

Closing Submissions

Within each Chapter of the Analysis Document, a number of issues were identified by Counsel to the Inquiry. These submissions seek to provide the Chairman with a summary of the COPFS position in relation to all the issues in which we consider that COPFS have an interest.

Invite Chair to have regard to these when forming a view on the evidence and any recommendations arising.

1. Discussions between the Crown and the police regarding sufficiency prior to Full Committal of Asbury

Chapter 3, issue (3)

The concern regarding this matter arises as a result of Sheriff Crowe's statement [FI 0048, paragraph 16] that the Procurator Fiscal (PF), Mr McMenemy was "slightly suspicious" when QI2 was discovered, because it was an "evidentially thin" case. Coupled with the evidence given by Stephen Heath that when he delivered the custody case, the PF, Mr McMenemy said to him that it was a "fairly circumstantial case", there was a concern that the police had been put under pressure to produce more evidence in the case against David Asbury and there was concern regarding the last minute discovery of QI2 [Heath Statement paragraph 222, FI 0013; Heath Evidence Day 4, 9/6/09, page 35 - 39].

COPFS position is that there was nothing questionable about the discussions between the PF and DCI Heath and the PF had no reason to be suspicious of the discovery of QI2. If Sheriff Crowe interpreted his discussion with the PF in that way, then he has misinterpreted the

position. Indeed, he accepted that it was possible he had misunderstood [Sheriff Crowe's evidence, Day 17, 2/7/09, pages 134, line 11].

The comment from Mr McMenemy did not put any additional pressure on Mr Heath. [Heath Day 4, 9/6/09 pages 33 - 39].

On 31st January when the evidence regarding Q12 was intimated to the PF it made no difference, because the PF already had received the instruction to fully commit (FC) from Crown Counsel (CC) on the previous day, namely 30th January [CO 4034]. The Advocate Depute (AD) had authorised full committal on the basis of the evidence without Q12 and Mr Asbury was fully committed on 31st January 1997 on that basis. In any event, the PF was not "slightly suspicious" that the police produced Ms. Ross's print at the stage they did. Even without Q12 he thought there was a circumstantial case, but a case of substance. Although Q12 provided a motive, it was not necessary for the Crown to prove motive. [McMenemy Day 6, 11/6/09, pages 117 - 122]

It is important to have regard to the fact that a circumstantial case does not mean that the case was somehow weaker than a case involving e.g. eye witness evidence. In the circumstances, invite the Chair to find that the Crown did not have suspicions in relation to Q12; there were no grounds for any such suspicion; and the Crown case, albeit circumstantial, was sufficient and neither thin nor weak.

2. Preparation for the Prosecution of HMA v McKie

Chapter 7 Issues (1) (2) and (3); Chapter 8, issues 1 and 2.

When considering the issues which arise in relation to the prosecution of Miss McKie, it is important to bear in mind the prevailing view regarding fingerprint evidence at the time the case was being prepared. It has been universally accepted throughout the evidence that, prior to the McKie trial, fingerprint evidence was viewed as totally reliable, infallible even. If anything, this view was reinforced by the fact that no one had experience of any challenge to an identification of a fingerprint in Scotland [Sheriff Gilchrist, Day 13, 24/6/09, pages 59 – 60; Sheriff Murphy QC, Day 14, 25/6/09, pages 87 – 88; Lord Boyd of Duncansby, QC, Day 46, 10/11/09, pages 62 – 63; Denise Greaves, Day 16, 1/7/09, pages 69 – 70]. We have also heard from fingerprint officers who talk consistently of 100% certainty [Greg Padden, Day 12, 23/6/09, page 66; Terence Foley, Day 12, 23/6/09, page 161; Alistair Geddes, Day 15, 26/6/09, page 20;], the police [Stephen Heath, Day 4, 9/6/09, page 121 (reference to infallibility);] and this was also acknowledged by Mr McKie in his evidence [Day 34, 15/10/09, pages 7 – 9].

Decision to Place on Petition

Invite the Chair to accept the evidence of Lord Boyd in connection with this matter. It was a decision of prosecutorial discretion. Lord Boyd evidence, Day 46, 10/11/09, pages 8 – 23]

Background to Instruction of Mr Kent

When the precognition was prepared by Mrs Denise Greaves, Principal Procurator Fiscal Depute, we have seen that it contained in the Analysis section a comment that CC may wish to consider whether or not an expert, previously unconnected with the case, should make a

further comparison [CO 2561 page 37]. CC was asked whether an expert in this field should be instructed, with Terry Kent of Home Office, being suggested. The papers were received in Crown Office and considered by Mr Norman McFadyen, the then Deputy Crown Agent, and sent to an indicter, Miss Gillian Climie along with a note dated 2 January 1998 [CO 3936]. Miss Climie had previously indicted the Asbury case. He expressed the view that it was “incomprehensible that fingerprints will have been planted in this case, but given the observations on Cardwell’s plausibility it may indeed make sense to involve an independent expert – both on the question of transfer/planting and on the general basis for concluding that fingerprint identification is 100% reliable”. He asked that his note be passed to an AD. He did not recommend that a further expert report be obtained, conducting an independent comparison of Y7 with the prints of Ms McKie.

Having considered the papers in detail and discussing the case with the Advocate Depute who prosecuted Mr Asbury, Miss Climie then did a note to the Duty Advocate Depute dated 15th January 1998 requesting instructions [CO 3935]. In her note she advised that the Advocate Depute in Asbury’s case was of the view that DC Cardwell should be prosecuted for perjury and there would appear to be no need to delay proceedings against Cardwell until the disposal of Asbury’s appeal. She recommended that further fingerprint evidence be pursued:

“The Home Office expert should be asked to give expert evidence on (a) the possibility of transfer/planting of the point and (b) the general basis for concluding that fingerprint identification is 100% reliable (I understand, although I do not know the detail, that the English standard for matching prints is more stringent than that used in Scotland, although even in Scotland the number of points of comparison required before a match is declared is higher than the number required in some other jurisdictions. It might be an idea to pursue whether Y7 can be matched to Shirley

Cardwell on the English standard. Presumably the Home Office expert could deal with this).”

The Duty AD responded by instruction “indict High Court” [CO 3394] and considered that:

“independent experts should be instructed re the fingerprint comparison and on the question of planting/reliability of fingerprint identification. If the English requirement is more stringent, it would be helpful if the expert making yet another comparison could do so to the English requirements.”

Miss Climie then sent a note to the Deputy Crown Agent on 15th January 1998 [CO 3933] explaining that Ms Cardwell had not yet appeared on petition, which would be the first step before indicting. She also expressed the view that the further fingerprint expert evidence angle should be pursued and again explained her understanding of the difference in the English standard.

