THE SHEKU BAYOH INQUIRY

SUBMISSION ON BEHALF OF THE SOLICITOR GENERAL FOR SCOTLAND

ON THE MATTER OF APPARENT BIAS AND FAIRNESS

Introduction

1. By letter of 29 April 2025, the Solicitor to the Inquiry advised that the Inquiry would hold a public hearing on 12 and 13 June, and invited submissions, on the fairness of the conduct and procedure adopted by the Chair in meeting with the families of Mr Bayoh. This submission sets out the position of the Solicitor General on that matter.

2. Two points might be mentioned at the outset. First, in keeping with the approach taken on behalf of the SPF, Ms Short and Mr Walker, the Solicitor General would not see the issues raised as being about personal bias on the part of the Chair. The issues raised in (what will be referred to for convenience as) the SPF Submission are concerned with the objective appearance of events not with the subjective intentions of those involved. It is to be emphasised nevertheless that the Solicitor General shares the view that there is no basis for assuming anything other than good intentions on the part of the Chair.

3. Secondly, questions have been raised, at §78 of the SPF Submission and in correspondence on behalf of the Chief Constable, about the procedure adopted by the Inquiry for addressing the concern raised about apparent bias and fairness. While there may be force in certain of the points made, particularly as regards the nature and scope of the proposed hearing, the issues raised in the SPF Submission are very serious, as would be the ramifications of decisions to accede to the motion made. It is appropriate that CPs be given the opportunity to set out their position, at least in writing, and that there is a public record of what was said about the present matter.

4. The Solicitor General acts, and must be seen to act, in the public interest. The Solicitor General's role as a Core Participant in the present Inquiry is as the head of the systems of criminal prosecution and investigation of deaths in Scotland for the purposes of the issues under investigation by the Inquiry. In addition, it would be for the Solicitor General to determine if there were circumstances disclosed in the Inquiry's

investigation that required reassessment by the Crown of whether criminal prosecutions should be considered in connection with the death of Sheku Bayoh.

5. The Solicitor General is mindful that, subject to the matter just mentioned, it is for the Inquiry to complete the state's investigative obligations under Article 2 ECHR. The concerns discussed in the SPF Submission, no matter how they are resolved, have the potential to undermine and impede that task, and to have done so already. In this situation, it would not be open to the Solicitor General, standing her constitutional position, to decline to set out a position on the concerns raised. She would see the requirement to do that as arising also from her role as a CP with an obligation to assist the Inquiry.

Summary of the Solicitor General's position

6. The Solicitor General has reflected very carefully on the issues raised in the SPF Submission and in the material disclosed by the Inquiry. The Solicitor General is mindful of how long the Inquiry has lasted and the attendant effort and time that has been invested. It is therefore with great regret that she has come to the view that the circumstances of the Chair's meetings with Mr Bayoh's families and their legal advisers, seen in their proper context, do satisfy the test for apparent bias. The Solicitor General concludes that the procedure followed by the Inquiry was unfair.

7. The Solicitor General's conclusions are based on careful analysis of the following matters: the applicable legal principles; the content of the disclosed meeting minutes and other documents; and the surrounding context.

The applicable legal principles

8. Subject to what follows, the Solicitor General does not take issue with the articulation of the appropriate legal principles and the overall tests set out in the SPF Submission.

9. It is not in doubt that the principles of natural justice apply to the conduct of the Inquiry.[1] The "rule against bias" is one aspect of this requirement[2]. As stated above, we are concerned here with – and only with – the appearance of bias. The test for whether

[1] S.17(3) of the Inquiries Act 2005; *Greater Glasgow Health Board v Chairman Scottish Hospitals Inquiry* 2025 SLT 205; and see also *R v Lord Saville of Newdigate & Others* [2000] 1 WLR 1855 at §§ 32E & 38.
[2] *Kanda v Government of Malaya* [1962] AC 322

apparent bias on the part of a decision-maker or process is made out is that articulated by Lord Hope in *Porter v Magill*[3]*:*

> "*The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*

10. In the context of whether private meetings with a decision-maker risked an appearance of bias, the *Porter* test might be expressed this way: whether the observer, having considered the facts, would conclude that there was a real possibility of the decision-maker being influenced by the meetings[4].

11. In asking what an observer would make of the present circumstances, it is important to keep in mind what the court said in *Helow v Advocate General for Scotland*[5]. The task for anyone assessing the concerns in the SPF submission is not to set out their own personal views. It is to consider what the person described below might make of the disclosed circumstances. That is the approach that the Solicitor General has followed.

> *"The observer who is fair minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v Johnson (p 509, para 53). Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.*

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[3] [2002] 2 AC 357, at § 103
[4] Cf. De Smith, *Judicial Review,* 9th edition*,* § 12-034
[5] 2009 S.C. (H.L.) 1, §§ [2]-[3]

Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

12. As just indicated, the observer would want to consider the Inquiry proceedings as a whole; the issue must be "judged in the round"[6]. That very point was made on behalf of the Inquiry in its letter of 6 May 2025 to Police Scotland Legal Services. The focus presently may be individual meetings, but the fairness of those can only be considered against the whole relevant background. The observer would want to ask herself whether that broader context addressed any concern about the possibility of bias arising from the meetings. She would want to consider the way in which the Inquiry had undertaken its investigation and other work, and to consider whether that allayed any concerns.

13. As an aspect of the principles applicable to apparent bias, the SPF Submission says that[7] "*it is settled that any decision maker tasked with arriving at a decision fairly and in compliance with the tenets of natural justice should not meet privately or secretly with a party with an interest therein*". The SPF Submission also indicates[8] that protestations by a decision-maker that they are not in fact biased are unlikely to be relevant (a point also made by Lord Hope in *Porter v Magill*[9].)

14. Subject to one caveat, as statements of general principle, this submission is in agreement with these points. The caveat is that it is always necessary to consider the circumstances. It may be true that meetings of the sort described in the quotation ought not to happen. The question is whether, in the circumstances, the meetings in the present case meet the *Porter v Magill* test. As indicated, that question falls to be determined by considering not just the fact that meetings took place but also – and this is the critical issue in the present case from the Solicitor General's perspective – the

[6] Beer, *Public Inquiries* 11.16(7)
[7] At §4
[8] At § 11
[9] At § [104]

indicated content of those meetings, as well as the broader context in which that took place. To be clear, the SPF Submission does not suggest that any different approach should be taken to the analysis.

