

**The Right Honourable Lord Mulholland, Senator of the College of Justice**  
**Statement for the Inquiry into the death of Sheku Bayoh**

**Introduction**

1. I was the Lord Advocate of Scotland from May 2011 to June 2016. Prior to 2011, I was the Solicitor General for Scotland between 2007 to 2011. I have served as Crown Council and Senior Crown Council between 1997 and 2007. I have also held the positions of Assistant Procurator Fiscal, Procurator Fiscal, Edinburgh and Area Procurator Fiscal Lothian and Borders. I have worked in various parts of the Crown Office including the High Court and Appeals units. I have worked as a Procurator Fiscal Depute in Greenock, Glasgow and Edinburgh. I also have extensive experience in dealing with deaths reported to the Crown Office and Procurator Fiscal Service (CPFS) and complaints against the police, including deaths in police custody. As Crown Council, I have extensive experience in instructing expert witnesses and leading evidence from expert witnesses, who are referred to as skilled witnesses in Scots Law. As Lord Advocate, I chaired the equality and diversity committee for the Crown Office and Procurator Fiscal Service.

**Role of the Lord Advocate**

2. The Lord advocate is the chief legal advisor to the Scottish Government and the ministerial head of prosecutions in Scotland. He is also responsible for the investigation of all sudden, suspicious and unexplained deaths, which includes deaths in police custody.
3. The Procurator Fiscal will investigate the death and report it to the Crown Office for consideration by Crown Council. Crown Council will decide whether or not to take criminal proceedings and whether or not a Fatal Accident Inquiry, including a statutory inquiry, should be held in relation to a reported death.

**1 (i) Management of COPFS**

4. The management of COPFS is undertaken by the Crown Agent and local Procurators Fiscal assisted by local managers and prosecutors. The Lord Advocate is the ministerial lead for the department. He has cabinet rights of audience, although in accordance with First Minister policy, he only attends when there is a reason to attend. He is accountable to the Scottish Parliament. He answers questions in parliament on a six-weekly rota at Law Officers' questions. He can be called to give evidence to parliamentary committees and

frequently does so. The Lord Advocate heads the cadre of Crown Council who take decisions in his name.

5. Crown Counsel is often not appointed at the beginning of an investigation. They will be appointed by a Law Officer, if the matter is serious enough, in discussion with the Principal Advocate Depute and sometimes the Deputy Crown Agent and Crown Agent. The case will go to the appointed Crown Counsel once it is ready, and their involvement will add value. Crown Counsel was not appointed on this investigation, in the time I was Lord Advocate as the investigation was not complete and the decisions in the case were not imminent.
6. The reason I involved myself from the beginning of the investigation into the death of Sheku Bayoh was in light of my experience of 30 years as a prosecutor. I have been involved in numerous high profile and complex cases. I was not involved in the initial investigation into the death of Surjit Singh Chhokar but I dealt with the fallout from the case and the Jandoo report, which concluded that COPFS was institutionally racist. I prioritized this case for re investigation and superintended the subsequent murder case through the double jeopardy application and trial. I was not going to let what happened in the Chhokar case happen again with Sheku Bayoh, namely poor liaison with the family, not addressing issues of colour nor investigating racial motivations, if any, for what happened. That is why I became involved at an early stage.
7. Although in my time, I did not take any decisions on prosecution or whether it should be an inquiry and if so what form of inquiry, I met with the family a few times and superintended the initial Crown Office work. Included in this were a number of actions to maintain the confidence of the deceased's family.
8. It was challenging for all who worked on the investigation to navigate due to the interests of various parties, often competing, namely the family and their solicitor, the Scottish Police Federation, the police officers under scrutiny and investigation, their families, the media and other interested parties. In light of these interests, everyone had to carefully navigate the investigation to ensure that everything was being done to the best of the Crown's ability and not to get drawn into blind alleyways where the investigation should not be going and to keep a focus on the key issues in the case.
9. The role of Lord Advocate is a very involved role. I cannot be involved in all the minutiae of an investigation. David Green and Les Brown are very experienced prosecutors both of whom I hold in the highest regard. They were involved at the beginning. They would generally issue any directions to PIRC and deal with the Crown side of things. If they wanted to elevate something to Law Officer level, then I would give them a steer.

#### **1 (ii) Investigations of deaths in Scotland, including deaths in custody**

10. Such decisions will include decisions on deaths reported by the Procurator Fiscal. Decisions can include whether or not to raise criminal proceedings and/or whether or not to hold an inquiry in whatever form is appropriate. Reports for consideration of Crown Council are prepared and submitted by local Procurators Fiscal. Such reports contain all the evidence gathered in the case which, depending on the nature of the case, can include expert evidence and opinion, together with a narrative of the facts and analysis and a recommendation on future procedure.
11. In order to ensure excellence, the investigation of deaths is conducted by fatalities units throughout the country. Such units are staffed with experienced investigators and prosecutors. Where there is a death in custody there will be a crossover between the death and the fact that it involves police officers and therefore a possible criminal complaint against police officers. Such cases will be investigated by specialized units investigating complaints against the police, in this case the Criminal Allegations against the Police Division which at the time was headed up by Les Brown, a very experienced prosecutor who I held in high regard. He led the investigation into the death of Sheku Bayoh in my time as Lord Advocate. The Procurator Fiscal is independent of the police and PIRC ensuring an independent investigation which meets articles two and six obligations in terms of the European Convention of Human Rights.
12. The procurators are guided by the relevant chapters of the Book of Regulations, relevant crown office circulars and local instructions and memoranda.