The papers were then sent to the Solicitor General, now Lord Boyd of Duncansby, QC, by the Deputy Crown Agent (DCA) on 16/1/98 [CO 3932]. He expressed the view that he would be reluctant to delay placing Cardwell on petition. The Solicitor General responded on 20th January 1998 [CO 3931] indicating that he considered that Cardwell be placed on petition in early course. He was of the view that a further independent expert was required but that need not hold up the petition and he asked the DCA to have a word with him about timing. On 26 January 1998 having made reference to a discussion, the instruction was sent out to place Miss McKie on petition [CO 3930] and this was passed on to Miss Climie via the DCA [CO 3929]. Miss Climie then forwarded a letter to Mrs Greaves on 30th January 1998 [CO 3928/CO 3473]:

“...please would you proceed as quickly as possible with the further fingerprint expert enquiry referred to in the second paragraph of page 37 of the Precognition. A suitable English expert should be sought who can give evidence regarding the following matters:-

1. The general question of the transfer and planting of lifted fingerprints on to another surface;
2. The general basis for concluding that fingerprint identification is 100% reliable;
3. Whether, on examination of the fingerprint Y7, there is anything to suggest that this print has been lifted from another surface and transferred to the door surround.”

Albeit there was reference to page 37, none of these specific points sought a further comparison report on the identification of Y7. Only then did she go on to discuss the English standard.

Mrs Greaves then sent a letter of instruction to Mr Kent on 12th March 1998 [CO 0270] instructing him to prepare a report considering certain matters:

- (1) A narration of your expertise relative to fingerprints;
- (2) An analysis of fingerprint planting and manufacture;
- (3) The quality of the fingerprint Y7;
- (4) Any concerns that you may have regarding the fingerprint Y7;
- (5) Any comment that you may wish to make on the SCRO 16 point comparison of fingerprints and the statistical basis for duplication of fingerprints;
- (6) If you are able to make any comment on the identity of the fingerprint compared with Shirley Cardwell’s fingerprint form this should also be included.

Mrs Greaves had some difficulty making contact with Terry Kent by telephone as is clear from her correspondence with Miss Climie on 15th April 1998 [CO 3467/3476] and she wrote to him asking him to discuss the matter with her and when his report was likely to be available [CO 3468]. She subsequently spoke to him sometime prior to 22 April 1998 and

forwarded additional statements to him [CO 3466]. Thereafter he submitted his report to her with a covering letter dated 13 May 1998 [CO 3448 and CO 0296/3876]].

In his evidence, Mr Kent indicated that in relation to instructions (5) or (6), however, he did not have the expertise to express a view. Initially in his evidence and in fact throughout his evidence, Mr Kent said he did not remember having a conversation with Denise Greaves about the instructions he received. He could not remember exactly what his actions were in response, but he indicated that what he would have done would be to pick up the phone to the author of the letter and say: if you want advice on the statistics of the 16 point comparison then talk to Christophe Champod in Lausanne as he was the only person doing research in that area. In cross he again stated that he could not recall the conversation with Miss Greaves, although he would not accept that he could have been mistaken in his suggestion of what he would have done or said. [Day 19, 7/7/09, pages 39 – 40; and 158 - 160].

Whether Terry Kent advised Denise Greaves to approach Professor Champod?

I would wish to draw to the Chair's attention that:

- (i) there was nothing about Professor Champod in his own covering letter to his Report [CO 3448/3876]
- (ii) there was nothing about Professor Champod in his Report [CO 0296/3876]. If Mr Kent had already told Mrs Greaves that he was not qualified and she would have to go to another expert abroad, namely Professor Champod, then why does he not mention this in paragraph 33 of his Report? Although in evidence, Mr Kent tried to suggest that this paragraph was an answer to instruction (3), even Mr Moynihan queried that answer [Day 19, 7/7/09, page 42] and Mr Kent accepted that this would not necessarily be the way others would read this part of his Report.

(iii)there was nothing in Mr Kent's Statement to the Inquiry [FI 0052] about such a conversation regarding Professor Champod

(iv)There is nothing in Mrs Greaves' own correspondence about such a discussion taking place.

(v) In cross Mr Kent said he could have phoned Mrs Greaves, he also said he possibly spoke to someone else in the Fiscal's office. He also said it was possible he spoke to Chief Inspector Hogg. He also said it was possibly someone in Strathclyde. In evidence, he did not at any stage say he actually did contact any of these people.

This apparent conversation was not put to Mrs Greaves when she gave evidence, because there was no mention of this in anything Mr Kent produced to the Inquiry. She described herself as having more general conversations with Mr Kent [Day 16, 1/7/09, pages 87 – 88]. However, a Supplementary Statement on the subject was obtained from Mrs Greaves and the Inquiry has confirmed that this is to be treated as her evidence [CO 4429]. Mrs Greaves made it clear that he did not mention Professor Champod or indeed any foreign experts to her. This would have been very unusual and required instruction from CC and an interpreter, which did not happen. Accordingly, I would commend that to the Inquiry and invite the Chair to reject the suggestion that Mr Kent gave Professor Champod's name to Mrs Greaves at that time [CO 4429, paragraph 6].

Also, the Inquiry should not accept evidence that Mrs Greaves had a conversation with Mr Kent about this and was told to contact another expert. If that is accepted, then the Inquiry will be finding that Mrs Greaves ignored this advice from an expert, did not tell anyone about it; did not act on it; did not take any steps to let anyone know about it; did not seek

instructions; did not mention it in reminders. This would be contrary to the approach Mrs Greaves was taking to her work which is apparent from the correspondence available. This contrasts with Mr Kent's approach of an unexplained delay in producing his report between March and May 1998, and a failure to set out clearly his position in relation to his letter of instruction regarding which points he was answering.

Failure to Exhaust Instructions

It is accepted that the Crown did not obtain a further expert report after Mr Kent's report was received. However, it does not necessarily follow from this that Crown Counsel did not consider this issue.

In 1998, the normal procedure in this situation where an expert has been unable to respond to every aspect of his instruction, would be for the Procurator Fiscal to bring the matter to the attention of Crown Office, via the indicter. Then for the indicter to draw that to the attention of the Advocate Depute who instructed the expert report (if available) or the Duty Advocate Depute and to seek an instruction from CC on whether to instruct a further expert report or to proceed in the absence of that. Thereafter for the indicter to pass those instructions back to the Fiscal. [Denise Greaves, Day 16, 1/7/09, pages 92 – 101; and 142 - 145; Gillian Climie, Day 17, 2/7/09, pages 79 -90; Lord Boyd, Day 46, 10/11/09, pages 27 - 29].

We have seen from correspondence that Mrs Greaves did indeed contact Crown Office by sending a letter to the indicter, Gillian Climie dated 15th May 1998 [CO 3463] enclosing the Report and seeking comment and further instruction. Mrs Greaves subsequently had a telephone conversation with Miss Climie on 17th August 1998, during which Miss Climie indicated that she would re-read the Report and advise if any further matters required clarification prior to the wood (doorframe) and other productions being returned [CO 3460].