15. A key part of the present context is that we are concerned here not with an adversarial court process but with a public inquiry under the 2005 Act. It is therefore necessary to consider the way in which the principles discussed in the preceding paragraphs fall to be applied in that context. Guidance on that matter is to be found in the discussion of Toulson LJ in *R (on the application of Associated Newspapers Ltd) v The Rt Hon Lord Justice Leveson*[10]:

> *"A duty of fairness does not exist in a vacuum. In that respect a duty to be fair is like a duty of care. In a case of a professional retainer, the professional person's duty of care is inexorably tied up with what he is retained to do. This point was eloquently made by Oliver J in Midland Bank v Hett Stubbs and Kemp [1979] 1 Ch 384, 434. So in the present case, the starting point for any consideration of the Chairman's duty of fairness is the task which he was appointed to perform under his Terms of Reference."*

16. Applying that methodology, Toulson LJ came to this view about the Leveson Inquiry[11]:

> "*Above all, it is of the greatest importance that the Inquiry should be, and seen by the public to be, as thorough and balanced as is practically possible."*

17. This submission has sought to apply the methodology suggested by Toulson LJ, and it has come to the same view. The remit of the present Inquiry, in part, requires it to perform the same function as a Sheriff would undertake in a Fatal Accident Inquiry under the 2016 Act. The Sheriff undertaking that task is acting in a judicial capacity,[12] and the usual principles of procedural fairness that arise in that judicial context apply. Thus the comparison the SPF Submission seeks to draw with the Warren Fenty FAI is apposite.

18. The Inquiry is also tasked with addressing a number of points that could not be captured or fully captured in the FAI process. Overall, the Inquiry requires to

[10] [2012] EWHC 57 (Admin), § [35]
[11] At § [53]
[12] *Black v Scott Lithgow* 1990 SC 322 at p.328

investigate, and the Chair requires to determine, a number of very sensitive and serious questions in relation to which there are opposing interests among some CPs. These questions include whether the force used by each individual officer involved in the confrontation with and restraint of Mr Bayoh was no more than absolutely necessary; as well as whether their actions were racially motivated; as well as whether their actions caused or contributed to Mr Bayoh's death. Sensitive questions about the interactions of state agencies with Mr Bayoh's families and about race require to be addressed. Compliance with Convention rights and adherence to other standards requires to be considered.

19. Section 2(1) of the 2005 Act may preclude the Chair from determining civil or criminal liability, but s.2(2) is a reminder of how close to that point he is required to go where that is indicated. Plainly, the decisions to be reached by the Chair on the issues before him may have serious ramifications for those involved and for society. In this situation, the approach suggested by Toulson LJ falls to be applied: the obligation on the Inquiry was to take – and to be seen to take – as balanced an approach to its investigation as was practically possible. It follows that there really is no room here for watering down the usual rules and principles of apparent bias and of natural justice. It is against that legal framework that the present circumstances fall to be measured.

The Chair's meetings with the family and their legal representatives

<u>The setting-up and early months of the Inquiry</u>

20. On 12 November 2019, the Cabinet Secretary for Justice announced that there would be an inquiry into the circumstances surrounding the death of Sheku Bayoh. Terms of reference were disclosed on 21 May 2020. The Inquiry itself is understood to have been set up around 30 November 2020. On that date, the Chair provided an opening statement. He emphasised that the Inquiry was independent, that it was "entirely impartial" and that its role was inquisitorial. The Solicitor to the Inquiry had said something similar in her letter of 26 November 2020 to Professor Watson. She said that the Inquiry was independent of any person or organisation[13].

21. On 30 April 2021, the Chair provided an update. He said[14] that "*transparency and openness would be at the heart of this Inquiry*." The Chair's statement set out an assurance – in public – to the family of Sheku Bayoh and to all others with an interest

[13] PH-00014, 1/3
[14] PH-00015, 2/1

in the Inquiry that the investigation was moving forward with focus and determination. He explained that discussions with CPs were underway, and that these discussions were being conducted between the legal representatives of CPs and the legal team instructed to represent the Inquiry[15]. The Chair indicated that it would be by working in this way that everyone would have an opportunity to fully engage with the Inquiry's work.

22. The Chair also explained that a Framework Document would be used to enable the Inquiry to work through the matters that required to be determined under the Inquiry's Terms of Reference. Five matters were particularised, on the basis, presumably, that they were thought to contain the most important factual issues for determination. The matters mentioned included post-incident management, liaison with the family and race and equalities[16].

The meeting of 4 November 2021

23. According to the letter from the Solicitor to the Inquiry of 5 March 2025[17] ("the March '25 letter"), a meeting took place on 4 November 2021. Of what took place, the only thing referred to in the March '25 letter was this: "*At the 4 November 2021 meeting there was a discussion about the families' approach to their presentation on the life of Sheku Bayoh to be made on 10 May 2022 at the beginning of the first hearing*."

24. No minute of this meeting is said to exist. The Inquiry has provided a brief email chain[18], comprising two emails, regarding the arrangements for the meeting (though not any correspondence explaining how or why the requirement for a meeting came about). The email of 1 November 2021 from Aamer & Anwar & Co ("AA&Co") apparently had an agenda attached to it. That agenda has now been provided by the Inquiry, as has some further material. The email asks a number of questions about the detail of the evidence recovery process and suggests that the Inquiry provide a "schedule of s21 notices".

25. In her reply of 2 November, the Inquiry Solicitor said she would share the notices and reply on the individual points raised. Some correspondence relative to that has now been produced. This includes an email of 3 November from the Solicitor to the Inquiry

[15] PH-00015, 2/3&4
[16] PH-00015, 2/3-4
[17] PH-00013, 19/1
[18] PH-0001, 3/1-2

to AA&Co[19]. Attached to this email were certain documents. One of these, an overview of the s.21 Notices, has been produced. A second, a list of action points from an earlier meeting, has not.

26. The disclosed bundle contains what bears to be a speaking note for the Chair's use at the meeting[20]. It is unclear who was present at the meeting, but it appears not in doubt that the Chair and members of the Inquiry team were present along with members of the family and their legal representative(s). The speaking note would indicate that the Chair intended to tell the family that they would be "at the heart" of the Inquiry. Among the things that were apparently to be done to achieve this, there is a reference to keeping the family in the loop. The speaking note says on that matter: "*I think that in the summer we rather lapsed in that regard and I am sorry for that*".

27. That comment raises the possibility that the meeting itself and the statement – apparently made for the first time – that the family would be at the heart of the Inquiry may have come after the expression of some form of concern or complaint. In that regard, a comment in the March '25 letter might be of some interest: "*There was a real prospect that [the family] would not engage at all with the Inquiry process or at some point would cease to engage with it*."

