

Tuesday, 10th November 2009

1

2 (Morning session)

3 (9.30 am)

4

**LORD BOYD OF DUNCANSBY, sworn**

5

THE CHAIRMAN: Your full names so we can have them on the  
6 record, please.

6

7

A. My name is Colin David Boyd, Lord Boyd of Duncansby.

8

**Examined by MR MOYNIHAN**

9

Q. Lord Boyd, you have assisted the Inquiry by providing us  
10 with two statements. The first our code is FI0057 and  
11 the second FI0079.

11

12

I understand you have copies with you.?

13

A. Yes, I do.

14

Q. So far as these statements are concerned, you have had  
15 an opportunity to consider these statements and, subject  
16 to one thing we will discuss about the first, you are  
17 generally content these represent the truth as best you  
18 can recollect it on the matters you have been asked  
19 questions about?

19

20

A. Yes, I am.

21

Q. The one point that we want just to tidy up is, in fact,  
22 to large measure the reason for the second statement  
23 existing. When you were asked to give your first  
24 statement, the Inquiry team did not have the  
25 correspondence relating to the treatment of the four or

25

1 perhaps six Scottish Criminal Record Office staff and  
2 their suspension and then we did obtain that material  
3 and you provided a second statement.

4 So far as which of the two one should rely on as the  
5 more accurate representation of your position, can you  
6 explain which of the two it is?

7 A. Well, the second one is the accurate one because the  
8 first one was based on my best recollection at the time.  
9 I didn't have any material to go on and once I saw that,  
10 then I made the second statement. So if there is a  
11 discrepancy between the two, then it is the later  
12 statement that should prevail.

13 Q. More generally in relation to the matters that we are  
14 going to cover, are you, like many others, dependent on  
15 the documentation that is shown to you rather than  
16 having a particularly clear recollection of events?

17 A. Yes. I mean, clearly those events that are towards the  
18 end of all of this process I have a better recollection  
19 than I do of the start of the process, but I do very  
20 much rely upon the documentation.

21 Q. What I want to do is to start in a more general way  
22 relating to your function as a Law Officer and then we  
23 will come down to the specifics of this.

24 For the events with which we are concerned, you were  
25 for a period the Solicitor-General and for a period the

1 Lord Advocate.

2 Can you explain what the difference would be between  
3 the two Law Officers in relation to conduct of a case  
4 such as this?

5 A. Yes. The Lord Advocate is the senior of the two Law  
6 Officers. The Solicitor-General is, effectively, his or  
7 her deputy. The rough -- well, actually it was a bit  
8 clearer than this. The distinction between the two, at  
9 least in my time, was that the Solicitor-General tended  
10 to deal with the casework in the Crown Office whereas  
11 the Lord Advocate was more concerned with the overall  
12 policy, with civil matters, which of course we're not  
13 dealing with here, and things such as resourcing and so  
14 on. That is not to say that the Lord Advocate would not  
15 get involved in particular individual cases but  
16 certainly the Solicitor-General was the individual who  
17 had responsibility for the day-to-day casework in Crown  
18 Office.

19 Q. More particularly we are involved in this case initially  
20 with the murder before your time as a Law Officer but by  
21 the stage that you are a Law Officer we are interested  
22 in the potential and then ultimately the actual  
23 prosecution of a serving police officer.

24 Were there special arrangements in Crown Office  
25 relating to these matters?

1 A. Yes. All complaints against police with allegations of  
2 criminal conduct would go to the Solicitor-General.

3 Q. Is that with a view to any sort of prosecution decision  
4 or, indeed, disciplinary decision?

5 A. Not disciplinary but certainly every prosecution  
6 decision would be taken by the Solicitor-General.  
7 Occasionally, if the Solicitor-General wasn't there, it  
8 might go to the Lord Advocate, but the policy was that  
9 it was the Solicitor-General who dealt with these.

10 Q. Why would it be that in relation to serving police  
11 officers a Law Officer would be involved in the  
12 prosecution decisions as opposed to any one of the other  
13 Lord Advocate's Deputies?

14 A. I think because of the nature of the alleged offences.  
15 Police officers are of course agents of the State and  
16 they have powers and responsibilities which we ask them  
17 to exercise on our behalf but, equally, where  
18 allegations of criminal conduct are made against them,  
19 then the public interest is engaged in a way in which it  
20 wouldn't be with many other ordinary citizens.

21 I think it's probably fair to say that the  
22 complaints against police involving criminal conduct  
23 were usually allegations of assault and often made  
24 either in response to allegations of assault against the  
25 individual who is in turn making the complaint against

1 the police officer or in general melees often that took  
2 place after pubs closing and so on, or occasionally you  
3 would have allegations of assault within police  
4 stations.

5 I think there are two issues. One was that they  
6 would be, police officers may be more the subject of  
7 malicious complaints in that sort of situation or,  
8 alternatively, that in fact because they deal with the  
9 more vulnerable in our society that actually there  
10 was an obligation on us as prosecutors to ensure that  
11 these offences were properly investigated and, if  
12 necessary, prosecuted.

13 This particular one, perjury, perhaps falls  
14 obviously outwith that issue and in that situation the  
15 key issue is, I suppose, an offence against the  
16 administration of justice. If a police officer commits  
17 perjury or attempts to pervert the course of justice,  
18 then that is very serious and that would also require  
19 the kind of consideration that would come from a Law  
20 Officer.

21 Q. One might think of the importance of the case as  
22 requiring a Law Officer from either of two perspectives,  
23 either the importance of it for the purposes of the  
24 career of the serving officer or the alternative is the  
25 importance of police officers, as you say, as hands of

1 the State and the public interest in maintaining proper  
2 discipline of the police.

3 So far as the involvement of a Law Officer is  
4 concerned, from which of these two angles did you view  
5 it, the consequence for the individual or the attitude  
6 of the public?

7 A. I think it has to be the attitude of the public. I  
8 mean, any prosecution decision will have implications  
9 for an accused person and police officers, in one sense,  
10 are no different from anybody else, if it's a doctor or  
11 a lawyer or somebody professional then it could have  
12 serious implications but equally of course anybody who's  
13 charged in the High Court it will have implications for  
14 them. So the reason why it became a Law Officer  
15 involvement was not necessarily the implications for the  
16 accused, but the wider interests of justice.

17 Q. Again, speaking generally -- we will come to specifics  
18 in this instance -- if you as the Solicitor-General were  
19 dealing with a case involving a police officer would you  
20 receive the ordinary papers that would come in in any  
21 criminal prosecution that would be, as we understand it,  
22 the precognition and any sort of correspondence file?

23 A. I think the answer to that is yes. I don't think that  
24 anything was taken out, particularly in those days.  
25 Things have changed markedly since 1998, but I'm pretty

1           sure that I would have seen the precognition and the  
2           correspondence file. I mean, I can't be 100 per cent  
3           certain on that but I think I would have.

4       Q.   If I confine myself to the time 1997 to 1999, the time  
5           of the McKie case, therefore, just in asking these  
6           questions, the papers coming to you as a Law Officer one  
7           might think, in some situations, a civil servant, might  
8           present just a memo or summary and ask for an immediate  
9           decision. The alternative would be that you would be  
10          simply left to read as much of the full papers as you  
11          thought appropriate.

12                 Which was it in relation to police prosecutions?

13       A.   It did change slightly when I was there as  
14           Solicitor-General because of changes that I initiated  
15           when I was Solicitor-General but I think that this would  
16           have been before then, and I think that what one got was  
17           the precognition, which would be in probably several  
18           volumes.

19                 I'm pretty certain, reasonably certain, that I would  
20           have got the correspondence file and I would have had a  
21           memo, probably from the Deputy Crown Agent, possibly  
22           something from the Advocate Depute, the Crown Counsel,  
23           but certainly I would have had something from the Deputy  
24           Crown Agent.

25       Q.   Would you then proceed to read as much of the

1 precognition as you thought necessary?

2 A. Yes.

3 Q. In relation to Ms McKie we are dealing with a case which  
4 is one of a potential prosecution for perjury, do you  
5 have a recollection of considering the papers in her  
6 case?

7 A. A hazy recollection, helped by what I've seen from the  
8 Inquiry team. I think without that I would have found  
9 it pretty difficult.

10 Q. One of the questions that you have been asked to  
11 consider by reference to such papers as we do have is in  
12 relation to the actual decision to prosecute her. In an  
13 ordinary case we would understand that an individual may  
14 be placed on petition immediately after the crime has  
15 been committed with investigation in relation to the  
16 background and the preparation of a precognition coming  
17 later and then a second decision being taken to indict  
18 the individual in the light of the precognition.

19 We have had evidence that with perjury it could  
20 occur in a different order and in this particular case  
21 we know from the papers we have seen that a full  
22 precognition was carried out before the case came to you  
23 for a decision to place on petition. As I think you are  
24 aware, we do not have available to us -- first of all,  
25 we don't have the file; secondly, we don't have



1 available to us any piece of paper that would represent  
2 a separate decision to indict, there seems only to be  
3 the decision at the time that she was placed on  
4 petition.

5 Can you explain how perjury would and whether it may  
6 be that there was only one decision taken in relation to  
7 this case?

8 A. I don't recall there being a policy that perjury was  
9 dealt with in any different way from any other case but  
10 that might be very well have been true.

11 I can't really -- in relation to decision separately  
12 to indict, I have no recollection of having taken a  
13 separate decision. Clearly from the papers I know it  
14 came to me at a point where she had not been put on  
15 petition. I am aware there had been an instruction from  
16 Crown Counsel actually to go to indictment and my  
17 instruction is for petition. As I say, I have no  
18 recollection of seeing them separately to put on  
19 indictment.

20 Now, it may be that the view was taken that because  
21 I had seen all of the papers that would have been  
22 considered at indictment stage, because Crown Counsel  
23 had separately instructed indictment, that it was not  
24 necessary for me to see the papers again and the  
25 instruction to place on petition was, in effect, taken

1 as one to indict.

2 It might have been better had it come back for a  
3 separate instruction. It may have done but I don't  
4 recall it. It may have gone to an Advocate Depute and  
5 there'd been an instruction at that stage but I'm not  
6 sure that I would criticise the officials for having  
7 taken a decision, if they did, that I didn't need to see  
8 it again.

9 THE CHAIRMAN: Would it be fair to say that, in effect, you  
10 had authorised a prosecution in the general sense and  
11 that the indictment is a more detailed part of that?

12 A. I think that would be fair, yes, yes.

13 MR MOYNIHAN: If we just look at some of the documents you  
14 have seen so that others can see. Just so we get a  
15 date, if I show you CO3937. This is simply the cover  
16 sheet from the precognition that will show the  
17 precognition was, in fact, received in the Crown Office  
18 on 22nd December 1997. We see the name of the accused  
19 was Shirley Cardwell as she then was and the charge  
20 suggested was one of perjury.

21 I then take you to CO3936. Perhaps there is more  
22 than one page. Could you bring up the two pages  
23 side-by-side.

24 At that time things were dealt with in Crown Office  
25 in manuscript?

1 A. Yes.

2 Q. The suggestion is that this is the handwriting of the  
3 then Deputy Crown Agent, Norman MacFadyen?

4 A. Yes, I recognise it.

5 Q. It's not the easiest to read?

6 A. No, it never was.

7 Q. We see that, in fact, he is writing on 2nd January 1998?

8 A. Yes.

9 Q. If I understand it correctly, he sent the papers to  
10 Ms Climie who dealt with the Asbury case and saying it  
11 would be helpful if Crown Counsel can have your comments  
12 before instructing here and then he sets out his own  
13 view:

14 "My own view is that there is no reason not to  
15 prosecute and no reason to delay pending appeal."

16 The complication there was Mr Asbury's appeal was  
17 still outstanding?

18 A. Yes.

19 Q. "Application can be made for release of the  
20 productions", then something I can't read ...

21 A. "... which can obviously be made available for the  
22 purposes of appeal."

23 Q. "It is ..."?

24 A. "... incomprehensible".

25 Q. "... incomprehensible that fingerprints would have been

1           planted in this case".

2       A.    Yes.

3       Q.    "... but given the observations on Cardwell's

4           plausibility, it may indeed make sense to ..."

5       A.    "... involve an independent expert."

6           It is perhaps easier if I ...

7       Q.    Yes, please do.

8       A.    "... both on the question of transfer/planting and on

9           the general basis for concluding that fingerprint ..."

10          observation?

11       Q.    "... identification".

12       A.    "... identification [sorry] is 100 per cent reliable --

13          please pass directly to AD with this note."

14       Q.    He was, in fact, in the hall last week. We should have

15          asked him to read it out when he was here.

16          So that is a note going from the Deputy Crown Agent.

17          One of the reasons for looking to that is it picks up

18          one of the questions I am going to ultimately ask you

19          about, namely the independent expert.

20          He sends that on 2nd January to Ms Climie.

21          Ms Climie then, if we look at CO3935 -- and there may be

22          more than one page to this -- a note by Ms Climie to the

23          Duty AD.

24          Would that simply be the procedure at this time,

25          that the Procurator Fiscals would be referring the

1 papers on to the --

2 A. Yes, to the Duty Advocate Depute, yes.

3 Q. We will see she gives some of the history of her own  
4 involvement, having indicted the murder case. She had  
5 apparently spoken to the prosecutor and the information  
6 was his position was that Ms Cardwell (Ms McKie) should  
7 be prosecuted, then she says:

8 "No reason to delay until the disposal of the  
9 appeal. The productions can be obtained."

10 She then says that Ms Cardwell has not yet appeared  
11 on petition. She would recommend that further  
12 fingerprint expert evidence be pursued and we have  
13 previously seen page 37 of the precognition. The Home  
14 Office expert should be asked to give expert evidence  
15 and then she says:

16 "(a) the possibility of transfer/planting; (b) the  
17 general basis for concluding that fingerprint evidence  
18 is 100 per cent reliable."

19 She says:

20 "I understand although I do not know the detail that  
21 the English standard for matching prints is more  
22 stringent than that used in Scotland, although even in  
23 Scotland the number of points of comparison required  
24 before a match is declared is higher than the number  
25 required in some other jurisdictions. It might be an

1 idea to pursue whether Y7 can be matched to Shirley  
2 Cardwell on the English standard. Presumably the Home  
3 Office expert could deal with this. Crown Counsel's  
4 instructions are sought."

5 So this is being sent to the Duty AD.

6 First of all, just stopping there, from your own  
7 experience, your own knowledge, were you aware of a  
8 difference in standard between Scotland and England in  
9 relation to fingerprints?

10 A. No. I knew that there was a standard of 16 points and  
11 that that was true, I think, throughout the United  
12 Kingdom. I certainly didn't know that there were any  
13 differences in terms of the way particular things were  
14 analysed, as to whether a point was a point in England  
15 as opposed to in Scotland. I didn't know anything about  
16 that so that was news to me.

17 Q. Picking up just the very point you mentioned there just  
18 now, from your understanding of the case, from your  
19 understanding, it was a case in which it was being  
20 suggested that the print had been identified to the  
21 16-point national standard?