### **Instruction of the Police Investigations and Review Commissioner (PIRC)**

#### **2 (i) Terms of instruction under Section 33A of the Police, Public Order and Criminal Justice (Scotland) Act 2006**

13. In terms of section 33A of the Police, Public Order and Criminal Justice (Scotland) Act 2006 the commissioner of PIRC is required to: -
  - (b) where directed to do so by the appropriate prosecutor—
    - (i) to investigate any circumstances in which there is an indication that a person serving with the police may have committed an offence;
    - (ii) to investigate, on behalf of the relevant procurator fiscal, the circumstances of any death involving a person serving with the police which that Procurator Fiscal is required to investigate under section 1 of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016;
14. Such an instruction will have been issued in this case, either directly in writing or implicitly, to investigate the death of Sheku Bayoh, or both. It should be noted

that this power persists throughout the PIRC investigation, for example in the letter issued to PIRC following receipt of the interim report additional instructions were issued and a letter from Les Brown to Kate Frame PIRS dated 28 August 2015 (04748a).

## **2 (ii) Liaison between COPFS and PIRC**


15. The liaison between COPFS and PIRC would have been strong and effective whilst respecting each other's roles and the authority and primacy of COPFS. This relationship was underpinned by a Memorandum of Understanding.

## **2 (iii) Differences, if any, between COPFS liaison with Police Scotland and PIRC**

16. I am not aware of any beyond the obvious that they are two different organisations with different personnel and different roles and remits.
17. The Crown will not be involved in operational or investigational matters. Neither the police nor PIRC are an arm of the Crown. If a police officer or PIRC investigator asked for advice on whether the Crown considered a person to be a suspect or a witness, the answer is that it is not for the Crown to determine. Operational matters are day to day decisions in the investigation.
18. At a strategic level the Crown can provide guidance. If the question relates to a systemic issue such as whether the police or PIRC have the power to do something, the Crown may answer this at a high level.
19. The reason for this is that the Crown may be prosecuting the case or the case may be subject to an inquiry and any issues with the investigation and the way the evidence was obtained will be dealt with at the trial or inquiry. The Crown must maintain independence in order to deal with these issues objectively. If the Crown has made a decision on an operational matter, then this can affect the independence of the Crown at trial.
20. I have read the letter from PBW Law to the Lord Advocate dated 10 June 2015 (COPFS-04850 (a)). If the Lord Advocate is sent a letter this goes direct to Private Office. These are printed by officials, logged and submitted to me. I have written my suggested response on the top right of the first page. The official will frame the reply on my behalf. The issue in this letter relates to PIRC seizing PC Kayleigh Good's mobile phone and the interview strategy. These are operational matters for PIRC to address.

21. I have read the letter from PBW Law to the Lord Advocate dated 10 September 2015 and enclosed report of the findings of their investigation (COPFS-05179(a)). PBW represented a number of the police officers. I would have read this letter and report to get an impression of what the reply should be, but it is neither here nor there what the outcome of PBW's enquiries are. Les Brown will complete his own investigations in accordance with the independence and duties of the Crown.

## **2 (iv) Expectations and timescales for PIRC investigation**

22. These would be set by Les Brown, the head of the Criminal Allegations against the Police Division in consultation with the head of the PIRC. It is important that the investigation was thorough, and all avenues were thoroughly investigated which would drive the timescales for reporting. Given the profile of the death and its complexities, it would also be sensible to submit an interim report for consideration, which was done in this case.
23. I have read the statement of Ade Johnson (SBPI-00248) at paragraph 46: "We raised concerns about PIRC's approach to witnesses and he was the one that said he was going to take precognitions. He was going to do his own investigation. He was not going to rely on the PIRC anymore because there were so many flaws brought to his attention."
24. The point I was making in this meeting is that the Crown will be conducting their own investigation follow on from PIRC's reporting. I wanted the family to have the comfort that the Crown has a duty to investigate and would be conducting their own independent investigation.
25. 

## **2 (v) Health and safety**

26. Before I became a Law Officer, I was prosecuted the Transco case. This involved a year's preparation for the trial and the trial itself which took 7 months. The case proved in the end. It became apparent to me from my experience in that case that the Crown needed skilled and experienced health and safety prosecutors. Following the case, I set up the Health and Safety Unit. This brings expertise and experience in dealing with health and safety matters.
27. At an early stage in the investigation into the death of Sheku Bayoh, I gave an instruction to Les Brown to consider any systemic health and safety breaches

by Police Scotland. I asked him to speak to the Crown's Health and Safety Unit and the Health and Safety Executive. My thinking at the time was to look at and consider police training on the deployment of sprays and handling the arrest of a strong person, who may be intoxicated. If there was insufficient training, guidance or protocols relating to these matters, then that would raise an issue on potential systemic health and safety breaches.

That was fed into the Health and Safety Executive (HSE). The response from the HSE was that they would not be involved at that stage, but they would keep a watching brief.