28. The impression, that a concern or complaint – and perhaps even the prospect of disengagement – gave rise to the meeting, is supported by item 5 on the speaking note: "*Delay by the inquiry using legal powers*". Under that heading, there is a discussion of an impasse of some kind, and a reference to the Solicitor General having been advised by the Chair that the Crown's position on the matter in question was "*wholly unacceptable and untenable*". The Chair records how his intervention had broken the "*logjam and within days the matter was resolved*." He says that this experience reinforced in his mind the importance of the Inquiry being prepared to take a strong line.

29. No written record has been provided of what anyone – and not just the Chair – actually said at the meeting. But assuming the meeting covered the matters referred to in the speaking note, the discussion went well beyond the explanation of the meeting provided in the March '25 letter. The speaking note comprises 17 pages (including one

[19] PH-00033
[20] PH-0002

that is apparently a blank). The single matter referred to in the March '25 letter is referred to on the final page. Within the pages preceding it, are indications of an intention to discuss substantive issues. In particular, the Chair appears to have intended to invite comment on at least three of the five matters particularised in April 2021: the family's "*journey… and frustrations*" since 3 May 2015 (i.e. post-incident management and liaison with the family); and on questions of race.

30. Confirmation that discussion of these matters did take place comes in a series of letters from the Chair to family members just under one week after the meeting[21]. The Chair said that he felt "*humbled and honoured*" that the family members had shared the story of their loss and of the "*frustration you feel at the subsequent actions of the police and those investigating your brother's death*." He said: "*I want you to know that I heard your concerns about race*." He then set out his commitment to put the family at the heart of the Inquiry and to finding out the truth of what happened to Mr Bayoh on 3 May 2015 and identifying any failures.

Preliminary hearing 18 November 2021

31. At the hearing on 18 November 2021, the Chair said, apparently for the first time in public or to any other CP, that the family of Mr Bayoh would be "at the heart" of the Inquiry. Little detail of what that involved was provided beyond an indication that the Chair had begun discussion with the family about what form the opportunity to family members to speak publicly about Mr Bayoh would take. There was no indication in this statement that the discussion in question was with the Chair personally. Nor was there any indication that a discussion had already taken place which went significantly beyond the single matter mentioned at the hearing. The Chair repeated the commitment to carry out an investigation that was "*independent, impartial, fair and effective*".

Email exchanges 8 & 22 February 2022

32. The PH bundle contains an email exchange[22] between the Inquiry and AA&Co concerning the rearrangement of a proposed meeting involving the Chair and the family. The suggestion that the meeting be rearranged came from the Inquiry. The reason was that the Chair was currently considering the question of undertakings. The

[21] PH-0003-0005
[22] PH-00010, 9/1

email said: "*You will appreciate that we need to guard against any possible perception of partiality*."

33. That statement might be thought to indicate a view within the Inquiry: that the Inquiry may be subject to the usual principles applicable to apparent bias discussed above; and that discussions in private with a party prior to a decision being taken by the Chair on a contentious matter risked expressions of concern that those principles may have been breached.

The meeting of 13 April 2022

34. This meeting appears to have involved the Chair, at least one member of the counsel team, the family and representatives from AA&Co. In the March '25 letter the Solicitor wrote: "*The meeting of 13 April 2022 was essentially a follow up meeting to discuss the details ahead of the presentation [i.e. the so-called pen portrait of Mr Bayoh]*." While that may not be inconsistent at least with what is said in the minutes, it may be important to note that the minutes additionally record the Chair making this statement (emphasis added):

> "*When I spoke to you before when we met – each of you gave me **a very powerful account** of the way in which **you were treated** on 3 May 2015 and subsequently. I will want you to give evidence in due course about that*."

35. The Chair is recorded as going on to say of the presentation: "*Think that will be a very strong start to the hearings*."

The meeting on 21 November 2022

36. The March '25 letter says that aside the meeting of 13 April 2022, "*meetings were held on a more or less annual basis*". The letter states[23]:

> "*The purpose of the annual meetings was to address issues relating to the welfare of family members as the Inquiry progressed and the impact on family members of the processes and procedures of the Inquiry. The Chair made it clear that anything of an evidential nature would require to be examined in evidence in the Inquiry*."

[23] PH-00013, 19/2

37. The natural reading of what is said in the letter is that, in order to check up on the welfare of the family, the Chair and other members of the team met with them on an occasional, roughly yearly, basis. The natural reading of the letter is that what was discussed at meetings was in keeping with that indicated purpose: the discussion was confined to issues of welfare. That reading of the March '25 letter is reinforced by the final sentence in the quotation. It indicates to the reader the provision of some sort of warning, caution or reminder that discussion of evidence was a matter for public hearings rather than private meetings with one CP.

38. The natural reading of the March '25 letter just suggested is not easily reconciled with the minute of the meeting of 21 November 2022. No correspondence explaining the reasons for the meeting has been provided. It is certainly true that the minute discloses discussion of what might be described as welfare issues (abuse of the family and of Mr Anwar). But the discussion goes well beyond that. The following passages might be mentioned.

39. One of the assessors, Mr Bhatt, is recorded as having said this (emphasis added)[24]:

> "*Sad to hear what I am hearing – won't come as a surprise. What we can do is support you – don't have the magic wand to change the world* ***but what we can is try to help achieve what you want***."

40. Context is of course everything. The minute records two people as having spoken before Mr Bhatt: a family member and Mr Anwar. It seems likely that at least part of what they each said was concerned with – or had as its context – recent racial abuse of the family (and perhaps Mr Anwar also). But the family member is also recorded as having said this:

> "*What happened on 3 May 2015 should never have happened. All asking for is to get to the truth. Plunged more into seeing how society is. Colour of skin. Day to day re-living the incident. This on top of it, it is crushing us. It is a heavy load to carry*."

41. There are likely a number of available interpretations of Mr Bhatt's words. But one of them certainly is that the minute records an assurance by him that he saw his – and

[24] PH-00007, 11/1

the Inquiry's – remit as being to try and help the family to "achieve what [they] want"; and that he said this after a family member had discussed the circumstances of the death of Mr Bayoh. There is no recorded demurral or qualification to Mr Bhatt's statement.

42. A family member, later in the discussion[25], provided their assessment of the evidence of – it is assumed – the police officers who appeared as witnesses in hearing 1. The family member is recorded as having said this (emphasis added):

> "*There are **a lot of good things came out** – approach – got the witnesses to step out side and demo – other side of things **liked** – **presenting evidence that contradicts their statements**. Questions family and friends asking – **what happens if lie under oath**. What happens after that*?"

