said:

20 "Technology is always moving on. There are always
21 different ways to do it. Had this happened nowadays or
22 today, then things would have been entirely different.
23 Things have moved on."

24 Mr Thurley was talking about fingerprint techniques
25 but the point may have a more general application. For

1 example, there is the comment of Alexander McAllister on
2 the eighth day talking about procedure at crime scenes.

3 He said:

4 "I think it's fair to say the position nowadays
5 bears little resemblance to where we were 12 years ago."

6 The murder of Marion Ross was a terrible crime.

7 There was undoubtedly pressure on the police to get
8 results but it does not follow that this would create
9 any pressure to settle for the wrong result. Indeed,
10 the contrary might be more likely.

11 The officers on the case worked extremely hard. The
12 hours were long and the work was not easy. It would
13 perhaps be surprising if there were no errors in the
14 paperwork or the administration or in the handling of
15 the crime scene.

16 Sir, it is unfair to suggest that there are those
17 within Strathclyde Police who presume that Shirley McKie
18 was guilty, notwithstanding on her acquittal. No police
19 witness has maintained that.

20 It might be recalled that Mr McKie himself has
21 spoken about the faith he originally had in fingerprint
22 evidence and the doubt he had at the outset given his
23 daughter's insistence that she had not been in the
24 house. It is a consistent theme that fingerprints were
25 then considered infallible. Perhaps it would not be

1 surprising if some police officers have been hard to
2 persuade otherwise.

3 There is these days a tendency to look for blame
4 where there may be only ordinary mistakes. There is a
5 desire for the blame to be tracked all the way to the
6 top. When something goes wrong in the public sphere
7 anger is channelled to the institution and there is a
8 search for wider or systemic failures. Perhaps
9 sometimes, sir, there is maybe just an ordinary error.

10 The evidence in this case has not always painted a
11 picture of a system operating perfectly. It is, it is
12 submitted, difficult to imagine what a perfectly working
13 system would look like in an imperfect world. Even if
14 the Inquiry has identified failures, mistakes or
15 omissions, none are indicative of anything systematic or
16 intentional or corrupt. There is no conspiracy and
17 there never has been.

18 The Chief Constable submits that the public interest
19 is served by identifying where mistakes have been made,
20 where improvements can be found but also in permitting
21 public servants to continue to use their best endeavours
22 recognising that they will not always do so without
23 falling into error.

24 Thank you, sir.

25 THE CHAIRMAN: Thank you, Mr MacPherson.

1 Ms Jones, I think you were going to come next; is
2 that right?

3 MS JONES: Yes, sir, thank you.

4 THE CHAIRMAN: Very good.

5 **Submission by MS JONES**

6 MS JONES: My submission will also be brief, sir.

7 SPSA has welcomed the opportunity to participate in
8 the fingerprint Inquiry and has found the process of
9 involvement helpful in the continuing analysis of its
10 fingerprint operations.

11 SPSA would also like to record its thanks for the
12 professional conduct of the Inquiry by all of those
13 involved both in relation to the management of the
14 proceedings and the constructive approach taken to the
15 gathering of evidence. SPSA has also sought to assist
16 as much as possible with the conduct of the Inquiry and
17 has encouraged, facilitated and supported the
18 contribution of its staff in this regard.

19 The Inquiry has heard evidence and received evidence
20 from a number of members of staff of SPSA. It's not
21 intended to comment in any detail on the evidence
22 already available to the Inquiry. This, however, should
23 not be taken as an indication that the evidence has not
24 been considered by SPSA or as an attempt to minimise the
25 task of the Inquiry in distilling that evidence in

1 producing a report and recommendations. It is
2 appreciated that this is a substantial and very
3 significant task. However, SPSA instead wishes in this
4 closing statement to make some overarching comments on
5 the Inquiry and the potential recommendations which may
6 be made.

7 It may be of assistance to the Inquiry to know that
8 operations in relation to fingerprint services represent
9 around 3 per cent of the various police support services
10 that are delivered by SPSA. While SPSA does not wish to
11 diminish in any way the importance of its operations in
12 this regard the issue of recommendations, resources and
13 the issues for fingerprint services raised in the
14 context of this Inquiry must be viewed as specific to
15 SPSA Forensic Services and not to SPSA as a whole.

16 Regard should also be given to the implications on
17 police training, police ICT and criminal justice
18 information systems which are among some of the other
19 obligations and operations of SPSA when considering
20 SPSA's ability to divert its finite budget from one part
21 of its operations to another. We therefore trust that
22 any such recommendations facilitate a more efficient and
23 effective delivery of fingerprint services within
24 existing resource while taking into account, of course,
25 the interests of all relevant parties.

1 SPSA also wishes to make clear its continued
2 willingness to engage in discussion and the provision of
3 information with the Inquiry team during this concluding
4 stage of its proceedings. In particular, the national
5 forensic modernisation work which has been referred to
6 in evidence is due to report in the next few months. It
7 may be that emerging thinking on that modernisation
8 approach is of assistance to the Inquiry Team as it
9 considers its final report and recommendations.

10 We would be keen to engage with the Inquiry on any
11 draft recommendations to ensure that they are both
12 feasible and realistic in light of the emerging picture
13 of demand and capacity that this work is developing. We
14 can, however, confirm that SPSA will consider the final
15 recommendations with this Inquiry in developing future
16 proposals relating to systems and procedures for
17 fingerprints which flow from this modernisation work.

18 It is clear from the evidence to the Inquiry that
19 much has changed in relation to the provision of
20 fingerprint services in Scotland since the events which
21 led to this Inquiry. The organisation of the service
22 itself has been altered a number of times from the
23 creation of the Scottish Fingerprint Service to its
24 current location within the auspices of SPSA.

25 The management of the services has dramatically

1 altered from the structure which was in existence at the
2 time of the events which led to this Inquiry. Perhaps
3 most notably the service is no longer closely linked
4 with any one police force and is subject to the scrutiny
5 of a board which comprises chief constables, police
6 authority conveners but also independent individuals
7 drawn from both industry and other areas of public life.
8 It is submitted that this brings a level of transparency
9 and independence which is of assistance in improving
10 performance of the service.

11 There have also been numerous reports and
12 investigations into the provision of the service over
13 the years. It should again, however, be borne in mind
14 that the senior management in the service is now very
15 different from that which existed at the time of those
16 reports and investigations. Therefore, while SPSA can
17 be held accountable and responsible for what it has done
18 since its creation in April 2007, it is clear that it
19 cannot be held so accountable for actions and inactions
20 before its creation. SPSA has, since its creation,
21 sought to look forward and develop the provision of the
22 service rather than analyse in detail the inherited
23 context in which the service previously operated and
24 that is not least in relation to the position
25 surrounding the marks known as Y7 and Q12.

1 There has been some criticism of SPSA by some
2 contributions to the Inquiry for adopting this approach.
3 This has been dealt with, to a large extent, in
4 evidence. However, it is important to bear in mind the
5 sequence of events. The Inquiry will recall that as
6 SPSA was being established in early 2007 there was no
7 strong prospect at that stage of any independent
8 authoritative re-examination of the marks taking place.
9 The Scottish election, a new Government and the
10 commitment to this Inquiry subsequently changed that
11 position.

12 Since it began its work this Inquiry has made clear
13 its intention to carry out the most intensive
14 re-examination of these marks that would be possible.
15 The resources which have been expended in this
16 comprehensive Inquiry dramatically exceed any resources
17 which SPSA with a finite budget, considerable start-up
18 costs and challenges and day-to-day responsibility for
19 meeting the demands of the Scottish Police Service and
20 Crown for Forensic Services could possibly have devoted.

21 We have made clear since the beginning of this
22 Inquiry our commitment as an organisation to support and
23 assist the Inquiry in this task. If as part of its
24 conclusions the Inquiry, following extensive and
25 thorough re-examination, delivers a clear view on the

1 identification of these marks it is SPSA's intention to
2 accept such findings.

3 As has been indicated, SPSA's response to the issue
4 surrounding this Inquiry is to look forward and seek to
5 develop an organisation where an open and transparent
6 culture is fostered, embedded and developed. While not
7 wishing to prejudge the findings of the Inquiry it is
8 clear the culture of the fingerprint organisation
9 inherited by SPSA required considerable improvement.
10 SPSA's approach to this was and continues to be to
11 introduce systems which are robust and demonstrate best
12 practice, to develop a culture which will facilitate the
13 provision of a first class service that meets the needs
14 of its police and fiscal customers, to provide training
15 to staff which would assist in meeting this objective,
16 and to introduce methods of measuring and improving on
17 the quality of the service that is being provided.

18 While it would not be equitable for SPSA to be
19 criticised for failures which were not of its making,
20 equally it would not be appropriate to fail to recognise
21 that a number of these improvements were already in
22 train when SPSA came into existence.

23 One of the particular areas of enquiry has been the
24 introduction and ongoing practice of the non-numeric
25 identification of fingerprints. SPSA remains committed

1 to this method of analysis and identification and
2 remains of the view that it facilitates a more
3 appropriate approach to the provision of this service.
4 However, it is recognised that this process, as with any
5 other, must be subject to constant analysis and
6 improvement.

7 One particular issue which has been highlighted
8 during the Inquiry is the importance of note-taking. As
9 indicated by Tom Nelson in his evidence, this is an
10 issue in respect of which SPSA already accepts that
11 there is a case for enhancing the current approach. It
12 is accepted there is a good argument for increased
13 note-taking in certain cases. Work is already planned
14 to ensure that recording processes which are appropriate
15 to the resources available to SPSA and the needs of its
16 customers are developed in the near future and we would
17 be keen to engage further with the Inquiry on defining
18 the scope of future changes.

19 The question of disclosure is also likely to be a
20 matter addressed by the Inquiry in its findings. Again,
21 as has been heard from Tom Nelson and Scott Pattison
22 this is a matter currently being addressed by both SPSA
23 and the Crown. In addition, SPSA is keen to facilitate
24 and participate in the ongoing progress of increased
25 research, development and academic study into practises

1 and procedures involved in fingerprint identification.

2 It is hoped this will form part of SPSA's vision of
3 fingerprint services sitting alongside other forensic
4 sciences as part of a coherent and integrated service.

5 Again, however it must be recognised that this has
6 been developed at the same time as we are seeking to
7 balance increasing demand for Forensic Services within
8 the finite and challenging budgets to which all public
9 sector services are likely to be subject for several
10 years.

11 It is anticipated that recommendations will be made
12 which will directly impact upon the work of SPSA
13 Forensic Services. SPSA will take a positive and
14 responsible approach to the conclusions of the Inquiry
15 and we will expect our fingerprint staff to respect the
16 conclusions of the Inquiry in carrying out their
17 professional duties and responsibilities.

18 Similarly, we will look to implement in a
19 proportionate and pragmatic way such recommendations
20 that are made to improve further the delivery of
21 fingerprint services in the future.

22 As an organisation that handles approximately 12,000
23 fingerprint cases annually often involving the analysis
24 of multiple prints we would welcome an opportunity to
25 comment on any draft recommendations which are likely to

1 have resource implications on the organisation. SPSA
2 would also wish to engage in discussion over any
3 recommendations which may impact upon the speed with
4 which we can support the police and fiscal in order to
5 properly assess the feasibility of such recommendations.

6 Finally, and notwithstanding any recommendations for
7 improvements that are made, we hope and expect that this
8 Inquiry will acknowledge the dedication that fingerprint
9 staff in Scotland, past and present, have shown over the
10 course of the past decade. In that period they have
11 handled well over 100,000 fingerprint examinations, the
12 vast majority without controversy or challenge and made
13 a substantial and ongoing contribution to the pursuit of
14 justice in this country. They have coped with
15 unprecedented and sustained levels of scrutiny. SPSA
16 staff continue to bear that scrutiny with dignity and
17 professionalism.

18 As an organisation, it is our hope for them this
19 Inquiry will be a watershed that will allow the Service
20 to collectively move forward in step with the rest of
21 our valued forensic disciplines.

22 Thank you, sir.

23 THE CHAIRMAN: Thank you very much.

24 Miss Grahame?

25 **Submission by MISS GRAHAME**

1 MISS GRAHAME: Thank you very much.

2 Written submissions have been prepared on behalf of
3 the Crown and while copies are being distributed I would
4 like to begin by expressing on behalf of the
5 Lord Advocate the thanks to the Chair, first of all, for
6 allowing the Crown to have the opportunity of taking
7 part in this Inquiry and also to the Inquiry Team for
8 adopting many of the lines of questioning which have
9 been proposed by the Crown and, finally, to the core
10 participants and legal representatives whose constant
11 and constructive efforts have allowed us to make
12 considerable progress during the Inquiry.

13 Turning if I may to the submissions, as can be seen
14 from the index sheet it is split into 11 different
15 issues. As we all recall within each chapter of the
16 analysis document which was produced by Counsel to the
17 Inquiry at the outset there were a number of issues
18 which were identified at the conclusion of each chapter.
19 These written submissions endeavour to provide a summary
20 of the Crown Office position in relation to all of the
21 issues in which it is considered Crown Office have an
22 interest.

23 All of these issues are important but some of these
24 have featured more prominently during the course of the
25 Inquiry than others and, with that in mind, my

1 submissions today will deal with two of the issues which
2 I consider to have featured most significantly. Those
3 are the many topics under issue 2, of which I will deal
4 with majority, and issue 5.

5 Having said that, I would invite the Inquiry to have
6 regard to the entire written submissions when forming a
7 view as to the evidence and the Crown would also request
8 that the entire written submissions be put on the
9 Inquiry website in order that any interested members of
10 the public may have access to the full text.

11 THE CHAIRMAN: I can assure you that will be done.

12 MISS GRAHAME: I am much obliged.

13 Before I turn to my submissions on issue 2, may I,
14 first of all, make a deletion within the written
15 submissions. It is on page 32 and it is in the second
16 paragraph. In the second paragraph on line 2 I would
17 ask that the words "until 2009" be deleted. That was an
18 error by myself.