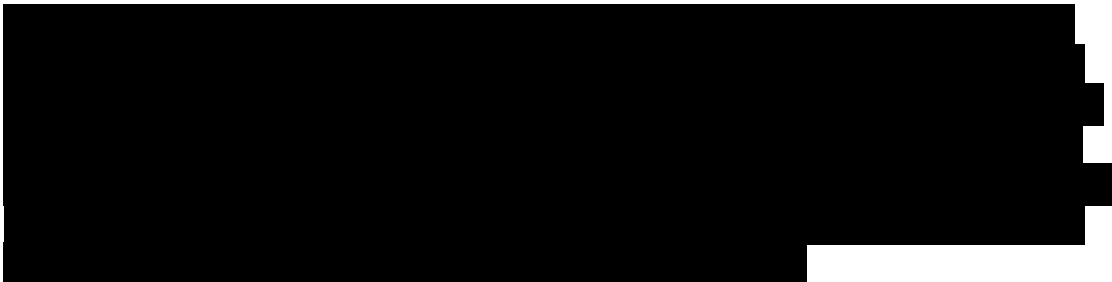
28. There cannot be two Units dealing with the same case. CAAPD and the HSU would not split the case.
29. I have been asked what the difference would be in the HSE being involved to investigation health and safety matters as opposed to PIRC. The HSE have the necessary expertise to look at the issue of training to deal with the situation faced by the officers. They would consider if the training and guidance was sufficient and whether there was a breach of Section 3 of the Health and Safety at Work etc. Act 1974. PIRC do not have the expertise to make such an assessment and whether it is a breach of health and safety law. The HSE do have this expertise.

### **3 Obligations and duties of COPFS under Articles 2 and 14 of the ECHR**

30. This would be well known to COPFS. For example, Article 2 imposes a positive obligation to investigate deaths at the hands of state agents that may have occurred in breach of article 2 of the Convention (McCann and Others v. the United Kingdom). "The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (Anguelova v. Bulgaria, no. 38361/97, § 137, Jasinskis v. Latvia, no. 45744/08, judgment of 21.12.2010, § 72).
31. With regard to article 14, it obligates that the enjoyment of the rights and freedoms in the Convention must be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. For example, in Kjeldson v Denmark [1976] EHRR 711 it was held that it is necessary to look at whether an individual had been treated differently because of discriminatory action which has as its basis or reason a 'personal characteristic' which distinguishes persons or groups from each other.
32. This article can only be engaged if another provision of the convention is engaged. Article 14 is not free-standing. It applies only where the discrimination

complained of falls within the ambit of a substantive Convention right (Watson v King 2009 SCCR 323).

33. In respect of a potential racist motive for a crime, the Crown and PIRC has a duty to “take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice might have played a role”. (Nachova and Others v. Bulgaria (no. 43577/98) Grand Chamber judgment of 06.07.2005 and Angelova and Iliev v. Bulgaria (no. 55523/00) 26.7.2007).
34. I have been asked what discussions I was involved in during the investigation in relation to the Crown’s obligations under Articles 2 and 14 of the ECHR in respect of Mr Bayoh and his family. I knew the law, which I have outlined above, at the time. I would be astonished if the Senior Procurator Fiscals in the investigation did not know this. We knew our obligations and did not need to discuss it.
35. I have been asked if PIRC’s obligations under Articles 2 and 14 of the ECHR were discussed and if the Crown had a role in ensuring that PIRC’s investigation was compliant. The Crown is an independent organisation and does not have a role in PIRC’s compliance with the ECHR. The Crown is not responsible for any deficiencies in PIRC’s investigation. Kate Frame, the PIRC, is an experienced prosecutor. She would be well aware of these obligations.
36. You have to complete the investigation before considering Article 2 compliance. It would be difficult to say that an incomplete investigation is not compliant.

37. 

#### **4 Post mortem examination and release of Sheku Bayoh’s body**

38. A post mortem examination took place on 4 June 2015 at the Edinburgh City Mortuary. The cause of death was certified as sudden death in a man intoxicated by MDMA (ecstasy) and alpha-PVP, whilst being restrained. The arrangement of the post mortem examination and release of the body was a matter for the head of the Criminal Allegations against the Police Division.
39. The results of the post mortem examination concluded that there was no evidence of natural disease that would have played any role in death. The thyroid gland was enlarged but not to such an extent that it would have caused airway compromise.

40. In terms of injury to the body, there were a number of minor blunt force injuries, namely bruises, lacerations and abrasions to the head, face, trunk and limbs. Internal examination revealed a fracture to the left first rib, just beside the spine and this could have been sustained whilst he was being restrained, albeit the possibility of it occurring during resuscitation cannot be completely excluded. Notably, in keeping with the history of him being restrained, there was an injury to the left wrist with corresponding bruising into the subcutaneous tissue. Internal examination of the head and face showed several areas of bruising in keeping with blunt force impacts to these areas (and could be in keeping with being sustained as a consequence of baton use), but there was no evidence of fracturing of the skull or facial bones.
41. Neuropathology was undertaken which showed changes consistent with evolving global ischaemic brain injury secondary to cardiac arrest with resuscitation and short survival period, but no other significant abnormality, including no traumatic injury. Notably there was no evidence of injury to the body that would account for the death of Sheku Bayoh.
42. Toxicology revealed in hospital blood, post mortem blood and post mortem urine the presence of MDMA (ecstasy), MDA and alpha-PVP. HHMA and HMMA are both metabolites of MDMA. MDA is also a metabolite of MDMA but can be encountered on its own or as a constituent of ecstasy tablets. If its level in blood is lower than that of MDMA, as was the case here, it is likely to be present as a metabolite of MDMA, rather than a separate drug on its own.
43. MDMA is a stimulant drug that can result in sudden death from a fatal cardiac arrhythmia and /or seizure, albeit there was no history of a seizure in this case. Alpha-PVP is a substituted cathinone and the database on New Drugs reports a number of health risks associated with this drug including neuropsychic (euphoria, psychomotor agitation, hallucinations/ delusions, seizure/tremor and paranoia) and cardiovascular (hypertension, tachycardia). This may explain Sheku Bayoh's behaviour prior to his death.
44. Toxicology also revealed in his urine nandrolone and metabolites, consistent with the recent administration of the anabolic steroid nandrolone. Given there was no evidence of heart disease, this drug is unlikely to have played a role in his death.
45. With regards to the role PAVA and/or CS sprays may have played in the death, from the information made available from police officers, it was said that the use of these substances had no immediate effects on Mr Bayoh. In addition, one civilian witness described how he had been on his feet and moving after one of these substances was deployed.