43. The Chair apparently responded that it would be for the Crown to decide what happens next.

44. There is no record of any warning about discussing evidence. To the contrary, the Chair then steers the discussion to another topic that forms part of the issues before the Inquiry: the *post-mortem*. That topic is discussed along with a number of others.

45. The further issues discussed at the meeting include the report of Dr Crawford who was instructed by the Crown at the stage of the VRR to provide a report on the injuries to PC Nicole Short. A family member is recorded in the minute as having suggested Dr Crawford had mis-quoted the medical records.

46. The minute concludes with a discussion of the oral evidence given to the Inquiry by two witnesses: the first, an associate of Mr Bayoh who had been with him in the hours before his death; the second, one of the police officers in attendance at Hayfield Road. A family member is recorded as having expressed concern about the comparative treatment of these witnesses by the Inquiry. Both the Chair and Counsel to the Inquiry are recorded as having offered their views on that concern. Counsel is recorded as having said of the first witness (emphasis added):

[25] PH-00007, 11/2

"*Maybe I did push him – **encouraged him to help SB**. It was for that reason – to try to get really good evidence*."

47. The meeting concludes with this statement by a family member:

"*Like the questioning [Counsel to the Inquiry] put to witnesses – like them to give more examples – worked with or come into contact – white/black and comparison in approaches*."

The meeting of 18 January 2024

48. This meeting took place shortly before commencement of the hearings at which the PIRC and Crown witnesses would appear. Present at the meeting, according to the minute, were the Chair and representatives of the Inquiry team (including one counsel member), family members and three legal representatives. The meeting opened with a statement by the Chair that the family remained at the heart of the Inquiry. He is noted as having thanked the family for their perseverance and as having thanked them for their commitment to the process.

49. Once again, there is discussion of evidence. A family member is recorded as saying of evidence that has been heard (emphasis added):

"***Why are they lying**? You eventually through questioning get the answer but why is it that way. Grateful for the team and the way questions asked and put forward. **If not for creativity of your team and our team it would not come out***."

50. A little later, Mr Anwar is recorded as having offered some observations on disclosure of evidence concerning the PIRC and/or the Crown. He is noted as having said (emphasis added):

"*What is coming from the PIRC/Crown [redacted] – **lied repeatedly** to the family. [Redacted] – particularly difficult for the family to hear an (sic) see in disclosure what is being said*."

51. As the quotation perhaps indicates, it may be that the discussion was in part about the impact of the evidence of the PIRC and/or Crown witnesses upon the family; and it may be that there is an argument to be made that, in an indirect sense, this is *capable*

of appearing to have been a discussion in part about welfare, and about the impact of the process on the family. But the cause of the impact was not – or not principally – the process: the cause of the impact was said to be the evidence of, or evidence relevant to, witnesses who were said by the family's solicitor to have repeatedly lied and who were (presumably) shortly to give evidence to the Inquiry.

52. The Chair and Inquiry team were in effect being told that the family – whose trust the Chair and Inquiry had on the face of things been anxious to secure in the first place and to then retain – would find the evidence of PIRC/Crown witnesses very difficult because they had been lied to. Indeed, towards the end of the meeting, Mr Anwar is noted as having said[26]: "*this is going to be extremely difficult for the family*".

53. The redactions in the passage involving Mr Anwar have been queried by CPs. The Inquiry has advised that the Chair considers that the redactions should remain. It has been explained that the two redactions relate to observations which "*express the impact felt by members of the Bayoh families in attendance at that meeting. They do not refer to a further body or person*". Two points might be made about that.

54. First, if, despite use of the word "further", this explanation is intended to indicate that no body or person is referred to at all in, or is identifiable from, the redacted comments, that means the minute does not disclose who Mr Anwar described as having lied. That would mean the minute is not a complete record of what was discussed. Secondly, the explanation might tend to reinforce the impression that the recorded comments of Mr Anwar rather emphasised to the Chair the effect on the family of their perception that they were lied to.

<u>The meeting of 5 December 2024</u>

55. By this stage, all evidential hearings were concluded. A meeting took place at which the Chair and all senior members of the Inquiry team (and other team members) were present along with members of the family and three legal advisers. The question of extension of the Terms of Reference remained to be determined. The minute[27] – which records this meeting as being the fourth with the family – indicates that the Chair described the purpose of the meeting as being to enable the family to raise any issues they wished to discuss.

[26] PH-00008, 14/4
[27] PH-00009, 16/1

56. The minute indicates a discussion with an agenda comprising four matters. Item 1 was *Opening Remarks by Chair, including progress of Inquiry to date and consideration of Terms of Reference by the Scottish Government*. On the latter topic, only a brief exchange is recorded in the minutes with no reference to any substantive discussion.

57. There is extensive discussion of the family's view of the Inquiry. The family are recorded as having said that the Inquiry followed through on its intention of keeping them at the centre of things. The Inquiry is said to have been "good", and a family member expresses the view that they are "happy with the way things have gone".

58. Another family member expresses thanks to the Chair and to the Inquiry for following through on promises and for keeping the family at the centre of things; that there have been very few inquiries like this before; that the family had anticipated (as had others) that asking for an inquiry would be a waste of time; and that the family saw the present inquiry as being the benchmark for others.

59. Mr Anwar is noted as having echoed these observations. He is recorded as having "*expressed his thanks to the Chair and the team for being the only authority in nine years that has managed to retain the family's trust*."

Discussion

60. In the SPF Submission[28], the following is said: "*The minutes read, with great respect, less like detached discussions of formalities, and more like consultations with a client.*" Regrettably, and with the same measure of respect, that assessment is not easily dismissed. It does indeed provide something in the nature of a shorthand description of what appears (from the incomplete record) to have taken place at meetings. But before coming to a view on whether this gave rise to a risk of bias, the fair-minded and informed observer would want to consider the whole of the relevant circumstances and surrounding context. As indicated above, she would want to consider whether that context allayed the concerns that might arise from the content of the partial record of the meetings.

[28] § 65

Contextual matters

Additional comments made at the meetings with the families

61. The observer would be careful to ensure that she considered any indication within the minutes of statements having been made at the meetings that were capable of addressing concerns about the passages referred to above. She would want to consider whether there were any warnings that evidence ought not to be discussed at meetings, or reminders that the Chair's determination of all issues would be based on, and only on, the evidence properly before him.