22 A. Yes. In fact, there were four SCRO officers who said  
23 that as you know.

24 Q. We will come on to a little bit more about that in a  
25 moment.

1                   We then go from Ms Climie having written to the Duty

2                   AD. If we then go, please, to CO3934.

3                   This is the note by Crown Counsel; is that correct?

4       A.    Yes.

5       Q.    It says:

6                   "Please indict High Court. Crown Counsel considers

7                   that the independent expert should be instructed re the

8                   fingerprint comparison and on question of

9                   planting/reliability of fingerprint identification. If

10                  the English requirement is more stringent, it would be

11                  helpful if the expert making yet another comparison

12                  could do so to the English requirements. In due course,

13                  a transcript of the evidence or at least the relevant

14                  evidence will be required."

15                  That is 15th January.

16       A.    Yes.

17       Q.    Technically speaking, from what you said earlier, should

18                  it in fact or should an Advocate Depute have been taking

19                  this decision, given it was a serving police officer?

20       A.    It should have gone to a Law Officer, although I think

21                  at that stage my recollection is that an Advocate Depute

22                  would always see a complaint against a police officer

23                  and write a note for the Solicitor-General and I think

24                  that's probably why it went to Crown Counsel and that

25                  was probably the expectation.

1                   That changed later but certainly at that stage that  
2                   would have been the process.

3       Q.    What we, in fact, see is that Crown Counsel has, as you  
4            have yourself said previously, actually given the  
5            instruction, "Please, indict High Court" that in normal  
6            events would have resulted in a prosecution decision; is  
7            that correct?

8       A.   Yes, I think that's right. I mean, I think that  
9            technically it should have been a note to the  
10          Solicitor-General, which I would imagine in this case  
11          would be a recommendation that there be an indictment.

12      Q.    I will bring up the document just in a second but there  
13            was, in fact, a questioning of that by Ms Climie, the  
14            Procurator Fiscal, quite properly, saying in fact she  
15            saw merit in Ms McKie being placed on petition first if  
16            there were any enquiries to be carried out.

17            If I look at 3933 now -- take down 34 and bring up,  
18            perhaps it's more than one page of 3933.

19      A.    Yes, I see it.

20      Q.    You will see, in effect, the second paragraph, Ms Climie  
21            writing to the DCA. It says:

22            "Please see Crown counsel's instructions. Obviously  
23            Cardwell has not appeared on petition yet and that would  
24            seem to be the appropriate first step."

25            Then of course she goes on in relation to these



1 matters about other reports.

2 If I fast forward, what we will do is see at 3932 --

3 there is obviously more than one page -- this is the

4 Deputy Crown Agent writing to you. It happens to be

5 undated but writing to you as Solicitor-General --

6 A. I think there is actually a date, though it's perhaps

7 not very clear but just at the bottom -- well, maybe

8 not.

9 Q. Oh, yes.

10 A. I take that as being a date but I'm not sure I would be

11 able to tell what date it is.

12 Q. In effect, what we can see is that it is being

13 communicated now to you that the Deputy Crown Agent is

14 envisaging further fingerprint evidence but not

15 envisaging the need to delay putting Miss Cardwell on

16 petition; is that correct?

17 A. Yes, and that would have accorded with my view. I mean,

18 the problem about delay in placing on petition is it

19 actually leaves the individual really in a bit of a

20 limbo and until they are put on petition they can't

21 apply for Legal Aid and instruct their own advisers and

22 it just builds delay into the process. So that would

23 certainly have accorded with my view.

24 Q. The next then document is 3931. I had better not say

25 too much about this handwriting. The motif at the top

1           tells us this is, in fact, a letter from you.

2           This is your own initial thinking on

3           20th January 1998.

4    A.    Yes.

5    Q.    It would seem that your only hesitation/concern is the

6           relationship of this prosecution to the outstanding

7           appeal?

8    A.    Yes. Looking at the papers in preparation for this and

9           for finalising the statement, it was clear that that was

10          an issue raised by Alf Vannet and Denise Greaves in the

11          precognition and I have picked up on that and wanted to

12          be satisfied that there wasn't going to be a difficulty

13          with productions if we placed her on petition.

14    Q.    One of the things I am going to come back to in due

15          course is you, in fact, echo what is an accumulating

16          picture here of the need to look at an independent

17          expert being instructed. You say:

18          "Clearly we need a further independent expert but

19          that need not hold up the petition."

20    A.    Yes.

21    Q.    Prior to that, since this is only one stage of the

22          process, prior to that you said:

23          "Could you please have a word with me about timing."

24          Is there anything unusual about you having a word

25          with the Deputy Crown Agent on any matter?

1 A. No. The Deputy Crown Agent was responsible for the  
2 operations within Crown Office. The Solicitor-General  
3 dealt with the casework. I would see the Deputy Crown  
4 Agent certainly two or three times a week, depending if  
5 I was in Edinburgh or in London and sometimes two or  
6 three times a day.

7 Q. So he was simply someone who was available to give you  
8 advice as required?

9 A. Yes.

10 Q. Can we then go on to the next point, 3930, please.  
11 Again, a note in your handwriting on 26th January 1998  
12 to the Deputy Crown Agent:

13 "As discussed, please arrange for Cardwell to be  
14 placed on petition."

15 Do you see that?

16 A. Mmm.

17 Q. So plainly this comes after your discussion with the  
18 Deputy Crown Agent and is a decision to place on  
19 petition?

20 A. I think we can safely say that the discussion took place  
21 on 26th January and at the end of it I would have picked  
22 up the slip of paper and written that out and handed in  
23 the papers. He would have probably gone out with them,  
24 although it is possible it went through the private  
25 office but the discussion would have taken place on that

1 day.

2 Q. The significance of the piece of paper, may I take it  
3 that what this means is that instructions, whether from  
4 a Law Officer or an Advocate Depute, instructions from  
5 Crown Counsel collectively would tend to be in writing?

6 A. Yes.

7 Q. Albeit of a brief and formal nature?

8 A. Yes. I mean, these things have changed over time and I  
9 think probably now there's a greater emphasis on having,  
10 you know, a typewritten record with probably more  
11 explanation, frankly. But in those days that was not  
12 unusual.

13 Q. I'll just separate out two different strands at the  
14 moment: the question of further investigation and also  
15 the question of the decision actually ultimately to  
16 prosecute. We know that takes place a year later, the  
17 prosecution, in 1999.

18 The intermediate stage between the two is a letter  
19 that goes out from the Crown Office. It is CO3928.  
20 There are two pages to this. It is a letter dated  
21 30th January 1998. It goes from Gillian Climie,  
22 Procurator Fiscal, to Mrs Denise Greaves in the Glasgow  
23 office. As we see, it's -- first of all it returns the  
24 precognition and then it says:

25 "Crown Counsel instruct that you proceed to place

1 the accused Cardwell on petition on a charge of perjury.  
2 There would appear to be no reason to oppose bail, if  
3 sought."

4 So far as the instruction to place on petition, the  
5 Crown Counsel involved would have been yourself?

6 A. Yes.

7 Q. We will come back to this letter. Perhaps if we just  
8 take it at this stage and we will come to separate them  
9 later, you will see that in this letter there is a  
10 number of lines of enquiry suggested by Ms Climie, one  
11 primarily this the question of the English expert and  
12 re-fingerprinting Ms McKie (Detective Constable  
13 Cardwell) on arrest.

14 Do you see that?

15 A. Yes.

16 Q. In fact, if I move on from there -- sorry, if I just  
17 finish, the last paragraph refers to a form F32 being  
18 received as soon as possible. If I bring that in it is  
19 in a somewhat peculiar location, CO3921. I'll at the  
20 peculiar location first so that we see we are now  
21 beginning to move to a point where I simply don't have  
22 papers to show you relating to some of this. I am  
23 bringing up what is, in fact, the CV of Mr Kent. If I  
24 move to attachments of that, pdf pages 4 and 5, do we  
25 see that page 4 on the left-hand side is a letter to

1 Crown Office from Denise Greaves, dated 15th April?

2 A. Yes.

3 Q. It refers to the fact that there had been some contact

4 with Mr Kent by telephone. It also refers to the F32.

5 That is the form that had been previously requested and

6 the F32 is on the right-hand side.

7 Do you see that?

8 A. Yes.

9 Q. We are told -- and I don't know if you can assist in

10 relation to this -- that the F32, quite apart from

11 giving dates that are relevant to the time bars in the

12 case, so that it would be known that Ms McKie having

13 appeared on petition on 6th March 1998 her trial,

14 barring an adjournment, had to commence by

15 6th March 1999; is that correct?

16 A. Yes.

17 Q. We are told that this form would mark the opening of a

18 file for Ms McKie and the file reference is given in the

19 top right-hand side. As I say, I don't have that file

20 to show you. What I am primarily interested in is what

21 is written in manuscript at the bottom:

22 "Crown Counsel's instructions are to proceed High

23 Court. Additional investigation is ongoing."

24 Then the Crown Office contact is given as Ms Climie.

25 I just want us to stop there.

1 First of all, there might have been the suggestion  
2 that Ms McKie having been placed on petition with  
3 further enquiries being undertaken that the further  
4 enquiries would have a bearing on whether she is  
5 prosecuted or not. That is one possibility.

6 The alternative is that she was going to be  
7 prosecuted anyway and the further enquiries were simply  
8 relating to ancillary matters, detail which builds up.

9 This particular document would suggest that it is  
10 the latter: a decision had been taken to prosecute,  
11 albeit some more detailed preparation work to be done.  
12 That is why I have been asking about the absence of any  
13 other paperwork relating to the decision to prosecute.

14 First of all, just for the avoidance of doubt, you  
15 yourself have no recollection of being involved beyond  
16 the January correspondence that we have seen?

17 A. That's true.

18 Q. I certainly have no internal Crown Office documentation  
19 that would assist one way or the other in relation to  
20 this.

21 Having looked at -- it is in your first statement --  
22 having looked at such documentation as you have been  
23 able to be shown, as we have shown you, your  
24 understanding was that it was a reasonable  
25 interpretation that your original decision to place on

1 petition, perhaps read in the light of Crown Counsel's  
2 earlier instruction to indict High Court, could have  
3 been understood by the Procurators Fiscal in the Crown  
4 Office as a final decision to prosecute?

5 A. Yes. I mean, as I say, I can't be absolutely  
6 100 per cent certain that it might not have come back to  
7 me but I have no recollection of it and, obviously, I'm  
8 aware of F32s but it's not something that I dealt with.

9 Q. Certainly from your point of view and knowing, as you  
10 do, the special procedures involved with police officers  
11 so that a final decision on prosecution would rest with  
12 you as Solicitor-General, you have no criticism that it  
13 may be that your original decision to place on petition  
14 was understood to be the final decision to indict the  
15 case?

16 A. Yes, that's absolutely right and it seems to me, just on  
17 looking at the totality of the documentation that you  
18 have been showing to the Inquiry, that the further  
19 evidence that was being considered or expected was in  
20 the context of meeting a possible defence rather than in  
21 terms of dealing with a sufficiency of evidence, for  
22 example.

23 Q. Can we move on, without looking at the correspondence  
24 itself, it is important in trying to understand what  
25 your position was and your own knowledge at this time,



1 in 1997/1998.

2 You cover this to some extent in your statement.

3 What was your perception of the reliability of  
4 fingerprint evidence at that time?

5 A. I had been an Advocate Depute for three years before  
6 becoming Solicitor-General. I had dealt with  
7 fingerprint evidence. I knew the generality of the case  
8 law and fingerprint evidence was regarded as being  
9 100 per cent reliable. So the evidence of a mark was  
10 regarded as effectively conclusive evidence of either --  
11 of that individual having touched the place where the  
12 mark was found. So if it was an immovable object, then  
13 it would be evidence of presence. If it was a movable  
14 object it would be evidence of that perhaps having been  
15 in their possession at some stage or at least having  
16 been handled in some way.

17 Q. You have already touched on this, that you were aware  
18 from the reading of the papers of some question of  
19 forgery or planting of that sort.

20 At the time when you were involved, did you envisage  
21 anything other than forgery or planting, in other words,  
22 any question of it relating to the reliability of the  
23 fingerprint evidence itself?

24 A. No.

25 Q. One interpretation of the letter that came out from

1 Crown Office about the instruction of an expert, because  
2 it mentions the English expert checking whether Y7 can  
3 be confirmed to the English standard, on one reading it  
4 might be thought at least someone within Crown Office  
5 was envisaging some doubt and, therefore, the need to  
6 check the reliability of the identification.

7 Is that something that was on your mind at all at  
8 that time?

9 A. Well, I'd be surprised if anybody had any doubt. The  
10 view within Crown Office at the time was that there  
11 would be no doubt. I mean, it seems to me that if you  
12 have instructed a particular expert to deal with the  
13 issue of planting and ... lifting and planting, then it  
14 would be perhaps inconceivable you might not ask them  
15 also to look at the issue of comparison because in terms  
16 of the way in which the presentation would go to the  
17 jury, if they had not themselves looked at a comparison,  
18 then they might be open to criticism and the Crown might  
19 be open to criticism by the defence. The first question  
20 would be, "Well, have you made a comparison yourself?"

21 So it wouldn't surprise me that that question would  
22 be asked of an English expert, as Terry Kent was, and I  
23 understand from what I know that he was not able to do  
24 that but, I mean, that I'm not sure was known to others  
25 at the time.

1 Q. If I can just deal with that, it transpired that  
2 Mr Kent, who was thought to be the man who would deal  
3 with all aspects of this, it transpires is a scientist  
4 who could deal with and did deal with the question of  
5 planting but was unable to express a fingerprint  
6 opinion?

7 A. Yes.

8 Q. When his report came back in May, Mrs Greaves picked up  
9 on one point -- not that point, picked up on one  
10 point -- that was in correspondence with Crown Office.  
11 Ultimately, the question comes to be asked, if we look  
12 at CO3453 -- and, again, I do apologise, I can only show  
13 you excerpts rather than a complete picture -- you will  
14 see Mrs Greaves comes to write on 19th October  
15 to Ms Climie, with some correspondence from  
16 Levy & McRae, who were then the solicitors acting  
17 for Ms McKie. Then it says:

18 "Please advise if Crown Counsel are satisfied with  
19 the terms of Terry Kent's report. If so, I will arrange  
20 for the return of the productions from PSDB."

21 That is the Police Science Development Branch in  
22 London where Mr Kent operated.

23 First of all, understanding the normal procedure in  
24 Crown Office at that time -- this is 1998 -- Fiscals  
25 writing to each other referring to Crown Counsel being

1 satisfied with the terms of Mr Kent's report, would you  
2 understand why Fiscals would be writing to ask if Crown  
3 Counsel were satisfied?

4 A. Yes, I think that was understandable. I would have  
5 expected that it would have gone to the Duty Advocate  
6 Depute. It is possible, though I think unlikely, that I  
7 was asked about it. I have no recollection of it.

8 Q. But at the very least, because we have an absence of  
9 paper, at the very least your understanding of normal  
10 routine is a Fiscal presented with such a question would  
11 consult the Duty Advocate Depute?

12 A. Yes. Of course, that has changed now but at that time  
13 it would be the Duty Advocate Depute.

14 Q. You would never expect a Fiscal -- one readily  
15 understands this might be capable of misinterpretation,  
16 I'm not suggesting otherwise -- you would not expect a  
17 Procurator Fiscal to take the decision herself?

18 A. I would have been surprised if that happened.

19 Q. One assumes, therefore, in the ordinary course of events  
20 that Ms Climie will have consulted an Advocate Depute  
21 but there is now no record of that having occurred?