Subsequent to that telephone conversation, Mrs Greaves wrote to Messrs Levy & McRae on 21st August 1998 indicating to them that the Depute at Crown Office “assures me I should have Crown Counsel’s instructions within the next 2 weeks” [CO3458]. From these documents, together with the evidence of Mrs Greaves and Miss Climie, I invite the Chair to accept that (i) Mrs Greaves and Miss Climie were following the normal procedure at the time; in other words, Mrs Greaves had sought instruction from Crown Office with the expectation that CC would be asked to provide that by the indicter, and (ii) that Miss Climie, the indicter, had expressed an intention to re-read the Report and then seek those instructions from CC.

Subsequent documentation includes

- (i) a reminder letter dated 10th September 1998 [CO 3456] asking if CC are satisfied with the terms of Terry Kent’s report;
- (ii) a handwritten note by Mrs Greaves dated 29th September 1998 [CO 3788] indicating that she spoke to Miss Climie and Miss Climie would write to Mrs Greaves with instructions re: Terry Kent’s report. It was explained in evidence that these instructions would come from CC and not Mrs Climie [Greaves, Day 16, 1/7/09, pages 92 – 101; and 142 – 145]; and
- (iii) a letter dated 19th October 1998 from Mrs Greaves FAO Gillian Climie again asking for the view of CC [CO 3453].

All of this documentation shows that Mrs Greaves remained of the view that the instruction would come from CC and that Miss Climie was to obtain this and she confirmed this in her evidence [Greaves, Day 16, 1/7/09, pages 92 – 101; and 142 – 145]. A letter of 9th November 1998 to Messrs Levy & McRae from Mrs Greaves subsequently states “I ...confirm that I have now received instructions...”. In evidence, Mrs Greaves indicated that this would be a

reference to receiving CC instructions from Miss Climie [Greaves, Day 16, 1/7/09, pages 92 – 101; and 142 – 145]. In addition, Miss Climie indicated in evidence that she had “absolutely no doubt” that Crown Counsel would have looked at the Kent report [Evidence, Day 17, 02/07/09, morning, pages 72].

Accordingly, albeit there is no blue CC slip and albeit neither Mrs Greaves or Miss Climie recalled obtaining or receiving an instruction back from CC, it is clear from the terms of the documentation available that the normal procedure was being followed. It also indicates that it was the clear intention that CC instructions would be sought and it was the view of Denise Greaves at the time, that they were ultimately obtained. Accordingly, at the very least, what can be said is that none of the documentation is inconsistent with CC having considered the Report of Terry Kent and took the view that the case could proceed in the absence of a further expert report.

In the circumstances, what has not previously been appreciated by others is that the Crown had a positive interest in finding all the documentation regarding this issue. It remains a matter of regret that these papers are not entirely complete, however, I do not wish to add to the comments made in evidence by Mr Scott Pattison [Day 51, 17/11/09, pages 10 - 12] which explained the background to the dissemination and fragmentation of the papers since 1997. I simply refer to that evidence along with the detailed letter sent to the Inquiry on the 1st June 2009 regarding this matter [CO 4432].

Another possibility was explored in evidence with the witnesses, namely that the Fiscals themselves would have taken a decision in relation to the outstanding matters in Terry Kent’s

report and no instruction was sought from CC. That would not have been in accordance with the normal procedure in Crown Office [Sheriff Murphy QC, Day 14, 25/6/09 pages 45 – 48]. This course of action is not one that Denise Greaves would have thought likely [Day 16, 1/7/09, pages 92 – 101]. It is apparent that it was not the course being followed by Mrs Greaves given the terms of her correspondence. It is also clear that Miss Climie was a conscientious and careful indicter and would not have failed to follow the proper procedure. Her documented approach to the instruction of CC regarding “pro high court” where Miss McKie had not appeared on petition is a testament to that. In evidence, Miss Climie did not remember seeking the instruction from Crown Counsel and as a result she accepted that there was a possibility that whoever sought the instructions may have missed the fact that Mr Kent had not answered all the questions. However, this was pure speculation on the part of Miss Climie. It was not based on anything in the documentation indicating that anyone else, other than herself, was involved with the Kent report. From the correspondence, it is clear that she did have conversations with Mrs Greaves about the matter and did indicate that she would re-read the Report and obtain instructions. In the circumstances, it is unlikely that she would have done anything other than a thorough job [Greaves’ Evidence, Day 16, 1/7/09, pages 144 – 145; Miss Climie, Evidence, Day 17, 02/07/09, pages 72-74].

Finally, Denise Greaves spoke in her evidence of having a general awareness that an expert (Malcolm Graham) in the Asbury case had agreed with the identification made by SCRO in relation to Y7 being that of Miss McKie and she described this in her statement as the “fall back” position, although she considered that to have perhaps not been as well phrased as she would have liked [Day 16, 1/7/09, page 101].

Nature of Further Expert Assistance

Finally, regardless of any view taken in relation to the above, it is important to consider Terry Kent's Report and the nature of the outstanding issues. In other words to consider what it was that the prosecutors were seeking in exploring this area with an expert.

COPFS position is that this was not and was never intended to be a cross check on the opinion of SCRO. The report was not sought due to any doubt about the reliability of the opinion on Y7. There was some confusion in the evidence about the reasoning behind the instruction to Mr Kent. Mrs Greaves initially indicated that she was of the view that this was done for completeness, to ensure the investigation was complete and every aspect had been looked at. She had no basis upon which to question the identification of Y7 as Miss McKie's [Day 16, 1/7/09, pages 73 – 74; 76]. She later appeared to indicate that she also thought that in asking about the reliability of fingerprinting that this was to obtain confirmation that the identification of Y7 was correct [pages 78 – 79]. However, Gillian Climie was of the view that they had ruled out getting Y7 cross-checked although it appeared that Mrs Greaves did not appreciate that Crown Counsel had not taken on-board, the suggestion she had made in the precognition [Climie, Evidence, Day 17, 02/07/09, pages 66-68].

Lord Boyd of Duncansby QC also stated in evidence that he would have been surprised if there had been any doubt regarding the reliability of the identification of Y7. He had been an Advocate Depute for three years before becoming Solicitor General and fingerprint evidence was regarded as 100% reliable. Lord Boyd suggested that in instructing an expert to deal with the issue of planting it would be inconceivable that they, the expert, would not be asked to look at the issue of comparison lest they be criticised and the Crown left open to criticism by the defence [Lord Boyd of Duncansby QC, Evidence, Day 46 10/11/09, pages 25 - 26].

This does not indicate that the Crown had doubts about the identification or that they viewed it as requiring a cross-check.

Consequences of Not Exhausting Instructions to Mr Kent

It is appreciated that there is an interest in speculating into what would have happened had the Crown exhausted these instructions. Even if a further report had been obtained and even if that report was another independent expert report on a comparison of Y7 with Shirley McKie's print, it does not necessarily follow that the Crown would have received an opinion which contradicted that of the 4 SCRO officers who signed the report. If the Crown had obtained a further expert report, it could just as easily have been from an expert who held the same views as Malcolm Graham or from Peter Swann or Martin Leadbetter, both of whom are based in England.