62. At the meeting of 5 December 2024, some weeks after evidential hearings had concluded, the Chair advised the family that his report would be based on the evidence heard[29]. Plainly, that may be an important statement for present purposes. The observer would consider it was relevant to any concern that the Chair might base his decision on evidence provided to him in private rather than on evidence properly before the Inquiry.

63. But although that may be among the concerns that arise from the meetings, it is not the only one. Indeed, it might be thought that the greater concern is of discussions held in private being seen to create the possibility of influence, which may of course be unconscious, upon the Chair's assessment of the evidence. It is difficult to see how a statement that a decision will be taken on the evidence is an answer to a concern about how that evidence will be assessed.

64. By way of further example, in the speaking note prepared in advance of the first meeting it is said that the evidence will be laid out in public and that that is where the family would hear and form their view about it[30]. Again, that is clearly an important statement. But again its limits should be noticed. It seems unlikely that the notional observer would read this as having been intended as some sort of warning not to discuss evidence at meetings when the speaking note itself appears to have been designed to encourage that very thing.

65. The observer may think it potentially of significance that the minute of the meeting on November 2022 records this comment by the Chair: *"There will be times when I have*

[29] PH-00009, 16/2
[30] PH-00002, 4/6

to make decisions with which you do not agree. Always make decisions based on evidence."[31]

66. But the context of this comment is unclear. It seems unlikely that it records some qualification to the observations referred to above between §§39-47. For example, it does not seem likely that the observer would see this as having much impact on the significance to be attached to the expression of support by Mr Bhatt, the discussion about witnesses having lied or the discussion about the manner and content of questioning in oral hearings.

Whether CPs were made aware of the meetings with Mr Bayoh's family

67. In the March '25 letter, the Solicitor to the Inquiry said that from the beginning the Chair expressed his intention to have the family at the heart of the Inquiry and that there had been expressions of support for that from CPs. But, based on the disclosed record of the meetings, the indication at the hearing on 18 November 2021, was not a meaningful communication of what the family being at the heart of the Inquiry really meant. In her letter of 29 April 2025, the Solicitor refers to passing comments made in media reports, one attributed to a family member and a second, around the time of the December 2024 meeting, attributed to an Inquiry "media manager".

68. Correctly, neither letter suggests that the Inquiry positively took steps to advise CPs of the fact of meetings taking place or of their import. As the SPF Submission indicates under reference to the FAI into the death of Warren Fenty[32], one step that might have been taken would have been to tell CPs that it was proposed to hold meetings at which evidence would be discussed and to invite comment. The observer would consider the absence of that step relevant to the question of fairness and whether the Chair's meetings with the family and their legal representatives created a risk of bias.

The Inquiry's response to the concern about apparent bias

69. Concerns on behalf of the SPF, Ms Short and Mr Walker were initially set out by letter of 6 February 2025[33]. A number of questions were raised. These included whether there were minutes of meetings and whether those could be disclosed.

[31] PH-00007, 11/3
[32] § 72
[33] PH-00012

70. The Inquiry eventually responded substantively in the March ’25 letter. The letter explained that it was written in response to the concerns raised. It concluded:

> “*If your clients have any further concerns please do let me know as soon as possible. Absent any further correspondence on this matter, I will arrange to have this letter published on the website on 11 March*.”

71. Despite being asked the question, the letter did not say whether minutes had been taken of the meetings. The quoted passage indicates that it was hoped within the Inquiry that the explanation set out in the body of the letter would provide whatever assurance was needed to permit withdrawal of the concern.

72. Minutes and other documents did exist; they have now been produced. As discussed above, there is obvious tension between their content and the description of events in the March ’25 letter. The description of events set out in that letter is less full than, and not wholly consistent with, the narrative that emerges from the documents disclosed in the PH bundle. The description in the March ’25 letter had the potential to mislead.

73. The point has already been made that *ex post facto* explanations and justifications may not count for very much in the present situation. Here, the considerations just mentioned put that beyond doubt (and not to be forgotten is that the correspondence with PBW Law came itself after an even briefer description of the circumstances had been provided by the Inquiry in the letter to the Chief Constable of 4 February 2025).

74. One further aspect of the March ’25 letter ought to be mentioned. In setting out the rationale for meeting with the families, the following was said:

> *“The engagement of the families with the Inquiry is crucial to the effectiveness of the Inquiry in fulfilling its terms of reference. If the inquiry failed to obtain and retain the confidence of the families its effectiveness would be prejudiced.*
>
> *Over the years from 2015 the families lost confidence in the various state institutions with which they had dealings – Police Scotland, the Police Investigations and Review Commissioner, and the Crown Office. There was a real prospect that they would not engage at all with the Inquiry process or at some point would cease to engage with it.*

The Inquiry has been mindful of the obligation under article 2 ECHR to involve the next of kin in the Inquiry. From the beginning the Chair has publicly expressed his intention to keep the families at the heart of the inquiry. Core Participants have publicly expressed their support for this approach."

75. This explanation might indicate that the Inquiry saw the effective completion of its investigation as requiring the maintenance of the family's confidence in the process in a way that other institutions had not achieved. That reasoning is problematic. Putting to one side the point that the Inquiry should not be seen to be prejudging the circumstances of any prior loss of confidence (a matter the Inquiry requires to investigate), it is to be recalled that the Inquiry required to have in mind not just the family's perceptions of the process but also that of others with an interest in seeing the Inquiry complete its investigation thoroughly and fairly[34]. It should also be emphasised that the confidence of one party in a process is not the measure of its effectiveness. To use that as the measure of effectiveness is to run the very risk that the SPF Submission says has arisen. The stated reasoning raises obvious questions about its consistency with a commitment that the process be independent of any person.

76. Although it does not say so explicitly, the letter indicates that the Inquiry's explanation for the meetings may in part lie in its assessment of what Article 2 required. It should be emphasised that Article 2 required that the family be involved <u>in the Inquiry process</u> to the extent needed to safeguard their <u>legitimate</u> rights. Private meetings with one CP at which the Chair is present and at which evidence is discussed are not part of the Inquiry's process. The requirement under Article 2 to enable participation in an investigation by the family of a deceased person does not go the distance of requiring that other interested parties be treated unfairly[35]. Accordingly, if, based on the content of the minutes of meetings, the fair-minded observer considered that there was a real possibility of bias, the Inquiry's obligations to the family under Article 2 would not provide a justification.

77. In all the circumstances, were the observer to have regard to the way in which the Inquiry has responded to the concern about apparent bias, it is unlikely that any concern would be allayed.