22 THE CHAIRMAN: Miss Greaves.

23 MR MOYNIHAN: No, ms Climie. Ms Climie in the Crown Office.

24 THE CHAIRMAN: I see, once she got the letter from  
25 Mrs Greaves.

1 MR MOYNIHAN: So one assumes that she did.

2 A. I would have assumed that, yes.

3 Q. But you certainly, as the Law Officer, you have no  
4 recollection of yourself being involved?

5 A. None whatsoever.

6 Q. As we then know in 1999, the case comes up for  
7 prosecution. It would seem it is indicted in January.  
8 It comes up, as the time bar would have suggested, at  
9 the beginning of March. It seems to have been adjourned  
10 and then it comes for prosecution April/May of that  
11 year?

12 A. Yes.

13 Q. To the point of March, we understand from the background  
14 that the defence issue was still one of planting/forgery  
15 and you yourself didn't know otherwise at that stage?

16 A. Yes. I mean, again I have no recollection of having  
17 seen or discussed it.

18 Q. Shortly before the trial took place/began, the defence  
19 did indeed intimate to the Advocate Depute that the  
20 nature of the defence was going to change and was going  
21 to change to a suggestion of mis-identification.

22 Were you consulted by the Advocate Depute at that  
23 stage?

24 A. I've no recollection of that.

25 Q. Would there have been any need for the Advocate Depute

1 to have consulted you at that stage?

2 A. I wouldn't have expected that. There were particular  
3 issues that Advocate Deputes were expected to discuss  
4 with Law Officers but that would not be one of them.

5 Q. So there would be some crimes at that time, it would be  
6 murder and rape, where Advocate Deputes would be  
7 expected to consult the Law Officers, again given the  
8 public importance of those crimes, but perjury would not  
9 require consultation?

10 A. That's right. I mean, occasionally you would have an  
11 Advocate Depute asking to discuss other issues but I  
12 can't think this would have been one of them.

13 Q. Again, just from your experience as a Law Officer and  
14 again a prosecutor, the Advocate Depute is now faced  
15 with a challenge to his expert evidence. He has  
16 available to him four Scottish Criminal Record Office  
17 experts. He is told that apparently two other  
18 experts -- they happen to be American, it matters not --  
19 two other experts are going to challenge their evidence.

20 Would you expect the Advocate Depute to, in the  
21 first instance, consult his own experts or would you  
22 expect him to be considering going off to get some  
23 further external expert?

24 A. In the first instance, I would expect the Advocate  
25 Depute to consult with their own experts. What would

1           happen after that might very well depend on what was  
2           said, but the first step would be to see your own  
3           experts. Indeed, I think it would be highly unfortunate  
4           if you went off and got another expert without going  
5           back and giving them an opportunity to comment.

6       Q.   Assume for the moment that the Advocate Depute consults  
7           two of the four, is led to believe that they are  
8           confident of their ability to meet the challenge. Would  
9           you have any concern about the Advocate Depute  
10          proceeding with the trial in that situation?

11    A.   No.

12    Q.   By this stage, there plainly is at least the  
13          anticipation of a conflict of evidence among experts.  
14          Would you, as the Law Officer who carried  
15          responsibility, although you weren't consulted, have any  
16          difficulty about the Advocate Depute proceeding in that  
17          situation to trial?

18    A.   No. I think the -- I was always very clear that once  
19          the case had passed to an Advocate Depute, it really was  
20          Crown Counsel's responsibility to take the decisions in  
21          relation to it. There were, as you say, special  
22          considerations in certain cases (murder and rape) but,  
23          by and large, I took the view that it was not for others  
24          to interfere in the discretion of counsel and, you know,  
25          as somebody who had been an Advocate Depute myself I

1           didn't think it was right to have that degree of  
2           control.

3       Q.    I'm sorry, it is my question. I had not in fact put it  
4           correctly. What I was thinking was -- and we're not  
5           looking here at the prosecution decisions, we're looking  
6           at the question of the appropriate approach to expert  
7           evidence -- what I was thinking was perhaps a more crude  
8           thing: just because two experts come in and take a  
9           contrary position, is it understandable that the Crown  
10          would nonetheless proceed to trial?

11     A.    Yes. Experts often disagree with each other. It was  
12          highly -- would have to be said -- it was highly unusual  
13          to have a challenge of this nature to a fingerprint, but  
14          it was not unusual to have experts disagreeing and it  
15          then became a matter for the jury.

16     Q.    One subtlety to this, if I could take a step back, you  
17          are now aware and indeed we are all now aware, that if  
18          we had frozen the scene just at that point, had gone  
19          back into Scottish Criminal Record Office and had  
20          carried out a thorough investigation of others involved  
21          that it might have come to light that though a number of  
22          individuals agreed that Ms McKie's fingerprint was to be  
23          identified as Y7, a number of them could not identify it  
24          to the 16-point standard and, indeed, one had withstood  
25          discussion and had said, no, he could not find more than



1           ten.

2                   First of all, just for the record, were you unaware  
3           that there had been that background difference of view  
4           within SCRO at the time of the prosecution decisions?

5    A.   Completely unaware.

6    Q.   It is a very difficult question to ask you, given all  
7           that has gone on: is it just impossible now to say what  
8           attitude you would have taken at the time, had you known  
9           about that fact?

10   A.   I think it's very difficult because actually you're  
11          making an assessment or trying to make an assessment  
12          without the influence of other factors that you know  
13          about.

14               On one view, you might have said that by and large  
15          the others were supportive, albeit that they didn't  
16          reach the 16 points but were supportive of the print  
17          being Shirley McKie's.

18               On the other hand, I think that certainly one would  
19          have wanted to disclose that issue to the defence and  
20          the Advocate Depute might have taken that into account  
21          at the point where he knew that there was an allegation  
22          that there had been a mis-identification. So it may not  
23          have influenced the original decision to prosecute,  
24          although one would want to make sure that there was  
25          disclosure, but it might have influenced a later

1 decision. Again, I think it's very difficult to say,  
2 even with the benefit of hindsight, what might have  
3 happened.

4 Q. I think the notes will not record your facial and hand  
5 gestures. You do see this as a very difficult to answer  
6 now, given all the complications of hindsight?

7 A. Yes.

8 Q. If I can then take you to the point after the trial,  
9 Ms McKie as we know was acquitted, were you involved in  
10 the immediate aftermath as Solicitor-General? We know  
11 of one letter that in fact came out written by others in  
12 the name of the Lord Advocate. Do you have any  
13 recollection of whether you were involved or the  
14 Lord Advocate, Lord Hardie?

15 A. Well, first of all, we were aware of the result. I have  
16 sort of vague recollections of discussions and it being  
17 talked about. I can't remember any sort of specific  
18 meetings which were targeted at that issue, as it were,  
19 but that may have happened. But certainly as  
20 Solicitor-General I would have been informed of what the  
21 result of the trial was.

22 My recollection is that -- I am pretty sure that I  
23 perhaps would have spoken to the Advocate Depute and got  
24 their perspective on it. I don't remember being in a  
25 sense -- if I say particularly surprised that might

1           sound the wrong note. I'm not sure that at that stage I  
2           was particularly concerned about it because juries often  
3           reach decisions which aren't perhaps readily  
4           explainable.

5                 In this case, there was a conflict of evidence and  
6           one might have thought the jury would find it difficult  
7           to decide one between the other and they would obviously  
8           have to give the benefit of the doubt to the accused.

9           So I don't think that I would have been particularly  
10          concerned at that stage about the outcome of the trial.

11       Q.   At that stage, I'm just now trying to plumb your memory  
12           just a little bit more, do you have a recollection of  
13           difficulties over matters other than the fingerprints in  
14           the background to the case? I'm thinking particularly  
15           of logs and that sort of thing.

16       A.   Sorry, would you repeat that.

17       Q.   I'm thinking of logs.

18       A.   Logs. I remember thinking -- and I suspect this was at  
19           the time when I read the precognition before the  
20           decision was taken -- I remember looking at the logs and  
21           wondering how these fitted in with the fingerprint  
22           evidence and taking the view that this was a matter for  
23           the jury. I may have rationalised that as another way  
24           in which the jury would have found it perhaps difficult  
25           to find beyond reasonable doubt that Ms McKie was

1 guilty. So that may very well have played a part in my  
2 rationalisation of the verdict at the time.

3 Q. At that time, in the immediate few days and weeks after  
4 the verdict, were you thinking that this was something  
5 that would fundamentally challenge the reliability of  
6 fingerprint evidence or did you think there were a  
7 number of complicating factors?

8 A. I don't think that I thought that at the time, no.

9 Q. We know and we have seen records of a meeting that took  
10 place with Mr Murphy and the by now Deputy Crown Agent,  
11 Mr Crowe, and some members of the SCRO in May 1999. We  
12 have minutes of that. We also have a note that  
13 Mr Murphy prepared for internal use within Crown Office.

14 Do you have recollection of these events or is that  
15 something you are simply dependent on the documentation  
16 for?

17 A. No, I think I probably was aware that there were  
18 meetings taking place and considerations but I don't  
19 remember seeing any paperwork or being asked to take any  
20 decisions or any view on any matters. I, frankly, can't  
21 recall now.

22 Q. If I move from May and going into June, a letter came in  
23 from Mr McKie that I won't take you to addressed,  
24 naturally enough, to the Lord Advocate in the case.

25 We then have a letter from or written by someone on

1           behalf of the Lord Advocate. If I take you to DB0582,  
2           there are two pages to this letter.

3       A.    It's not a particularly -- I think someone writing,  
4           "Dear McKie", is quite inappropriate if I may say so.

5       Q.    So it is inappropriately addressed?

6       A.    Inappropriately addressed.

7       Q.    It happens to be referring in the first paragraph to the  
8           letter that is dated 9th June to the Lord Advocate and  
9           the Lord Advocate has asked Mr Miller to respond.

10           Do you have any recollection of being involved at  
11          this stage in this correspondence?

12      A.    None. I've no recollection of seeing it until it was  
13          shown to me by the Inquiry team and there was no reason  
14          for me to have seen it.

15      Q.    If I can just ask you, because if I simply explain in  
16          fairness to you, since Lord Hardie is a serving High  
17          Court judge, we thought it more politic to ask you  
18          rather than summon him to discuss this letter.

19           What I am interested in is the last paragraph on the  
20          first page and then the penultimate paragraph of the  
21          letter. You will see that what is written on behalf of  
22          the Lord Advocate is:

23           "Turning to your daughter's trial, I would stress  
24          the significance of the fact that the charge against  
25          your daughter reached the jury. As a matter of law, it

1 follows from this that the prosecution evidence, to  
2 justify the jury in returning a verdict of guilty."

3 I'm sorry, something is wrong with the syntax of  
4 that.

5 A. Yes.

6 Q. Are we perhaps to understand that what the Lord Advocate  
7 is saying is that there was what is technically known as  
8 a sufficiency of evidence; in other words, there was  
9 enough evidence which, if the jury had accepted it, they  
10 could have convicted?

11 A. Yes.

12 Q. However, it was entirely a matter for the jury whether  
13 they accepted the evidence or not and plainly, looking  
14 at the totality, the jury must have been left with, at  
15 the very least, a reasonable doubt. Is that fair?

16 A. Yes. Sorry.

17 Q. Then the point that I was asking you earlier on, if I  
18 can just bring up the last -- we will look at the last  
19 two lines perhaps we don't need to highlight. It says:

20 "There were however other areas of the evidence  
21 which were in dispute and may have influenced the jury's  
22 verdict."

23 A. Yes.

24 Q. So, in other words, matters other than just the  
25 fingerprint evidence. Was that your understanding at

1 the time?

2 A. Yes.

3 Q. We have touched on some of that, namely the log and that  
4 there no doubt were other matters.

5 What I want to ask you about is the penultimate  
6 paragraph in light of that. Mr Miller on behalf of the  
7 Lord Advocate says:

8 "I can confirm that the Lord Advocate does not  
9 propose to prevent the citation as prosecution witnesses  
10 in appropriate cases of the officers from the Scottish  
11 Criminal Record Office who gave evidence for the Crown  
12 in this case. The Lord Advocate does not propose to  
13 instruct review of the findings of those officers in  
14 relation to other cases."

15 A. Yes.

16 Q. I appreciate you were not involved in it at the time.  
17 Things changed later. Can you understand what the  
18 thinking was at this time that the Lord Advocate was not  
19 going to do, what in fact within in a year the  
20 Lord Advocate was doing?

21 A. Yes. Well, think that the general view, which changed  
22 later, but the general view was that there wasn't any  
23 particular reason to doubt the overall reliability of  
24 fingerprint evidence or to question, for example, SCRO  
25 procedures or anything of that nature. I think it was

1 thought at the time that this was a one-off decision,  
2 that it was explicable, there were views being expressed  
3 about the defence witnesses and, at that stage, no-one  
4 was suggesting that there were other miscarriages of  
5 justice -- or any miscarriages of justice, put it that  
6 way.

7 So I think that perhaps is the thinking at the time.  
8 Certainly it was the view that I, as Solicitor-General,  
9 had and I am almost certain that, you know, I would have  
10 discussed this with the Lord Advocate at the time. That  
11 was just the generally accepted view between the Law  
12 Officers and officials.

13 Q. Of course, as you indicated or as my question indicated  
14 things changed, changed within in fact six months really  
15 of this, certainly within a year.

16 From your perspective, what was it that effected  
17 that change?

18 A. Well, I can't recollect exactly when that changed but I  
19 think it is fair to say that the Frontline Scotland  
20 programme was the catalyst for the reassessment of what  
21 had happened in the trial.

22 As you know, Crown Office themselves instructed a  
23 review of the two prints, Y7 and Q12. That certainly  
24 took place alongside the request from the  
25 Justice Minister to William Taylor, the Chief Inspector



1 of Constabulary, to undertake a review and he instructed  
2 his own experts, with Mr Zeelenberg and Rudrud, and it  
3 was at that time really that, it was over that period  
4 that things changed.

5 So I can't actually say exactly when these things  
6 were all instructed but I'm certainly clear in my own  
7 mind that it was the Frontline Scotland report --  
8 programme that was the catalyst for it and I think it's  
9 fair to say also the political debate that came out of  
10 that.

11 Q. So Frontline Scotland, having raised a question that the  
12 McKie case did have peculiarities relating to the  
13 reliability of fingerprint evidence, caused a  
14 reassessment?

15 A. Yes.

16 Q. Not only by the Association of Chief Police Officers,  
17 who I think started perhaps to some extent in  
18 conjunction with Crown Office but then latterly with  
19 Crown Office itself involved?

20 A. Yes. I mean, I think that there would have been very  
21 close discussion. I can't really speak to this because  
22 it would have been between officials but I'm pretty  
23 certain that the Deputy Crown Agent, for example, would  
24 have discussed it with the president of ACPOS.

25 Q. Since we have had evidence from the officials involved

1 and, in particular, we have had evidence from now  
2 Sheriff Crowe in relation to these events I will not  
3 take them up with you.

4 So far as the situation actually ultimately becomes,  
5 about Y7 and Q12, plainly you are not in a position to  
6 reach your own personal view on these matters about the  
7 reliability of the fingerprint identifications. It is a  
8 matter for expert evidence. Would that be fair?