19 If I may now turn to issue 2, this begins, the
20 heading is on the very bottom of page 2 of the
21 submissions and this issue deals with preparation for
22 the prosecution of **HMA v McKie**.

23 From page 3, when considering the issues which arise
24 in relation to the prosecution, it is important, I would
25 submit, to bear in mind the prevailing view regarding

1 fingerprint evidence at the time that the case was being
2 prepared. It appears that it has been universally
3 accepted throughout the evidence that prior to the McKie
4 trial fingerprint evidence was viewed as totally
5 reliable, infallible even. If anything, this view was
6 reinforced by the fact that no-one had experience of any
7 challenge to an identification of a fingerprint in
8 Scotland.

9 We have also heard from Fingerprint Officers who
10 talk consistently of 100 per cent certainty and this has
11 been repeated by evidence from the police and, indeed,
12 was acknowledged by Mr McKie in his evidence.

13 Turning to the section on the background to the
14 instructions of Mr Kent, if I may, without going through
15 this section in detail because I understand that the
16 Inquiry does not want to hear excessive comment on
17 evidence which has already been led, this does provide a
18 summary of the Crown documentation regarding the
19 instructions of Mr Kent.

20 We have heard of the precognition prepared by
21 Mrs Denise Greaves, who was the Procurator Fiscal, and
22 the documentation that was sent into Crown Office and
23 seen, first of all, by the then Deputy Crown Agent
24 Mr MacFadyen and then passed to Ms Climie, the indicter,
25 who had been the indicter in the David Asbury case.

1 The precognition did raise the issue of whether an
2 expert previously unconnected with the case should make
3 a further comparison in relation to Y7 and made mention
4 for the first time of Mr Kent. After the papers were
5 passed to the DCA, he expressed the view that perhaps it
6 did make sense to involve an independent expert but, on
7 the basis of the question of transfer and planting and
8 on the general basis for concluding that fingerprint
9 identification was 100 per cent reliable.

10 He did not recommend that a further expert report be
11 obtained conducting an independent comparison of Y7 with
12 the prints of Ms McKie. Ms Climie, it is known, did
13 speak to the Advocate Depute who had prosecuted
14 Mr Asbury and her recommendations to the Duty Advocate
15 Depute are set out on page 4 of the written submission
16 and I will not repeat those.

17 She picked up on the DCA's recommendation and she
18 introduced a comment regarding the English standard, of
19 which we have heard evidence. This was placed in
20 brackets next to the second point regarding the
21 reliability of fingerprints.

22 We have heard that the Duty AD then sent an
23 instruction back to the indicter but Ms Climie then sent
24 the papers through the DCA to the Solicitor-General who
25 ultimately instructed that Ms McKie be placed on

1 petition. Again, the detail of that is set out on
2 page 5 of the submissions.

3 After that instruction was issued, Ms Climie then
4 sent a letter from Crown Office to Mrs Greaves on
5 30th January 1998 and the terms of that are repeated on
6 page 6. The three main points are set out towards the
7 top of that page. These do not specify that an
8 independent comparison of Y7 should be made.

9 Mrs Greaves then in response to that letter sent a
10 letter of instruction to Mr Kent and it was at that
11 point that six separate points were made in that letter
12 instructing Mr Kent. We know that Mrs Greaves had some
13 difficulty making contact with Mr Kent by telephone and
14 that is clear from the correspondence which was within
15 the papers and she did write to him around a month later
16 asking him to discuss the matter with her and when his
17 report was likely to be available. She did speak to him
18 some time prior to 22nd April when she forwarded
19 additional statements to him and then his report was
20 finally submitted with a covering letter in the May.

21 In his evidence, Mr Kent indicated that in relation
22 to instructions 5 and 6 he did not have the expertise to
23 express a view. Initially in his evidence, and in fact
24 throughout his evidence, Mr Kent said he did not
25 remember having a conversation with Mrs Greaves about

1 the instruction he received. He could not remember
2 exactly what his actions were in response, but he
3 indicated that what he would have done would be to pick
4 up the phone to the author of the letter and say, "If
5 you want advice on the statistics of the 16-point
6 comparison, then talk to Professor Champod", as he was
7 the only person doing research in that area.

8 In cross, he again stated that he could not recall
9 the conversation with Mrs Greaves although he would not
10 accept that he could have been mistaken in his
11 suggestion of what he would have done or said.

12 In considering whether Terry Kent advised Denise
13 Greaves to approach Professor Champod, I would wish to
14 make a number of points. Firstly, there was nothing
15 about Professor Champod in Mr Kent's own covering letter
16 with his report. There was nothing about
17 Professor Champod in his actual report. If Mr Kent had
18 already told Mrs Greaves that he was not qualified and
19 she would have to go to another expert abroad, then I
20 wonder why it doesn't appear at the very least in
21 paragraph 33 of the report.

22 Although in evidence Mr Kent tried to suggest that
23 that paragraph was an answer to instruction 3 rather
24 than 5 or 6, even that was queried by Mr Moynihan in
25 evidence and Mr Kent accepted that others would not

1 necessarily read that in that way.

2 Thirdly, there was nothing in Mr Kent's statement to
3 the Inquiry about such a conversation regarding the
4 Professor and his evidence in July of this year was the
5 first time that this had ever been mentioned.

6 Fourthly, there's nothing in Mrs Greaves' own
7 correspondence about such a discussion taking place or a
8 note about Professor Champod or his location.

9 In cross, Mr Kent said he would have phoned Mrs
10 Greaves. He said he possibly spoke to someone else in
11 the Fiscal's office. He also said it was possible he
12 spoke to Chief Inspector Hogg and he also said it was
13 possibly someone in Strathclyde but at no stage in his
14 evidence did he actually say he did contact any of these
15 people.

16 This apparent conversation was not put to
17 Mrs Greaves when she gave evidence because there was no
18 mention of this in Mr Kent's statement. She had
19 described having general conversations with Mr Kent but
20 nothing about Professor Champod.

21 A supplementary statement was obtained from
22 Mrs Greaves and the Inquiry confirmed last week that
23 that is to be treated as her evidence and she did not
24 require to be recalled. Mrs Greaves made clear in that
25 statement that Mr Kent did not mention Professor Champod

1 or indeed any foreign experts to her. This would have
2 been very unusual and would have required the
3 instruction of Crown Counsel and an interpreter and she
4 said it did not happen. Accordingly, I would commend
5 her position to the Inquiry and invite the Chair to
6 reject the suggestion that Mr Kent gave
7 Professor Champod's name to Mrs Greaves.

8 Another reason the Inquiry should not accept the
9 evidence that Mrs Greaves had this conversation with
10 Mr Kent is that if it is accepted, then the Inquiry will
11 be finding that Mrs Greaves ignored the advice of an
12 expert, did not tell anyone about it or act upon it and
13 did not take any steps to let anyone know about it,
14 didn't seek the instructions of Crown Counsel or mention
15 it in reminders and this would be contrary to the
16 approach Mrs Greaves was taking to her work which is
17 apparent from the correspondence available.

18 This contrasts with Mr Kent's approach of what is an
19 unexplained delay in producing his report between March
20 and May of 1998 and his failure to set out clearly his
21 position in relation to the points given in the letter
22 of instruction.

23 Moving on, it is accepted that the Crown did not
24 obtain a further report after Mr Kent's report was
25 received. However, it does not necessarily follow that

1 Crown Counsel did not consider this issue.

2 In 1998, the normal procedure in this situation when
3 an expert has been unable to respond to every aspect of
4 the instruction would be for the Fiscal to bring the
5 matter to the attention of Crown Office via the indicter
6 and then for the indicter to draw that to the attention
7 of an Advocate Depute, either the one who had originally
8 issued the instruction or, if unavailable, the Duty
9 Advocate Depute, then to seek instruction from there
10 and, thereafter, for the indicter to pass those back to
11 the Fiscal.

12 We have seen from correspondence that indeed
13 Mrs Greaves did contact Crown Office by sending a letter
14 to the indicter, Ms Climie, enclosing the report and
15 seeking her instruction. It is acknowledged that she
16 did not specifically raise in that letter that Mr Kent
17 had not responded to points 5 or 6. But Mrs Greaves
18 subsequently had a telephone conversation with Ms Climie
19 during which Ms Climie indicated to Mrs Greaves that she
20 would reread the report and advise if any further
21 matters required clarification.

22 Mrs Greaves wrote to Messrs Levy & McRae indicating
23 to them that:

24 "The Depute at Crown Office assures me I should have
25 Crown Counsel's instructions within the next two weeks."

1 From these documents, together with the evidence of
2 Mrs Greaves and Ms Climie I invite the Chair to accept
3 that Mrs Greaves and Ms Climie were following the normal
4 procedure at the time, that Mrs Greaves had sought
5 instruction from Crown Office with the expectation that
6 Crown Counsel would be asked to provide that by the
7 indicter and that Ms Climie, the indicter, had expressed
8 an intention to reread the report and then seek those
9 instructions from Crown Counsel.

10 There is subsequent documentation regarding
11 reminders and a handwritten note from Mrs Greaves and
12 Mrs Greaves explained in evidence that these
13 instructions that were sought regarding Terry Kent's
14 report, she anticipated they would come from Crown
15 Counsel and not Ms Climie.

16 All of this documentation shows that Mrs Greaves
17 remained of the view that the instruction would come
18 from Crown Counsel and that Ms Climie had agreed to
19 obtain this and she confirmed this in evidence. There
20 is also a further letter confirming that that was her
21 understanding at the time.

22 In evidence, Ms Climie indicated that she had
23 absolutely no doubt that Crown Counsel would have looked
24 at the Kent report. So albeit there is no slip from
25 Crown Counsel and albeit Mrs Greaves and Ms Climie do

1 not recall obtaining or receiving that instruction it is
2 clear from the documentation available that the normal
3 procedure was being followed. It also indicates that it
4 was the clear intention that Crown Counsel's
5 instructions would be sought and it was the view
6 certainly of Mrs Greaves at the time that they were
7 ultimately obtained. Accordingly, at the very least,
8 what can be said is that none of the documentation is
9 inconsistent with Crown Counsel having considered the
10 report of Terry Kent and taken the view that the case
11 could proceed in the absence of a further expert report.

12 In the circumstances, what has not previously been
13 appreciated perhaps by others is that the Crown had a
14 positive interest in finding all of the documentation
15 regarding this issue and it remains a matter of regret
16 that the papers are not entirely complete. However, I
17 do not wish to add to any of the comments already made
18 by Mr Pattison in his evidence which explained the
19 background to the dissemination and fragmentation of the
20 papers since 1997 and the letter which was previously
21 sent to the Inquiry.

22 Another possibility that was explored in evidence
23 was that the Fiscals themselves would have taken the
24 decision in relation to the outstanding matters in
25 Mr Kent's report and that no instruction was sought from

1 Crown Counsel. That would not be in accordance with the
2 normal procedure and it is not a course of action that
3 Mrs Greaves considered likely. It is certainly not the
4 course that was followed by Mrs Greaves and it is clear,
5 I would submit, from the evidence that Ms Climie was a
6 conscientious and careful indicter and would not have
7 failed to follow the proper procedure. Her documented
8 approach from the correspondence clearly shows that she
9 was a very careful indicter.

10 In the event, Ms Climie did not remember seeking
11 instructions from Crown Counsel and she accepted in
12 evidence there was a possibility that whoever sought the
13 instructions may have missed that fact, that Mr Kent had
14 not answered all questions, perhaps not drawn it to
15 Crown Counsel's attention and perhaps Crown Counsel
16 missed it but I'd submit that was speculation on the
17 part of Ms Climie and it is not based on anything in
18 documentation to support it.

19 Finally, Mrs Greaves spoke in her evidence of having
20 a general awareness that an expert, Mr Graham in the
21 Asbury case, had agreed with the identification made by
22 SCRO and she described in her statement that this was a
23 fall-back position although perhaps she considered it
24 was not as well phrased as she may have liked.

25 Moving on to the nature of the further expert

1 assistance, finally, regardless of any view taken in
2 relation to the view above it is important to consider
3 Terry Kent's report and the nature of the outstanding
4 issues. In other words, to consider what it was that
5 the prosecutors were seeking to explore in this area.

6 Crown Office position is that this was not and was
7 never intended to be a cross-check on the opinion of
8 SCRO. The report was not sought due to any doubt about
9 the reliability of the opinion on Y7. There did appear
10 to be some confusion about the basis of it and what was
11 understood between the indicter and the Fiscal, but even
12 Lord Boyd indicated that he would have been surprised if
13 there had been any doubt regarding reliability of the
14 identification because he had been an advocate depute
15 for three years before becoming Solicitor-General and
16 fingerprint evidence was regarded as 100 per cent
17 reliable.

18 Looking at the consequences of not exhausting the
19 instructions to Mr Kent it is appreciated there is an
20 interest in speculating what would have happened or what
21 might have happened had the Crown exhausted these
22 instructions. Even if a further report had been
23 obtained and if that report was another independent
24 expert report or a comparison of Y7, it does not
25 necessarily follow that the Crown would have received an

1 opinion which contradicted that of the four SCRO
2 officers. If the Crown had obtained a further expert
3 report it could just as easily have been from an expert
4 who held the same views as Mr Graham or from Mr Swann or
5 Mr Leadbetter both of whom are based in England.

6 Crown Office appreciate that with hindsight,
7 however, it is clear that there could have been improved
8 avenues of communication between fiscals, indicters and
9 Crown Counsel than was the position in 1997. It was
10 suggested in evidence that when papers left the fiscal
11 that they went behind closed doors into Crown Office.
12 However, there have been considerable changes since then
13 in practice and procedure. Lord Boyd was responsible
14 for many of these improvements which have been
15 significant and the Lord Advocate remains committed to
16 achieving improvements in all areas and the report to
17 this Inquiry will be of significant benefit in directing
18 those areas of improvement in the field of fingerprint
19 evidence.