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[34] Cf. *R v Lord Saville* [2000] 1 WLR 1855, § 68(4). And cf. Lord Scott, "Procedures at Inquiries – the Duty to be Fair." (1995) 111 LQR 596 at p.615: "*There is a further point*. …"
[35] *Guiliani & Gaggio v Italy* (2012) 54 EHRR 10, §§ 303-304

The application to extend the terms of reference

78. Beginning at §39, the SPF Submission discusses aspects of the Chair's involvement in the families' application to extend the Terms of Reference. The submission describes the similarity of the points articulated by the Chair and by Mr Anwar; and it describes how the Chair's "*certain questions*" about the prosecutorial decision in September 2024 evolved, concluding with a statement attributed to him in the letter of 25 February 2025 that there were "*strong indications that the prosecutorial decision was flawed*".

79. The SPF Submission says this of the Chair's involvement[36]: "*The Chair has adopted the language of the family of Mr Bayoh and advocated their cause*". With the qualification that it is not clear who adopted whose language, there is force in this description of events. On 6 March 2025, the Crown raised certain concerns about the letter of 25 February. The Crown's letter said this of the "strong indications" comment: "*It is not unreasonable to think that this statement could give rise to a concern on the part of CPs that the Chair has formed a view on this matter*."

80. The question is not whether, on their own, the Chair's support for the extension of the Terms of Reference and his statements of concern about the prosecutorial decision meet the test for apparent bias or predetermination. The question is what assistance is to be derived from such surrounding context in determining what is to be made of the meetings. Would the fair-minded and informed observer see in these surrounding events reassuring indications of neutrality and impartiality, or would she see support for one party's position? To answer that question, the observer would want to fully understand the known circumstances surrounding the Chair's statements about the Terms of Reference.

The evidence of Mr Graves

81. As the SPF Submission explains, by letter of 6 September 2024, the Solicitor to the Inquiry advised CPs that the Chair had met the day before with the Deputy First Minister to discuss the application to extend the Terms of Reference. The letter stated that the Chair had mentioned that the questions he had about the Crown's investigation, and which he thought were likely to have been integral to the prosecutorial decision, were concerned with the Crown's understanding of the factual

[36] At §64

evidence; the instructions given to expert witnesses; and the absence of an examination of the issue of race.

82. As the SPF Submission also explains[37], some weeks later, on 18 November 2024, the Chair wrote to the Deputy First Minister. He reiterated the above concerns and then said this: "*Since my meeting with you in September the Inquiry has heard further evidence from an expert instructed by the Crown which only reinforces these concerns."* This was a reference to the evidence of Martin Graves, an OST and restraint expert who, between the time of the Chair's discussions with the Deputy First Minister in September 2024 and the letter of 18 November 2024, had returned to give evidence for a second time to the Inquiry.

83. Mr Graves gave his evidence between 2 & 4 October 2024. In advance of this hearing, the COPFS legal team sought clarification from the Inquiry team about its scope; COPFS asked whether a list of issues would be produced for the hearing. On 16 September, a member of the Inquiry team responded and indicated that the list of issues for the Training Hearing would be the relevant one for Mr Graves. A report prepared for the Inquiry by Mr Graves was disclosed to CPs. It was concerned with training. Within the COPFS team, consideration was given to whether it would be necessary to seek to have questions put to Mr Graves or to make a Rule 9 application. In light of the understanding that his evidence would be concerned with training, it was considered that this would not be necessary. For the same reason, it was considered that it would be unnecessary to incur the expense of having senior counsel present.

84. In keeping with the COPFS understanding of things, at the outset of the hearing on 1 October, the Chair indicated[38] that, following completion of Mr Anwar's evidence, the remainder of the hearing would be concerned with training. Counsel gave a similar indication to Mr Graves towards the beginning of his evidence[39]; and, for the first two days of his evidence, training was indeed the sole focus.

85. Senior counsel concluded her questioning slightly early on the second day. She indicated that she intended to move onto a different chapter the following morning. She did not say what that would be. The questioning the following day was not concerned with training. The focus was now upon the Crown's instruction of and interactions with

[37] §47
[38] 117/1/6-8
[39] 118/3/3

Mr Graves. The purpose of the questioning appears to have been the identification of deficiencies in the Crown's instruction of its OST and restraint expert: an aspect or example of what will be referred to for convenience in this submission as counsel's "case theory".

86. If Mr Graves had been given notice of the points put to him, this was far from obvious in his responses in evidence[40]. On the face of things, the documents put to him appeared to comprise material that he had either never seen before or had not seen or considered for some time. On important issues, he appeared to be working from memory, on the hoof, in the pressure of an Inquiry hearing. Additionally, in relation to each of the criticisms explored with him, the contextual evidence drawn to his attention for consideration was less complete than it might have been. A discussion of the evidence is beyond the scope of this submission. On the other hand, it may be important and only fair to give examples of the issues just touched upon. It is sufficient to mention three examples. There are others that might be canvassed but those would require detailed discussion of evidence, a matter for closing submissions, whereas the current focus is purely at the level of appearances.

87. A key component of counsel's criticisms appears to be a suggestion that the Crown wrongly delegated to Mr Graves the task of determining factual questions, specifically about the way in which the confrontation with and restraint of Mr Bayoh arose and progressed. Not put to Mr Graves in evidence was a statement in the body of his report that might be thought to have some bearing on that question.

88. In particular, in the section entitled *Summary of his Conclusions*, Mr Graves said this[41]: *Some issues in relation to this case are evidence of fact and it will be for the investigator or court to decide which are correct and which are not.* It might have been important to examine the criticism of the Crown instruction in the context of that statement. That might have some relevance to whether the Crown lawyers and the expert each understood their proper roles.

89. A second example worthy of mention involves Mr Graves's attendance at a consultation with Ms Edwards KC and Mr Brown. The consultation took place in August 2018. Mr Graves said he did not have a good memory of the content of that meeting[42].

[40] It is unclear whether the reference at 120/11/21-22 might indicate some prior warning to Mr Graves, although that might simply beg the question of why CPs were not given the same warning.
[41] COPFS-00024, §8(a)
[42] 120/43/20

He was asked if he had a recollection of a discussion about the speed of the incident involving Mr Bayoh. He indicated that he did not[43]. It was put to him that the consultation notes contained nothing about the matter[44], the implication apparently being that it had not been discussed. Not drawn to his attention was: that the consultation note is clearly not intended to be comprehensive[45]; that on the first page of the consultation note, there are at least two references consistent with a discussion of speed[46]; and that Ms Edwards appeared to think that the question of speed had indeed been discussed[47].