9 A. Yes.

10 Q. You did, or the Crown Office did, take advice from in  
11 fact Mr Rasmussen and Mr Rokkjaer?

12 A. Yes.

13 Q. You would have been aware previously Mr Zeelenberg and  
14 Mr Rudrud had also been consulted by Mr Taylor?

15 A. Yes.

16 Q. Did you yourself, in the light of that advice and the  
17 work that was done by Mr Gilchrist also in considering a  
18 prosecution, did you ever yourself come to a personal  
19 view about the reliability of Y7, first of all?

20 A. To be honest, I find that difficult to answer.

21 Certainly the report from Bill Gilchrist in relation to  
22 the allegations of criminal conduct that had been made  
23 by Mr McKie against the SCRO officers, I recollect he  
24 came to the view that there had been mis-identification.  
25 I think we had that view from Bill Gilchrist. We had

1 the two sets of experts who had independently come to  
2 the view that there was mis-identification. I don't  
3 think that I ever challenged that but it didn't seem to  
4 me that I would have had to ever reach a view one way or  
5 another whether Y7 was right or wrong.

6 In a sense, as prosecutor, you are interested in  
7 what would be acceptable to or accepted by a court as  
8 evidence. So that, I think, was the way that I looked  
9 at this.

10 Q. What was your perception of the attitude of the court to  
11 the matter?

12 A. Well, I've no doubt that at the very least a court would  
13 have found it extremely hard to accept that Y7 was  
14 Shirley McKie's print or the other way round, I think:  
15 would probably find it difficult to find that Y7 was not  
16 her print. By the time we got towards the end of this  
17 process, we had a range of opinions and my view was that  
18 persuading the jury, if we ever got to that point, that  
19 this was definitely not her print might have been a tall  
20 order. That was certainly one of the considerations in  
21 deciding not to prosecute the SCRO officers. There were  
22 others but that was certainly one of the views, a view  
23 that I reached.

24 Q. As I say, I am not myself going to ask you about the  
25 decision not to prosecute but I wanted to see what your

1 attitude was to the evidence.

2 I want to carry this on now from a different  
3 perspective because what I want to ask you about is the  
4 handling of the six officers involved. Initially, the  
5 Lord Advocate, Lord Hardie, had said he was not going to  
6 prevent them from giving evidence again.

7 A. Yes.

8 Q. We know that that changed. The first four (that is  
9 Mr MacPherson, Mr Stewart, Mr McKenna and Ms McBride)  
10 were suspended, I believe, in August 2000.

11 A. Yes, that would have been right.

12 Q. In August 2000 and Mr Dunbar and Mr Mackenzie, the  
13 management superiors, were taken off active duty.

14 A. Yes.

15 Q. As far as I'm aware, no one of those six ever after that  
16 gave evidence in a criminal case. What I want to look  
17 at is what it was that had changed so that they were not  
18 going to give evidence. If I take it that where we've  
19 arrived at is perhaps, if one pushed it, the official  
20 view might have been that there had been a  
21 mis-identification but there were still some individuals  
22 of authority who were saying it had been correctly  
23 identified. So there was still a range of view. Is  
24 that a fair summary?

25 A. I'm sorry, could you just repeat that question? I think

1 I missed the thrust of it.

2 Q. I have perhaps taken it too far. What I have said is,  
3 just stopping, one might say given the advice that had  
4 been received from the four continental experts that  
5 Mr Taylor had accepted that Crown Office had received,  
6 that the official view might have been -- might have  
7 been -- that there had been a mis-identification.  
8 However, Crown Office knew that there was a range of  
9 opinion on the matter and, as you have said, it would be  
10 difficult to know what view a court would have taken in  
11 that situation.

12 First of all, is that a premise that you accept or  
13 is it overstating?

14 A. I think I would accept that. I've obviously lost at  
15 some point the thrust of the question but, as I  
16 understand it, what you are suggesting is that although  
17 there were six who were primarily involved (that is the  
18 four who signed the report plus Mr Mackenzie and  
19 Mr Dunbar), there were others who had expressed a view  
20 in support.

21 Q. I am sorry, I apologise. Yes, there were others who  
22 expressed a view. For example, we know Mr Swann and  
23 Mr Graham and indeed behind them there were others in  
24 the SCRO of a similar view, albeit slightly different on  
25 numbers.

1 A. Yes, that is right and there were a range of views  
2 beyond the immediate six, shall we say. Yes, that is  
3 certainly true.

4 Q. I am not looking at the decision to prosecute, I am more  
5 looking at the decision to use officers in future.

6 A. Yes.

7 Q. Where there has been a difference of opinion, and even  
8 if the official view is one body of opinion is correct,  
9 the other is wrong, one would not necessarily think that  
10 an expert whose view on one matter has not been accepted  
11 by a court would be precluded from giving evidence ever  
12 again?

13 A. Yes, that's absolutely right and indeed I suppose that  
14 was the initial view which was reflected in the  
15 Lord Advocate's letter.

16 Q. What was it that changed then that had these  
17 individuals, at least taking it in stages, at least  
18 sidelined for a period? What was it that had changed?

19 A. I think the start of it was the fact that the four  
20 officers were suspended and the other two were placed on  
21 non-operational duties. That wasn't -- so far as I'm  
22 aware, that's not a decision that Crown Office had any  
23 input into. It happened.

24 I think it's fair to say that after that there was a  
25 public campaign which targeted the SCRO officers and, of

1 course, there were the civil proceedings which were  
2 going on at the same time plus, it has to be said, the  
3 disciplinary proceedings against the officers.

4 Although the Crown was not involved in the decision  
5 to suspend, it seems to me that it was obvious that that  
6 would happen if there were disciplinary proceedings  
7 pending. We couldn't have used them during that time.

8 As things progressed and the campaign, as it were,  
9 took momentum, then I think we couldn't have used them  
10 at that point. While the civil proceedings were  
11 outstanding, I don't think that one could have used them  
12 at that stage.

13 Afterwards -- well, there were two things. I mean,  
14 first of all, the Scottish Executive had settled the  
15 case and that, I suppose, would have had some bearing on  
16 the credibility of the officers involved, but also there  
17 was the leak of the Mackay Report and whatever what view  
18 one might have taken of the Mackay Report, it did  
19 recommend criminal proceedings against four of the  
20 officers at least. So I think I have used the phrase  
21 before the Justice Committee that they became notorious  
22 and I'm afraid that's the way things progressed.

23 Putting on one side whether or not there was a  
24 mis-identification, I think it would have been extremely  
25 difficult for the Crown to have used these officers and

1 then to have turned a trial into a kind of another trial  
2 of the McKie case. They would have been immediately  
3 subject to cross-examination about the contents of  
4 Mr Mackay's report, which was in the public domain, and  
5 it would have been very difficult, I think, for the  
6 Crown to have suggested that they should be accepted as  
7 credible and reliable witnesses at that point.

8 Although one might have sympathy with the particular  
9 officers involved, in the public interest we simply  
10 couldn't use them.

11 Q. This is where we encounter the difference between your  
12 original statement and the revised one. The original  
13 statement at least carries the implication that a  
14 decision was taken at an early date in the sequence that  
15 these officers would never give evidence again. The  
16 correspondence suggested a more protracted period of  
17 debate about what to do about the officers.

18 Would you like just to explain, now you have had the  
19 benefit of reviewing the correspondence, which is the  
20 better recollection of the sequence of events?

21 A. I think it's fair to say that I was being pressed to say  
22 when was the decision taken on the first occasion and I  
23 linked it into the receipt of Mr Gilchrist's report in  
24 August 2001. I mean, it is actually clear that there  
25 wasn't a decision taken back then and I'm now clear in



1 my own mind that we did defer the decision, first of  
2 all, actually for the disciplinary proceedings and, now  
3 that I've seen the papers, I recollect being somewhat  
4 surprised at the outcome of that although, having  
5 thought about it, I can understand perhaps why the  
6 disciplinary proceedings went the way they did.

7 I think we were always conscious that the decision  
8 not to use the officers again was likely to result in  
9 them losing their careers and so the decision was taken  
10 to defer the final decision, as it were. I regret the  
11 length of time that that took, frankly. It might have  
12 been better for them had they been finally told earlier  
13 but, having said that, had the civil proceedings gone a  
14 different way then one might have contemplated a  
15 situation where they might have worked themselves back  
16 into that position. So it was very difficult to deal  
17 with and, as I say, on a human level one has some  
18 sympathy with them but I've no doubt that was the right  
19 decision to take.

20 Q. In relation to this, I have given you the date the  
21 officers were suspended in August 2000. My  
22 understanding is that they continued to work in the  
23 Fingerprint Service until March 2007. So more than six  
24 years. That is the area of your regret, that it hung  
25 over these individuals for more than six years?

1 A. Yes, the civil proceedings were rather protracted. I  
2 think that's unfortunate.

3 Q. If I can just bring up one particular document that fits  
4 with that, if I bring up CO4090, this is a document  
5 written in March 2004, so therefore part way through.

6 By March 2004 were you the Lord Advocate?

7 A. Yes.

8 Q. This is an e-mail written by an individual, Chris Orman  
9 written to the Deputy Crown Agent by then Mr Gilchrist.  
10 It says:

11 "The Lord Advocate has seen your minute of  
12 10th March and agreed with your suggestion."

13 One can go back and look at that. That was  
14 deferring the decision to the outcome of the civil  
15 proceedings. Then it says:

16 "However, he would not wish matters to be delayed  
17 too long."

18 Is that consistent with what you are saying?

19 A. I think I was frustrated at just how long these  
20 proceedings were taking.

21 Q. Again from the point of view of the individual officers  
22 themselves, from what you said earlier, did you at least  
23 envisage there might be some outcome to the civil action  
24 that would be beneficial to their careers?

25 A. Well, I thought that that was a possibility but, beyond

1           that ... I think it's fair to say that I hoped, for  
2           their sake, that we might have reached a situation where  
3           they could have continued to be employed by SCRO.

4       Q.    Sir, I am conscious of the time but there is one part to  
5           finish and then we will stop.

6           One of the reasons for having gone over some of the  
7           history of this is, in particular, you had asked me  
8           about other individuals, without naming them because I  
9           don't want it to be too invidious, I know that there are  
10          other individuals within SCRO who, if one looked at the  
11          background paperwork, would be associated with the same  
12          opinion that Y7 was correctly identified as Ms McKie.  
13          They were not sidelined. They were not suspended. They  
14          were not stopped from giving evidence in court and  
15          indeed they were the subject of some correspondence from  
16          Mr McKie to Crown Office.

17          Can you rationalise why the Crown Office would have  
18          treated people of the same view, in the same profession,  
19          differently?

20       A.   Yes. I think that the difference is that the four who  
21           had signed the report and I think -- I've now  
22           forgotten -- I think three of them gave evidence, but  
23           they had been prepared to sign a report and go and give  
24           evidence to the effect that this was Ms McKie's print,  
25           plus Mr Mackenzie and Mr Dunbar had been in supervisory

1 positions and closely associated with them. They were  
2 themselves the targets, as it were, of the campaign and  
3 indeed for that matter the civil proceedings and the  
4 others had continued to work without really any undue  
5 difficulties, as I think we saw it.

6 So the notoriety, as it were, attached to the  
7 individuals who had signed the report and Mr Mackenzie  
8 and Mr Dunbar rather than to the others. That is not to  
9 say that we didn't have some issues in some cases where  
10 defence counsel might bring up the McKie case, but I  
11 think the view was taken that we were able to deal with  
12 that and that they had not themselves been associated  
13 with the decision to identify it as a mark and to give  
14 evidence.

15 Q. Let me see if I understand that correctly. First of  
16 all, there were cases where defence counsel, even with  
17 other Fingerprint Officers, were questioning the  
18 reliability of fingerprint evidence because of McKie so  
19 it was being used in a collateral way? That was first  
20 off all a concern?

21 A. Yes.

22 Q. Secondly, so far as any of the particular officers who  
23 had expressed an opinion on Y7 was concerned, there was  
24 a difference in degree, you used the word "notoriety", a  
25 difference in the notoriety that separated out the four

1        who'd signed the original report, three of them gave  
2        evidence and their supervisors, singled them out  
3        relative to anybody else who may in fact have shared the  
4        same view?

5 A. Yes, that's right.

6 THE CHAIRMAN: I suppose on that point it was inevitable or  
7 is inevitable that any fingerprint case, counsel for the  
8 defence is likely to refer to mistakes are said to occur  
9 and that is an example of it. That is bound to happen?

10 A. Yes.

11 THE CHAIRMAN: What we normally do is take a short break and  
12 if that's not inconvenient we will stop now until 11.25.

13 (11.05 am)

14 (A short break)

15 (11.25 am)

16 MR MOYNIHAN: First of all, I apologise to people in the  
17 public benches. I have been told off that I cannot be  
18 heard, let alone Lord Boyd not being heard which is  
19 perhaps more important. So I will try to do better. I  
20 have just said we have to keep the microphone perhaps  
21 uncomfortably close so it's picked up.

22 If I can just complete, in fact, what we were  
23 talking about before the break, my attention has been  
24 drawn to a document which might in fact assist in  
25 presenting a summary of the position in relation to the

1 four officers. My attention has been drawn to a  
2 document CO4096 which will be brought up on the screen  
3 for you.

4 A. All right, yes.

5 Q. This is a document which is dated in typescript, from  
6 the Deputy Crown Agent, by now Mr Brisbane, on 27th  
7 March 2006. You have written in manuscript on 28th  
8 March 2006 and do we see the conclusion that you  
9 yourself reached?

10 A. Yes.

11 Q. You say:

12 "I consider it would not be appropriate to use the  
13 SCRO personnel involved in the McKie case as witnesses  
14 in criminal trials in the future for the reasons  
15 discussed today."

16 A. Yes. I think I recollect that there was a discussion  
17 which involved actually both Law Officers, the Deputy  
18 Crown Agent. I suspect the Crown Agent may very well  
19 have been involved as well and Leanne Cross.

20 Q. First of all, at this date you are the Lord Advocate?

21 A. Yes.

22 Q. Leanne Cross would be a member of the Procurator Fiscal  
23 Service?

24 A. She was, I think, the Deputy Crown Agent's assistant.

25 Q. One of the reasons -- first of all, we can see that

1 perhaps this is the decision being taken and it is 28th  
2 March 2006?

3 A. Yes.

4 Q. The second thing is it happens that this is at a time  
5 just immediately after the conclusion of the civil  
6 proceedings?

7 A. Yes, and from recollection that was either January or  
8 February 2006.

9 Q. Therefore, we can see written in the report the factors  
10 that were at least in the minds of the officials who  
11 were bringing this matter to your attention; is that  
12 fair?

13 A. Yes.

14 Q. Among the things that are referred to in the discussion  
15 section at paragraph 4 is the question of the leaking of  
16 the Mackay Robertson Report that you yourself have  
17 mentioned; is that correct?

18 A. Yes. Yes, I think it says:

19 "It is hard to envisage any circumstances in which  
20 these witnesses' evidence would not run the risk of  
21 challenge on the basis of Mackay's allegations of  
22 criminality, notwithstanding how remote of or irrelevant  
23 that may seem to be. It would ... become a side issue  
24 and a distraction in any proceedings."