46. Given the circumstances provided, toxicological findings and lack of another cause of death at post mortem, the possibility of the controversial excited delirium syndrome had been considered in the case. Excited delirium syndrome is described as a life threatening condition that has a variety of causes, but is largely associated with drug intoxication, in particular stimulant drugs (MDMA and alpha-PVP are both stimulant drugs). It can include paranoid and aggressive behaviour as was reported in this case and has no pathognomonic findings at post mortem. It is said that individuals suffering from this condition, due to their behaviour, often come to the attention of police services and often die during or shortly after restraint.
47. However, it is not completely understood why such individuals die.
48. Taking everything into consideration and that the death was sudden in nature, there was no evidence of gross or histological natural disease that would account for death. Toxicology revealed MDMA and alpha-PVP and these drugs could potentially have caused sudden death at any time due to a fatal cardiac arrhythmia. That said, it was also recognised that restraint in itself can be a cause, or contributing factor, in some deaths and given the circumstances, that he was restrained at the time of his arrest and post mortem examination showed petechial haemorrhages that may represent a degree of asphyxia, it could not be excluded and as a result must be positively asserted that restraint could have had a role to play in the death either as a primary or contributory cause.
49. Overall, it was not possible for the pathologists to be sure what had been the most significant factor in death and as such the cause of death was best regarded by them as being sudden death in a man intoxicated by MDMA (ecstasy) and alpha-PVP, whilst being restrained.
50. The results of the post mortem examination would have informed the further investigations instructed by the Crown and undertaken by PIRC.
51. From my papers, I see that I was provided a copy of the post mortem report at the time.
52. I have been asked to comment on the statement of Ade Johnson (SBPI-00248) at paragraph 30:-

30. I am asked about when was the first time I found out about the post-mortem. It was in Aamer's office. It was on the Tuesday. I was never informed by Keith Harrower on the morning of the 4<sup>th</sup> May 2015 that the post-mortem would go ahead, Aamer had confirmed with the Lord Advocate Frank Mulholland that the post-mortem was to be on hold to allow the family to attend but also a pathologist that Aamer had instructed too.

53. I was not involved in arrangements about the post mortem. I do not recollect this but it may be that PIRC telephoned me to ask to hold the post mortem.
54. I have a vague recollection of the timing of the post mortem being an issue but I cannot remember the details. What Ade Johnson states about Aamer Anwar is noted by me. I have no reason to contradict it.
55. You would not have the family present at the post mortem examination for a whole host of reasons, the primary reason being the invasive nature of the post mortem. Identification is a different issue. The family may provide identification of the deceased. Identification must occur prior to the post mortem examination in order to ensure that the cause of death relates to the right person. This is an for proof in a prosecution.
56. If there is no suspect identified, then the body may be retained for a number of weeks to see if a person(s) is arrested and if a defence post mortem will be required.
57. I have been asked to comment on the statement of Ade Johnson (SBPI-00248) at paragraph 31:-

31. Aamer was on the phone because he was going to organise for us to go and identify the body and he was then told the post-mortem has already taken place. I was unable to hear because of the anger and noise in his office at that time because it was just a continuation of the catalogue of lies that followed. I think at the time PIRC had told Frank Mulholland that we had given the okay for them to go ahead with the post-mortem. I can recall the family liaison officer or somebody from PIRC saying that we had given him the okay for them to go ahead, and then it turns out that he said, "No, he had made a mistake."

58. I do not recall any of this. If I received the information I would pass it on. The issues of the post mortem are for PIRC and David Green, the Head of the Fatalities Unit. If the family asked to delay the post mortem, that seems perfectly reasonable to me, assuming it was not a delay for a long period of time and there was time to delay the post mortem. Post mortems can cause a family a lot of angst and are upsetting.
59. I have been asked to comment on David Green's email dated 6 May 2015 (COPFS-04924) which describes that the neuropathological examination of Mr Bayoh's brain has been conducted by Dr Colin Smith and "I appreciate that this does not meet the Lord Advocate's desires but that is simply not possible."

60. I am not sure what my desires were on this day. I may have been ensuring that the invasive samples were kept to a minimum.
61. I have been told that I may have given Aamer Anwar his choice of neuropathology expert and David Green is confirming that the examination has already taken place. Mr Anwar would be allowed to suggest another expert for the Crown to instruct or he will be able to instruct another neuropathologist on behalf of the family. I do not remember being asked this. In a case like this I could facilitate this because of the sensitivities of it and maintaining the confidence of the family.