20 I would commend to the Inquiry the evidence which
21 was given by Mr Pattison and Lord Boyd regarding the
22 changes in procedure. We have heard about the
23 allocation of an advocate depute at a very early stage
24 in complex cases and this assists the direction of those
25 cases. It is clear that there are much more open lines

1 of communication now in cases from a very early stage
2 right up to and including the trial and that is a
3 significant difference from the position in 1997.

4 In addition, we have heard that there is now a
5 mandatory instruction to precognosce all experts in all
6 High Court cases and there's a presumption in relation
7 to Sheriff and Jury cases under exception where the
8 evidence is agreed and we have also heard evidence
9 regarding the aide-memoire. We have also heard about
10 the advocacy skills training which is provided to
11 fiscals and members of staff in Crown Office regarding
12 expert evidence and how to deal with that.

13 With regard to the decision to indict, questions
14 were asked of Lord Boyd of why there appeared to be no
15 separate instruction to indict within the papers
16 available and he explained it might be that the view was
17 taken that because he, as Solicitor-General, had seen
18 all of the papers that would have been considered
19 normally at an indictment stage and because Crown
20 Counsel had separately instructed indictment that it was
21 not necessary for him to see the papers again and the
22 instruction to place on petition by him at an early
23 stage was taken as one to indict. He did accept that
24 perhaps it might have been better if it had come back
25 for a separate instruction although he was unable to

1 recall if it had.

2 He also said it may have gone to an advocate depute
3 and there may have been an instruction. In any event,
4 he said he would not criticise the officials for having
5 taken that decision if they did and that he did not need
6 to see it again because he had authorised the
7 prosecution. In the circumstances, we would submit it
8 would be inappropriate for the Inquiry to criticise any
9 individual officials in that regard.

10 In relation to the joint report, there was a
11 reference in the first report of 27th March 1997
12 regarding the orientation of Y7, which was not contained
13 in the later report. There has been evidence led in
14 regard to this about whether a fiscal instructed this.

15 No adverse inferences should be drawn against the
16 COPFS in relation to this entry in the report. If a
17 query was made by a fiscal then it was not unreasonable
18 to ask an expert whether this could be addressed in a
19 report and although it was removed later, it seems to
20 have been removed against a background where Fingerprint
21 Officers in general did not feel comfortable expressing
22 such opinions or conclusions.

23 There has been some evidence that there is
24 hesitation on the part of experts to make these
25 comments, although I recall that Mr Wertheim did say

1 that he had thought initially about whether it would be
2 a woman or a man but the discomfort, as I understand it,
3 was not on the basis it was an improper question to ask,
4 more that it was perhaps considered something that was
5 not within the experts' area of expertise.

6 Turning to the charted enlargements if I may, there
7 was clearly a difference of opinion about the purpose of
8 producing case-specific enlargements. Crown Office
9 thought they showed the individual characteristics which
10 were identified by the experts and formed part of their
11 reasoning and that evidence was given by Mrs Greaves,
12 whereas the fingerprint officers apparently viewed this
13 as a mere illustration to give to the jury. The
14 understanding of Crown Office was, I would suggest,
15 entirely reasonable. The enlargements were not generic.
16 They were not designed to show ideal or easily visible
17 examples of individual characteristics. They were
18 specific to each case, using the prints found and
19 identified and were often marked up with at least
20 16 points thereon which corresponded to the standard at
21 the time.

22 Given the absence of challenge to expert evidence on
23 an identification prior to the McKie case, however, it
24 is perhaps understandable that insofar as SCRO had a
25 different understanding of their purpose that this had

1 never been made obvious to the Crown.

2 Regarding their accuracy, the majority of witnesses
3 asked appeared to agree that the enlargements were not
4 accurate and this was attributed to the inadequacies in
5 the charting PC. Although Mr MacPherson appeared to
6 feel uncomfortable about accepting that in regard to the
7 specific enlargements used for the McKie trial he did
8 appear to concede later in his evidence there were
9 issues regarding that.

10 The situation appears to have existed because the
11 charting PC had been purchased at great expense.
12 Management did not appear to be aware of the
13 difficulties individual officers were experiencing and
14 the situation was compounded by the fact that disputes
15 over fingerprint evidence and challenges from the
16 defence were so rare and, perhaps, a certain complacency
17 slipped into the use of the charting PC.

18 What is clear is that Crown Office were not told of
19 the difficulties experienced and we heard from Sheriff
20 Murphy QC that had this been raised he would have
21 considered it to be of grave concern. Although officers
22 did express the view that they would all have been able
23 to explain the position to the jury at the trial, that
24 was perhaps a little optimistic given the comments made
25 by Sheriff Murphy regarding the actual experience during

1 the McKie trial.

2 With regard to the position for the future, these
3 are, as we have heard, no longer produced as a matter of
4 course in every case when reports are sought for court.
5 Having regard to the statistics on fingerprint evidence
6 and the lack of challenge, this is appropriate and we
7 would invite the Inquiry to take the view that the
8 status quo should be maintained. However, it has
9 remained the case that enlargements can be requested if
10 required and that also appears to be the position in
11 England and Wales.

12 As we have heard, it is rare for Fingerprint
13 Officers to be called to give evidence and where they
14 are, it is rare for this to be in relation to a disputed
15 identification. For the witnesses who have given
16 evidence to this Inquiry, no-one has been able to give
17 an example of such a situation arising other than in the
18 McKie case before or after in this jurisdiction.

19 Clearly, if there is a disputed identification over
20 fingerprints in the future enlargements would be sought
21 by the Crown because it is certainly their position that
22 this would be necessary in order to provide a full
23 explanation of the reasoning and also full disclosure of
24 the individual characteristics found by the officers.

25 The Inquiry have also heard that Crown Office are

1 about to start a project which will test the use of
2 case-specific enlargements, although one issue remains
3 about the practical difficulty of testing their use
4 given the very small number of cases where fingerprint
5 evidence is relied on.

6 In addition, the Inquiry has heard that the Crown
7 have used and are developing the use of generic
8 enlargements in court in the area of forensic science,
9 including fingerprints, and there is considerable
10 interest between SPSA and the Crown in assessing the
11 system that has been used during the course of this
12 Inquiry.

13 As a result, I invite the Inquiry to make
14 recommendations maintaining the current position and
15 recommend that case-specific enlargements be created by
16 each individual officer and sent to Crown Office showing
17 the points in sequence and agreement along with an
18 explanation of the character and nature of each point
19 identified if they are required to give evidence. In
20 addition, that other generic visual images continue to
21 be considered and developed in order for use during the
22 giving of evidence to provide a detailed explanation to
23 the jury. However, Crown Office suggest this be
24 required only where there is a disagreement about
25 identification or where oral evidence is to be led at

1 trial. Any suggestion they be created for all cases
2 would be an unnecessary burden on Fingerprint Officers
3 and an unreasonable allocation of resources.

4 Another issue has been raised during the Inquiry as
5 to whether the Crown ought to have obtained a further
6 independent expert report outwith SCRO once
7 Mr Wertheim's acetates became available. This was dealt
8 with by Lord Boyd in his evidence and he explained that
9 as Lord Advocate he would have expected an AD to seek
10 comment from the experts instructed by the Crown. If
11 they expressed confidence in dealing with the challenge
12 he would not expect a further independent report to be
13 obtained.

14 Sheriff Murphy QC also explained from his
15 perspective that he did not want to seek another
16 independent expert report prior to the trial for fear of
17 bamboozling the jury.

18 The matter at dispute between the experts is one for
19 the jury to determine rather than introducing more and
20 more expert views into the evidence and, therefore, the
21 Crown would not encourage expert shopping. So the
22 decision not to go outwith SCRO once the materials were
23 available from Mr Wertheim was an entirely reasonable
24 one in the circumstances.

25 Considering whether the prosecution were properly

1 prepared to present the evidence, what is clear from the
2 evidence during the Inquiry is that regardless of how
3 experienced or senior they are, Fingerprint Officers in
4 Scotland rarely give evidence in court and on those few
5 occasions when they do, it is not just exceptional for
6 the case to involve a disputed ID but, in fact, the
7 McKie case is the only case of which we have heard where
8 experts were challenged in court on that basis in
9 Scotland.

10 Even when one takes account of the experience of
11 other witnesses who regularly practise in other
12 jurisdictions, including Northern Ireland, England and
13 Wales and the United States, it would appear that it is
14 not unusual in those jurisdictions for a challenge of
15 that sort to be very rare. Against that background, it
16 is unsurprising that officers were not equipped with the
17 experience required to withstand such a challenge and
18 nor is it surprising that training provided by lawyers
19 and other experts in Scotland who will no doubt be
20 equally unfamiliar with cases involving challenges of
21 that sort would be limited by that lack of familiarity.

22 Firstly, in answering this issue it may assist to
23 consider what the Depute did when approaching the trial
24 and when the Crown became aware that the defence
25 position had changed to mis-identification rather than

1 planting or faking. In this regard, assistance is
2 gained by considering the evidence of Sheriff Murphy QC
3 who spoke about, in advance of the trial, meeting
4 Mr Stewart and Mr MacPherson. Despite some initial
5 confusion, once he had sight of his statement to the
6 Mackay Robertson Inquiry in 2000 he accepted that he
7 found out about the defence some time around 16th April,
8 which was the Friday prior to the trial starting the
9 next Wednesday.

10 This late availability of defence productions
11 clearly had an impact and limited the time available to
12 the Crown and the experts immediately prior to the start
13 of the trial. We have heard that the trial had
14 previously been adjourned and given the procedures in
15 place at the time this was not an uncommon situation and
16 there was a desire as a result to make progress. This
17 situation is one of the issues that the new procedures
18 have sought to address. I will deal with this later.

19 Secondly, it is also vital that consideration be
20 given to the Advocate Depute's assessment of the case as
21 a whole including the anticipated eye witness evidence.
22 Despite many attempts throughout the Inquiry to present
23 this case as one consisting solely of fingerprint
24 evidence that view simply fails to take account of the
25 Depute's assessment of the evidential position prior to

1 the trial. We have heard that he placed considerable
2 weight on the anticipated evidence of Mr Kerr and he did
3 explain his position regarding Mr Kerr's evidence in his
4 statement to the Inquiry and also under reference during
5 his evidence to Mr Kerr's statements and precognitions.

6 He also spoke about how he had asked the Fiscal to
7 speak again with Mr Kerr immediately before he gave
8 evidence and the information he received from that
9 conversation and the significant difference it made when
10 Mr Kerr went into the witness box and appeared to have
11 changed his evidence.

12 Up until Mr Kerr's position changed from what was
13 expected by the Depute, the fingerprint identification
14 was not the only evidence in the case and so I submit it
15 is not correct to assess probability or likelihood on
16 the basis that it was. In any event, criminal trials
17 are based on sufficiency and, ultimately, reasonable
18 doubt and not probability.

19 In the circumstances, Sheriff Murphy explained why
20 he decided to proceed to trial rather than seek an
21 adjournment and he explained in detail the three
22 considerations to which he had regard in reaching his
23 view. He had met with the experts before the trial
24 proceeded and once his understanding of the defence
25 position became clear. Both Mr MacPherson and

1 Mr Stewart reviewed the materials prepared by
2 Mr Wertheim. Sheriff Murphy was not asked for more time
3 by them and he was not advised that they could not
4 prepare for the trial in the limited time available to
5 them. He understood them to be confident in the face of
6 Mr Wertheim's position and his detailed position on that
7 is set out in Sheriff Murphy's statement to the Mackay
8 Robertson Inquiry.

9 In light of that background, the Inquiry, I would
10 submit, should hesitate before second-guessing any of
11 the decisions which were taken as part of the
12 prosecutorial discretion of Sheriff Murphy at the time.

13 One further issue arose relating to the late citing
14 of Ms McBride and Mr McKenna for the trial. It was
15 acknowledged that this was not the normal procedure.
16 They were substitutes for the main signatories on the
17 basis of annual leave. In relation to Ms McBride, she
18 advised that she had not seen the defence productions
19 before she went into the witness box and it is accepted
20 that this an unsatisfactory position and should be
21 avoided. Unfortunately, we do not have Sheriff Murphy's
22 position in relation to this matter. What can be said
23 is that the Inquiry has heard from Scott Pattison
24 regarding the current procedures in place and how there
25 is now a seven-day time limit in place where defence

1 productions and lists of witnesses are lodged prior to a
2 preliminary hearing. We have heard that these are
3 designed to reduce the very late lodging of defence
4 productions and that trials are no longer fixed until
5 all parties are prepared.

6 Mr Pattison did acknowledge there is still an
7 element of judicial discretion here and so late lodging
8 by the defence can never be entirely ruled out because
9 it is clearly appropriate that that discretion exists to
10 ensure a fair trial.

11 However, on the part of Crown Office, the Inquiry
12 has also heard about the allocation at an early stage of
13 an Advocate Depute who will conduct a preliminary
14 hearing and the trial in cases, such as a high profile
15 case involving a police officer, and also the continual
16 involvement of indicters and Fiscals who retain control
17 of a case from the beginning to the end. This allows
18 for a very close monitoring and direction to be given
19 by experienced prosecutors in relation to issues
20 involving expert evidence, even if it comes at a late
21 stage.

22 We have also heard about the guidance set out in the
23 Crown Office Circular and the aide-memoire which is
24 being prepared to give guidance to prosecutors. Crown
25 Office acknowledges that there have been concerns which

1 have been raised regarding the delay in issuing the
2 guidance and the Circular. However, there was a DVD and
3 a leaflet issued in 2006 when the new standard was
4 introduced and previous guidance was available to
5 precognoscers at that time.

6 Although it is not possible to say that the lodging
7 of late defence productions will never happen again in
8 the future, the new procedures do minimise that risk
9 significantly and, although a small risk does remain, I
10 would submit that the Crown Office, now that they have
11 staff closely involved in cases throughout the process,
12 this can be dealt with more appropriately now than
13 perhaps it would have previously.

14 We have also heard with regard to future training
15 that it is clear that considerable work has and will
16 continue to be done by Crown Office. We have also
17 lodged documentation with the Inquiry team regarding the
18 extent of that training, which includes training in
19 relation to expert evidence, and again that will assist
20 prosecutors in their handling of matters.