25 Q. You have been given an opportunity to consider this

1 particular document over the break.

2 Are you content that this document reflects the  
3 factors that were underpinning your decision as at  
4 March 2006?

5 A. Yes.

6 Q. The next and final topic that I wanted to consider with  
7 you is the question of the move that occurred to the  
8 non-numeric standard.

9 A. Yes.

10 Q. In 1997/1999 the understanding was the national standard  
11 was a 16-point standard. That now is no longer a  
12 requirement and I want to look at the practice concerned  
13 there.

14 First of all, as a Law Officer did you at least have  
15 some involvement in the process that resulted in that  
16 change?

17 A. Yes.

18 Q. One thing that I would like to ask, just again I started  
19 by asking you about the function of Law Officers in  
20 relation to prosecution, it might be thought that since  
21 this is a matter of expert evidence that the content of  
22 the evidence and indeed the standards to which the  
23 evidence is addressed are a matter for the witness --  
24 are a matter for the witness' discipline.

25 Why would you have any involvement in relation to



1           this particular matter as a Law Officer? Perhaps more  
2           generally, why would the Crown Office have any  
3           involvement in this?

4       A.    I think there might be two answers to that. The first  
5           is that in Scotland the Lord Advocate's role goes beyond  
6           the simple prosecution and has a role in directing the  
7           investigation of crime and often that is done through  
8           the issuing of guidelines to the police. But I suppose,  
9           more generally, it is important that the Crown are  
10          satisfied that if the evidence is presented in such a  
11          way that it will be accepted by the Court. So these I  
12          think are the two reasons that I would suggest there was  
13          a role for the Lord Advocate.

14       Q.   In fact, what I am going to do is to begin at an earlier  
15          period, that is before you were a Law Officer, so a  
16          previous generation of Law Officers to see if the matter  
17          had been under discussion.

18                I am going to go to 1994 and I think by coincidence  
19          you were an Advocate Depute at this particular time in  
20          1994?

21       A.    That's right.

22       Q.    What I am going to begin with is just to look at a  
23          document CO4427. If we go to the end of that document,  
24          we will see the date. It is a document dated  
25          22nd August 1994. If I go back to the start. It is

1 from a standing committee on expert evidence. It is a  
2 report to the Crown Agent regarding fingerprints and it  
3 relates to the question of the 16-point standard.

4 A. Yes.

5 Q. I will look at that particular part of this report  
6 slightly later but do you recollection as an Advocate  
7 Depute in about this time of debate concerning the  
8 16-point standard?

9 A. Certainly about fingerprints, I suspect it was this  
10 report that stimulated that debate. My recollection is  
11 that the Advocate Deputes and Crown Counsel -- sorry,  
12 the Law Officers, Crown Counsel together, had a  
13 discussion about this at our away weekend and that  
14 fingerprints was an issue.

15 I recollect seeing this document. I can't remember  
16 whether or not it would have been at that time or at a  
17 later stage when I became a Law Officer but one of the  
18 concerns that we had as prosecutors was that we did not  
19 know when comparisons had been made but the 16-point  
20 standard had not been reached because that information  
21 was simply never given to the Crown.

22 I notice reference to Wick and the case that came  
23 from Wick where I think it was 12 points of similarity  
24 had been found. That I think was an exception. People  
25 were not generally told -- the Crown was not generally

1 told where some lower threshold had been reached.

2 That meant that where you had a trial and  
3 fingerprints had been taken and often that fact might  
4 have been brought out by defence counsel in the course  
5 of the investigating officer's evidence, and then the  
6 question would then go something along the lines of,  
7 "And were any comparisons made?", and, "Were my client's  
8 prints found on the particular object". So, for  
9 example, if it was a packet of drugs or a weapon or  
10 something of that nature and the answer would be no.

11 For all you knew as a prosecutor, there had actually  
12 been a comparison, there might have been 7, 8, 9 points  
13 of -- or even 15 of similarity but you didn't know that  
14 and then that meant that it was an opening for defence  
15 counsel to go to the jury and say, "Ladies and  
16 gentlemen, you have heard that there were prints found  
17 but they are not my client's", and you would be able to  
18 get away with that because there was no evidence to  
19 suggest otherwise. Now it might be perfectly consistent  
20 with it being their clients and it just hadn't reached  
21 the 16-point standard.

22 So that was a concern at that time and I have to say  
23 it was one that was never really satisfactorily resolved  
24 and worried me because, you know, the basis upon which  
25 the Crown take decisions is on the basis that all the

1 fruits of the investigation are handed over to the  
2 Crown. That was the case of **Smith**, the whole issue of  
3 disclosure was predicated on that taking place.

4 Of course, it could be that the defence would have  
5 an interest in this as well, if there were prints that  
6 perhaps, although they didn't match another individual,  
7 might be consistent with another individual being  
8 involved. So it was a point of concern at that stage  
9 and I don't think was satisfactorily resolved at that  
10 time.

11 Q. If I step back just for the purposes of those who are  
12 listening from the public bench, first of all, what you  
13 are indicating is that at this time in particular the  
14 Crown would have responsibility to in gather all of the  
15 evidence, whether favourable to the prosecution or not?

16 A. Yes.

17 Q. And the Crown had the responsibility to disclose to the  
18 defence all relevant evidence whether favourable or not?

19 A. Yes. I mean, that was -- in Scotland, that was an issue  
20 that was being gradually established, the **MacLeod** case  
21 in 1998, **Holland and Sinclair v Privy Council** going back  
22 now to 2004 or so but certainly the Crown always  
23 accepted that it had an obligation to disclose evidence  
24 which undermined the Crown case.

25 Q. What you are suggesting, namely, that -- let us take an

1           easy example, Fingerprint Officers have checked a print  
2           and have found ten points in sequence and agreement, let  
3           us say, because we have heard evidence of this type,  
4           that they themselves are privately convinced to the  
5           point of certainty that that can be identified as a  
6           certain individual but because it has not reached the  
7           national standard they would not expect it to be used in  
8           evidence, so that evidence would at that time have been  
9           lost.

10       A.    Yes.

11       Q.    Are you indicating that that evidence might, depending  
12           on the case, have been of significance not only to the  
13           Crown if, for example, it was the suspect's print, it  
14           may have been of significance to the Crown, but equally  
15           there might be a case where it would be of significance  
16           to the defence if, for example, it was a potential  
17           incriminee's print that was found?

18       A.    Yes, potentially.

19       Q.    So you had a concern about the loss of that type of  
20           evidence?

21       A.    Yes.

22       Q.    In addition, because what you are talking about is  
23           consistent, did you have a concern about the loss of  
24           evidence where Fingerprint Officers, though they did not  
25           see enough to be satisfied of unique identity, did see

1 enough pointers so that they could at least say it's  
2 consistent with the suspect or the incriminee, they  
3 can't say it is uniquely him but it is consistent with,  
4 were you concerned at the loss of that type of evidence?

5 A. Yes, I was. I think it's fair to say that it was a fact  
6 that you really never knew because that disclosure was  
7 simply not made to the Crown and it was always seen as  
8 either was an identification or it wasn't. There was  
9 never any, as it were, halfway house and I think that  
10 that really was a concern. I think philosophically it  
11 was -- fingerprints were thought to be infallible and  
12 sometimes there was a mixture of Fingerprint Officers  
13 being infallible and one had the impression, fairly or  
14 not, that there was a sense of preservation of that.

15 Q. If I can understand that -- you see it is important and  
16 I will use, unfortunately, an expression we use here  
17 about teasing it out -- you are saying there was a  
18 confusion between fingerprint identification being  
19 infallible and Fingerprint Officers being infallible.  
20 You, first of all, saw that as --

21 A. I think that was a concern. The way we kind of tried to  
22 analyse that, I think that really was a concern, that  
23 one of the reasons for saying we will not give evidence  
24 where we don't reach the 16 points is in case we kind of  
25 give ground on fingerprint evidence generally and our

1 own credibility.

2 Q. So in other words there was a perception that such an  
3 extraordinary high standard had to be maintained in  
4 order to preserve the aura of infallibility?

5 A. That's a fair way of putting the perception that we had.  
6 It is for others to judge whether that was a fair  
7 perception or not but that was certainly a perception  
8 that we had.

9 Q. Again, this is before your time as an officer so you are  
10 simply speaking as a prosecutor amongst other  
11 prosecutors discussing this, if I understand, what you  
12 are saying is that the prosecutors both for their own  
13 interest, if it favoured the prosecution, and also  
14 conscious of their duty to the defence, if it favoured  
15 the defence, would be looking for the lesser evidence,  
16 namely evidence of consistency and not just unique  
17 identity?

18 A. Yes.

19 Q. If I move on from 1994 and take the period when you  
20 become a Law Officer, was that in 1997?

21 A. Yes.

22 Q. We know that the system was not changed until  
23 September 2006 and in part that is influenced by the  
24 McKie case that comes in in 1997 to 1999.

25 Do you have any indication yourself of what might

1           have happened had the McKie case not occurred? Might  
2           the change have occurred earlier than it did?

3       A.   Undoubtedly, but I think I have a recollection of  
4           effectively a decision being taken. I can't give the  
5           exact date but 2001, 2002 ... well not beyond 2002, to  
6           move to what is generally referred to as a non-numeric  
7           system.

8           I think the tragedy in many ways of what happened  
9           with McKie was that actually, although the Frontline  
10          Scotland television programme highlighted difficulties  
11          and then led us to question the procedures and processes  
12          that were used, in actual fact thereafter we were kind  
13          of frozen in what we could actually achieve because  
14          everything was judged against the McKie case and getting  
15          the political (with a very small P) will and impetus  
16          behind change was, to my mind, very difficult indeed.

17          I think you should remember that this was a time  
18          where a lot of things were changing within the Crown  
19          Office and Procurator Fiscal Service as a result of  
20          other cases and other reports and this was one area  
21          which almost was impossible to touch.

22       Q.   In trying to understand the thinking behind the change  
23           to the non-numeric system, if I have in mind now the  
24           discussion we have just been having about 1994, the two  
25           potentially different things, first of all, a positive



1 identification to the point of uniqueness?

2 A. Yes.

3 Q. That might be attained to a standard below 16, let us  
4 say 10. That is one thing.

5 The other thing that we were discussing is where  
6 Fingerprint Officers might say they've not seen enough  
7 to persuade them of unique identity but they can at  
8 least say the suspect or the incriminee is one of the  
9 possible donors; it is consistent with his fingerprint.

10 When the system was under consideration for change,  
11 did you have in mind dealing with just one of those or  
12 both of those?

13 A. That's a fair question and I have to say that I can't  
14 now recollect what the answer would be. My concern I  
15 think was very much that we needed to see a change in  
16 culture where the service was seen as being more open  
17 and accountable, first of all to the Crown, frankly, and  
18 I saw the move to the non-numeric system as being a way  
19 of addressing that particular issue.

20 On the issue of getting marks which were consistent  
21 I cannot now recollect how we were dealing with that. I  
22 am pretty certain I would have asked the question -- I  
23 remember we had briefings and so on -- but I now can't  
24 recollect what the response to that was.

25 I think it is fair to say that my first concern was

1 to get a system where the SCRO and their successors were  
2 frankly more open and accountable than they had been and  
3 processes within the service where it was less  
4 hierarchical and where there was more of a culture of  
5 challenge.

6 Q. I am grateful to you. If I leave then out the lesser  
7 evidence of consistency with an accused and look at  
8 unique identity as something that the non-numeric  
9 addresses. I think you touched just in your final few  
10 remarks there about what you meant by a difference in  
11 culture.

12 Just to be clear about this, you mentioned something  
13 about this hierarchical approach. What was your concern  
14 there?

15 A. Well, I think that, again, what I should say is that  
16 it's a wee while since I've read in detail, for example,  
17 HMIC's report but the perception was that the way in  
18 which SCRO operated at that time -- and I emphasise at  
19 that time, rather than now -- was one where there was  
20 perhaps more of a deference to more senior people within  
21 the service, Fingerprint Service, and perhaps a feeling  
22 that people might be reluctant to challenge.

23 You know, I was influenced, I have to say, by  
24 reading some work from a psychologist Dr Dror in  
25 2005/2006, as well as the Interpol report, that

1 emphasised to me the need to have systems in place where  
2 the people were free from influence, in terms of making  
3 an identification and psychological pressures that can  
4 be there.

5 Within the police you have a hierarchical approach  
6 of necessity. Discipline is important. But actually  
7 when you come to fingerprinting and the identification  
8 of marks, you actually want the opposite. You want a  
9 much more collegiate approach where there is less  
10 deference, I think, to the senior officer and more of an  
11 ability to say, "I don't agree".

12 Now, the perception -- again, I emphasise the  
13 perception -- at the time was that one was less able to  
14 do that than perhaps now is the case.

15 Q. As you say, for the perception what you are doing is  
16 referring to the official reports that were commissioned  
17 and made available at the time that the Inquiry has  
18 access to as well?

19 A. Yes.

20 Q. Beyond the culture, as you say, the hierarchy in  
21 creating a culture where individuals can openly, in  
22 effect, not just challenge but openly express  
23 differences of view, what was your concern so far as  
24 transparency to the Crown was concerned?

25 A. You know, we didn't know in the McKie case about the

1 other people who had been involved. I think, you know,  
2 frankly, we should have known about that and my view is  
3 that the Crown should be told the processes that the  
4 Fingerprint Officers go through and who has looked at it  
5 and who has expressed a view, whether that's consistent  
6 or inconsistent with the evidence that is being given by  
7 others. That judgment is actually a matter for the  
8 Crown to take as to whether or not it's to be disclosed,  
9 for example, or used in evidence. So that the issue of  
10 transparency is that they ought to tell us and going  
11 back to 1994, they weren't.

12 Q. If I look at one chapter of the HMIC report, that is  
13 chapter 8, the reference is SG0375 and if I go to  
14 page 82, please.

15 If you have not had a chance to consider this  
16 recently, just indicate. I was going to bring this up  
17 just for your comment because what I was going to ask  
18 you about was the detail of consideration in relation to  
19 the Crown Office and the lead up to the change to the  
20 non-numeric. Reading paragraph 8.1.1, perhaps if we can  
21 highlight this, and I do apologise the photocopy is poor  
22 you see that the Taylor report begins:

23 "The application of a standard is very important to  
24 maintaining a safe and reliable method of fingerprint  
25 comparison. Experience and expertise enables a

1 fingerprint expert to 'know' that a mark has been made  
2 by a certain finger but it is necessary that a standard  
3 is applied to translate that view into a reasoned  
4 argument on which the conclusion can be based. The  
5 application of a recognised and accepted standard  
6 protects the fingerprint expert from inappropriate  
7 pressures and influences and allows the generation of  
8 safe and positive conclusions."

9 My reading, at least in context, was that Taylor,  
10 anticipating the move to the non-numeric system, had  
11 nonetheless in mind a non-numeric standard, that is to  
12 say some standard set for the evidence.

13 Do you have any recollection of a consideration of  
14 that being given at the time?

15 A. Well, I looked at this again last night. I have to say  
16 I'm not entirely clear what he means by standard in this  
17 context. I'm not sure whether he means some equivalent  
18 of the 16-point standard or whether he is referring, for  
19 example, to some kind of quality assurance and I think  
20 that I would be reluctant, frankly, to comment on it  
21 without some interpretation from him.