## **5 Status of police officers and obtaining their statements**

62. I was aware of the refusal by officers of the Police Service of Scotland to provide operational statements which was hampering the progress of the investigation. I understood that the provision of statements was conditional on a reassurance that they would not be prosecuted which could not be given at that stage. That said, PIRC confirmed that the police officers in attendance were not regarded as potential suspects in a criminal enquiry and as a result should have provided operational statements. The police officers initially refused to provide statements and this caused concern and hampered the initial stages of the enquiry.
63. This was partly the reason why I concluded that it would be inappropriate to release an interim statement on the enquiry as the Crown was asked to do by the Chief Constable. One of the rationales for this decision was that this evidence was not yet available as it was an incomplete investigation at that stage. As a point of principle the Crown would not publish interim findings.
64. I considered that the refusal to provide an operational statement impacted upon the statutory duties of a Constable, particularly the provisions of Section 17 of the Police and Fire Reform (Scotland) Act 2012 relating to the duty to make reports to the appropriate Prosecutor, and indeed upon their oath of office as a constable. I wrote to the Chief Constable to advise him of my concerns and the decision not to release an interim statement (letter dated 21 May 2015 extracted below). From recollection, I do not think that I was party to discussions between Police Scotland and COPFS on these matters prior to 3 May 2015. I understood that Les Brown was in policy discussion of DCC Richardson on the provision for operational statements going forward.
65. The status of the officers is a matter for PIRC not the Crown. My correspondence with Police Scotland states that PIRC consider the officers to be witnesses. I was not involved in determining if the police officers should be witnesses or suspects.

66. It is a matter for PIRC whether the status of the officers changes at any point as the PIRC investigation advances. They must take that decision.
67. If a person is treated as a witness at a time when they should have been a suspect, then their statements given in this period of time could be inadmissible in a prosecution against them.
68. The reason I approached Police Scotland directly was that I was concerned about the police delaying providing statements despite PIRC stating they were witnesses. They have a statutory duty to provide statements. I cannot force the police officers to provide statements, but I can raise the issue. It was a concern that this was slowing the investigation and the family did not know what was happening.

## **6 Race**

69. As indicated above there is a human rights duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice might have played a role in the death.
70. As a result PIRC were instructed to (1) examine whether issues of race and/or evidence of racial motivation impacted on the police approach to the deceased (2) determine whether there was evidence that any of the principal officers involved had expressed racist views or opinions in the past and (3) to examine whether any of the principal officers were involved in an alleged incident in the Fife division of Police Scotland when officers were alleged to have texted racial slogans.
71. There may have been other specific instructions and directions on the investigation of racial motivation that I am not aware of or could not recollect at the time this statement was drawn up.
72. The Crown's duty is to investigate whether any racist motive (institutional or attributed to individuals) which has played a role in the arrest and death of Sheku Bayoh.
73. I note that the former Chief Constable, Ian Livingston before stepping down said publicly that Police Scotland are institutionally racist. It should be noted that the term 'institutional racism' does not refer to individuals, but to practices and processes that prevent members of the minority ethnic communities from obtaining the high standard of service from Police Scotland to which they are entitled. It is rarely about deliberate malice, ill will or prejudice within an organisation. It is about not fully appreciating and responding to the needs of ethnic minorities.

74. Following the Chokkar case, which I was involved in under double jeopardy legislation, and the report from Raj Jandoo into that case, the Crown embarked on a systemic review of all its policies and procedures to ensure that it was not institutionally racist. Following the Jandoo report, all staff (new and existing) were trained on diversity and discrimination, including racism and religious bigotry.
75. A steering group was set up to ensure that such policies and procedures were implemented, staff (including all ADs) were trained to ensure that issues relative to diversity and racism were dealt with at the highest level and area groups were set up reporting to the steering group on local issues. All new staff had to undergo the training within 6 months to a year of taking up post.
76. As indicated I chaired the steering group as a law officer.
77. With regard to the meeting with Ms Deborah Coles, the executive director of INQUEST, I have no specific memory of the meeting.
78. I have read the statement of Mr Johnson (SBPI-00248). At paragraph 43 he suggests that race only became a factor in the PIRC investigation after Mr Anwar contacted me to ask it to form part of the remit. Mr Anwar may have suggested it, I do not dispute that. Race was front and centre from the outset of the investigation. A black man has died in police custody, it was obvious.
79. I am aware of how important race was to this investigation from my experience of the fallout from the Chhokar case and the Jandoo report concluding that the Crown was institutionally racist. This caused rewriting of policies and practices to ensure the culture of the organisation was the best it could be. I did a lot of work in the Crown on policies and practice in areas such as race, LGBTQI and transgender issues before these were hot topics in the media. I was the first head of the prosecution in Europe to speak at a transgender conference, held in Aberdeen.

## **7 Media**

80. PIRC and Scottish Police Federation (SPF) media releases are of course a matter for PIRC and SPF. I was aware that the family were concerned and upset at such releases and anonymous briefings and as a result I wrote to the Chief Constable on 21 May 2015 expressing concern about SPF press briefings. The following is an extract from this letter: -

“I share your concern in relation to the briefing of the press and agree that it is very unfortunate that the Police Federation saw fit to put information into the public domain at such a sensitive time and when the facts had still to be established. This was in my view unhelpful and caused the family of the deceased considerable distress on the day that I met with them at Crown Office together with their solicitor...”