COPFS appreciate that with hindsight it is clear that there could have been improved avenues of communication between Procurators Fiscal, indicters and Crown Counsel in 1997. It was suggested to Mrs Greaves in evidence that matters went "behind closed doors" when correspondence was sent to CO at that time [Greaves' Evidence, Day 16, 1/7/09 page 52]. What is also clear is that at that time, the Procurator Fiscal did not have the same clear understanding of the purpose of instructing Mr Kent as the indicter and we have also heard that the guidance from CC in those days was not as full as is expected now.

However, there have been considerable changes in practice and procedure since that time. Lord Boyd was responsible for the implementation of significant improvements in the handling of criminal cases by COPFS, for which he deserves credit. The Lord Advocate remains committed to achieving improvements in all areas and the report to this Inquiry will

be of significant benefit in directing those areas of improvement in the field of fingerprint evidence.

I would commend to the Inquiry, the evidence from Scott Pattison and Lord Boyd of Duncansby QC regarding the changes which have taken place in procedures since then. [Pattison Statement FI0114-02; Pattison Evidence, Day 49, 13/11/09, pages 130 – 139; Lord Boyd, Day 46, 10/11/09, pages 95 – 96; 102]. The Inquiry has also heard about the involvement of an allocated Advocate Depute at an early stage. This will also assist the direction and follow up in complex cases, including those involving serving police officers. In view of this, it is clear that there are much better, more open, lines of communication now between all those involved in High Court cases from an early stage right up to the trial.

In addition, COPFS have a mandatory instruction to staff to precognosce experts in all High Court cases and a presumption applies in relation to Sheriff and Jury cases, except where the evidence is agreed [CO Circular 8/2009 [CO 4109]]. The Inquiry has also heard in detail about this and the aide memoire which is designed to give staff further guidance in relation to expert witnesses and their precognition. [Pattison Evidence, Day 49, 13/11/09, pages 166 - 189].

The Inquiry has also heard about the Advocacy Skills training in relation to the instruction of experts - expert evidence is being introduced as a topic for training in an advanced course. If we are introducing this for staff it will provide benefits in enhancing their approach to expert evidence from an early stage in proceedings.

Decision to Indict

Questions were asked of Lord Boyd in regard to why, having given an instruction to put Miss McKie on petition, there was no separate instruction to indict. He explained it may be that the view was taken that, because he as Solicitor General, had seen all of the papers that would have been considered at indictment stage and because Crown Counsel had separately instructed indictment [CO 3394], that it was not necessary for him to see the papers again and the instruction to place on petition was, in effect, taken as one to indict. He did accept that it might have been better had it come back for a separate instruction, he was unable to recall if it had. He also said it may have gone to an Advocate Depute and there had been an instruction at that stage. In any event, he would not criticise the officials for having taken a decision, if they did, that he did not need to see it again. It was made clear that he had authorised prosecution [Lord Boyd evidence, Day 46, 10/11/09, pages 8 - 10]. In the circumstances, we would suggest that it would be inappropriate for the Inquiry to criticise any officials in this regard.

Joint Report dated 27th March 1997

Chapter 6, Issue (5) in this Chapter – Court Reports

There was a reference in the first report dated 27th March 1997 regarding the orientation of Y7 [DB 0004]. This was not contained in the later report dated 10th April 1997 [SG 0409/0388]. There has been evidence led from Charles Stewart in relation to this issue although we have not heard from any PF who made the request nor anyone who received this request direct from a Procurator Fiscal [Stewart Statement FI 0036.02, paragraph 23, Day 44, 5/11/09, pages 104 – 105].

In this regard, no adverse inferences should be drawn against COPFS in relation to this entry in the report. If such a query was made by a Procurator Fiscal then it was not unreasonable to ask an expert whether this could be addressed in a report. Although it was removed later, it seems to have been removed against a background that the fingerprint officers did not feel comfortable expressing a conclusion on that matter and they considered it to be a non-standard request. It is clear that at some unknown point the comment was removed from the report, albeit again we have no evidence which would allow a finding to be made that this was on the instruction of the Procurator Fiscal. Certainly, if the signatories to the report had expressed their discomfort about expressing a view, again it would be reasonable for this to be removed.

This type of question has been asked of other experts during the Inquiry and there has been some hesitation about this type of question, e.g. expressed by Mr Wertheim in his evidence about whether it was made by a man or a woman etc. But that discomfort was not on the basis of it being an improper question, rather it was considered to be something that was not truly within the expert's area of expertise. That first report was not lodged but again, if the comment on the orientation of the print was not something that the experts felt comfortable with, then there should really be no criticism in its removal. If there is any criticism, it should not lie with the question being asked or any request being made to comment on the matter in a report.

With regard to whether this first report should have been lodged: Disclosure has been an issue that has been raised during the Inquiry in relation to a number of matters, but it is difficult to see how this entry in the first report would undermine the Crown position or assist the defence position or be exculpatory of the accused. Accordingly, it would be entirely

reasonable to take the view that this did not fall within the nature of information the Crown were obliged to disclose. In any event, this is not an issue that has been fully explored in evidence with any of the Procurators Fiscal or other witnesses from COPFS and in the circumstances I would invite the Chair not to make any adverse findings against COPFS in this regard.

Charted Enlargements

Chapter 1 of the Analysis document, issue (3); Chapter 6, issues (7), (8) and (9); Chapter 8 issues (3) and (4) - Charted Enlargements

What was the purpose of producing case specific enlargements?

There was clearly a difference of opinion about the purpose of producing case specific enlargements. COPFS thought they showed the individual characteristics which were identified by the experts and formed part of their reasoning. For example, Denise Greaves understood that the enlargements were designed to demonstrate how the officers reached their conclusions [Greaves' Evidence, Day 16, 1/7/09, pages 130- 131]. Whereas, the fingerprint officers apparently viewed these as a mere "illustration" to give to the jury.

The understanding of COPFS was entirely reasonable. The enlargements were not generic and not designed to show ideal or easily visible examples of individual characteristics. The enlargements were specific to each case using the prints found and identified and were marked up by the fingerprint officers with at least 16 points marked thereon, which corresponded to the 16 point standard at the time.

Given the absence of challenge to expert evidence on an identification prior to the McKie case, however, it is perhaps understandable that insofar as SCRO had a different understanding of the purpose of the enlargements, that this had never been made obvious to the Crown.

Accuracy of Enlargements

Miss Greaves doubted that the enlargements in the McKie case were available to her at the time of precognition [Day 16, 1/7/09, page 130]. However, once they were available, none of the SCRO witnesses suggested to the Crown, prior to the trial, that the chartings were not an accurate recording of the 16 points. In fact, the majority of witnesses agreed to this Inquiry that the enlargements produced were not accurate. This was attributed to the inadequacies in the charting PC. Although Mr MacPherson appeared to agree that the machine was not producing quality images, he then seemed very unhappy about the suggestion that the images he produced for the McKie trial may be inadequate in some way [Day 42, 3/11/09, pages 62 – 66] but to that extent he did not accord with others who acknowledged the problems. Later in his evidence though he did seem to accept that there were difficulties with accuracy [pages 101 – 105; 135]

This situation appears to have existed because the charting PC had been purchased at great expense and was designed to be used by officers at SCRO. Management were not aware of the difficulties being experienced and the officers did not raise the issue [Harry Bell Evidence; Day 18, 3/7/09, page 157]. The situation was compounded by the fact that disputes over fingerprint evidence and challenges from the defence were so rare and perhaps a certain complacency slipped in regarding the preparation of these enlargements for court.