22 Q. That is fine.

23 The other factors that come through, without taking  
24 you to the specific passages in chapter 8, with a view  
25 to transparency even to the Crown, let alone almost from

1 the Crown to the defence, was some attention to be given  
2 to the keeping of contemporaneous working notes?

3 A. Yes.

4 Q. Do you have any comment in relation to that?

5 A. Personally, I would have thought that was desirable.

6 Q. But you would not know how that actually fed through  
7 into the actual implementation of the non-numeric  
8 standard?

9 A. I have been told how it is working now. I think other  
10 people will no doubt give evidence about that. My own  
11 view is that that would be desirable and would be  
12 consistent with the view that I took from an early stage  
13 about transparency.

14 Q. Progressing up again, I don't wish to take it beyond  
15 matters that you are comfortable commenting on, up  
16 beyond working notes into the report which is produced  
17 to the Crown and through that to the court, a question  
18 requiring detailed reporting, do you have any comment on  
19 the need for detailed reporting, in other words  
20 something that is beyond an assertion of a conclusion?

21 A. I think I am beginning to get beyond my comfort zone, if  
22 I may say so, to be honest. I haven't been involved in  
23 this for three years and I haven't seen what a report  
24 looks like now. So I would decline to answer that, if I  
25 may.

1 Q. No, that's fine.

2 The final point that I was going to ask you about  
3 was that in the lead-up -- as you said, a decision had  
4 been taken in principle at an early date, delayed as you  
5 have said for the reasons you indicated, systems  
6 eventually introduced in September 2006.

7 We happen now to know, again with hindsight, that in  
8 March of that year, 2006, a report was published in the  
9 United States concerning the handling of fingerprint  
10 identifications in the case of an individual called  
11 Brandon Mayfield?

12 A. Yes.

13 Q. In fact, we have check with the officials in the Crown  
14 Office and the officials in the SPSA. There is  
15 apparently no record of that case having been considered  
16 by Crown Office in the run-up to the change to the  
17 non-numeric system.

18 Did you yourself have any knowledge of Brandon  
19 Mayfield?

20 A. I don't recollect that. I think I've heard of it since,  
21 if I'm honest. I've certainly never read it. We had a  
22 presentation in Crown Office some time in 2006 and I  
23 don't recollect the case being referred to and I don't  
24 recollect it being drawn to my attention at any time. I  
25 think probably because of -- you know, I've read about

1           it since but it's just in general interest rather than  
2           anything else.

3       MR MOYNIHAN:   I have no further questions. Thank you.

4       THE CHAIRMAN:   I think it is appropriate once again, to ask  
5           you, Mr Smith, first of all if you want to apply to ask  
6           any questions.

7       MR SMITH:   Yes, thank you, sir. I would like to ask some  
8           questions and these relate to essentially to topics that  
9           have been covered but one or two additional questions.  
10          Principally, it's the decision to indict Shirley McKie.

11          I have one question relating to that and the response to  
12          the acquittal, but I will again endeavour not to cover  
13          the same ground that has been covered by Mr Moynihan.

14       THE CHAIRMAN:   Yes. If you can avoid covering aspects that  
15          have already been dealt with.

16       MR SMITH:   I shall try to do so, sir.

17                               **Cross-examined by MR SMITH**

18       Q.   Lord Boyd, I wonder if I can ask you, first of all,  
19          about the decision to prosecute Shirley McKie.

20               In your statement in paragraph 23 -- I don't need to  
21          take you to it necessarily -- but you indicate, as you  
22          told us, you were aware of the decision being taken and  
23          the instruction, I think from yourself, to place Shirley  
24          McKie on petition. Obviously from that would follow the  
25          indictment in due course.



1                   Did you consider at any stage whether it might be  
2                   prudent to get the papers back in the period between  
3                   petition and indictment to consider whether there were  
4                   any major issues that might arise?

5       A.    I simply can't -- I certainly don't recall seeing the  
6            papers. I don't recall asking to see the papers. I may  
7            have done but it doesn't surprise me if I didn't see  
8            them.

9       Q.    I understand but there must have been a point in time  
10            when you did become aware, and it may of course have  
11            been after the trial had been completed, that there was  
12            actually, if I put it this way, not an issue confined to  
13            the four corners of that case, there was a bigger issue  
14            that had arisen which was a challenge to fingerprint  
15            experts used regularly by the Crown.

16            Can I ask when it was, as far as you can recollect,  
17            you were first aware that the big issue was one that had  
18            developed?

19       A.    As I think I said in answer to Mr Moynihan, I can't  
20            recollect when that was but I'm clear, as I said, in my  
21            own mind that the Frontline Scotland programme was very  
22            significant and, you know, I think it's fair to say it  
23            flowed on from that and from the political concern that  
24            there was at the time.

25       Q.    On a point of detail, I take it that SCRO, as an

1 organisation, as far as you are aware, was one that the  
2 Crown regularly used to provide expert information in  
3 investigation and ultimate prosecution of crime?

4 A. Yes, that's obvious, yes.

5 Q. What I am interested in is when, as it were, the balloon  
6 went up and there was a concern over SCRO. I take it  
7 that it would be obvious the concern that the Crown  
8 Office should have is not so much whether defence  
9 counsel were able to cast a reasonable doubt by  
10 reference to the McKie case but the fundamental question  
11 of, "We are paying these people and relying on these  
12 people to provide evidence. Can we have confidence in  
13 their ability to do so?" That must have been the first  
14 thing that was thought about. Is that fair?

15 A. That was certainly a concern and we addressed that by  
16 having an independent check, not from SCRO but from an  
17 outside force. From memory, it was the RUC or if it was  
18 PSNI by then I can't recall, but from memory it was they  
19 who provided that check.

20 Q. As far as the PSNI is concerned, I take it they were  
21 chosen because of a belief that they had a particular  
22 quality and experience to be able to provide that  
23 independent check? They were respected as examiners?

24 A. Well, I can't recollect why they were chosen rather than  
25 others and, indeed, I may not have actually had been

1           asked about this. I think maybe they said, "Well, we  
2           can get so and so in there", and no doubt the view was  
3           taken that they were respected and able to provide the  
4           service.

5       Q.   Do you know who chose the actual prints to check for  
6           that exercise? Was it SCRO who surrendered, as it were,  
7           the documentation to the PSNI or did they go in and  
8           demand everything or was it someone Crown Office that  
9           directed which cases --

10      A.   I'm sorry, I can't tell you how that worked. I think  
11           other witnesses would no doubt be able to assist you in  
12           that, Mr Smith.

13      Q.   Very well.

14           I would like to ask if I can, under reference to a  
15           document, as to the position adopted principally by  
16           Lord Hardie.

17           Can I have first on the screen document DB0576,  
18           which should hopefully, as we can see, be a letter  
19           addressed to Lord Hardie, the then Lord Advocate on  
20           9th June 1999 just immediately following Shirley McKie's  
21           acquittal.

22           I am sorry, if this is unfair asking if you  
23           recognise ever having seen this letter but do you recall  
24           a letter being brought to your attention, a letter being  
25           written by Mr McKie shortly after the acquittal?

1 A. I haven't seen this -- well, I don't believe I've seen  
2 this letter before.

3 Q. Very well. Perhaps you can just take it from me rather  
4 than read through it that what Mr McKie was doing was  
5 drawing the Crown's attention to his concerns in  
6 particular relating to the SCRO experts still continuing  
7 to act as Crown experts in the case and I'm guessing you  
8 would agree that would fit in with the pattern of your  
9 understanding?

10 A. I'm sure, yes, absolutely and I don't know if the letter  
11 that I saw earlier was a response to this particular  
12 letter.

13 Q. It's possible -- perhaps if I can go on to another  
14 document, which is CO0034.

15 Again this appears to be a minute of a meeting that  
16 took place and we can see amongst others at the bottom  
17 of the list Mr Sean Murphy, the Advocate Depute, and  
18 Frank Crowe, the Deputy Crown Agent, were present along  
19 with a number of individuals from SCRO, the Fingerprint  
20 Bureau.

21 Again, do you have any recollection of having seen  
22 this minute at any time?

23 A. I can't really say, to be honest. I mean, it's possible  
24 that it was in some background material that was given  
25 to me at some point when we were discussing it but --

1 well, I think the short answer is, no, I can't recollect  
2 seeing it but what I'm suggesting to you is it's not  
3 impossible that I would have.

4 Q. Very well. Can I ask for a further document to be  
5 brought up, which is DB0718.

6 This bears to be a letter of 12th July 1999 to  
7 Mr McKie?

8 A. Yes. I see it is actually a response to the letter  
9 which you have just shown me.

10 Q. Can I ask to go to the next page of it, please. I am  
11 interested in the first full paragraph on that page.  
12 Could we have that expanded.

13 We can see, in fact, in the image beneath that that  
14 it from Andrew Miller at the Policy Group but it refers  
15 to the Lord Advocate's position. Just reading it out:

16 "It is the Lord Advocate's duty to look into matters  
17 of apparent concern arising from the prosecution of  
18 crime generally and from individual prosecutions in  
19 particular. I can confirm the various issues raised by  
20 this case have been the subject of investigation by the  
21 Lord Advocate, including of course the issue of the  
22 conflict between the evidence of the Crown and defence  
23 witnesses as to the interpretation of fingerprint  
24 evidence. The Lord Advocate does not propose to publish  
25 the details of his investigations."

1                   Can I ask this: are you aware of what investigations  
2                   had been carried out? What was being referred to there?

3       A.   Well, I have to say it's difficult for me to comment on  
4           another person's letter. All I can say is that, so far  
5           as I can recollect afterwards -- and this is just my  
6           recollection -- there were discussions which involved,  
7           as you have pointed out, the Advocate Depute who  
8           prosecuted the case and the Deputy Crown Agent. It is  
9           possible that -- in fact, quite probable -- that the  
10          Lord Advocate and I discussed it but I have no  
11          recollection of any conversations.

12                I don't believe "investigations" refers to any  
13                formal process and I certainly wasn't aware of that and  
14                I think I would have been aware.

15       Q.   I think it is fair to say the matter was gathering speed  
16           in a very public way almost immediately following the  
17           trial.

18                Is that your recollection of the circumstances?

19       A.   Yes. I mean, it's so long ago to be honest, I really  
20           can't recollect the sequence of events.

21       Q.   Can I ask for another document, please, CO4065. Can we  
22           go on to the next page, please, and hold it there.

23           Thank you.

24                I am interested in the fifth line on the first  
25           paragraph. There are obviously some parts of it that

1 have been redacted so it is hard to place it in absolute  
2 context. This we understand to be a minute to the  
3 Lord Advocate from Mr Gilchrist and this is being said:

4 "Although we are not prosecuting these officers, our  
5 position must be that they made serious mistakes in the  
6 Asbury/McKie cases."

7 I don't think I need trouble you with the rest of  
8 it. Particularly, it deals with the question of  
9 dismissal and so on.

10 Obviously, by this case it was identified that there  
11 had, in fact, between two errors which is why the  
12 reference appears to be, I think, if I've got my dates  
13 right, the Asbury and McKie cases.

14 Again, there appears to be an acknowledgement at  
15 this point in time, in 2001 -- we can see the date of  
16 the minute -- that there were serious mistakes made with  
17 regards to -- that was the Crown position -- that there  
18 appeared to have been serious mistakes that had been  
19 made.

20 I take it we can agree that, at least at  
21 September 2001, there was a very clear Crown position  
22 and there must have been a very clear concern within  
23 Crown Office as to what had happened and what I suppose  
24 could happen in the future. Is that fair?

25 A. Yes. A slight hesitation is I wonder if that is perhaps

1 a bit of an overstatement in the end of the day,  
2 although it's written by Bill Gilchrist who did the  
3 report. I just wonder if -- I think I would need to go  
4 back and look at the Gilchrist report again but I wonder  
5 whether or not there was a feeling that the errors might  
6 have been more as a result of the processes rather than  
7 the individuals. I mean, I think ultimately the Bill  
8 Gilchrist position was that there were  
9 mis-identifications and there were mis-identifications  
10 in two cases, so I can see why he wrote that.

11 Whether I actually fully adopted that or some  
12 position which was a little short of it, I can't now  
13 recall.

14 Q. I think I understand your position that I suppose you  
15 are really saying you would have to read it in the  
16 context of other documents and this document to be clear  
17 about what was being said.

18 A. I think it is fair to say that Bill Gilchrist's position  
19 was that there were errors in both Asbury and McKie and  
20 I didn't challenge that. I'm not sure that I went  
21 through a process of saying I agreed with it or I  
22 disagreed with it. It didn't seem to me to be  
23 particularly relevant to the issues that I was dealing  
24 with.

25 Q. Can I ask for another document up. It is one, I think,



1           you might find easier for you, this one, CO4073.

2           I think this is, as we can see, a document

3           initialled by yourself addressed to the Deputy Crown

4           Agent. You refer in the second paragraph, what you say

5           is:

6           "To be blunt, I find it difficult to understand how

7           the Tribunal ..."

8           That is, I think, a reference to a --

9       A.   A disciplinary tribunal, that they were referred to,

10          yes.

11       Q.   Yes, the Black report, I think it has been described as:

12          "... I find it difficult to understand how the

13          Tribunal came to its conclusions standing our own view

14          of what went wrong."

15          You say:

16          "The Board is making it difficult for us in not

17          showing us the report."

18          Again, what I would like to understand is this

19          appears to be indicating almost a firm decision within

20          Crown Office that there was a major problem, as at April

21          2002, with regards to your satisfaction on the quality

22          of information that had been provided in the McKie and

23          Asbury cases. Is that fair?

24       A.   Yes. I think that my initial response to hearing that

25          the Tribunal had found that there wasn't a case for the

1 officers to answer was: how did they reach that  
2 decision?

3 I think probably on reflection, it is possible that  
4 it was because the thought that the processes which the  
5 officers were following were more at fault than the  
6 individual officers but since we didn't see -- we never  
7 saw the report, that was really speculation.

8 I also, I suppose, thought that the Tribunal, if  
9 they had found the SCRO officers guilty of a  
10 disciplinary offence, would have made it easier in the  
11 sense for us to have taken the ultimate decision that we  
12 did take.

13 Q. Did you know at any time that the Black Report did not  
14 actually analyse the fingerprint? It was more -- if I  
15 put it this way -- an employment matter rather than a  
16 technical matter? Were you aware of that?

17 A. As I say, we never saw the report so I don't know what  
18 approach they took but I can now rationalise it, as I  
19 said, as to why they may have come to that view but if  
20 they had shown us this then I might not have written  
21 that particular sentence.

22 Q. You mentioned that -- I think the word you used was  
23 "catalyst" was the Frontline Scotland programme report  
24 for doing something, if I put it that way, for really  
25 taking a very clear and close look at things.

1 I take it you would agree that, as far as David  
2 Asbury is concerned -- and for your information I also  
3 represent his interests in this Inquiry -- a catalyst  
4 for something to happen with regards to David Asbury was  
5 a Panorama programme which had paid for Mr Wertheim to  
6 analyse the Q12 print.