81. I understand that he shared my concern.
82. In order to give some comfort to the deceased's family, in my letter to the Chief Constable I stated as follows; -
- "The family of the deceased have already commented negatively on the multiplicity of accounts given to them (and inconsistencies between the various accounts) in relation to the circumstances of the death of Mr Bayoh. I have advised the family that the Crown will not be making any public comment until the investigation is completed and I consider that this undertaking must be met."
83. As a result of these concerns, I took the unusual step of issuing a press statements calling for the end of such briefings and to let the Crown and PIRC get on with its job of investigating this anxious and complex case.
84. I have read the statement of Mr Johnson (SBPI-00248) at paragraph 44 where he states that me calling publicly for calm and commentary to stop, made the family feel that they were put in the same bracket at the SPF.
85. I was not intending to put the family in the same bracket as the SPF. In the media release (COPFS-00975) I stated: "However, speculation and a running commentary on the investigation can be upsetting to the family of Sheku Bayoh as well as the families of the officers involved." I was not suggesting the family were leaking information and briefing the press. The terms of this media release is pored over by officials and the Head of Communications to get it right. I am sorry if Mr Johnson is upset by this, but in my opinion it could not have been phrased better. It was not directed at the family.

## **7 Family liaison**

### **(i) [and (iv)] Approach to and meetings with Mr Bayoh's family**

86. Given that this was a death in police custody and the allegations that the death was racially motivated, I took the view that it was important that the family of the deceased were given reassurance that the case would be properly and thoroughly investigated. Of course, the Crown does not represent the family of the deceased, but nevertheless it is important that the family are listened to, their views considered and acted upon if appropriate. I considered that it was important that the family should have confidence in the investigation. Confidence is often hard won but easily lost. I was aware, of course, of the damage done in the investigations of the death of Steven Lawrence and Surjit Singh Chokkar by the failure to treat the family with dignity and respect and have proper, timely and effective lines of communication. That is why I considered it appropriate that the Lord Advocate met with the family and their solicitor. I did this often, on about a two monthly basis and on request. At these meetings the family [siblings] had travelled from London, and from Fife [partner]. Their Solicitor attended also. A letter dated 14 October 2015 (COPFS-04836 (b)) which I authored to Mrs Paton sets out the Crown's approach.

87. I have read the statement of Collette Bell dated 24 January 2023 (SBPI-00247) where she stated at paragraph 54: "I only attended meetings with Frank Mulholland. I did not have any interactions with James Wolffe... Then when I was attending the meetings, I left angry. I didn't leave feeling any better. I felt worse and, a lot of the times, very angry." I was not aware of that.

88. I have read the statement of Lorraine Bell dated 13 January 2023 (SBPI-00237) where she states at paragraph 45:-

I think the first couple of meetings with Frank Mulholland he seemed to be okay, but then it sort of turned a corner and he said something, I don't know if it was PIRC or if something just fell out of his mouth but that upset Collette. I can't remember exactly what it was, but I could remember Collette being annoyed and speaking back to him. I am asked how he dealt with being challenged by Collette. I think he thought it was quite funny that he was getting challenged by Collette or rude, that he was getting challenged and that he wouldn't have expected that to take place.

89. I was not aware of this. I cannot sugarcoat the information I give to the family. I have to be honest, but not brutally honest. I will tell them things that will cause upset. I certainly did not laugh at anything. There was nothing to laugh at. This was a matter of the utmost seriousness. I cannot comment further as I do not know what I am supposed to have said.

90. I have been asked what is the role of the Victim Information & Advice service ("VIA") in liaison with the family and for my recollection of the involvement of VIA. VIA would become involved but not at the early stage. The last thing you want is for organisations competing with each other and stepping on each other's toes. The PIRC FLO was appointed at the beginning and they were meeting with me. VIA are part of COPFS. They provide information and advice in the criminal process, when proceedings are raised.

**(ii) Disclosures to Mr Bayoh's family**

91. At the meetings I gave an indication of the general direction of the inquiry and the issues where were being investigated and addressed. I did not discuss the evidence in any detail as the enquiries were not yet completed. I considered that it would be inappropriate to discuss the evidence with them beyond the general direction of the enquiry. I was also aware that the partner of the deceased, and perhaps other members of the family, could be witnesses to fact and as a result it would not be appropriate to discuss the evidence in their presence. I understand that this concern was understood.

92. I understand that Mr Brown may also have his own lines of communication with the family. These did not involve me.

93. I obviously cannot comment on any conversations with the family which did not involve me.

**(iii) Undertaking and promises**

94. I am not aware of any undertakings and promises made by me beyond the general one that the enquiry would be thorough, that the issue of possible racial motivation would be investigated, that I would continue to meet with the family and that the Crown would not make any public statement on the investigation.
95. I have been told that Mr Brown in his statement to the Inquiry (SBPI-00419) stated:

The meetings also provided the opportunity for the Bayoh family and Mr Anwar to request access to information for the purposes of instructing their own experts. My recollection is that Frank Mulholland was very receptive to these requests and agreed to facilitate this. In particular my recollection is that at a meeting with the Lord Advocate (Mulholland) Mr Anwar requested that he be provided with redacted witness statements relating to the restraint of Mr Bayoh that the Lord Advocate agreed to. This undertaking was communicated to PIRC who facilitated their provision.