What is clear from the evidence is that COPFS were never told of the difficulties experienced with preparing charted enlargements by SCRO. We heard from Sheriff Murphy QC that had this been raised, he would have considered it to be of “grave concern” [Day 14, 25/6/09, pages 125 – 126]. Despite these inaccuracies, the officers did express the view that all the officers would have been able to explain the true position to the jury in evidence, although this was perhaps a little optimistic given the views of Sheriff Murphy QC regarding the difficulties experienced in court.

With regard to the position regarding enlargements in the future. These are no longer produced as a matter of course in every case where reports are sought for court. Having regard to the statistics on fingerprint evidence and the lack of challenge, this is appropriate and the status quo should be maintained. However, it has remained the case that enlargements can be requested if required [Scott Pattison’s evidence; Day 51, 17/11/09, page 6]. It would appear that this is also the position in England & Wales, as spoken to by Mr Pugh 24/11/09.

As we have heard, it is rare for fingerprint officers to be called to give evidence and where they are, it is rare for this to be in relation to a disputed identification. For the witnesses who have given evidence to this enquiry, no one has been able to give an example of such a situation arising other than in the McKie case either before or after it in this jurisdiction. Clearly if there is a disputed identification over fingerprints in the future, enlargements would be sought by the Crown because it is certainly our position that this would be necessary to provide a full explanation of their reasoning and full disclosure of the individual characteristics found by the officers. The Crown have also heard that COPFS are about to start a project which will test the use of case specific enlargements although one issue

remains about the practical difficulty in testing their use given the very small number of cases where fingerprint evidence is relied upon. In addition, the Inquiry has heard that the Crown have used and are developing the use of generic enlargements in court in the area of forensic science, including fingerprint and there is considerable interest in assessing the system used in this Inquiry [Scott Pattison's evidence; Day 51, 17/11/09, page 6 - 10].

As a result, I invite the Inquiry to make recommendations maintaining the current position and recommend that case specific enlargements be created by each individual officer and sent to COPFS showing the points in sequence and agreement along with an explanation of the character and nature of each point identified if they are required to give evidence. In addition, that other generic visual images continue to be considered and developed in order for use during the giving of evidence to provide a detailed explanation to the jury. However, COPFS suggest that this be required, only where there is a disagreement about identification or where oral evidence is to be led at trial. Any suggestion that they be created for all cases would be an unnecessary burden on fingerprint officers and an unreasonable allocation of resources.

Obtaining Further Independent Expert Report after Receipt of Defence Productions

An issue has been raised during the Inquiry as to whether the Crown ought to have obtained a further independent expert report, outwith SCRO, once Mr Wertheim's acetates became available to the Crown. This was dealt with by Lord Boyd in evidence. He explained that, as Lord Advocate, he would have expected an Advocate Depute to seek comment from the experts instructed by the Crown. If they expressed confidence in dealing with the challenge he would not expect a further independent report to be obtained. [Day 46, 10/11/09, pages 30 – 32]. Sheriff Murphy QC also explained that from his perspective he did not want to seek

another independent expert report, prior to the trial, for fear of bamboozling the jury [Day 46, 10/11/09, pages 35 – 36; 135 – 137]. The matter at dispute between the experts is one for the jury to determine rather than introducing more and more expert views into the evidence. Therefore, the Crown would not encourage “expert shopping”.

Were the prosecution properly prepared to present SCRO evidence in the face of contradictors?

Chapter 8, issue 5, Chapter 8 issue 6, Chapter 10, issue (4)

What is clear from the evidence during the Inquiry is that regardless of how experienced or senior they are, fingerprint officers in Scotland rarely give evidence in court and on those few occasions when they do, it is not just exceptional for the case to involve a disputed identification but in fact the McKie case is the only case of which we have heard evidence where experts were challenged on that basis in Scotland. Even when one takes account of the experience of other witnesses who regularly practice in other jurisdictions in the UK, including Northern Ireland and England and Wales, and the United States of America it would appear that this is not unusual. Against that background, it is unsurprising that officers were not equipped with the experience required to withstand such a challenge. Nor is it surprising that training provided by lawyers or experts in Scotland, who will be equally unfamiliar with cases of that sort, would be limited by that lack of familiarity with the situation.

Firstly, in answering this issue, it may assist to consider what the AD did when approaching trial and when the Crown became aware that the defence position had changed to misidentification rather than planting/faking. In this regard, assistance is gained by

considering the evidence of Sheriff Murphy QC. In advance of the trial, he met with Charles Stewart and Hugh MacPherson to go over their position on 30th April 1998 [Day 14, 25/6/09, page 183]. Despite some initial confusion, once he had had sight of the relevant documentation he accepted that he found out about the defence sometime around 16th April which was the Friday prior to the trial (which started on 21st April 1998) [Statement of Sheriff Murphy QC to the Mackay & Robertson Inquiry dated on 6th September 2000 [CO 2036]]. He explained that his recollection then was much more accurate than it would be at the time of his evidence to the Inquiry [Day 14, 25/6/09, page 178]. With that in mind, he accepted the position of Charles Stewart as correct, i.e. that it was at the second meeting he had with the AD that he became aware of the new defence position [Statement Stewart FI 0036.055 paragraph 264]. This position was consistent with the Statement from September 2000 [Day 14, 25/6/09, page 183]. This late availability of defence productions clearly had an impact and limited the time available to the Crown and the experts, immediately prior to the start of the trial. The trial had previously been adjourned and given the procedures in place at the time, this was not an uncommon situation, and there was a desire to make progress. This situation is one of the issues which the new procedures have sought to address (see below).