90. A similar point can be made about a third possible criticism pursued by counsel: whether the Crown – ever – asked Mr Graves to address matters from the perspective of what the hypothetical reasonable officer would have done[48]. Mr Graves was asked if he recalled being asked at the consultation with Ms Edwards KC to explore matters from that perspective. He said he did not recall that, but indicated that if the point was covered in the consultation note, he would be happy to review his recollection[49]. Standing an indication that he would review matters if there was other evidence bearing on his recollection, it might be thought that the evidence of Ms Edwards could have helped. She appeared to indicate that the matter had been canvassed at consultation and that the matter had certainly been covered in the Crown instruction[50].

Discussion

91. It must be emphasised that no one must read what has just been set out as indicating that inferences about intentions fall to be drawn. There may be several possible explanations for the circumstances surrounding the evidence of Mr Graves and its connection to the Chair's support for an extension to the Terms of Reference. There would be no proper basis for drawing inferences of the sort just mentioned. In any event, and to repeat, this submission is not concerned with intentions but with appearances.

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[43] 120/45/20
[44] 120/45/17
[45] COPFS-02143: email of 23 August 2018 time at 09:29: discussion of face mask at the consultation but not included in the note.
[46] COPFS-02337
[47] 103/96/5-12; 103/99/11-22; 104/144/20
[48] 120/22/19-20
[49] 120/44/16-20
[50] 103/98/20-22; 103/93/1-3; 104/145/3-10; & 104/148/12 - /104/49/23

92. The fair-minded observer is likely to consider the following matters relevant to her analysis: the evidence of Mr Graves was led at a time when the application to extend the Terms of Reference was pending; his evidence was considered by the Chair to be relevant to the question of whether the Terms of Reference should be extended; it was used by him to support the application; the Solicitor General had a direct interest in the application and is a CP; her team were given what proved to be a misleading explanation of the hearing's scope; Mr Graves's evidence on the above matters was slotted into a hearing that was supposed to be about something else; the evidence explored with Mr Graves was not as complete as it might have been; discussions at meetings appear to have included discussion of counsel's approach to questioning (though it is to be acknowledged that there is no record of a discussion about Mr Graves).

93. The question here is not whether, on their own, these events provide a basis for alleging apparent bias. This submission does not allege that. The question is about what this aspect of the broader context says about the concern created by the discussions taking place at private meetings. The observer's concern is likely to be around the risk that those discussions create the appearance of support for one party's interests. That concern is not likely to be allayed – it is much more likely to find support in – the Chair's support for the extension to the terms of reference and the part that the evidence of Mr Graves played in that process.

<u>The Inquiry's examination of witnesses</u>

94. The discussion about the evidence of Mr Graves connects to another contextual matter which has been raised in the SPF Submission[51] and about which the fair-minded observer would therefore want to be informed: the manner in which evidence has been adduced. The SPF Submission describes the questioning of some witnesses relative to others as "robust". Remembering the Inquiry's obligation under Article 2 that it demonstrate its independence from the state agencies under investigation, there is nothing wrong in principle with robust questioning. The SPF Submission does not suggest otherwise. But an issue about the questioning of witnesses has been raised, and the fair-minded observer, concerned by the content of the meeting minutes, would consider that this part of the context required further consideration.

[51] At § 25

95. As a starting point, the observer would wish to consider any explanation that the Inquiry had provided regarding the method to be used for taking evidence from witnesses. On that matter, at the preliminary hearing on 18 November 2021, the Chair said this of the procedure to be followed within the Inquiry[52]:

> "*In relation to that last issue, namely the examination of witnesses by representatives of core participants, it is important to bear in mind that the procedure is inquisitorial and investigative. It is not the adversarial procedure that is normal in the courts. I anticipate that, in the main, questioning of witnesses will be conducted by counsel to the Inquiry and there will not be routine cross-examination on behalf of core participants*."

96. In order to assess the way in which the stated approach has been followed in practice, the fair-minded observer would require to understand the key distinguishing features of an adversarial court process compared to an inquisitorial process conducted by a public inquiry[53]. The observer would be informed that in the latter context the rules of procedure and evidence applicable to a court process do not ordinarily apply; that that is because the Inquiry is engaged in an investigation not a contest between parties to a litigation; that the procedure to be followed is at the discretion of the Chair; but that the requirement to act fairly (and to be seen to do so) remains[54].

97. The observer would want to consider any authoritative descriptions of the techniques typically used in an inquiry setting for securing witness evidence. In his helpful discussion of this matter in *Public Inquiries*[55], Jason Beer KC, identifies a number of the models conventionally applied. The author is careful to emphasise the very general nature of his summary. Of those discussed, the model described as hybrid most closely resembles (without perhaps being identical to) the procedure that the Chair has directed should be followed here. The observer would notice from Mr Beer's description that the hybrid model might involve some cross-examination by counsel to an inquiry[56].

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[52] PH-00018, 8/8
[53] See e.g. Beer, §§ 5.01 -5.03
[54] *R (Cabinet Office) v Chair of the UK Covid-19 Inquiry* [2024] KB 319; R v Lord Saville of Newdigate & Others [2000] 1 WLR 1855 at § 38
[55] See, e.g. the discussion in Beer, at §§ 5.177-5.189
[56] Beer, §5.186(iii)(2)

98. As the current discussion is about the appearance of balance and of fairness, the observer would be interested to understand the safeguards conventionally built into the hybrid model to enable and ensure these things. In that regard, the observer would notice that there are a number of possible advantages to the hybrid model described by Mr Beer. These include fairness to witnesses. The author notes[57]: "*It ensures fairness to witnesses … witnesses can be warned of likely areas of criticism in advance of giving evidence*".

99. There is a connection here to the Salmon principles.[58] The observer would consider that these are an authoritative source for understanding some of the key indicators of fairness in an inquiry. The second Salmon principle is in these terms: "*Before any witness who is involved in an inquiry is called as a witness, they should be informed of any allegations made against them and the substance of the evidence in support of them*." Although it is to be kept in mind that the present Inquiry proceeds under the 2005 Act as well as the 2007 Rules, it cannot seriously be doubted that fulfilment of the second Salmon principle continues to provide the means of securing an important stamp of fairness in any inquiry[59].

100. Finally, the observer would want to consider useful examples or discussions about the taking of evidence in an inquiry context. Sir William Macpherson's discussion within Volume 1 of the Lawrence Inquiry report[60] would be one source of information. The observer would notice the precautions taken in that inquiry to ensure fairness to witnesses, including notice of allegations and access to "all potentially relevant documents" prior to witnesses giving evidence[61]. It is important to notice that in the Lawrence Inquiry, the model for taking evidence was the so-called traditional one: an essentially adversarial process where all witnesses had legal representation. That was not the position in the present Inquiry: CPs were not given the automatic rights of participation associated with an adversarial process; many of the witnesses (including all of the COPFS ones) were not legally represented. The case for the precautions taken by Sir William Macpherson was acute.