96. I have read a Minute by Mr Les Brown to the Lord Advocate (Wolffe) dated 13 October 2017 (COPFS-03325a) which includes the following note:

I have reviewed previous correspondence and it seems clear that there was an understanding dating back to early 2016 that reports that were commissioned during the PIRC investigation would be disclosed solely for the purposes of instructing their expert, Dr Cary. Disclosure of some of these reports was made on that basis some time ago.

97. I cannot remember it but if I did give an undertaking for disclosure of reports then that would be fine. There is no reason not to disclose the reports. The case would go to a criminal prosecution or at least an FAI. They would receive disclosure of these reports in the course of those proceedings. This would include the PIRC reports and the expert reports. This is not an exceptional undertaking.
98. Undertakings are not binding on the Lord Advocate's successor. However if an undertaking is given by me on behalf of the Crown, then I would expect it to be continued unless it is wholly unreasonable.

**9 Parallel investigation**

**(i) Investigation conducted on behalf of the SPF.**

I was aware of a parallel investigation carried out by or on behalf of the Scottish Police Federation the results of which were detailed in a letter from Peter Watson dated 3 September 2015 (COPFS-05179 (a)). [REDACTED]

**(i) Lord Advocate's involvement in addressing concerns**

99. I wrote to the Chief Constable on 21 May 2015 expressing my concern at the SPF briefing to the press. Here is an extract of the letter: -

100. "I share your concern in relation to the briefing of the press and agree that it is very unfortunate that the Police Federation saw fit to put information into the public domain at such a sensitive time and when the facts had still to be established. This was in my view unhelpful and caused the family of the deceased considerable distress on the day that I met with them at Crown Office together with their solicitor."

101. I was also aware that Mr Brown instructed PIRC to investigate the family's issues as detailed by their solicitor Mr Anwar. These instructions and the results of the enquiries are detailed in the letter from the PIRC to Mr Brown dated 30 October 2015.

102. I was so concerned about the press briefings and the effect that that was having on the family that I unusually issued a press release on 22 October 2015 calling for restraint and to allow the Crown and PIRC to get on with their jobs.

**10 Instruction of expert witnesses**

**(i) Duties of COPFS in the instruction of expert witnesses**

103. From recollection there is a chapter in the Book of Regulations which governs the instruction of expert witnesses. I no longer have access to this, but you will find in detail the instructions which Procurators Fiscal are required to follow.

104. With regard to the law, the general rule is that examination of witnesses must be on facts which fall under their own observation, not on matters of opinion or inference, which are for the jury, not the witnesses.

105. An exception to the general rule against examining witnesses on matters of opinion occurs wherever the issue involves scientific knowledge, or acquaintance with the rules of any trade, manufacture, or business, with which persons of ordinary intelligence are not likely to be familiar. It should be noted that the witness can only give opinion evidence within the areas of the witness's expertise.

106. An expert witness, in Scotland called a skilled witness, does not need to know, and ordinarily will not know, the facts of the case from his or her own knowledge. Accordingly, his or her knowledge of the facts has to be obtained from information supplied to him or her and from his or her inspection of documents and real evidence. It may, with the trial judge's agreement, be supplemented by his or her presence in court during the testimony of witnesses to fact. If it is intended to do this, there should be an application to the Court at the outset.
107. The need for more than one expert opinion must always be considered. An expert witness must be given all necessary and relevant information to enable him or her to provide an informed opinion of matters within their expertise. A case conference can be held with the experts who are to undertake the work in order to ensure that they are aware of all relevant information and that their work is focused and their instructions are clear.
108. All relevant lines of enquiry should be followed whether or not it is of benefit to the prosecution and whether or not it supports the defence case.
109. Relevant case law is as follows: -
110. **Davie v Magistrates of Edinburgh** 1953 SC 34 at p 40 per Lord President Cooper, “Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or the judge sitting as a jury, any more than a technical assessor can substitute his advice for the judgement of the court [SS Bogota v SS Alconda 1923 SC 526]. Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the judge and jury. In particular the bare ipse dixit of a scientist, however eminent, upon the issue in controversy, will normally carry very little weight for it cannot be tested by cross examination not independently appraise, and the parties have invited the decision of a judicial tribunal and not an oracular pronouncement by an expert.”
111. In **R v Turner** [1975] QB 834 [Approved in **R v Jordan** [1977] AC 699 and in **R v Skirving** [1985] 2 WLR 1001] Lawton LJ stated “....the opinion of scientific men upon proven facts may be given by men of science within their own science. An expert’s opinion is admissible to furnish the court with scientific information which is likely to be outside the experience of a judge and jury. If on the proven facts a judge or jury can form their own conclusions without help, then opinion of an expert is unnecessary. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters

of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does.”