21 I would like to now turn, if I may, to issue number
22 5. This relates to the current arrangements regarding
23 documentation, precognition and the impact of
24 disclosure. It begins on page 28. The current
25 arrangements for the provision and disclosure of

1 statements, joint reports and precognition facilities
2 have been explained by a number of witnesses. In the
3 event of a prosecution, we now know that the Crown is
4 provided with, first of all, a joint report which
5 details all prints identified as matching the accused
6 and a copy of that is given to the defence. There is an
7 annex containing details of other prints found at the
8 scene and examined, whether identified, eliminated or
9 insufficient. That is also disclosed to the defence,
10 subject to any appropriate redactions. Thirdly, there
11 is a written statement prepared by any fingerprint
12 examiner who signed the report and that is also
13 disclosed automatically to the defence at the outset,
14 again, subject to any appropriate redactions.

15 In addition to the documentation, uniquely in
16 Scotland the Crown have the additional advantage of
17 precognition where the Fingerprint Examiners will
18 explain the report and findings with the prosecutor
19 prior to the trial and a note will be prepared and will
20 form the basis of a document known as a precognition.

21 The purpose of precognition is not simply to
22 understand the evidence but to allow the prosecutor to
23 assess the quality of the evidence given or which will
24 be given by a particular witness. We have heard about
25 the Circular which makes that mandatory now for experts

1 in High Court cases and there is a presumption in
2 Sheriff and Jury cases where that evidence will be
3 agreed. We have heard that very few cases involving,
4 however, the leading of fingerprint evidence and in
5 those rare cases where evidence is led, this has not
6 been as a result of a dispute about the identification
7 of a mark. Statistics have been provided in relation to
8 the very limited number of cases proceeding to court
9 where evidence of Fingerprint Examiners is led. Other
10 expert evidence would appear to indicate that it is
11 equally rare in England and Wales and Northern Ireland
12 as it is in Scotland.

13 We have heard, despite all of this, that the Crown
14 Office were not being told about certain material
15 matters, including: occasions when there was a dispute
16 or disagreement between experts as to the identification
17 of a print; occasions when examiners have been unable to
18 find 16 characteristics when that was the national
19 standard (for example, Mr Alister Geddes's involvement);
20 and, thirdly, the existence and results of blind
21 testing. It is accepted these issues should have been
22 disclosed to the Crown in order that the Crown could
23 fully comply with their duty of disclosure.

24 It has, however, been recognised and accepted by
25 SPSA that although the duty of disclosure is well-known

1 and although the Crown had a legitimate expectation that
2 material which might assist the Crown or the defence or
3 which was exculpatory of the accused would be disclosed,
4 it is fair to say that this was not perhaps fully
5 understood by fingerprint staff and the Crown equally
6 did not make this sufficiently clear to those members of
7 the fingerprint staff.

8 Despite the change to the non-numeric system and the
9 new style documentation, it would appear that this
10 situation has continued and it is also clear that the
11 failure to disclose was not a one-off situation relating
12 to the circumstances surrounding Y7. It is thanks to
13 this Inquiry that it is now clear to both SPSA and to
14 Crown Office that there is an unresolved issue in this
15 area and SPSA intend to improve the training of their
16 own staff in this area under reference to the recently
17 issued ACPOS guidance manual.

18 Further, there will be discussions about the matter
19 between Mr Pattison and Mr Nelson to ensure that this
20 situation does not arise again and, in addition, steps
21 have been taken by the Crown to prepare an
22 aide-memoire for precognoscers raising these issues
23 specifically, even where Crown Office have not been
24 advised that any difference of view or disagreement
25 exists between examiners. This also specifically

1 reminds precognoscers of the importance of disclosing
2 any such issue raised at the precognition to
3 the defence, although there is a continuing duty of the
4 Crown to disclose material information at any stage that
5 it comes to light and this will provide some protection
6 pending the introduction of further training to SPSA
7 staff.

8 It is appreciated that the Crown have been aware
9 since 2001 of the involvement of Alister Geddes and have
10 been aware that they did not receive evidence in
11 relation to prints which may have been consistent with
12 an accused. Crown Office is also aware that advocate
13 deputes have known since 1994 that this evidence was not
14 being made available to the Crown. The example given to
15 show the importance of this related to a print on a
16 murder weapon which was not an accused's but which might
17 relate, for example, to an incriminee.

18 Concerns have been raised about this situation
19 continuing an absence of any instructions or guidelines
20 from the Crown to SCRO, SFS or SPSA and these have also
21 been highlighted during the Inquiry under reference to
22 an example given of the situation where a print was
23 found on a murder weapon.

24 I would invite the Chair to consider the reality of
25 a situation such as this arising. As the position

1 stands, if a print is found on a murder weapon, then the
2 fact that that exists would be disclosed to the defence
3 in 1997 in the joint report and would now be disclosed
4 to the defence in the annex to the report. As a result,
5 it has always been the position that the defence are
6 made aware of the existence of such a print and it is
7 open to the defence to investigate that further to see
8 whether it is in any way consistent with any line of
9 defence maintained by them.

10 If it is marked as insufficient, then the defence
11 will still be able to highlight the existence of this
12 print to the jury and raise the issue of reasonable
13 doubt, even if no further investigations are carried out
14 or even where they are not possible.

15 Further, the existence of such a print is not
16 something that the Crown would ignore because it could
17 raise a reasonable doubt with the jury so the Crown
18 would investigate the existence of a print of that sort
19 further.

20 In addition, if there is an incriminee -- and a
21 notice of incrimination would be lodged if there was
22 one -- then equally the onus is on the Crown to prove
23 beyond reasonable doubt that the incriminee did not
24 commit the crime and so it is actually something that
25 the Crown have an interest in investigating and in fact

1 an onus of disproving.

2 So although the Lord Advocate's guidelines which
3 dealt with this matter or would have dealt with this
4 matter were not ultimately issued, the reality is that
5 had that situation arisen in the example given the Crown
6 would have investigated that print, even if the defence
7 had failed to investigate.

8 However, if the Inquiry consider that a further
9 category of unable to exclude would highlight to the
10 Crown and the defence that a print which cannot be
11 identified or eliminated may, on further investigation,
12 be of some potential assistance, the Crown would welcome
13 this change and it is understood that this is a category
14 which is used in England and Wales.

15 We should not assume that in the absence of such a
16 category that the Crown or defence have ignored or would
17 ignore unidentified prints if found on weapons or at
18 crime scenes. Although Fingerprint Officers may not
19 provide the full extent of information available on a
20 particular print in the joint report or an annex, it has
21 always been open to the Crown or the defence to instruct
22 further enquiries where that is appropriate. We have
23 also heard reference to the ACPOS guidance manual which
24 now provides considerable guidance on disclosure in
25 chapter 7 and that is published now on the website and

1 we have heard that there will be further training given
2 in that regard.

3 Finally, in relation to this aspect of disclosure,
4 it should be noted that when in force the Criminal
5 Justice Bill Section 30 will place an obligation on an
6 accused person where he instructs a person with a view
7 to his providing an expert opinion for possible use as
8 evidence at a trial he must give to the court a notice
9 specifying the person's name and addresses and,
10 accordingly, once the legislation comes into force where
11 a defence expert gives an opinion contrary to an
12 accused's position this will ultimately come to the
13 attention of the Crown. This is a change to the
14 situation which exists at the time of the McKie trial
15 where Mr Swann was instructed on behalf of the defence
16 but not relied upon.

17 Finally, I just wish to indicate that the
18 Lord Advocate looks forward to receiving and considering
19 the full report and recommendations in due course and I
20 thank you for your attention.

21 THE CHAIRMAN: Thank you very much. Subject to the one
22 deletion, we will arrange for the written submission to
23 be put on the website.

24 MISS GRAHAME: I am obliged.

25 THE CHAIRMAN: I suggest that perhaps this might be the time

1 to take the break and we will sit again at 11.40. Then
2 you will be coming next, is that right, Mr Smith?

3 MR SMITH: Thank you, sir. I have agreed with
4 Mr Holmes that we should reverse that order for no
5 particular reason.

6 THE CHAIRMAN: Whichever way you agree to it, we'll take
7 whoever it is at 11.40.

8 **(11.20 am)**

9 **(A short break)**

10 **(11.40 am)**

11 THE CHAIRMAN: Mr Holmes, when you are ready.

12 **Submission by MR HOLMES**

13 MR HOLMES: Thank you, Mr Chairman. I will begin by
14 reiterating a remark that was made at the very beginning
15 of these proceedings, which is that this matter arose
16 from a murder investigation in which my clients and the
17 other officers of SCRO played only a part. Whilst the
18 events of the intervening years have had a dramatic and
19 unwelcome effect on all their lives, the victim in this
20 case always has been and always will be Marion Ross.

21 I would invite you to bear in mind that in 1997 and
22 1999 the SCRO experts who made the identifications were
23 Fingerprint Experts but also employees who did not have
24 any control over policy decisions nor any control of
25 identifications made on the basis of information they

1 provided. They refrained from media comment as
2 instructed by their employers and have conducted
3 themselves professionally at all times. Despite this,
4 they have been ill-served by the decisions made on
5 behalf of the institutions involved in this case.

6 My submissions will broadly follow the chapter
7 framework set out by Inquiry Counsel in his analysis,
8 although as the Inquiry have developed some issues have
9 become more relevant than others.

10 The first chapter relates to the investigations at
11 43 Irvine Road. Whilst it is unnecessary for me to
12 comment on all the matters pertinent to the murder
13 investigation there are particular issues to be
14 addressed. The first relates to the comments of
15 Mr Moffat. In my respectful submission, it is quite
16 clear that Mr Moffat did not make any suggestion to DI
17 McAllister that he thought Y7 was the mark of Gary Gray,
18 although he speaks to it, he acknowledges on day 6 at
19 page 10 that there is no reference to the incident in
20 either one of the notebooks that he has provided to the
21 Inquiry. DI McAllister in his statement does not recall
22 any reference to the incident, Mr Moffat's position
23 being DI McAllister is lying and DC Gray does not recall
24 his glove being ruptured or Mr Moffat telling him it was
25 ruptured or touching the doorframe at the **locus**.

1 Chief Inspector Hogg certainly had no recollection
2 of the incident when he spoke to the MacKay
3 investigators. James Kerr was present when Y7 was found
4 and has no recollection of any such conversation nor
5 does David Thurley. In my submission, the evidence of
6 these witnesses should be preferred to that of Mr Moffat
7 and the Inquiry should find that no such account was
8 ever given. In any event, this was one of many side
9 issues which took up a disproportionate amount of
10 Inquiry time for little purpose and created no real
11 doubt over the identification of mark Y7.

12 I note it is also clear from DI McAllister's
13 evidence that he did not tell Mr Moffat on
14 23rd January 1997 that mark Y7 had been identified as
15 belonging to a police officer.

16 In relation to the issues surrounding the recovery
17 of evidence at Irvine Road, firstly on delay, in my
18 submission, the recovery of fingerprint evidence was not
19 in any way affected by the delay in formal designation
20 as a murder in accordance with normal police procedures.
21 Mr Ferguson, a Scenes of Crime Officer, confirms that he
22 was instructed to treat the incident as a murder as does
23 Mr Thurley who says the scene was treated in exactly the
24 same way as it otherwise would have been.

25 In relation to choice of powder, in my submission,

1 the development of the mark by black powder rather than
2 aluminium powder is not a matter the Inquiry should
3 consider to be significant. Dr Bleay gave evidence that
4 either the area in which Y7 was discovered had not been
5 covered by aluminium powder or that the aluminium powder
6 did not adhere well to the area before it was re-treated
7 with the black powder. He is unable to tell which.

8 Under those circumstances there is no value in
9 speculating whether the mark was deposited before the
10 application of the aluminium powder but that the
11 aluminium powder did not adhere well to it or whether
12 the mark was deposited after the application of the
13 aluminium powder but before the application of the
14 black.

15 In relation to the issue surrounding access to the
16 **locus**, in my submission, there is contradictory evidence
17 from Ms McKie and from others as to the extent of her
18 entry into the house at Irvine Road. She stated she
19 entered the porch area whereas the officer in charge of
20 the log states that she did not. The log is incomplete.
21 It does not record the presence of DC Kerr though he
22 give evidence that he was there. DC Kerr also gives
23 evidence that Ms McKie was within the porch on at least
24 one occasion when he was there, which contradicts the
25 evidence, again, of PC Lees.

1 The very reason PC Lees gives for not recording the
2 presence of Ms McKie is that she did not enter the
3 vestibule of the house. This combined with the
4 demeanour of PC Lees during his evidence to the Inquiry
5 and the account of his evidence during the trial given
6 by Chief Inspector Carle is, in my submission, reason to
7 reject his evidence.

8 Whilst that does not prove the opposite is true and
9 that he did allow Ms McKie access to the **locus**, it does
10 in my submission show, taken along with the evidence
11 that other officers were present in the house who do not
12 appear on the log, that neither the log nor PC Lees'
13 recollection can be relied upon.

14 In my submission, the Inquiry should find that
15 individuals not on the log, including Ms McKie, at least
16 had the opportunity to access the **locus** without being
17 recorded in the log.

18 Chapter 2 relates to marks XF and Q12 and to the
19 detention of David Asbury. In relation to the
20 information available to the officers who examined the
21 tin, there has been a great deal of evidence about the
22 form 13 which was sent to SCRO along with the
23 photographs of the marks found on the Marks & Spencer
24 tin found in David Asbury's house which reads:

25 "Ident required for deceased".

1 Whilst the witnesses agree that in retrospect
2 the words were carelessly chosen they also agree that
3 what would have been intended was merely an instruction
4 that the marks on the tin were compared to the form in
5 the name of Marion Ross with some priority rather than
6 having officers go through the order on the worksheet.
7 This is, according to Mr Chamberlain, an advisable
8 approach.