Secondly, it is also vital that consideration be given to the Advocate Depute's assessment of the case as a whole, including the anticipated eye witness evidence. Despite many attempts throughout the Inquiry to present this case as one consisting solely of fingerprint evidence, that view fails to take account of the Advocate Depute's assessment of the evidential position immediately prior to the trial. In particular the Depute placed considerable weight on the anticipated evidence of Mr James Kerr [Statement to Inquiry, FI 0070, paragraphs 12 to 16; Evidence Day 14, 25/6/09, pages 185 - 193]. He explained his position in relation to Mr

Kerr's evidence under reference to Mr Kerr's statements and precognitions [Kerr Statement dated 10/4/97 [CO 2594] (no information); Kerr Statement dated 12/7/97 [CO 2593] pages 4 and 5 (no mention he saw her at 5pm); Precognition [CO 2592] pages 4 and 5 (saying he left the house at 3pm)]. He explained how he asked that the witness be spoken to again by the Fiscal prior to being called to give evidence, and the difference it made when Mr Kerr's evidence was not as anticipated in the witness box [Day 14, 25/6/09, pages 18 – 23]. [see also the cross examination of Mr Kerr on Day 10, 18/6/09, pages 56 – 64]

In the circumstances, Sheriff Sean Murphy QC explained why he decided to proceed to trial rather than seek an adjournment and he explained the three considerations to which he had regard in reaching his view [Murphy Evidence, Day 14, 25/6/09, pages 34 – 36]. In cross examination Mr MacPherson accepted that when he and Mr Stewart met and discussed the case with Sheriff Murphy QC that both he and Mr Stewart were aware that the defence case had changed and that the SCRO identification was now to be challenged. Both Mr MacPherson and Mr Stewart reviewed the materials prepared by Mr Wertheim [MacPherson Evidence, Day 42, 03/11/09, pages 77-84]. Sheriff Murphy QC was not asked for more time by the fingerprint officers, he was not advised that they could not prepare for the trial in the limited time available to them. He understood them to be confident in the face of Mr Wertheim's position. He discussed in evidence, having considered the possibility of an adjournment and explained why he did not seek one. He met with the experts Mr Stewart and Mr MacPherson; he met with Mr Kent; he properly assessed the evidence he had available to him. In light of the background, the Inquiry should hesitate before second guessing the decisions taken by the prosecutor at the trial [Sheriff Murphy QC Evidence, Day 14, 25/6/09, pages 137 – 145].

One further issue arose relating to the late citing of Ms. McBride and Mr McKenna for the trial. It was acknowledged that this was not the normal procedure. Miss McBride and Mr McKenna were substitutes for the two main signatories in the event of annual leave. Mr McKenna was not in the end available for trial. In relation to Ms. McBride, she advised that she had not seen the defence productions before she went into the witness box. It is accepted that this is an unsatisfactory situation and should be avoided. Unfortunately we do not have Sheriff Murphy QC's position in relation to this matter. What can be said, is that the Inquiry has heard from Scott Pattison regarding the current procedures and how there is now a 7 day time limit in place, where defence productions and lists of witness are lodged prior to the preliminary hearing. In addition the Inquiry has heard how these new procedures are designed to reduce the very late lodging of defence productions, but also that trials are no longer fixed until both parties are prepared and all documentation lodged. Mr Pattison did acknowledge that there is still an element of judicial discretion and latitude towards the defence and so late lodging can never be ruled out entirely. That is clearly appropriate to ensure that a fair trial is secured. However, on the part of COPFS the Inquiry has heard about the allocation, at an early stage, of an Advocate Depute who will conduct the preliminary hearing and the trial in cases, such as a high profile case against a police officer. Also the involvement of indicters and Procurators Fiscal who will retain control of the case from beginning to end. This allows for very close monitoring and direction to be given by very experienced prosecutors in relation to issues involving expert evidence including precognition and re-precognition if required. We have also heard about the mandatory guidance set out in the March 2009 Crown Office Circular [CO 4109] which now applies to fingerprint evidence, which by its very nature requires direct contact between the prosecutor and the expert prior to the trial. The Aide-Memoire which has been prepared highlights to the prosecutor that the defence should be discussed with the witness and this will also allow

for consideration to be given as to whether the expert acting for the Crown requires more information or further time to consider the defence position, without the immediacy of a trial pending.

COPFS acknowledge concerns which have been raised regarding the delay in issuing this guidance, however, the DVD and leaflet were issued in 2006 when the NNS was introduced and previous guidance was available to precognoscers at that time [Scott Pattison Evidence, Day 51, 17/11/09, pages 63 - 67]

Accordingly, although it is not possible to say that the lodging of late defence productions will never arise again in the future, the new procedures minimise that risk and although a small risk remains, adjournment remains open to the Crown to seek if it is considered appropriate in the circumstances.

With regard to future training it is also clear that considerable work is being done in this regard and I simply wish to refer the Inquiry to Scott Pattison's statement [FI 0114.-02, paragraphs 26 - 35] and Supplementary Statement [FI 0195-03, paragraphs 22 - 24] which go into considerable detail about COPFS involvement in training. We have also lodged documentation with the Inquiry team showing the extent of training and what information and guidance is given to staff. All of this adds to the expertise of prosecutors in handling expert evidence both before and during trials.

3. Whether the approach to the prosecutions would have been materially different had the non numeric approach been applied

Chapter 1, issue (4)

The fingerprint officers who have given evidence have said that the change to the non numeric standard made no actual difference to their work and would have made no material difference in this case. If it did not make any difference to the individual fingerprint officers in carrying out their assessment, then it is difficult to see how that in itself would have made a difference to the subsequent approach the Crown took to the prosecution. Having heard the evidence of Mr Geddes who was a fingerprint officer at the time of the Asbury/McKie cases and remains in post today, as I understand his position, he indicated that the change to NNS has made no difference to his view of Y7 [Geddes, Day 15, 26/6/09, pages 5 - 6].

4. Whether effective procedures in place to assess and review the Accreditation of Experts under s. 280

Chapter 9 issues 1 and 2

Despite some initial confusion, it has been made very clear in evidence that at the time, COPFS had no role in the accreditation of experts under this section and did not hold a “List of Expert Witnesses”.

It is appreciated that the Inquiry may make a recommendation that we become involved in this area. The main concern of COPFS is in connection with an increased involvement in accreditation would be that this risks undermining the independence of the witnesses. We would ask the Inquiry to ensure that there is a balance achieved which maintains the independence of the witnesses.

COPFS are willing to continue to be involved with SPSA and to take an active role in court training for fingerprint officers. Equally we are happy to be asked to participate in a

procedure whereby specific concerns regarding the performance of an officer in court are drawn to the attention of SPSA or where we engage in a debrief with SPSA after an expert gives evidence, but beyond that we would urge the Chair not to require COPFS to become heavily involved in the requirements for accreditation and any assessment of what is appropriate, other than in relation to court performance. [Statement of Scott Pattison, FI 0114 paragraphs 66 -69; evidence 17/11/09, pages 20 - 25]

5. Current Arrangements Relating to Documentation; Precognition and Impact on Disclosure

Chapter 10, issue (1) and Chapter 11 issues (4) and (5)