112. In **Young v HMA** [2014] HCJAC 113 Lord Eassie delivering the opinion of the court held that : -

1. Evidence about relevant matters which are not within the knowledge of everyday life may be admissible if it is likely to assist the jury in the proper determination of the issue before it;
2. Must be relevant and not collateral;
3. Must be based on a recognised and developed academic discipline. It must proceed on theories which have been tested [both by academic review and in practice] and found to have a practical and measurable consequence in real life. It must follow a developed methodology which is explicable and open to possible challenge and it must produce a result which is capable of being assessed and given more or less weight in light of all the evidence before the finder of fact;

113. In the UKSC case of **Kennedy v Cordia Services LLP** 2016 SLT 209 the duties and admissibility of expert evidence is summarised from paragraph 38 onwards. The duties of the expert witness are summarised as follows:

See **R v Harris and others** [2006] 1 Cr App R 5 at p 55 and **R v B [T]** 2006 EWCA 417

(1) Expert evidence presented to the court should be and seen to be the independent product of the expert uninfluenced as to form or content by the party instructing the opinion

(2) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of advocate.

(3) An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinions.

(4) An expert should make it clear when a particular question or issue falls outside his expertise.

(5) If an expert's opinion is not properly researched because he considers that insufficient data is available then this must be stated with an indication that the opinion is no more than a provisional one.

(6) If after considering defence expert reports an expert witness changes his view on material matters, such change of view should be communicated to the without delay to the party instructing the opinion and when appropriate to the court. A

supplementary report may require to be produced in consultation with the party instructing the opinion.

(7) Reference to literature or any other material which may assist the court should be referred to in the report.

(8) Details of the experts academic and professional qualifications, experience and accreditation relevant to the opinions expressed in the report and the range and extent of the expertise and any limitations upon the expertise should be stated in the report.

## **(ii) Choice of expert witnesses**

114. The choice of experts [and instruction] lies with the Crown. The Crown may take advice from a reporting agency such as PIRC or the police on the appropriate experts to instruct. In other cases where the Crown is not involved prior to reporting, the reporting agency, including PIRC, may identify and instruct appropriate experts without recourse to the Crown.

115. It is made clear in the memorandum of agreement between the Crown and PIRC that the final decision on the instruction of expert witnesses lies with the Crown.

116. In the investigation into the death of Sheku Bayoh, PIRC per points number 6 and 7 in the letter from PIRC to Les Brown dated 30 October 2015 set out possible experts to be instructed.

## **Issues regarding Dr Steven Karch**

117. The recommendation of this expert was initially proposed PIRC. It would have been done through an assessment of his experience and qualifications. Dr Karsh is a Forensic Pathologist who is expert in cardiac pathology, he is a Fellow of the Faculty of Forensic and Legal Medicine of the Royal College of Physicians London. He served as a cardiac pathologist at the office of the San Francisco Medical Examiner and is the author of a number of books and more than 200 papers. He has given evidence in a number of trials in this country (UK) including for the Crown in the Harold Shipman prosecution.

118. As far as I can recall concerns were expressed that Dr Karch is a believer in the contentious syndrome, excited delirium. He had sat on a special panel review which issued a 44-page report on excited delirium in 2011, voicing a consensus by the panel's medical experts that the condition is indeed real.

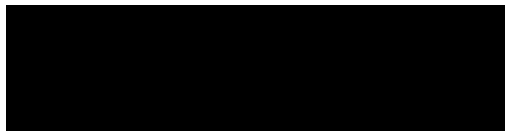
119. The contrary view is that excited delirium is an excuse on behalf of the state for a death in custody being a meaningless catch-all term that appears in restraint cases when the individual is seen acting aggressively and is on drugs or is mentally ill.

120. It is my recollection that there was a misunderstanding that Dr Kirch was instructed on excited delirium. This was not the case. He was instructed on his expertise on cardiology.
121. In any event, I understand that Dr Kirch gave an interview to the Sun newspaper published on 6 April 2016 commenting on the case which made him unsuitable to be retained as an expert instructed by the Crown.
122. A number of points can be made here: -
1. The decision on instructing experts is a matter ultimately for the Crown.
  2. The Crown acts in the public interest and does not represent any party.
  3. The Crown has a duty to investigate all avenues of enquiry.
  4. The issue of excited delirium was a legitimate avenue of enquiry notwithstanding that Dr Kirch was not asked to opine on the matter.
  5. The Crown would be failing in its duty if it took a decision in the case without having obtained expert opinion on this issue.
  6. Dr Kirch owes a duty to the court as an expert witness. An expert does not represent any party to the case. An expert witness will provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. His interview to a newspaper was inconsistent with his duties on an independent expert.
  7. It is open to the Crown to disregard the expert opinion.
  8. It is open to the Crown to instruct other expert opinions on the same topic. I have been involved in cases, and Inquiries, where the Crown has led contrary expert opinion. In these circumstances the court has the fullest picture.
  9. Taking account of the family's concerns, views and wishes is important, but the Crown's duty overall is to do justice for all affected by a case.

## **11 Handover of investigation into Sheku Bayoh's death to Mr Wolffe KC**

123. As with the appointment with all new Law Officers, a full briefing would be carried out by Crown Office Officials and SGLD senior lawyers.
124. I spoke to James Wolffe by telephone and re iterated the importance of this enquiry including the need to maintain good and regular liaison with the family.
125. I have now read a number of statements from members of the family on liaison after I had stepped down. This is disappointing to read, particularly around the publication of the decision to take no proceedings. As I was not involved at that time there is nothing I can usefully add on this matter.

126. I believe the facts stated in this witness statement are true. I understand that this statement may form part of the evidence before the Inquiry and be published on the Inquiry's website.



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