9 All the witnesses are clear that any comment on
10 a form 13 would not affect their examination of the mark
11 as against a known print. The tin was found in
12 Mr Asbury's house so the only relevance of any marks on
13 the tin to the murder inquiry would be if they belonged
14 to the deceased, Miss Ross. I would invite you to find
15 this comment had no bearing on the comparison of Q12.

16 In relation to the case against Mr Asbury,
17 Mr Gallacher wrote a note outlining the evidence against
18 Mr Asbury aside from the fingerprints dated 28th
19 January 1997. Crown Counsel instructed full committal
20 on 30th January 1997 and on the same day Mr Heath was
21 contacted by Mr McTaggart in relation to the two pieces
22 of evidence against Mr Asbury on which Mr Gallacher
23 sought clarification. Mr Asbury was fully committed the
24 following day.

25 The identification of Q12 as the right forefinger of

1 Marion Ross had no bearing on the decision to fully
2 commit Mr Asbury as the evidence is that the
3 identification was made on the day of full committal and
4 that decision had already been taken by the Crown and I
5 would invite you to make a finding to that effect.

6 In relation to XF the identification is not
7 disputed. The mark was identified by Mr MacPherson and
8 checked by three other officers. Despite many attempts
9 by Mr Wertheim to throw suspicion on the provenance of
10 mark XF when confronted with his own notes he was forced
11 to admit he had examined the original gift tag prior
12 to Ms McKie's trial and that there was no evidence that
13 the mark on it was fabricated.

14 Two marks from the end of the Marks & Spencer's tin
15 were identified, one of Miss Ross and one of Mr Asbury,
16 both from Q12. Mr MacPherson again was the first
17 examiner to identify these and he did so using the
18 original photograph, the original form and a
19 fingerprint glass. Each mark was checked by three other
20 examiners to the 16-point standard.

21 In relation to QD2 the evidence of the Danish
22 experts on this and all other marks must be regarded now
23 as discredited. There is no dispute that QD2 was
24 correctly identified by SCRO.

25 In relation to the use of the comparator we have

1 heard evidence that it was normal practice for the
2 comparator to be used in some way by Fingerprint
3 Experts. Those who were checking the marks after the
4 initial checker would make use of the comparator screen
5 to keep a record of who had looked at the mark and
6 confirmed the identification. Those details would later
7 be transferred to the reverse of the photograph.

8 It was the usual practice of Mr Stewart, Mr Geddes,
9 Ms McBride, Mr McKenna and Mr MacPherson to carry out
10 their initial comparisons with fingerprint glasses
11 regardless of whether the mark and print were on the
12 comparator to begin with and they could then move to the
13 comparator if that was required.

14 In relation to documentation, the identification of
15 part of QI2 as the right forefinger of Marion Ross was
16 documented to the accepted standard at the time. The
17 officers cannot be criticised for following the
18 processes in place. The officers who checked and
19 verified QI2 as that of the right forefinger of Marion
20 Ross recorded that fact on the reverse of the photograph
21 and the time and date this information was relayed to
22 the murder team was also recorded. This information was
23 again recorded on the SCRO diary page. The information
24 was also recorded on the Marks Worksheet.

25 Any criticism is baseless. On keeping notes in

1 general, Mr Logan gave evidence that he does not keep
2 notes on his examinations and that it is impractical to
3 do so in a working bureau. He also gave evidence that
4 it is of limited value to do so anyway since different
5 examiners may use different characteristics to come to a
6 view and that even the same examiner may use a different
7 set of characteristics on each occasion they examine the
8 mark. Mr Pugh appeared to have a similar opinion.

9 Chapter 3 relates to marks Y7 and Z7, the finding of
10 these marks and the initial assessment. On the issues
11 of where, when and under what circumstances Y7 was found
12 and when it was identified and checked, mark Y7 was
13 discovered at 43 Irvine Road on 14th January 1997. The
14 photographs available of the door standard confirm
15 Mr Moffat's notes that Y7 is on the right-hand inner
16 facing of the bathroom door surround about five feet up.

17 There's a piece of palm-print below the mark which
18 is unfortunately insufficient for identification but
19 that, along with Mr Moffat's notes, indicate that the
20 orientation was with the thumb facing upwards.

21 Dr Bleay gave evidence that there was no way to tell
22 whether or not the mark was deposited before or after
23 the application of aluminium powder. His evidence was
24 that whilst he could not detect aluminium there were a
25 number of possible reasons for this. There is, in my

1 submission, no way for this Inquiry to reach a safe
2 conclusion about this.

3 Mr Thurley seized the bathroom door on
4 9th January 1997. Given the position of mark, in my
5 submission, it has been demonstrated that it would be
6 relatively easy to leave a thumbprint if the door had
7 already been removed, less so if the door remained in
8 position. For that reason, in my submission, it is more
9 likely that the mark was deposited after the door was
10 removed and I would invite you to make a finding to that
11 effect.

12 Ms McKie's fingerprint form was not on file. It had
13 to be requested. The one compared against Y7 is dated
14 6th February 1997 so it cannot be the case that DI
15 McAllister could comment on the identification on
16 23rd January 1997. In any event, the mark was only
17 checked by four officers and called out of the Bureau on
18 11th February 1997 so again it cannot have been
19 attributed to a police officer prior to this.

20 The evidence before this Inquiry is that in relation
21 to mark Y7 it was in a bundle of marks which are logged
22 as arriving at SCRO on 14th January 1997 that were then
23 dealing with in the normal fashion and compared against
24 ten-print forms for those persons listed on the suspect,
25 elimination and police work sheets.

1 After the identification of mark Y7 as the left
2 thumbprint of Shirley McKie by Mr MacPherson, it was
3 then verified by three other experts in the normal way
4 before it was telephoned out to DCI Heath on
5 11th February 1997, as recorded on the reverse of the
6 photograph.

7 The process by which Y7 came to be identified as
8 that of Ms McKie was no different to the procedures
9 adopted for the other marks in the case.

10 From the evidence it was Mr MacPherson who took the
11 decision that mark Y7 would be verified using the
12 16-point court standard. Mr MacPherson had decided that
13 all identifications should be to that standard as this
14 murder inquiry started as what has been termed a
15 "whodunnit". As it transpired, the mark was identified
16 as belonging to a police officer whose name had appeared
17 on an elimination list of police officers provided by
18 the murder investigation team and, therefore, it ceased
19 to be of any significance to the murder inquiry itself
20 as far as the Fingerprint Officers were concerned at
21 that stage.

22 Mr Geddes states that he was asked by Mr MacPherson
23 to look at the mark and that he was aware that it had
24 been eliminated as belonging to a police officer.
25 Mr Stewart states that he was not aware of this. Ms

1 McBride was aware that Mr MacPherson had identified the
2 mark as the number 6 of Ms McKie. By the
3 time Mr Halliday, Mr Dunbar and Mr Mackenzie examined
4 the mark they were aware of the identification that had
5 been made.

6 Mr Geddes states that his recollection is that he
7 examined the photograph of the mark and the form using a
8 fingerprint glass. Mr Stewart states that he carried
9 out the examination using the photograph, the original
10 form and a fingerprint glass. Ms McBride used the
11 original photograph, the original form and a fingerprint
12 glass.

13 After Ms McKie denied having entered the **locus** at 43
14 Irvine Road, on 11th February DCI Heath says that he
15 gave the instruction for the mark to be checked again.
16 He states that he had no doubt himself but that because
17 fingerprint evidence was likely to be important to the
18 case and because he had already heard Ms McKie denying
19 loudly that the mark was hers he decided to have it
20 checked again.

21 SCRO were instructed by Chief Inspector O'Neill that
22 this identification should be rechecked. Chief
23 Inspector O'Neill was ordered to do so by the Deputy
24 Divisional Commander at Kilmarnock who had Mr McKie with
25 him at the time. This was an entirely nonstandard

1 procedure that only took place, on one view, because of
2 the intervention of Ms McKie's father. This was not an
3 opportunity that is likely to have been afforded to a
4 civilian.

5 Mr Mackenzie and Mr Dunbar then independently
6 checked mark Y7 and were both satisfied that there were
7 sufficient characteristics in sequence and agreement to
8 individualise mark Y7 as the left thumbprint of Shirley
9 McKie.

10 In relation to the blind test, Mr Mackenzie's
11 evidence makes it clear he considered this to be a
12 training opportunity. Mr Dunbar's recollection was
13 simply that he had been instructed to organise a further
14 examination of the mark. The list of those who
15 participated in the exercise has since been lost. The
16 evidence of Mr Dunbar is that the conclusion of all
17 those who took part was that the mark Y7 was made by the
18 left thumb of Shirley McKie, with the exception of two
19 officers who sought more time to complete the exercise.

20 With regard to the re-photographing and retaking of
21 prints on 18th February again this was an entirely
22 nonstandard procedure that would not have been afforded
23 to a civilian. The only reason for this was, it is
24 clear from the statement of Chief Inspector O'Neill, the
25 influence exerted by Ms McKie's father. Chief

1 Superintendent Ferry made it clear to Mr Mackenzie and
2 Mr Dunbar during an animated meeting that they
3 had better be certain of their findings. Following
4 this, Mr Mackenzie and Mr Dunbar rechecked the new
5 photographs and a new ten-print form and once again
6 confirmed that mark Y7 was the left thumbprint of
7 Shirley McKie. This information was then relayed to
8 Chief Superintendent Ferry by Mr Mackenzie.

9 Although it is not a matter upon which this Inquiry
10 has dwelt, the question has been asked whether or not
11 the SCRO examiners were aware that Ms McKie's
12 fingerprint was identified on a production in a case in
13 1993. This is, in my submission, a ridiculous notion.
14 Evidence has been heard of the huge volume of marks
15 compared by the Glasgow Bureau. Evidence has also been
16 heard that it was by no means an irregular occurrence
17 that police officers left their marks at loci and on
18 productions. To suggest that a particular examiner
19 would immediately recall an incident involving a
20 particular officer or the particular characteristics in
21 a mark submitted for comparison would bring a particular
22 officer to mind is, in my submission, inconceivable.

23 I would invite you to find that Y7 was correctly
24 identified as the left thumbprint of Shirley McKie.
25 Mr MacPherson and Mr Mackenzie have spoken to the

1 individual characteristics in Y7 of which they made use
2 in their identification. They have demonstrated where
3 those characteristics are to be found in the images
4 before the Inquiry.

5 They are challenged by Mr Wertheim and Mr Zeelenberg
6 on the basis that Mr Wertheim and Mr Zeelenberg perceive
7 a number of differences between Y7 and the left
8 thumbprint of Shirley McKie. Firstly, I would urge you
9 to make use of the images so far as possible in their
10 unadulterated form. Both Mr Zeelenberg and
11 Mr Wertheim's images are heavily marked and this, in my
12 submission, is unhelpful. It indicates what the
13 examiner wishes you to see but it is of course that
14 examiner's own interpretation of the detail not
15 necessarily what is actually there.

16 A pointed case of this came in relation to
17 Mr Wertheim's identification of what has become known as
18 the Rosetta characteristic where he lined out a
19 differing number of intervening ridges between two inked
20 prints used by Mr Swann in his illustrations.
21 Mr Wertheim on that occasion got it wrong. In that case
22 the illustration serves only to confuse. No doubt
23 Fingerprint Experts will access the materials published
24 by the Inquiry in future and no doubt they too will bear
25 that in mind.

1 In passing, I would note that Mr Wertheim's
2 suggestion that it was Inquiry Counsel who suggested
3 that the point he was looking at was the Rosetta
4 characteristic does not accord with the transcript of
5 the evidence, day 24, page 100 to 102 and the image
6 FI2309.014. I would invite you to consider this when
7 assessing whether Mr Wertheim's evidence to this Inquiry
8 was credible and to find that it was not.

9 Secondly, I would invite you to find that where a
10 sufficient volume of ridge detail in sequence and
11 agreement exists even a supposed difference between the
12 known impression and the crime scene mark does not
13 necessarily matter. It was accepted by a number of
14 witnesses that nobody will ever know the exact way in
15 which a mark was deposited. Attribution of differences
16 to movement, pressure distortion or contaminants will
17 always be a matter of coming to a view based on training
18 and experience. My clients and those who agree with the
19 identification of Y7 all take the view that the mark is
20 heavily distorted. Mr Swann went into some detail about
21 his own findings and I believe those of Mr Berry who
22 also agrees the identification in this regard.

23 It should also be born in mind that an attempt to
24 challenge an identification on this basis is not new.
25 In the case of Alfred and Albert Stratton in 1905, an

1 expert attempted to challenge a fingerprint
2 identification on the basis that there were a number of
3 dissimilarities between the known print and the crime
4 scene mark. The attempt to discredit the fingerprint
5 evidence failed now and it should fail now.

6 One feature of that case was that the defence expert
7 was found not to be a credible witness. There are a
8 number of matters which you, Mr Chairman, must consider
9 when deciding upon the weight to be given to differing
10 expert evidence. The credibility of each individual
11 witness must, in my submission, be a relevant factor.

12 Mr Wertheim has clearly become a part of the
13 campaign against those who identified Y7 and Q12. He
14 cannot be considered for these purposes to be an
15 independent expert. He says in his own evidence that he
16 considers it part of his role to persuade a jury of his
17 conclusions. In my submission the fact that any witness
18 states that they see it as their business to influence
19 the outcome of the proceedings is wholly inappropriate.
20 He sought to exact influence in this case by, amongst
21 other things, writing the e-mail enclosed with the
22 letter sent by Mr McKie to the Justice Minister to put
23 pressure on my clients' employment by suggesting that
24 SCRO needed to "clean house", as he puts it. He has
25 done so by appearing on television and suggesting that

1 Y7 is mis-identified and not in error, but deliberately.
2 He has maintained a position on XF that it is
3 fabricated, even in the knowledge that he had examined
4 the gift tag himself and declared it "legit".

5 He has commented constantly on the Internet and in
6 newspaper articles for a number of years, even during
7 this Inquiry, and has accused my clients of lying.