Current arrangements for the provision and disclosure of statements, Joint Reports and precognition facilities have been explained by Joanne Tierney, Mr Scott Pattison and Mr McGinnies. In the event of a prosecution the Crown is provided with (1) a Joint Report containing details of all prints identified as matching the accused. A copy is disclosed to the defence; (2) an Annex containing details of all other prints found at the scene and examined, whether identified, eliminated or deemed insufficient, which document is subsequently redacted as appropriate and disclosed to the defence; and (3) a Written Statement prepared by any fingerprint examiner who has signed the report, which is also disclosed to the defence, subject to any appropriate redaction. In addition to this documentation, uniquely in Scotland, the Crown have the additional advantage of precognition where the fingerprint examiners will explain their report and findings with the prosecutor prior to the trial and a note will be prepared and form the basis of a document known as a Precognition. This will be for the benefit of the prosecutor and is not reviewed, revised or signed by the witness. The purpose of precognition is not just to understand the evidence but to assess the quality of the evidence

given by a particular witness. In accordance with the Crown Office Circular of March 2009 [CO 4109] guidance is in place to prosecutors which makes it mandatory in all cases proceeding in the High Court of Justiciary for the experts to be precognosced. In cases proceeding in before a Sheriff and Jury, there is a presumption that the prosecutor will precognosce the expert. The only exception is where it is known that the evidence is to be agreed. Prior to this guidance coming into force, there was a presumption in favour of experts being precognosced. Very few cases involve the leading of fingerprint evidence and in those rare cases where evidence is led, this has not been as a result of a dispute about the identification of a mark. Statistics have been provided in relation to the number of cases proceeding to court where the evidence of the fingerprint examiners was led [Scott Pattison Supplementary Statement FI 0195-03; Evidence 17/11/09 page 39;]. Other expert evidence indicates that disputes about the identity of prints and the leading of oral evidence in that regard is equally rare in England and Wales and Northern Ireland as it is in Scotland [Mr Logan, Day 50, 16/11/09; Mr Chamberlain, Day 52, 18/11/09; Mr Pugh Evidence, Day 54, 24/11/09, (original unchecked Livenote pages 104 – 105)].

It is accepted that during the course of evidence the Inquiry has heard that COPFS were not told about certain material matters, including occasions when there is a dispute between experts as to the identification of a print; occasions when examiners have been unable to find 16 characteristics when that was the national standard e.g. Alistair Geddes' involvement in Y7 (being able to identify fewer than 16 points); and the McKie case regarding the existence and results of the blind testing. It is also accepted that these issues should have been disclosed to the Crown in order that the Crown could fully comply with their duty of disclosure [Joanne Tierney Evidence, Day 48, 12/11/09, pages 176 - 178; see also Pugh Evidence on how this is viewed by the Met, Day 54, 22/11/09 draft unchecked Livenote

pages 116 - 119]. It has been recognised and accepted by SPSA that although the duty of disclosure is well known, and although the Crown had a legitimate expectation that material that might assist the Crown/the defence or which was exculpatory of the accused would be disclosed, it is fair to say that this was not perhaps fully understood by the staff of SPSA and the Crown did not make this sufficiently clear. Despite the change to the NNS and the new style Joint Report, Annex and/or Written Statement, this situation has continued. It is also clear that the failure to disclose was not a one-off situation relating to the circumstances surrounding Y7/QI2. Thanks to the Inquiry it is now clear to SPSA and COPFS that there is an unresolved issue and SPSA intend to improve the training of their own staff in this area, under reference to the recently issued ACPOS guidance manual [see Statement of Scott Pattison FI 0195-03 paragraph 17 (not yet on database); McGinnies Evidence, Day 43, 4/11/09 pages 175 – 178; Joanne Tierney Evidence, Day 48, 12/11/09, pages 176 – 178]. Further, there will be discussions about the matter between Scott Pattison and Tom Nelson to ensure that this situation does not arise again. In addition, steps have been taken by the Crown to prepare an aide memoire to precognoscers raising these issues, even where COPFS have not been advised that any difference of view or disagreement exists between examiners. This also reminds precognoscers of the importance of disclosing any such issue raised at precognition to the defence. Albeit there remains a continuing duty on the Crown to disclose material information at any stage it comes to light [Pattison Evidence, Day 51, 17/11/09, pages 30; 44; 53; 67 – 69; 79 – 80; 83]. This will provide some protection, pending the introduction of further training for SPSA staff.

It is appreciated that the Crown have been aware since 2001 of the involvement of Alistair Geddes and have been aware that they did not receive evidence in relation to prints which may have been “consistent with” an accused. COPFS is also aware that Advocate Depute’s

have known since 1994 that this evidence was not available to the Crown as Lord Boyd accepted that in 1994 the Crown wished to rely on this evidence and he acknowledged that in certain circumstances the defence may have an interest in it. The example given related to a print on a murder weapon which was not the accused's, but which might relate to an incriminee.

Concerns have been raised about this situation continuing and the absence of any instructions or guidelines from the Crown to SCRO/SFS/SPSA. These have also been highlighted under reference to an example given of the situation where a print is found on a murder weapon.

The primary area of concern raised during the Inquiry relates to the interest of the defence in having this information disclosed. If the Crown do not have that evidence available to them to enhance their case against the accused, then there is no concern expressed by others as regards the accused's Article 6 rights.

I would invite the Chair to be alert to the reality of a situation such as this arising. As the position stands, if a print is found on a murder weapon then the fact that that exists would be disclosed to the defence, in 1997, in the Joint Report and would be disclosed now by way of the Annex. As a result, it has always been the position that the defence are made aware of the existence of such a print and it is open to the defence to investigate that further to see whether it is in any way consistent with any line of defence maintained by them. If it is marked as insufficient then the defence will still be able to highlight this to a jury and raise the issue of reasonable doubt even if no further investigations are carried out or possible.

Further, the existence of such a print is not something that the Crown would ignore because it could raise a reasonable doubt with the jury, so the Crown would investigate that further. In addition, if there is an incriminee (a Notice of Incrimination will be lodged) then equally, the onus is on the Crown to prove beyond reasonable doubt that the incriminee did not commit the crime. So that is also something the Crown will have an interest in investigating. [Scott Pattison's evidence 17/11/09].

So although Lord Advocates' Guidelines [CO 4406] which dealt with this matter, were not ultimately issued, the reality is that had that situation arisen, in the example given the Crown would have investigated that print even if the defence had failed to investigate that line of defence.

However, if the Inquiry consider that a further category of "unable to exclude" would highlight to the Crown and the defence that a print, which cannot be identified/eliminated may on further investigation, be of some potential assistance, the Crown would welcome this change. It is understood that this is a category which is used in England and Wales [Joanne Tierney Evidence, Day 45, 6/11/09 pages 49 - 50].

6. Working Notes

Chapter 10, issue (3); Chapter 11, issue (4)

It was suggested that COPFS apparently rejected disclosure of the full and detailed form of the joint report [Joanne Tierney Statement [FI 0152, paragraph 28]] however, in evidence Miss Tierney explained that this was not in fact the position and it was not her intention to express her position quite in that way in her Statement. We would note, that in any event it is clear that a short report is consistent with other jurisdictions [Chamberlain's evidence 18/11/09; Pugh Evidence, Day 54, 22/11/09, pages 95 – 98 (original unsigned Livenote transcript)] however, as was accepted by Mr Pattison, the Crown are happy to accept a more detailed written report if that is recommended by the Chair [17/11/09]. In addition, as Miss Tierney considered it a possibility that an absence of a specific "Disclosure" Section in the Joint Report or Written Statement format may be contributing to the failure of SPSA to disclose certain matters to the Crown, the Crown are content if a specific section is added to the Joint Report or Written Statement in order to draw this to the specific attention of SPSA staff.