7 Can you recall that?

8 A. Yes, I'm happy to accept that. I now can't recall it.

9 Q. Just to fill in a little more information, the position  
10 of David Asbury was that he was trying to -- I know the  
11 Crown wouldn't necessarily aware of this but he applied  
12 for Legal Aid repeatedly in order that after his  
13 conviction he could have all of the fingerprints be  
14 analysed in the case against him, which was  
15 predominantly a fingerprint-based prosecution. He  
16 didn't get Legal Aid. Panorama, as I understand it,  
17 then agreed to pay for the analysis of Q12. It was said  
18 to be incorrectly identified and thereafter when that  
19 report was given to the Crown, the Crown obtained the  
20 report from two Danish gentlemen on Q12 who affirmed the  
21 position there had been a mis-identification of Q12.

22 Does that ring bells with you?

23 A. I certainly recollect that the Crown independently  
24 commissioned the report from the Danish. My  
25 recollection is that they also did the same -- that it

1           was at the same time as the Y7. I may be wrong about  
2           that but that's my recollection and as for the Panorama  
3           having commissioned Mr Wertheim, yes, if you say that  
4           happened, I'm happy to accept it.

5       Q.    You see, if it is right, under the basis the Crown did  
6           not resist the appeal by David Asbury, recognising that  
7           there, one presumes, would probably have been a  
8           miscarriage of justice without that evidence being  
9           before the court on QI2, which was an extremely  
10          important piece of evidence, would you agree with the  
11          suggestion that without the involvement of Panorama, at  
12          least, at that stage, there was a real risk there could  
13          have been a miscarriage of justice continuing with  
14          Mr Asbury continuing to serve a life sentence for  
15          murder?

16       A.   No, I don't think so because we had done the Danish one  
17           and I think that given that Y7 was being looked at, I  
18           think we would have done QI2 as well. But ...

19       Q.    Is my understanding not right that the Danish report was  
20           commissioned as a response to the suggestion from Mr  
21           Wertheim in the Panorama programme that there had been a  
22           mis-identification? It was my understanding that the  
23           Danes were instructed because of that. It wasn't  
24           coincidental.

25                   Do you have any recollection of that?

1       A.    I don't and I think probably, you know, Mr Gilchrist  
2            might have been the better person to ask that question  
3            from, if I'm honest.

4       Q.    You see one thing that I am having trouble with is this:  
5            that after the acquittal of Shirley McKie and after the  
6            position that it becomes very clear that there is a  
7            question mark hanging over the quality of the  
8            fingerprint evidence provided in the McKie case, would  
9            it not have been relatively clear that the murder trial  
10          of David Asbury and the investigation ought to have been  
11          fully reinvestigated by an independent body of some kind  
12          looking at all the images, all the evidence, to then  
13          decide if there had been failings in the Shirley McKie  
14          case had there also been failings in the David Asbury  
15          case? Do you understand the point I am making. It is  
16          almost --

17      A.    Yes, and I fundamentally disagree with it. David Asbury  
18            was convicted of murder. The appropriate course of  
19            action is for him to challenge that conviction through  
20            the appeal process. He did that. I'm not responsible  
21            for whether or not he gets Legal Aid but the Crown --  
22            and whether it was prompted by the Panorama programme or  
23            not -- the Crown commissioned their own investigation  
24            and gave that to the defence. So that was the  
25            appropriate way to do it and ultimately the conviction

1           was quashed. To have some other body doing it I think  
2           would be highly inappropriate because that could not  
3           have resulted in the acquittal of Mr Asbury.

4                 So, I'm sorry, but I fundamentally disagree with the  
5           proposition that you put to me.

6    THE CHAIRMAN:   Just one point for me. Was there a Criminal  
7           Cases Review Body in Scotland at that time?

8    A.   Yes there was but they could only come in after the  
9           appeal process had been ... now he'd already -- my  
10          recollection -- and Mr Smith will correct me if I'm  
11          wrong -- but my recollection is that there was already  
12          an outstanding appeal at the point when the issue of  
13          fingerprinting came to the fore and, having got the  
14          Danish report, the Crown made it available to the  
15          defence. It took, I think, quite some considerable  
16          time, possibly because of Legal Aid considerations, I  
17          don't know, for the grounds of appeal to be amended to  
18          include the fingerprint evidence.

19   THE CHAIRMAN:   So because the appeal was still  
20          outstanding --

21   A.   The appeal was still outstanding at that point.

22   THE CHAIRMAN:   -- the Criminal Cases Review Body couldn't  
23          look at it. Yes, I quite understand.

24   MR SMITH:   If I have understood your position correctly,  
25          Lord Boyd, it is that the Crown would really react to an

1           appeal rather than be proactive in looking for problems.

2           Is that fair?

3       A.   No, we were proactive. They actually commissioned the  
4           Danish report and gave that to the defence so that they  
5           could bring it to the court's attention and that is the  
6           appropriate way of doing it.

7       Q.   With respect, as I understand it, that was reactive, the  
8           Danish report was reactive to the, as it were, the  
9           privately commissioned report by Panorama and without  
10          that being obtained are you suggesting that would have  
11          been obtained anyway? Are you saying that it would have  
12          been obtained in any event?

13      A.   My recollection -- and I'm afraid this is going back  
14          some time, but my recollection is that the issue of  
15          Shirley McKie's print, Y7, and QI2 went in tandem and at  
16          the point at which the Crown were alerted to the Y7  
17          problem, the investigation covered both QI2 and Y7.

18      Q.   Why was the audit carried out of the, I think, two  
19          years' worth of work by SCRO? Why was that carried out  
20          by the Crown?

21      A.   Why?

22      Q.   Yes.

23      A.   Because there was clearly a public concern and a concern  
24          within the profession about the work of SCRO.

25      Q.   If it had been discovered by PSNI or the RUC, whatever

1 the title was at that time, if it had been discovered  
2 that there was another mis-identification in another  
3 case, I take it that is something the Crown would  
4 immediately have disclosed to the defence in that case,  
5 would they?

6 A. Well, there was an issue about a case ... what was the  
7 name of it? Mark Sinclair, I think.

8 Q. It is certainly a name I've heard before.

9 A. And now I can't remember -- somebody else I think would  
10 be better able to tell you the details of that. As far  
11 as I'm aware, that was the only issue during that time  
12 that was brought to our attention and my recollection is  
13 that we didn't use that print and Mark Sinclair was  
14 convicted of a number of armed robberies but it didn't  
15 include that particular issue.

16 Q. I follow. It may be my fault but what I am really  
17 asking you is in the review exercise by PSNI you have  
18 referred to, if there had been an error popped up that  
19 had been, according to PSNI, committed in another case I  
20 take it that is something the Crown would have  
21 immediately disclosed to the defence, if the individual  
22 had been convicted?

23 A. Well, I think before you get there there is the issue of  
24 do you use the print in the trial? Because remember the  
25 PSNI process wasn't a review of past cases. It was of



1 evidence that was going to be used in cases after  
2 June 2001 -- I think it would be June 2001. So the  
3 issue would be do we use the print? Do we disclose it?  
4 Do we disclose information to the defence before the  
5 trial? I think it was highly unlikely we would have  
6 waited until there had been a conviction and then done  
7 it. That would have been wrong.

8 Q. I am sorry, it may be my misunderstanding as to what had  
9 been reviewed. I had understood it was review cases in  
10 which there had been work carried out there were  
11 historic cases rather than current cases?

12 A. No.

13 Q. That's wrong, is it?

14 A. That's wrong. There was consideration given to whether  
15 or not we should do that and it was thought to be an  
16 exercise that really could not properly be done.

17 Q. You will forgive me for this comment but we seem to have  
18 had a greater reaction to the Frontline Scotland  
19 programme than the complaints being presented by Iain  
20 McKie. Would you agree with that as a valid comment?

21 A. I don't really think I could comment, to be honest, on  
22 that.

23 Q. You have seen some correspondence from Mr McKie which  
24 appears to have resulted in a response saying, I think,  
25 very shortly "business as usual, we've looked at this,

1 we'll carry on, these people will continue to give  
2 evidence" but the Frontline Scotland comes along then it  
3 was the catalyst I think as you put it?

4 A. That's fair.

5 Q. Why would it be there would be a greater reaction to  
6 Frontline Scotland than the concerns presented by  
7 Mr McKie?

8 A. Well, I think there are a number of reasons for that.  
9 To be blunt, Mr McKie is one individual. He was, not  
10 unnaturally, concerned about the prosecution of his  
11 daughter and upset about the way in which she had been  
12 dealt with. I mean, to be honest, it's not unusual for  
13 Crown Office to get a complaint of that kind.

14 I think that it was at the point where the -- and I  
15 said publicly in a lecture that I gave that I paid  
16 tribute to the media when they went after cases where  
17 there had been either a miscarriage of justice or some  
18 injustice and that Frontline Scotland was an example of  
19 that. I think that it is right to say that the work  
20 that they did brought together the key strands and I  
21 think it's also fair to say that Mr McKie's campaign  
22 highlighted public concern, greater public concern, than  
23 just one individual.

24 Q. I take it you would agree that from what we seem to know  
25 now about a number of things regarding Y7 and Q12, even

1 if we just talk about the question of Crown concerns  
2 about the lack of disclosure, all of that is something  
3 that would not have happened had, frankly, Iain McKie  
4 had not been tenacious, got the media interested and  
5 pushed it forward and, whatever else happens, there is  
6 considerable benefit from having to analyse the systems  
7 in place.

8 Would you agree with that as a comment?

9 A. Yes, and no. I think I would agree that there was a  
10 catalyst in terms of bringing this to the attention of  
11 the public. Thereafter, it frankly froze any progress  
12 until we got past the end of the civil proceedings and I  
13 think that was a great tragedy.

14 Q. Why did that stop change? What was it that the civil  
15 case prevented the Crown Office from saying, "Well, we  
16 need to face up to this, we need to take a position on  
17 it, we need to restore public confidence in the entire  
18 system of fingerprinting in Scotland"? Why did the  
19 civil case inhibit that process?

20 A. Because quite simply there was no movement that could be  
21 made, for example, on non-numeric without it being  
22 judged being made against the Shirley McKie case and,  
23 frankly, the campaign that was waged by Mr McKie against  
24 the SCRO officers made it very, very difficult for  
25 anybody to move. I can quite see why you and Mr McKie

1           may feel that they brought this to the public attention  
2           and I'll accept that, but thereafter I am quite clear in  
3           my own mind that it was impossible to get the kind of  
4           movement that was required while that campaign was going  
5           on.

6       Q.   You see, Lord Boyd, I realise you do not perhaps know a  
7           great deal about the Brandon Mayfield case in 2006 but  
8           my understanding of that is that, in short, there was an  
9           apparent mis-identification by the FBI of a fingerprint  
10          and the reaction of the American authorities, in  
11          particular I think the Department of Justice, was to not  
12          only face up to it and accept there had been a mistake,  
13          to set up an inquiry into how it happened, how it could  
14          be prevented and to publish in its entirety (with I  
15          think one redaction of one name in a report of several  
16          dozen pages) to make it public, accessible online, to  
17          restore public confidence in an acceptance that mistakes  
18          had been made.

19                Do you not agree that that is perhaps a very hard  
20           thing to do, it may be embarrassing for some people, but  
21           it is something that can allow the public to have  
22           confidence in the system? Would you agree with that?

23       A.   I don't think that could have possibly have been done  
24           while the civil proceedings were continuing and that is  
25           to 2006. I simply don't see how you could have run both

1           some kind of inquiry which was published in advance of  
2           the conclusion of the civil proceedings.

3       Q.    Because it would have prejudiced the Executive's  
4           position in the civil case; is that what you are saying?

5       A.    Well, it certainly would have -- the case was **sub**  
6           **judice**.

7       Q.    In fact on that point of detail, just to be clear about  
8           it, once the pleadings are closed, the record is closed,  
9           it's not **sub judice** is it in terms of the Contempt of  
10          Court Act?

11      A.    I think that the difficulty would have been that we  
12          would have been running some kind of inquiry while there  
13          were outstanding civil proceedings and I think that that  
14          would have been virtually impossible.

15      Q.    But it wasn't **sub judice**, was it, after the record was  
16          closed?

17      A.    Well, it may not have been at that point. I can't  
18          remember the sequence of events, Mr Smith.

19      Q.    Can we deal with the question of what was going on with  
20          regard to disclosure. Again, for those who perhaps  
21          don't know as much as you do, and maybe even as I do,  
22          about issues of disclosure, the question of disclosure  
23          you have mentioned the case of **HMA v Smith** (I think it  
24          was in the 1950s or so) which related to questions of  
25          disclosure, but by 1998 the case of **MacLeod** was the most

1           important case. Again, I may be wrong about this but I  
2           think you actually appeared in **MacLeod**; is that right?

3       A.    Yes.

4       Q.    Of course, between 1998 and I think 2004 or 2005 the  
5           cases of **Sinclair** and **Holland** reached the Privy Council  
6           and disclosure was a pretty hot topic, wasn't it,  
7           throughout that period 1998 onwards?

8       A.    I think it is fair to say the law and practice were  
9           developing during that time and -- yes, that's fair.

10      Q.    By the time the Mackay Robertson Report came to your  
11           attention, and perhaps I can just ask you this, when do  
12           you recall first having seen the Mackay Robertson  
13           Report?

14      A.    Well, I mean, the Mackay Robertson report wasn't really  
15           the catalyst for anything, it was the Bill Gilchrist  
16           report which accompanied in 2001. So all I saw was Bill  
17           Gilchrist's report. From memory, it had attached to it  
18           part of the Mackay Report -- I think chapter 7. I also  
19           saw at that stage the Mackay Report or at least parts of  
20           it, if not all of it.

21      Q.    But you were aware at some stage that there had been  
22           individuals within SCRO who had failed to reach the  
23           16-point standard. You became aware of that reasonably  
24           shortly after the Mackay Robertson Report became  
25           available. Am I right?

1 A. I must have done, yes.

2 Q. What that did was -- and I think you very fairly  
3 accepted earlier on that is something that really the  
4 Crown ought to have known about for a number of reasons,  
5 failure to reach the 16-point standard -- at that point  
6 when you knew that there had been a failure to pass that  
7 information on to the Crown, you must have realised that  
8 there was a systemic problem with regards to the Crown  
9 relationship with SCRO?

10 A. Well, yes, there were changes that were going on at that  
11 stage and, yes, that's fair.

12 Q. The most important thing that one might think regarding  
13 disclosure should have been done once you knew about the  
14 failure to identify those failing to get a 16-point  
15 standard would be a directive, effectively, that SCRO  
16 should be told, "We need to know if there's anyone who  
17 fails to meet the 16-point standard. We have to be told  
18 about it".

19 Do you agree that is an obvious solution to at least  
20 that part of the problem?

21 A. Well, it's one part of how you deal with it. The other  
22 way of dealing with it is through precognition and one  
23 of the changes that we brought in through a process  
24 called solemn renewal was that experts should be  
25 precognosced and that is the sort of issue which I would

1 have expected to be dealt with through precognition.

2 Q. Were the instructions issued to precognoscers that they  
3 must ask about the, as it were, almost an audit trail?

4 Did the precognoscer what they should be asking is what

5 I am really asking?

6 A. Well, they certainly should do. I can't recollect now  
7 what instructions were given to precognoscers but  
8 disclosure became certainly more of an issue after 1998  
9 and became more important through that time. I can't  
10 say that on every occasion they were alerted to this. I  
11 just don't know.