8 Mr Wertheim is described in Sheriff Murphy's note as
9 "more showman than expert".

10 I have already invited you to find Mr Wertheim's
11 evidence to this Inquiry is not credible but standing
12 his position as to his recollection on the examination
13 of XF that he carried out in 2000, I would also invite
14 you to find that neither is his evidence to this Inquiry
15 reliable.

16 Mr Zeelenberg accuses my clients of bad practice or
17 malpractice, even in the knowledge that he has had to
18 recant an allegation of mis-identification on behalf of
19 the Danish experts and on behalf of Messrs Bail,
20 McGregor [sic, MacLeod] and Dempster. The Danish
21 experts, it should be remembered, have elected not to
22 co-operate with this Inquiry. Mr Zeelenberg refuses to
23 accept that another opinion could be honestly held by a
24 competent expert even though when challenged he declares
25 himself only to be an expert who gave his honest

1 opinion.

2 Mr Wertheim says the same, though he does invite
3 comment on his competency should the Inquiry find in
4 favour of the identification of Y7 and Q12.

5 Mr Logan, Mr Pugh and Mr Chamberlain acknowledge
6 that fingerprint evidence is subjective, even my own
7 clients have acknowledged that a competent expert acting
8 in good faith could have come to a different view.

9 Mr Mackenzie and Mr Dunbar's perception of the
10 discussion at Tulliallan is markedly different from
11 Mr Zeelenberg's and again it is telling that no evidence
12 has been provided by the only independent witness to
13 this incident, Mr Rudrud.

14 Mr Dunbar and Mr Mackenzie have given evidence on
15 their view of whether Mr Zeelenberg was acting in good
16 faith when, whether by threat or merely pointing out the
17 potential consequences for them in a friendly way, he
18 attempted during and after the Tulliallan conference to
19 solicit them to change their views. We also have
20 Mr Zeelenberg's evidence that he was not there to
21 facilitate a discussion but to persuade the SCRO experts
22 that they were incorrect.

23 Mr Sheppard and Mr Grigg made similar criticisms
24 from a position of having no knowledge of SCRO, its
25 systems or its procedures.

1 Mr MacLeod and Mr Bayle saw fit to call for the
2 closure of the Glasgow Bureau of SCRO on the basis of an
3 alleged mis-identification in the **Sutherland** case which
4 came at a crucial moment during Justice 1 and which they
5 have since been forced to acknowledge was wrong.

6 I was asked by Inquiry Counsel not to cross-examine
7 Mr MacLeod on any negative aspect of his evidence
8 because of his failure to properly carry out the task
9 asked of him during the comparative exercise. I did ask
10 Mr Bayle about his admission at Justice 1 that he was
11 incorrect to criticise **Sutherland** but he refused to
12 answer.

13 The identification of part of QI2 as being the right
14 middle fingerprint of David Asbury was questioned by
15 this Inquiry with reference to a 7th August 2000 report
16 prepared by Mr Rokkjaer and Mr Rasmussen. After a
17 lengthy examination, Mr Logan of the Police Service of
18 Northern Ireland has confirmed that the identification
19 was correct. In my submission all we have learned is
20 that this was another speculative attempt to cast doubt
21 on the ability of the officers involved in this case
22 and, in my submission, it is another attempt which has
23 failed.

24 The Danish experts Mr Rokkjaer and Mr Rasmussen also
25 questioned QD2 as not originating from Mr Asbury.

1 Mr Jensen of the Danish police later confirmed this was
2 incorrect and that he would have expected a novice to be
3 able to make the identification.

4 The Danish experts also indicated that QE2 and QL2
5 were sufficient for comparison, which has since been
6 contradicted by the examination carried out by Mr Logan
7 and the Police Service of Northern Ireland.

8 The language employed by some of the defence experts
9 in this case is far beyond what is appropriate for an
10 independent expert and must, in my submission, cast a
11 shadow over their credibility. Contrast that with the
12 level of co-operation and professionalism shown to this
13 Inquiry by those who identified Y7. My clients have
14 made themselves available and have carried out the work
15 the Inquiry requested of them. They have explained
16 their opinions and the reasons for disagreeing with the
17 defence experts. They have given their oral evidence in
18 a professional manner, even when challenged. The SCRO
19 experts have not shot from answering any question put to
20 them.

21 Attempts have also been made to refer to a general
22 mass of opinion amongst world experts. Firstly, the
23 reference to world experts is misleading. These are
24 experts from elsewhere in the world. I would call
25 attention to the evidence of Mr Logan who indicated that

1 the involvement of experts from jurisdictions with
2 different backgrounds and training is less desirable
3 than having a disputed mark looked at by experts from
4 the same jurisdiction. I would also invite you to note
5 that the Interpol European Expert Group of Fingerprint
6 Identification, which was mentioned by Mr Zeelenberg,
7 has stated that it is recommended that only the
8 receiving country can or should decide on the validity
9 of an identification for its own judicial process and
10 identifications established by another country should be
11 confirmed by the receiving country.

12 Secondly, we do not truly know the opinion of any
13 expert who has not offered his or her co-operation to
14 this Inquiry.

15 Thirdly, we do not know what materials, if any,
16 others have looked at. That being the case, the opinion
17 for or against the identification of Y7 cannot be
18 supported by reference to individuals who have not
19 provided evidence here.

20 In relation to chapter 4 which relates to the Crown
21 Office, the Procurator Fiscal and their preparation for
22 the Asbury trial and chapter 5, the preparation of
23 reports by SCRO in the Asbury and the McKie case,
24 reports were prepared in the normal manner for the
25 Asbury case. Any additional productions were only made

1 at the request of the Crown. The SCRO officers had no
2 discretion or input into such matters. The production
3 of books of all identified fingerprints in the case was
4 at the request of the Crown and was not a standard
5 procedure. What this meant was that all the marks and
6 identifications were available for scrutiny by the
7 defence Fingerprint Expert, Mr Graham, and he was
8 satisfied that they were correct.

9 It was normal practice for only two Fingerprint
10 Officers to attend court to give evidence. In the
11 Asbury trial these two witnesses were Mr Stewart and
12 Mr MacPherson. Ms McBride and Mr McKenna were the
13 alternates in case of holiday or unavailability.

14 The choice in number of fingerprint reports to
15 request and lodge as productions was entirely a matter
16 for the Crown. The Crown chose in the McKie case to
17 call all four Fingerprint Experts who had signed the
18 joint reports. Mr McKenna was unavailable so only three
19 gave evidence, Mr Stewart, Mr MacPherson and Ms McBride.
20 The joint reports and charted enlargements for these
21 trials were prepared by Mr MacPherson. However, it is
22 important to note that all four officers who signed
23 those reports had to independently satisfy themselves
24 that the information was correct as any of them could
25 have been called to give evidence at the trial.

1 In relation to chapter 6, fingerprint law and
2 practice, the evidence in relation to the signing of the
3 case envelope in the Asbury case is these would be the
4 individuals who had identified the majority of the marks
5 within the envelope and who would be most likely to be
6 used in the preparation of a joint report and the giving
7 of evidence if required.

8 As mentioned earlier, Ms McBride and Mr McKenna were
9 the chosen substitutes for other signatories based on
10 the pattern of annual leave. The selection of experts
11 and substitutes for particular cases was a management
12 decision.

13 In relation to the issues raised regarding joint
14 reports, each of the signatories to a joint report would
15 have to satisfy his or herself as to the identifications
16 described therein. They knew at that stage that they
17 may have to speak to the identification in court so they
18 would satisfy themselves at the time the joint report
19 was prepared.

20 In relation to the selection of images the officer
21 preparing the joint report would choose them and in
22 relation to the choice of forms there would be in all
23 likelihood only one form for each individual so there
24 was no choice but to use that form, although another
25 could be requested if the form was not clear.

1 On the additional comment in the March report, the
2 evidence has been that any derogation from the standard
3 form of report would have been on the request of the
4 Procurator Fiscal or Advocate Depute and there is no
5 inference that should be drawn from this.

6 In relation to production number 180, which was only
7 signed by Mr Stewart and Mr MacPherson, the evidence of
8 Chief Inspector Wilson was that this was prepared at his
9 request in relation to disciplinary matters. In any
10 event, it was produced at the McKie trial and disclosed
11 to the defence. Again, no inference can be drawn from
12 this as any report or charting would only have been
13 prepared by SCRO officers on the request of the Crown
14 or, as in this instance, on the request of the police.

15 As a matter of course for cases on indictment case
16 specific enlargements were prepared to illustrate the
17 processes used by the Fingerprint Experts in reaching
18 their conclusion as to unique identity, although as a
19 matter of fact it used 16 actual characteristics. This
20 illustration was intended to fulfil the same role as
21 generic fingerprint illustrations.

22 The criticism that has been levelled at my clients,
23 quite wrongly in my submission, is that without some
24 means to demonstrate what they are seeing they are
25 merely making a bald assertion that individual features

1 of a mark are there and expecting the jury, a judge or
2 you, Mr Chairman, to accept that.

3 In my submission, it is not necessary for the jury,
4 a judge or you to see individual characteristics on a
5 photograph. Medical experts give evidence a great
6 deal of the time in criminal cases without reference to
7 the photographs because to do so would be distressing
8 for the victim, their family or for the jurors
9 themselves. Their evidence of what they saw when they
10 examined a victim is merely evidence of fact which a
11 jury can choose to accept or reject, as with any other
12 evidence. Once that factual basis has been laid their
13 opinion evidence, the interpretation of what they have
14 seen can begin.

15 The suggestion that a jury must be able to see
16 characteristics on a photograph is misleading. The best
17 evidence is the original photograph used by the examiner
18 for their comparison which the jury would not in any
19 event be able to pick out individual characteristics
20 simply because of scale.

21 Mr Logan agreed with this in his evidence and went
22 so far as to say the production of case specific
23 enlargements was unhelpful since jurors would inevitably
24 fail to see all the characteristics an expert could see.
25 Within the limitations of the performance of the

1 charting PC, the court productions were accurate
2 representations of 16 characteristics in sequence and
3 agreement. Those characteristics may not have been the
4 ones used by each individual examiner to come to a
5 conclusion but they were characteristics that each
6 examiner was willing to agree upon.

7 The main flaw with the charting PC was the clarity
8 of the images it produced and the difficulty in
9 manipulating the points and lines. As the Inquiry has
10 seen, the marking up of images, even today, is difficult
11 with technology considerably more advanced than the
12 charting PC. Evidence of the actual identification was
13 in the original materials which the expert had used and
14 which were available to any defence expert.

15 Chapter 7 relates to the decision to prosecute in
16 the case of Ms McKie. The only comment that I would
17 make in relation to the decision to prosecute Ms McKie
18 is that it has been suggested that it would have made a
19 difference had it been known to the Crown that a number
20 of experts who did not sign the joint reports or court
21 production books had confirmed the identification on
22 fewer than 16 points. We have heard evidence that under
23 the non-numeric system it is a sufficiency of
24 characteristics to individualise that is important in
25 confirming an identification and under this system the

1 actual number of characteristics would make no
2 difference and would not be disclosed to the Crown. In
3 any event, there were circumstances where evidence could
4 be led in relation to identity, even where the 16-point
5 standard had not been met.

6 I would refer in this section to the case of
7 **R v Beeson** which is to found in 1990 New Zealand Law
8 Reports, page 572. In that case, fingerprint evidence
9 was led at a trial from two officers for the Crown. The
10 accused were convicted and appealed **inter alia** on the
11 ground that fingerprint evidence ought to have been
12 rendered inadmissible by a memorandum written by one of
13 the officers prior to trial which apparently indicated
14 that he had achieved fewer than the national standard,
15 which was 12 points, but was content to identify. The
16 appeal was refused.

17 The case also contains an interesting discussion on
18 whether jurors ought to be able to see individual
19 characteristics on charted enlargements. The court
20 concluded that they need not.

21 The other two decisions relating to Mr Asbury's
22 appeal and to the settlement of the civil case have been
23 decided not to be part of this Inquiry's remit. In
24 relation to that, I would note only that I made detailed
25 submissions as to why they ought to be included in the

1 remit and I respectfully remain of the view that this
2 Inquiry should have considered those decisions.

3 In relation to chapter 8, which relates to
4 Ms McKie's trial and the post trial review, firstly, in
5 relation to whether the Crown failed to take an
6 appropriate step by exhausting the instructions to
7 Mr Kent, in my submission the Crown did not fail to
8 exhaust the instructions to Mr Kent. The instructions
9 to Mr Kent were exhausted so far as they could be by
10 Mr Kent's involvement since he himself has said that he
11 is not a Fingerprint Expert.

12 It is clear from the evidence that Mrs Greaves
13 failed to appreciate that Mr Kent is not a Fingerprint
14 Expert and that if these instructions were to be carried
15 out a further expert would be required. Assuming such
16 an independent expert supported the Y7 identification,
17 as Malcolm Graham and Peter Swann had already done, this
18 would have provided valuable independent support to the
19 SCRO officers and the Crown case.

20 In Sheriff Murphy's note of 3rd June 1999, which was
21 not available prior to his giving evidence, he states he
22 was aware of a defence expert who had agreed with SCRO
23 before the trial and asked for this to be investigated.
24 It was not. This failure prevented the prosecution from
25 citing Mr Swann or putting his agreement with SCRO to

1 Ms McKie in cross-examination. I would note that
2 Mr Asbury's defence expert, Malcolm Graham, had already
3 examined the fingerprint productions and satisfied
4 himself that the identifications made were correct,
5 including both Y7 and Q12 and that Mr Graham had given
6 evidence at Mr Asbury's trial.

7 A further report not from Mr Kent but from a
8 Fingerprint Expert would either have confirmed SCRO's
9 findings and resulted in stronger evidence at trial.
10 Ms McKie states that her father had some difficulty in
11 coming up with a Fingerprint Expert who was prepared to
12 contradict the SCRO findings -- so I would suggest that
13 this is the more likely outcome -- or the further report
14 would have contradicted SCRO's findings and led most
15 likely to an adjournment of the case or to a desertion
16 of the case **pro loco et tempore** for any issues
17 surrounding the fingerprint evidence to be resolved.