With regard to written working notes, concern was expressed during the Inquiry that the Crown had indicated that they not want to receive these documents. It is recognised that the Inquiry may recommend that written working notes are prepared and retained by examiners in accordance with the ACPOS manual paragraph 7.57 (not yet on database). It is also recognised that the Inquiry may recommend that these be forwarded to the Crown and made available for disclosure to the defence. In that event, COPFS would invite the Chair to recommend that a sentence be inserted into the Joint Report indicating that written notes are available and arrangements can be made for their perusal/consideration, should that be required.

It remains a concern, that prosecutors will be ill equipped to interpret examiners' notes and so it remains vital to COPFS that full disclosure is still made of material matters within the body of the Report and/or Statement rather than being left to a reading of the notes.

Further concern remains regarding multiple handwritten notes being forwarded to the Crown. In responding to the question: in the absence of working notes, is the non-numeric standard (NNS) verifiable by the Crown at precognition and the defence? COPFS does not obtain the working notes of other experts, e.g. pathologists, biologists etc. This does not prevent them from providing a full and detailed explanation of their methodology and their findings at precognition.

7. Arrangements for Competency Testing – Disclosure

Chapter 10, issue (5)

COPFS are content with the position taken by Miss Tierney in evidence [Day 48, 12/11/09]. It seems reasonable that any failure would require investigation into the reasons. If the matter was considered appropriate to disclose to Crown Office then consideration would be given into disclosing this to the defence in any relevant case. The Crown would resist any suggestion that this should always automatically be disclosed to the defence in every case in which the examiner who failed the test had or in the future would give a report. The circumstances and reasons for such failure would require to be carefully considered and regard given to the materiality of that to any future criminal proceedings.

8. Evidence Where Fewer than 16 points & the Dire & Crucial Exception

Chapter 11, issue (1)

Having heard evidence from a number of examiners there was no one in a position to speak to actually giving evidence to a standard of fewer than 16 points (prior to the introduction of the non numeric standard).

COPFS had no role in the Dire and Crucial Exception and did not apply such a rule. [Scott Pattison Statement [FI 0114-03 paragraph 65] and Supplementary Statement [FI 0195-02 paragraph 14]. This exception was introduced in the guidelines issued by the Home Office in 1983 [Joanne Tierney's Statement FI 0152 paragraph 10]. Many of the examiners spoke of training and Durham, England and it may be that references have been made to the Home Office Guidance during this training which have been brought back to Scotland. Prior to the introduction of the NNS the Crown expected all identifications brought to court to be made to the 16 point standard.

9. COPFS involvement in Quality Standards

In his evidence, it was put to Lord Boyd that since it was a matter of expert evidence that the content of the evidence and indeed the standards to which the evidence is addressed are matters for the witness, why the Law Officers/COPFS may have any involvement. He expressed the view that "there might be two answers to that. The first is that in Scotland the Lord Advocates' role goes beyond the simple prosecution and has a role in directing the investigation of crime and often that is done through the issuing of guidelines to the police. But he supposed more generally, that it was important that the Crown are satisfied that if the

evidence is presented in such a way that it will be accepted by the Court” [Evidence, Day 46 10/11/09, morning, page 57].

Mr Pattison in his evidence emphasised the importance, however, of distinguishing between COPFS having a direct involvement in setting scientific standards and having an interest in ensuring that there is no objective basis to criticise the standard itself when presented in court. He did not consider that approach to conflict with the evidence given by Lord Boyd and explained his reasoning. The Crown do not take a role in determining the underlying standards applied by other experts, e.g. psychiatrists, pathologists, biologists. We would commend his evidence to the Inquiry. [Scott Pattison’s Evidence Day 49 13/11/09, pages 139 – 156; Day 51, 17/11/09, pages 75 - 77]. There is a concern that in the event the Crown is given a significant role in relation to fingerprint evidence, e.g. in relation to authorisation of experts or the underlying standards, then that could lead to a perception of a lack of independence on the part of the experts [Scott Pattison’s Evidence Day 49 13/11/09, pages 164 – 165]. It is important to the presentation of fingerprint evidence in the future, that any recommendations the Inquiry makes, do not introduce a ground for challenging this evidence on the basis (i) that the fingerprint examiners are not truly independent of the Crown and (ii) that any underlying standards applied by them are biased towards the Crown. Reference is made to the case of McTear v Imperial Tobacco 2005 2 SC 1 per Lord Nimmo Smith and the views expressed on experts therein regarding the status and independence of expert witnesses in Scotland. The independence of an expert witness is discussed in Section 5 of the Report and in particular reference is made to paragraphs [5.17] and [5.18]. Independence is also considered essential for an expert giving evidence in England and Wales [Chamberlain Evidence, Day 52, 18/11/09, pages 98 – 100].

10. MacNamee

It is accepted that when Mr Kent arrived to give evidence in the McKie trial, he mentioned what was probably this case, to Sheriff Sean Murphy QC, but any comments were general in nature. Mr Kent was not an expert in relation to the identification of Y7 and had no expertise in that regard. He was not aware that misidentification was the defence at the time he arrived to give evidence for the trial. Although he had a discussion or discussions with the Advocate Depute, Mr Kent did not consider that the matters raised in MacNamee were directly relevant to the McKie case [Sheriff Murphy QC, 25/06/09 morning, page 88; Mr Kent, Day 19, 7/7/09, morning, pages 72 – 74]. Mr Mackenzie, despite having given evidence in the MacNamee case and having been intimately involved with the investigations surrounding Y7 and its comparison with Ms McKie, stated in evidence that he didn't make any connection with the MacNamee case [Evidence, Day 28, 1/10/09 pages 104 - 105]. In addition, Mr Swann who also gave evidence in the MacNamee case also confirmed in evidence that he did not make any connection between the two cases [Evidence, Day 36, 21/10/09 unchecked Livenote pages 125 - 126]. Given that this case was and remains unreported and access to English cases via the internet was less extensive then as it is now, in the absence of an expert bringing this to the attention of the Crown Office, the Inquiry should resist making adverse comment against the Crown for not making any connection between MacNamee and the McKie trial.

11. Mayfield

With regard to the OIG report, COPFS were unaware of this because we rely on experts to keep us informed of developments in areas such as fingerprints. COPFS received a presentation on the change to the non-numeric system in 2006 and the Mayfield case was not mentioned at this time (Lord Boyd of Duncansby QC, Day 46 10/11/09, morning, page 71] Joanne Tierney acknowledged in evidence that she did not know about this and accordingly, could not have brought it to the Crown's attention. The Crown remains reliant on experts to draw attention to any important reports and highlight if there is exist objective reasons why e.g. the NNS should be criticised [see evidence of Scott Pattison, Day 49 13/11/09, afternoon, pages 29-30].