12 Q. It is my understanding from other documents available to  
13 us is that the precognition system, if I put it that  
14 way, did not become effective until this year.

15 Were you aware of that?

16 A. No, I disagree with that. I'm sure that it was done  
17 before then because the solemn renewal process came  
18 about as a result of the other changes that were being  
19 made in Crown Office at the time. The start of that was  
20 a report by Sir Anthony on the Chhokar case but then the  
21 changes in the working practices of Advocate Deputes and  
22 part of that was the precognition of experts.

23 Q. I take it you are not suggesting though that a civil  
24 case in some way held up a change in view about  
25 disclosure, did it?



1 A. No, I'm not suggesting that. I'm suggesting that it  
2 certainly held up some progress in the changes which  
3 really had to be brought in, such as a change to the  
4 non-numeric system and really inhibited the way in which  
5 we could influence change in SCRO.

6 Q. On a point of detail, the Crown regularly obtained,  
7 procured, reports from SCRO in the '90s right up beyond  
8 the Shirley McKie case, if I put it that way. I am  
9 correct in that, am I not? There was a regular  
10 procurement of reports from SCRO?

11 A. Procurement would perhaps be the wrong -- the reports  
12 would come from SCRO and their successor as part of a  
13 criminal investigation.

14 Q. Yes, but nonetheless if it came to the point where a  
15 fingerprint report and fingerprint evidence had to be  
16 presented before the jury would be a very direct  
17 reliance by the Advocate Depute on the information  
18 provided by the SCRO.

19 Would you agree with that?

20 A. I'm sorry, could you repeat that? I missed it.

21 Q. I am sorry, yes. It is my fault.

22 I am trying to establish if I can that the SCRO and  
23 ultimately the Crown, perhaps the police but ultimately  
24 the Crown, were regularly working together, as it were.  
25 Is that a fair analysis?

1 A. Working together. Yes, I mean, clearly they got SCRO  
2 reports and used they them in criminal trials, yes.

3 Q. Yes. Can you tell me this and thinking back to the time  
4 just prior to the civil action being raised, was it  
5 known by the Crown who employed SCRO, who their, as it  
6 were, vicarious employers were, who had vicarious  
7 responsibility?

8 A. I'm not aware of anybody having thought about it before  
9 the civil case was raised. I'm not sure that they would  
10 have any reason to think about it, to be honest.

11 Q. Other than they were obtaining reports, relying on  
12 reports. They did not know who their employer was. Is  
13 that not something that the crime might be interested  
14 in?

15 A. No, I don't see why it would be of any particular  
16 concern to the Crown who employs individuals. It wasn't  
17 the Crown. What we would be interested in is the  
18 report, not who actually employs them.

19 Q. But surely their employers would be relevant in the  
20 sense of being responsible, not just for legal  
21 responsibility, legal liability, but also for management  
22 responsibility to introduce change to control, to  
23 present people of quality and expertise and almost a  
24 corporate structure.

25 Is that something that would be important to the

1 Crown?

2 A. Well, clearly there would be conversations with  
3 managers. I don't actually see that it was necessary  
4 for the Crown to take the view as to who actually  
5 employed individuals.

6 Q. Lord Boyd, we are now sitting here some 13 years after  
7 the question of Shirley McKie was raised and Y7. Would  
8 you agree with the suggestion that public confidence in  
9 fingerprinting has undoubtedly been significantly  
10 damaged over the past 13 years? Would you agree with  
11 that?

12 A. I think I would rather leave it to the judgment of  
13 others, frankly.

14 Q. Can I ask your personal opinion then. Do you have every  
15 confidence in the position of fingerprinting in  
16 Scotland?

17 A. Well, I've no reason to doubt it but, Mr Smith, I  
18 haven't been Lord Advocate for three years and I don't  
19 practise criminal law so I have not actually seen a  
20 fingerprint since I left office and I think it is  
21 probably better for those who have responsibility for it  
22 at the present time to make these kind of comments than  
23 for me to make them.

24 Q. I am not asking you about the past three years. During  
25 the time you were Lord Advocate and prior to that

1 Solicitor-General, did you have any inkling that the  
2 public perception of fingerprinting and prosecution of  
3 cases where fingerprints were involved was something  
4 that was really a matter of concern in the public  
5 debate? You must have understood that Lord Boyd, didn't  
6 you?

7 A. Well, yes, but I think it's easy now to overstate it. I  
8 mean, I think it is interesting that this Inquiry is not  
9 being reported at all and I think that that perhaps  
10 demonstrates that people move on and concerns move on.

11 While I was Lord Advocate, it was certainly a heavy  
12 political issue and that was because the issue became  
13 politicised, frankly, Party politicised. So it was a  
14 political issue.

15 How far that actually reached down into the sort of  
16 general public I think is questionable and it was  
17 interesting that, you know, we did have in the course of  
18 trials defence counsel who would suggest that you could  
19 not rely upon fingerprints. But, you know, anecdotally  
20 we were not actually aware of any challenge having  
21 succeeded during that time and that, I think, begins to  
22 put it in perspective.

23 I think you are right that we couldn't have used,  
24 unfortunately, the SCRO officers who had been involved  
25 in this again because that would have produced its own

1 reaction but I think that one can overstate the sort of  
2 issue about public confidence, frankly.

3 Q. What you seem to be suggesting, if I have got this  
4 right, is that the fact the public may not be entirely  
5 interested means that the public interest suggests that  
6 everything was fine. You are not really taking the  
7 leap.

8 A. Now you are moving on from public confidence to the  
9 public interest, which is a slightly different concept  
10 if I may say so. The public interest obviously demands  
11 that we have confidence in any evidence that is placed  
12 before a court and I have no reason to doubt that that  
13 public interest has been served now.

14 Q. Can I just be clear, Lord Boyd, if this had not  
15 attracted media attention in the way it has over the  
16 past 13 years, would you have been quite content with  
17 the way, from what you knew about it, that the system  
18 had operated, no change, just ride this one out? Is  
19 that an approach we can expect to have heard about?

20 A. With respect, I don't actually think that I ever  
21 suggested that you ride this out. What I have in fact  
22 said is completely the opposite, that actually we were,  
23 to an extent, inhibited in taking this forward because  
24 of the McKie campaign, if I put it that way.

25 I am quite clear in my own mind that I would have

1           addressed this issue in the context of the very  
2           considerable changes that took place in the Crown Office  
3           and Procurator Fiscal Service while I was Lord Advocate.

4       Q.    I am right in saying, I think, that the previous  
5           Government opposed the Judicial Inquiry we that are  
6           sitting in today?

7       THE CHAIRMAN:   Is that really a relevant issue?

8       MR SMITH:   You are indicating, sir, I should not go there.  
9           I will not ask the question.

10           Lord Boyd, do you recognise now that considerable  
11           change to a number of systems and in talking about  
12           issues about disclosure, procedures about finding out  
13           about what should be disclosed to the Crown, perhaps  
14           about management issues, about the science of  
15           fingerprinting, expert testimony, all these issues that  
16           this Inquiry is looking at, do you recognise that is a  
17           healthy and a good thing that something like that should  
18           be taking place in the context of this matter?

19       A.    Are you asking me whether or not I approve of this  
20           Inquiry because that actually seems to be the question  
21           you are asking me, Mr Smith, and I'm not going to answer  
22           that.

23       Q.    Very well.

24           Do you consider that things could have been done  
25           differently? If you could wind the clock back,

1 Lord Boyd, would you do anything different with regards  
2 to the systems that were in place?

3 A. Would I do anything different? I mean, I think that  
4 that is a very difficult question to answer, Mr Smith.  
5 I mean, my philosophy in life is that one always learns  
6 from what one has done in the past and I'm sure there  
7 are things that I would approach differently, but I'm  
8 also confident that I take the right decisions.

9 MR SMITH: Thank you very much.

10 THE CHAIRMAN: Mr Holmes, I think you would be the next  
11 applicant.

12 MR HOLMES: Yes, sir. There is just one topic I would like  
13 to cover and that is the decision not to use the six  
14 officers to give evidence again. I'm aware there has  
15 been --

16 THE CHAIRMAN: If there is some new aspect of it you want to  
17 touch on, I will allow you to.

18 **Cross-examined by MR HOLMES**

19 Q. Lord Boyd, you said earlier on that the disciplinary  
20 proceedings conducted by SCRO identified no disciplinary  
21 issues with the six officers. You then went on in your  
22 evidence to identify three factors in the decision not  
23 to use these officers to give evidence again in spite of  
24 that.

25 The first of these was the public campaign against

1           them. By that, do you mean principally the media  
2           campaign?

3       A.   Well, I think it's quite -- yes, I think there was a  
4           campaign which sought to have the Fingerprint Officers  
5           prosecuted and that campaign continued after the  
6           decision not to prosecute. It came to the fore  
7           particularly after the settlement of the civil  
8           proceedings, I think, and the public campaign I think  
9           was a significant issue.

10      Q.   Is this a campaign which, in your view, was largely  
11           being conducted by Mr McKie?

12      A.   Well, you know, certainly the McKie campaign had a great  
13           deal of traction in the media. There's no doubt about  
14           that.

15      Q.   Were you left in any doubt as to what was being called  
16           for in relation to these six individuals?

17      A.   Well, initially at least up until 2001 it was for the  
18           prosecution of the officers involved, failing which  
19           certainly dismissal, disciplinary proceedings and so on.

20      Q.   The second factor that you identify in the decision is  
21           the decision of the Scottish Executive to settle the  
22           civil case. Indeed, one of the reasons that you give  
23           for the delay in deciding the fate of these officers is  
24           the pending civil proceedings.

25           Was it your view that had they been given an



1 opportunity to give evidence during the civil  
2 proceedings and had that evidence been accepted by the  
3 court that they could return to giving evidence in the  
4 course of their employment?

5 A. I don't think that I or maybe -- I don't think that I  
6 ever reached a view on that particular issue. I think  
7 it's fair to say that although I was the Law Officer, I  
8 have collective responsibility, as it were, for that  
9 decision although I was not personally involved in it.

10 Q. The third reason that you identified for the reason not  
11 to use these officers again is the leak of the Mackay  
12 Report and I think, in fairness, you say, whatever you  
13 think of the report itself, the leaking of it did  
14 contribute to the decision not to use these officers  
15 again.

16 In relation to all three of these matters, can I ask  
17 is any of them anything to do with any of the officers  
18 themselves?

19 A. I mean, I think that the ... I think that's a good  
20 question and let me just pause and think about it.

21 I think one has to say yes, it does because  
22 ultimately it was they who made the comparison and  
23 certainly, although as I say I didn't actually feel it  
24 was necessary to reach a view, the weight of the  
25 evidence did seem to support the view that this was not

1 Y7 or Y7 was not Shirley McKie's print and Q12 was not  
2 Asbury's. That was the weight of the evidence.

3 Q. You have said yourself that the disciplinary proceedings  
4 that were carried out by SCRO did not identify any  
5 issues with the conduct of the officers and the three  
6 factors that you identified thereafter in the decision  
7 not to use them again to give evidence seem, on the face  
8 of it at least, to be decisions taken by others, are  
9 they not?

10 A. I think that is fair to an extent that meant that we  
11 would have had difficulty in presenting them as reliable  
12 and credible. I mean, I think it's as fair to say that  
13 simply because somebody makes a mistake -- let's assume  
14 for a moment that there were errors in the  
15 identification -- that officers, people do make mistakes  
16 and if they make mistakes, then that shouldn't preclude  
17 them from being used again in evidence because, provided  
18 that doesn't reflect on their expertise, it might be  
19 said that one of the issues or one of the difficulties  
20 was that either the officers themselves never accepted  
21 they made a mistake. So one could not have gone to  
22 court and said we accept that they made a mistake in  
23 this case, standing the Mackay Report, and therefore  
24 bolstered their credibility in that way. That's a  
25 matter for the officers and, as I understand it, they

1           adhere to their view and they are entitled to do that  
2           but simply in terms of presenting them as credible  
3           witnesses that would be more difficult.

4       Q.   A decision must, therefore, have been required on the  
5           part of Crown Office as to whether these officers were  
6           correct or not because the three other factors that you  
7           have mentioned have been decisions that have been taken  
8           by people other than these officers.

9           Is that not right?

10      A.   Yes, but it might be hard but, ultimately, so far as the  
11           Crown is concerned the issue is whether or not we can  
12           present witnesses to court to a jury as being wholly  
13           reliable and credible and whether or not there was a  
14           mistake, whether it went beyond a mistake or whether  
15           they were indeed right, the fact of the matter is that,  
16           standing the factors that I put, we could not have  
17           presented them in that way.

18      Q.   I think in fairness the word you use in relation to two  
19           of these witnesses at least is "notoriety"; is that  
20           correct?

21      A.   Yes.

22      Q.   Was that notoriety, at least in part, as a result of the  
23           media campaign that was conducted against these  
24           officers?

25      A.   And the leak of the Mackay Report.

1 Q. If there is in the future an acquittal where fingerprint  
2 has been led what is there now to stop an accused person  
3 then mounting a campaign and ending the careers of the  
4 three officers who identified their fingerprint?

5 A. Well, I think that's not really a question for me, since  
6 I don't have responsibility for that.

7 MR HOLMES: Thank you.

8 THE CHAIRMAN: It is 1.00 but could I just have an  
9 indication, first of all, Miss Grahame do you have any  
10 application.

11 MISS GRAHAME: No thank you.

12 THE CHAIRMAN: Mr Macpherson?

13 MR MACPHERSON: No thank you, sir.

14 THE CHAIRMAN: Miss Jones?

15 A. No, sir.

16 THE CHAIRMAN: Mr Kemp, is there any matter you want to  
17 raise in re-examination?

18 MR KEMP: No, sir.

19 THE CHAIRMAN: And finally --

20 MR MOYNIHAN: No, sir, no further questions.

21 THE CHAIRMAN: There is just one point I wanted to ask you  
22 about. Disclosure is always very difficult and getting  
23 people to understand the need for disclosure, Government  
24 departments and so on, sometimes get into difficulty  
25 about it.

1                    Would it have been an approach to have told the Head  
2                    of SCRO, I mean, after I'm not saying in advance of  
3                    this, that in the future where any expert in the  
4                    department had disagreed with a decision that should be  
5                    disclosed to the Crown Office rather than relying on  
6                    individual officers being asked in the course of a  
7                    precognition?

8        A.    Yes, I think that's a fair comment. I don't know  
9                    whether or not that was done. I can't recollect giving  
10                  any instruction that it should happen. Possibly with  
11                  the benefit of hindsight that might have been done.

12       THE CHAIRMAN:    But directives of that sort weren't normally  
13                  given to departments?

14       A.    No, there were Lord Advocate's guidelines which were  
15                  given and I know that there were no guidelines given.  
16                  Indeed, these were part of what was held up as a result  
17                  of this process. I think that the Director and others  
18                  were certainly more aware of the need to have processes  
19                  in place where both the correct identifications were  
20                  made and without the processes and things, but also that  
21                  the Crown was informed as to when there were differences  
22                  of view.

23       THE CHAIRMAN:    Thank you very much and thank you for coming  
24                  to give evidence. I am glad to say we can release you  
25                  now.

2 (The witness withdrew)

4 (1.05 pm)

**5 (Luncheon Adjournment)**

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