18 In my respectful submission, it is also a matter of
19 considerable doubt the SCRO witnesses were properly
20 briefed by the Crown in advance of the McKie trial. The
21 situation where fingerprint evidence was contested was
22 rare. The main difference between the SCRO experts and
23 the defence experts has been agreed by the witnesses who
24 have spoken about it to relate to presentation. The
25 recognition of a need for training in this area is the

1 recognition that when faced with a slick presentation
2 from a defence expert on a difficult topic juries may
3 select which witness to prefer based on presentation
4 skills rather than on expertise.

5 Despite what Mr Nelson said about the use of
6 technology there is, in my submission, no good reason to
7 do so in a court setting other than to apply a veneer of
8 professionalism which may appeal to non-Fingerprint
9 Experts but should not be a substitute for the
10 underlying skills of the expert witness. I would refer
11 again to Sheriff Murphy's stated view of Mr Wertheim in
12 that regard.

13 As mentioned previously and bearing in mind the
14 stage at which the defence reports were received, in my
15 submission, it is doubtful that the prosecution were
16 properly prepared to present the SCRO evidence. The
17 fault, if there be any, for any lack of preparation must
18 lie with the Depute and not with the individual
19 witnesses.

20 Sheriff Murphy gave evidence that he learned of
21 another expert's involvement very soon before the
22 beginning of the trial and did not know that that expert
23 was Mr Swann. The very fact that her own expert had
24 confirmed SCRO's findings was very damaging to Ms McKie.
25 Sheriff Murphy could reasonably have anticipated that

1 she would be reluctant to disclose his findings. He
2 could reasonably have anticipated that had he
3 demonstrated before the jury that she had lied about
4 such matters her credibility would have been damaged.
5 He ought, therefore, to have instigated a
6 proper investigation into Mr Swann's identity
7 immediately he discovered someone else had been involved
8 on Ms McKie's behalf. He ought, if necessary, to have
9 sought an adjournment to do so. Further Sheriff Murphy
10 could not have been properly prepared to meet
11 Mr Wertheim's evidence because, with the greatest
12 respect to Mr Findlay and those instructing him, it was
13 made available at the very latest stage.

14 There is a clear divergence between Sheriff Murphy
15 on the one hand and Mr MacPherson and Mr Stewart on the
16 other as to the level of contact between the Crown and
17 the SCRO witnesses in advance of the McKie trial.

18 On any view the defence productions arrived very
19 late in the day and without proper notice of the exact
20 purpose of the US experts. In advance of the trial the
21 emphasis had been on whether the print could have been
22 fabricated. No detailed statements were taken from the
23 prosecution experts to inform the AD. One of the
24 prosecution witnesses was not asked to review the
25 defence productions, nor was she warned of the nature of

1 the challenge being made to the SCRO evidence by the
2 defence, nor was she or any of the prosecution experts
3 given copies of the defence productions or time to
4 examine them under laboratory conditions.

5 In addition, the large presence at the trial on
6 behalf of the Identification Bureau, in my submission,
7 indicates that, even at this stage, it was anticipated
8 that the defence would be based on an allegation that Y7
9 was fabricated.

10 Inquiry counsel has indicated that the issue of
11 whether Ms McKie gave perjured evidence during her own
12 perjury trial is a matter which will be considered by
13 the Inquiry. It is clear, in my submission, that she
14 did. The issues to be considered when coming to that
15 view are, firstly, that Ms McKie was aware of the
16 involvement of Peter Swann before she gave evidence at
17 her own trial. This is apparent from her statement,
18 from the statement of Mr McKie and that of Mr Swann.
19 That Ms McKie herself met with Mr Swann is not a matter
20 in dispute. The second issue is whether she states
21 under oath that she did not know of his involvement. In
22 my submission, looking at the transcript answers this.
23 She was given a number of opportunities by the Advocate
24 Depute to say whether Mr Swann had looked at the
25 fingerprint evidence and failed to do so. She was

1 finally asked whether she knew if anyone had looked at
2 the fingerprint evidence before Mr Wertheim and said
3 that she did not. It is clear, in my submission, that
4 this is not true and that Ms McKie knew that it was not
5 true.

6 Had the jury been aware that she lied, we do not
7 know whether this would have had made any difference to
8 the verdict. There are 15 jurors alone who would know
9 whether being aware that Ms McKie lied to them would
10 have made any difference to their vote. I do not ask
11 the Inquiry to make any finding on that, but rather
12 simply to find that Ms McKie was asked questions during
13 her trial to which the answers she gave were not the
14 truth. In my submission, Mr McKie's attempts to justify
15 his daughter's actions to this Inquiry have no bearing
16 on this question but may bear on this Inquiry's
17 assessment of his own credibility. His attempts to
18 blame this on Mr Findlay are rebutted by the statement
19 given by Mr Findlay who confirms that he had very
20 limited contact with Mr McKie and would not, in any
21 event, have instructed a witness to lie.

22 In relation to chapter 10, the reviews of
23 fingerprint evidence post McKie and the treatment of
24 SCRO staff. In my submission, the decision taken
25 relative to the six SCRO officers clearly did not

1 proceed upon a proper analysis of the fingerprint
2 evidence. Mr Nelson has given evidence that the SPSA
3 still does not have an official position on Y7 or QI2.
4 That fact alone indicates that the decisions taken
5 relative to these officers had nothing to do with
6 fingerprints. The disciplinary investigation by Black
7 brought up no issues in relation to their work. The
8 Advocate Depute was not critical of the expertise of the
9 officers at the McKie trial and made it clear in his
10 note to the Home Advocate Depute that, in his view,
11 where equally competent experts give opposing testimony
12 it is impossible to persuade the jury the Crown has
13 proved its case beyond a reasonable doubt.

14 The officers were suspended on the basis of the
15 controversy surrounding Ms McKie's trial. They remained
16 suspended pending the outcome of the action brought by
17 Ms McKie against the Scottish Executive. Lord Boyd made
18 it clear that the decision to refuse to accept evidence
19 from these officers by the Crown was taken on the basis
20 of external factors: firstly, the campaign waged against
21 them by Mr McKie and others leading to their notoriety;
22 secondly, the decision by the Scottish Executive to
23 settle the action brought by Ms McKie, despite the
24 outcome of the procedural hearing; and, thirdly, the
25 fact that the Mackay Report was leaked.

1 Mr Mulhern in turn confirmed that the decision to
2 terminate the employment of these officers was brought
3 about by the decision of the Crown no longer to accept
4 their evidence. None of this takes any account of the
5 fingerprints. The officer who gave evidence at the
6 McKie trial and who did not leave by agreement had her
7 employment terminated and was found to have been
8 unfairly dismissed.

9 In relation to accreditation, little has been heard
10 about the accreditation of Fingerprint Officers and
11 there seems to be no recognised procedure for removal of
12 that accreditation. If there was a concern about as to
13 a particular officer's competency, however, there was a
14 sufficient structure in place within SCRO, and now SPSA,
15 to assess the competency of an officer and to provide
16 retraining in the event of any deficit.

17 In my submission, it was not appropriate for SCRO,
18 as was, to leave employees (who had abided by their
19 employer's wishes and refrained from public comment
20 despite being caught in the maelstrom of negative
21 publicity as a result of the campaign waged by Mr McKie)
22 uncertain of their fate. The officers were left on
23 suspension and the reason for this was subject to
24 change. To treat any employee in this way is manifestly
25 unfair and the utter lack of support from the SCRO is,

1 in my submission, indicative of a directionless,
2 leaderless organisation utterly bereft of any concern
3 for its employees and unable to repel criticism from an
4 uninformed and biased media.

5 I would also invite this Inquiry to find that the
6 campaign, in his own words, waged by Mr McKie against
7 all of the SCRO officers had a direct affect on their
8 employment. Mr McKie's own statement makes reference to
9 the campaign waged against these officers. Whilst he
10 said in his evidence that he has been forthright, the
11 evidence of Lord Boyd makes it clear that he was a great
12 deal more forceful than that would suggest.

13 Mr McKie demanded disciplinary proceedings and a
14 criminal investigation centred on these officers. When
15 the disciplinary process found no issues with the
16 conduct of the officers and the criminal investigation
17 resulted in no prosecution, Mr McKie continued (and
18 continues) to call for an explanation as to why they
19 still gave evidence in a clear attempt, in my
20 submission, to ensure that they are denied the
21 opportunity to do so in future. His campaign has
22 clearly contributed much to the demise of these
23 officers' careers and the suffering to which they and
24 their families have been subjected over the intervening
25 years.

1 I would also invite the Inquiry to consider whether
2 SPSA's position that the marks are unsafe is
3 appropriate. Mr Nelson gave evidence that SPSA will not
4 examine the marks and that they will adopt the position
5 on the marks put forth in the findings of this Inquiry.
6 Whilst it is commendable that they are as an
7 organisation giving due weight to judicial determination
8 of the issues here, which not every organisation,
9 particularly the IAI in its cynical attempt to undermine
10 the findings of this Inquiry by rushing out the findings
11 of its own committee on Y7, it cannot benefit the sole
12 provider of fingerprint expertise to the police and the
13 prosecution in Scotland to say that they officially
14 don't know whether Y7 is Shirley McKie's and Q12 is
15 Marion Ross's.

16 I would also submit that the influence of the media
17 in the decisions taken by Crown Office and the SCRO was
18 excessive. Lord Boyd identified as the very first
19 factor in his decision not to accept evidence from the
20 six officers the media campaign against them. Should a
21 more robust approach not have been taken by SCRO and
22 Crown Office to reassure the public of the competency of
23 these witnesses? Lord Boyd declined to answer the
24 question of whether this could happen again and
25 Mr Nelson provided no satisfactory answer. In my

1 submission, it's entirely possible that a competent
2 expert who made an identification that was then
3 successfully disputed could be hounded out of their
4 employment in the same way these officers were. The
5 Inquiry cannot legislate for the control of a capricious
6 media or for the influence of malevolent individuals,
7 but it can make clear that a stronger approach should be
8 taken by SPSA than SCRO, who were content simply to
9 discard professionals with a lengthy record of public
10 service. I note in passing that Mr Nelson's evidence
11 offers no hope of this. His attempts to place the blame
12 for the so-called notoriety on my clients was
13 disingenuous and, in my submission, wholly unbecoming
14 any individual in a position of leadership.

15 Chapter 11 relates to the non-numeric system. I
16 would invite you to find that the non-numeric system
17 makes no discernible difference to the way a Fingerprint
18 Officer carries out a comparison. The non-numeric
19 information pack makes this clear, as does the SPSA
20 video presentation shown to the Inquiry. The only
21 difference under the non-numeric system is how the
22 opinion is presented in court productions and when
23 giving evidence. It was confirmed by Mr Pugh that ACE-V
24 is not a new process, merely a new way of describing a
25 process that officers had always carried out. He also

1 pointed out that even under the numeric system experts
2 were not merely counting points. Mr Logan of PSNI also
3 emphasised the fact that the difference between the
4 numeric and non-numeric systems was one of presentation
5 and not in the way that comparison of fingerprints is
6 carried out.

7 I would recommend their evidence as being clear,
8 unbiased and thankfully free of meaningless management
9 jargon in marked contrast to the management witnesses
10 from SPSA.

11 Mr Pugh's evidence was that the role of the
12 Metropolitan Police in relation to fingerprint
13 examination is to service the criminal justice system.
14 I would invite you to consider this consistent with the
15 evidence of my own clients who under both the numeric
16 and non-numeric systems sought to maintain
17 their Independence from the investigation in which they
18 were assisting. In relation to the practicality of
19 using contemporaneous notes, I would commend the
20 evidence of Mr Pugh and Mr Logan who suggests that,
21 whilst it might be desirable, it is not practical in the
22 context of a busy working Fingerprint Bureau to maintain
23 comprehensive notes on every comparison carried out nor
24 is it necessary to the explanation of an expert's
25 findings.

1 It is worthy of note by this Inquiry that despite
2 suggestions to the contrary, the McKie case has not had
3 any lasting impact upon fingerprint evidence and there
4 are still very few, if any, challenges being made to
5 fingerprint evidence in court.

6 Chapter 12 relates to the analysis of Y7, Q12, XF
7 and certain Q prints. In relation to whether the
8 analysis of fingerprints is affected by the development
9 technique, the evidence has been that the analysis of
10 fingerprints is conducted in the same way by Fingerprint
11 Officers regardless of the development technique.
12 Officers have always had the opportunity to request
13 other photographs with different contrasts to assist in
14 their analysis. Analysis of an electronically stored
15 image is difficult as it is dependent upon the device on
16 which it is being displayed or from which it is being
17 printed, but the analysis of photographs is the same
18 whether the photograph is of a lift developed with
19 powder, superglue or in any other development medium.

20 As to whether image quality affects examination, the
21 answer must be yes. Image quality must affect
22 examination but it should be borne in mind that crime
23 scene marks by their very nature are not perfect -- very
24 much the opposite. The quality of the mark is more
25 likely to affect the quality of the examination than the

1 quality of the image. Good quality photographic images
2 of poor quality marks were produced and used regularly
3 for comparison. The evidence of my clients has not been
4 critical of the images produced by the Identification
5 Bureau and that remains their position. They are
6 grateful to Mr Kent for the production of further good
7 images from the original negatives from which the
8 illustrations used by Mr MacPherson are sourced.

9 On the question of whether Y7 and Q12 were correctly
10 identified, I would submit that this Inquiry should find
11 that Y7 and Q12 were correctly identified and that this
12 is supported by the evidence.

13 My clients have explained their identification in
14 relation to each. Each mark was independently verified
15 by three officers after the initial identification in
16 the same way that independent verification takes place
17 now. In relation to each, my clients have given
18 evidence of the characteristics they discovered in
19 sequence and agreement between the two marks. It is
20 clear, in my submission, that there is a very large
21 volume of ridge characteristics in sequence and
22 agreement between the marks. It is also clear that
23 there is a particularly distinctive detail in both. I
24 refer not only to the Rosetta characteristic in Y7 of
25 which Mr Swann says that he has never in his lengthy

1 career seen anything resembling it, but also to the
2 Third Level Detail identified by Mr Mackenzie in his own
3 presentation.

4 These are, in my submission, supportive of a
5 conclusion of identity. Taking into account even the
6 views of Professor Champod, in my submission, the volume
7 of characteristics in sequence and agreement identified
8 by Mr Mackenzie in particular must surely exceed the
9 number present in any non-match seen by any of the
10 fingerprint practitioners who have given evidence to
11 this Inquiry. Certainly none has given evidence to the
12 contrary.

13 Mark Y7 is clearly a complex mark and there are
14 those who are of that view who do not agree the
15 identification. They insist, in particular Mr Wertheim
16 and Mr Zeelenberg, but also the Durham examiners, that
17 the mark is straightforward is indicative only, in my
18 submission, of the fact that they need to discount the
19 explanation given by those identifying Y7 of differences
20 by reference to movement and distortion. I would
21 recommend the evidence of those willing to recognise the
22 complexity of the mark and recommend the images prepared
23 by Dr Bleay. In my submission, looking at those images
24 it is undeniable that there are two distinct pieces to
25 the mark: one lying close to the horizontal at the

1 bottom of the mark and one aligned closer to vertical at
2 the top. This is, in my submission, supportive of the
3 explanation given for perceived differences and
4 contradicts those who insist the mark is
5 straightforward.

6 I would commend the Inquiry to the materials
7 produced by the officers I represent and, in particular,
8 the charts prepared by Mr MacPherson, TC2310 1 to 4 in
9 which he identifies significant detail, more than he
10 would have been required to do to meet the standard in
11 place in 1997 and, in my submission, without obscuring
12 the underlying image to the extent that other examiners
13 who have marked images for this Inquiry have in their
14 own illustrations.

15 In relation to QI2, I would recommend the evidence
16 of Mr Mackenzie and Mr MacPherson who again explained
17 the significant volume of distinctive ridge detail
18 within the mark. In my submission, the contradicters
19 failed to raise any real doubt about this
20 identification. In Mr Wertheim's evidence it is clear,
21 in my submission, that he has, for example,
22 significantly overstated the scale of the characteristic
23 at the core of the mark referred to by him as the chilli
24 pepper. As another example, he has dismissed an area of
25 the mark as being a smear when it is clear from his own

1 colour photographs that what he is looking at is the
2 underlying pattern on the surface from which the mark is
3 recovered. I would recommend the evidence supporting
4 this identification, including Mr Mackenzie's chart
5 prepared for Mr Gilchrist.

6 I would remind the Inquiry that no other donor has
7 been discovered in respect of either mark Y7 or of mark
8 QI2. I would ask the Inquiry to make a finding that XF
9 was a mark of natural origin and correctly identified as
10 the mark of David Asbury. This is a matter that is not
11 in dispute. Mr Wertheim has now confirmed that his view
12 in 2000 was that the mark was placed on the gift tag by
13 contact with the finger of the donor and, despite his
14 speculation in the intervening period, this remains his
15 view. The identification of XF as a mark properly
16 attributable to David Asbury has never been in dispute.

17 I would also ask you to find that what had been
18 referred to as the Asbury Q marks -- that is QI2
19 (Asbury), QE2 and QL2 -- were all correctly identified.
20 The officers of PSNI have now confirmed this. Yet
21 another challenge brought to bear on fingerprint
22 comparisons in this case other than Y7 and QI2 has been
23 resolved in a manner which supports absolutely the
24 original identifications made by SCRO.

25 I would also ask you to make a finding that QD2 was

1 correctly identified as that of David Asbury and finally
2 to put to rest any possibility of doubt about this mark
3 caused by the report by Mr Rokkjaer and Mr Rasmussen.

4 Mr Chairman, one minor clarification on a misreading
5 in my own notes, I should have indicated that
6 Mr Wertheim examined the gift tag after Ms McKie's trial
7 not prior to.

8 THE CHAIRMAN: Yes.

9 MR HOLMES: In my submission, it is significant that of the
10 contradicters, the Danes, Mr Rokkjaer and Mr Rasmussen,
11 chose not to co-operate with this Inquiry in order to
12 support their findings. Mr Wertheim and Mr Bayle chose
13 not to answer questions legitimately put to them.
14 Mr MacLeod completed the comparative exercise in such a
15 way that it cannot be relied upon. The Aberdeen
16 officers, Mr McGregor, Mr Dingwall and Mr Dempster, who
17 took it upon themselves to author a report on Y7 and one
18 on QI2 have not given evidence. In my submission, any
19 comments or opinions given by them or attributed to them
20 should be disregarded by this Inquiry as that evidence
21 has not been tested.

22 Ms McKie's knowledge that Mr Swann had examined Y7
23 prior to her trial, having been admitted by her father
24 Ms McKie, for whatever reason, did not attend this
25 Inquiry to give evidence.

1 The explanation offered by Mr McKie and in the
2 written statement provided by Mr McKie is, in my
3 submission, inherently incredible and I would invite you
4 to consider that issue specifically and to make a
5 finding to that effect.

6 The main findings for this Inquiry, in my
7 submission, should be that Y7 is the left thumbprint of
8 Shirley McKie; QI2 is the right forefinger of Marion
9 Ross; all the other so-called disputed marks in the
10 Asbury case (that is to say QD2, XF, QI2 (Asbury) QE2
11 and QL2) were correctly identified; that Shirley McKie
12 gave evidence which was not truthful at her perjury
13 trial; and that the treatment of those who have honestly
14 given their expert opinion in favour of these
15 identifications has been unwarranted, unjustified and
16 has had a devastating effect on their lives.

17 There is clearly, in my submission, no evidence of
18 malpractice or dishonesty on the part of any of those
19 SCRO experts who identified the marks connected with
20 **HMA v Asbury** or **HMA v McKie** and I would invite you to
21 make a finding to that effect.

22 Whilst there might be a superficial attraction in
23 criticising the officers and former officers who
24 identified the marks in this case as that requires no
25 acknowledgement of any institutional failings or indeed

1 any change to the way in which fingerprint evidence is
2 provided at present by SPSA, it would also, in my
3 submission, be wholly wrong. I would discourage this
4 Inquiry from taking, as others have done in the past,
5 the convenient option and further damaging the lives and
6 careers of these individuals who were doing no more or
7 less than giving their honest expert opinion.

8 My clients, the SCRO now SPSA and the taxpayer have
9 all suffered the consequences of this whole affair.
10 This Inquiry should not shrink from reaching the correct
11 conclusion that Y7 is the left thumbprint of Shirley
12 McKie and Q12 is the right forefinger of Marion Ross, no
13 matter how unpalatable that shows the earlier decisions
14 made by the institutions involved in this case, along
15 with the Scottish Executive and the Justice 1 Committee
16 to be.

17 Those are my submissions, sir. I will make a
18 written copy available to the Inquiry together with the
19 Inquiry reference numbers of the documents that I have
20 referred to.

21 THE CHAIRMAN: I am obliged to you. Thank you very much, Mr
22 Holmes.

23 It is 1.50. It is probably fair to start after
24 lunch.

25 MR SMITH: I am content to do that, sir, but there are one

1 or two comments I think I can usefully make before
2 detailing the submission. I will stop at 1.00.

3 THE CHAIRMAN: Certainly if you wish to do that.

4 **Submission by MR SMITH**

5 MR SMITH: I should say by way of explanation we have a
6 written submission to go in. What I intend to say is
7 certainly not verbatim of the written submission but it
8 covers, pretty well, the same issues.

9 Sir, before dealing with the submission, my own
10 submission, there are one or two matters I think should
11 be clarified relating to various things that Mr Holmes
12 has said.

13 In his submission he indicated that as far as
14 Mr Wertheim was concerned he launched a fairly full
15 scale attack on his credibility and one of the attacks
16 was in respect of his suggestion when he carried out the
17 exercise that the Rosetta point was in a different place
18 in Mr Swann's presentations. The comment was made about
19 the transcript of evidence and it was said that
20 Mr Wertheim's position, he asked for clarification from
21 Counsel to the Inquiry about whether the same point was
22 being referred to in both presentations. It was
23 suggested that that evidence was wrong. I may say, sir,
24 that it was my own recollection that accorded with
25 Mr Wertheim's and just shortly after he gave his

1 evidence I asked the Inquiry Stenographer and Editor if
2 there was some means of checking the position. I am
3 advised that there is a tape recording of the evidence
4 and I didn't think it would be necessary to pursue that,
5 to have the transcript corrected, but I am told it is
6 something that can be achieved and if it becomes an
7 issue for you, sir, if you consider that is an important
8 point, I would encourage it is clarified because it was
9 my own recollection quite independently of Mr Wertheim's
10 that he did ask Counsel to the Inquiry are these the
11 same points, and the answer given was, yes, they were.

12 THE CHAIRMAN: Well, arrangements can be made for that to be
13 done.

14 MR SMITH: Thank you, sir.

15 I wonder if we can also deal with another general
16 comment raised by Mr Holmes and I must confess to a
17 little confusion. His position appeared to be that
18 those who did not give evidence before this Inquiry,
19 effectively their evidence should be put to one side.
20 In that regard, as I understand it, he was principally
21 referring to, for example, the Danish experts and I
22 suppose by implication Mr Ashbaugh. One can see the
23 merit of that but one should have, in my respectful
24 submission, some consistency. If we are going to say
25 that the Danes should not have their opinion accepted

1 because they were not cross-examined equally and, in my
2 submission, Mr Holmes should not criticise the Danes
3 for, as it was put I think in evidence at least, getting
4 it wrong with regards to QD2. Mr Zeelenberg explained,
5 and I think it is in his written statement to the
6 Inquiry, that his understanding from a direct
7 conversation with the Danes was they were given the
8 incorrect materials. So I submit, therefore, that if we
9 are going to adopt a policy that those who have not
10 given evidence before this Inquiry should not have their
11 evidence, their positive evidence accepted, they should
12 neither be subject to criticism on the basis that they
13 haven't been given an opportunity to explain what the
14 position actually is.

15 The same goes, frankly, for Shirley McKie. The
16 suggestion was made at the end of the submission
17 presented by Mr Holmes, towards the end at least, that
18 Ms McKie didn't give evidence for reasons that no doubt
19 it was being suggested she was trying to avoid coming
20 here. The reason why Shirley McKie didn't give evidence
21 is that you, sir, as you are well aware, considered on
22 the basis of information provided that she was not
23 required to do so for medical reasons. That's why is
24 she did not give evidence. The suggestion that somehow
25 this Inquiry can leap to a conclusion that she committed

1 perjury in the course of the perjury trial, in my
2 submission, again should be subject to the scrutiny that
3 one should not be making these allegations when she
4 didn't give her evidence before this Inquiry in person.

5 Criticism was directed to Iain McKie and suggested
6 that, on the basis of Mr Findlay's statement, it was
7 quite clear that Mr McKie was being at best
8 disingenuous. Mr Findlay didn't give evidence. The
9 prospect of cross-examining Mr Findlay is not one that
10 appeals to anyone but nonetheless he did not give
11 evidence and if we are going to that rule it should be
12 applied consistently.

13 Finally, as far as the generality is concerned one
14 of the comments I will be making in due course is there
15 has been a consistent pattern throughout the past ten
16 years or so in response to those who criticise or
17 contradict the SCRO position, it appears to be, first of
18 all, an attack on the messenger not on the basis of the
19 message that is being brought and it appears that that
20 particular pattern has continued even up to the point of
21 Mr Holmes' submissions.

22 So with these general comments what I would intend
23 to do, sir, in the afternoon is to explain my position
24 from my submission itself. I should say I would only
25 imagine I would take about 15 or 20 minutes.

1 THE CHAIRMAN: Of course, take such time as required.

2 I think I should make clear that my attitude is that
3 statements taken from witnesses by the Inquiry I said
4 would be treated as the evidence-in-chief, therefore, it
5 will be a matter of weight that I can attach to that
6 where the person has not been cross-examined and been
7 asked to attend to give oral evidence.

8 MR SMITH: Of course I fully accept that, sir. I simply
9 make the comment that whatever is done should be
10 consistent across the board and I detected what -- and I
11 make no personal criticism of Mr Holmes and I wish to
12 make that clear -- but I detect something of an
13 inconsistency on one hand of saying we should reject
14 evidence and of course we didn't hear from Mr Berry. By
15 that token, Mr Berry's evidence should not be accepted
16 and Mr Graham, of course, didn't give evidence about the
17 fingerprint analysis itself. He declined on the basis
18 that he had not been involved in fingerprints for some
19 time. I am content with that, with either approach, as
20 long as it is applied consistently and that is the
21 simple comment I wish to make.

22 THE CHAIRMAN: No, well I intend to apply it consistently.

23 MR MOYNIHAN: Sir, perhaps just to complete the picture in
24 relation to that, it should be a matter of record in
25 relation to the Danish experts, Mr Rasmussen and

1 Mr Rokkjaer, knowing that they were unavailable to the
2 Inquiry, what I specifically asked Mr Zeelenberg, you
3 may recollect, to delete from his presentation his
4 exchange with them simply because they were not
5 available for cross-examination and, accordingly, what I
6 would be commending to you is a neutral position in
7 respect of Mr Rasmussen and Mr Rokkjaer. Insofar as
8 their evidence had relevance what we, of course, did was
9 went to the PSNI to ask them independently to revisit
10 the question and to that extent my position would be
11 that Mr Rasmussen and Mr Rokkjaer have been superseded
12 by the PSNI and I certainly had not anticipated anything
13 adverse being said about Mr Rasmussen and Mr Rokkjaer
14 because otherwise it would have been fairer to have
15 allowed Mr Zeelenberg to have said what he had otherwise
16 been prepared to say in that regard.

17 THE CHAIRMAN: Yes, very good.

18 We will sit again at 1.50.

19 **(1.00 pm)**

20 **(Luncheon Adjournment)**

21

22

23

24

25