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[57] § 5.188(5)
[58] Royal Commission on Tribunals of Inquiry 1966 (Salmon Report). See the discussion in Beer at § 9.10 *et seq.*
[59] Cf. Lord Scott, "Procedures at Inquiries – the Duty to be Fair." (1995) 111 LQR 596
[60] In particular at §§ 3.1-3.22. See also the discussion of the (so-called traditional model) procedure in that Inquiry in *Public Inquiries* at §§ 5.178-5.179.
[61] §§ 3.5 and 3.7

101. A second source of understanding, with a particular focus on the utility of the Salmon principles, might be found in Lord Scott's reflections on the so-called Arms to Iraq Inquiry[62]. The observer might find these observations of some interest:

> *"The overall problem, in my view, with the six Salmon 'cardinal principles' is that they are too heavily based on procedural requirements of fairness in an adversarial system. In an inquisitorial Inquiry, the questioning of the witnesses by the Inquiry is not an examination-in-chief, nor is it a cross-examination. Hearsay evidence may be sought. Opinions, whether or not expert, may be sought. Questions to which the questioner does not know the answer will frequently be asked--and, indeed, will be asked because the questioner does not know the answer. The techniques of questioning witnesses in adversarial litigation can be set aside. The questioning process is, or should be, a part of a thorough investigation to determine the truth. It is not a process designed either to promote or to demolish a 'case'".*

102. With the benefit all of this information, it would be possible for the observer to return to the description within the SPF Submission. It is certainly the case that counsel's questioning of Police, PIRC and Crown witnesses was very directed. The focus tended to be on the adducing of evidence that met aspects of what was described above as counsel's "case theory". The case theory usually appeared to align with the position of the family. The examination of Mr Graves would be an example of that. As in that example, the case theory was at times pursued with notable vigour, creating the impression that the purpose was to validate rather than test the theory. The questioning of Fiona Carnan would be a further example of that. In relation to a number of witnesses, techniques of cross-examination – specifically, closed leading questions – were regularly used. Long passages of evidence and documents were put to witnesses in very short order and questions were then put for their agreement.[63]

103. For a number of witnesses, only limited access to documents appears to have been permitted at the time of statements being provided. Criticisms were pursued in oral examination that had not been foreshadowed in Rule 8 questions. Ms Edwards presents a good example of these matters. The concerns about Mr Graves were not raised with her at the time of providing her statement; he was not mentioned in the Rule 8 questions; she was provided with a very limited amount of material along with

[62] Op cit.
[63] *See, e.g.,* the evidence of Fiona Carnan at 92/33/16 – 92/61/4

the Rule 8 question set. Prior to Ms Edwards giving oral evidence, the Inquiry indicated that it was considering issuing a further Rule 8 question set to her. To the knowledge of the COPFS Inquiry team that did not happen.

104. Serious allegations about individuals who had previously given evidence to the Inquiry were canvassed with later witnesses, without those allegations first having been put in evidence to the individuals themselves. The individuals concerned are not CPs; they are not represented in the Inquiry.

105. The observer would keep in mind the challenges faced by a public inquiry, and the need for flexibility as well as the requirement to proceed in a way that avoided unnecessary cost. The requirement to maintain the appearance of independence from state agencies is also an important consideration. *Some* of the techniques just mentioned might be useful methods for cutting through matters expeditiously, depending on the nature of the inquiry's remit and the issues under investigation. Whether this Inquiry was suited to that approach is a matter for consideration in closing submissions. The present question is whether the observer, concerned by the content of the meeting minutes, would find reassurance in the Inquiry's investigative procedures: was the approach to taking evidence at all times conspicuously inquisitorial and as fair and balanced as possible?

106. It cannot be denied that aspects of the approach described above have a strong resonance in adversarial proceedings. Notwithstanding that, the observer would notice that the overall process remained inquisitorial. That had certain consequences for CPs. Three aspects might be mentioned.

107. First, on 30 June 2022, the Chair requested that CPs did not take statements from witnesses. The Crown acceded to that request; they did not discuss the issues before the Inquiry with Crown witnesses. Secondly, Inquiry witness statements were provided very late in the day. In the case of Crown witnesses, many of them – including those of Crown Counsel and James Wolffe KC – were produced only after the Crown hearing commenced and important witnesses had completed their evidence. This was compounded by the fact that, despite sharing the first one or two Rule 8 questions with the COPFS Inquiry team, there came a point when the Inquiry determined that this was not to happen. Thus, for most Crown witnesses, the Crown Inquiry team were unaware of the questions raised by the Inquiry until disclosure of the witness statement. Thirdly, by direction issued on 23 January 2023, the Chair indicated that it would not be

appropriate for a CP representative, in effect, to object to evidence other than in exceptional circumstances.

108. In a situation where the witnesses themselves may have had limited access to materials or advance notice of issues, the foregoing features created an obvious risk of imbalance for CPs seeking to respond to a robustly directed approach. The observer is likely to see in the Inquiry's approach features of the adversarial system, but without the protections that that system builds in to ensure fairness and balance: early disclosure of evidence, notice of lines of attack, the automatic right to cross-examine, the right to object to questioning. These features were absent here. Having informed herself of the usual features of the inquisitorial system discussed above, the observer might be concerned by the possibility that missing from the Inquiry's approach to that system here were a number of elements that would usually be thought important to ensure the process had the stamp of balance and of fairness at all times.

109. The impact of all of this on the evidence is for another day. The key point just now is that the observer is unlikely to find her concerns about imbalance allayed upon consideration of the process adopted by the Inquiry for adducing evidence.

Conclusion

110. The Solicitor General's constitutional position in the context of the state's currently incomplete Article 2 investigation, as well as her role as an institutional CP in the present Inquiry, requires her to set out her position on the issues raised in the SPF Submission.

111. To repeat, there is no question of the present circumstances indicating anything other than good intentions on the part of the Chair. He is, and remains, a highly respected judge. It is a matter of profound regret that, as a result of the way in which the Inquiry has conducted itself, he finds himself in the present situation. Unfortunately, however, it is not possible to avoid the conclusion that there is force in the concerns raised within the SPF Submission.

112. The partial record of the meetings made available indicates significant and repeated discussion of evidence and of counsel's questioning of witnesses in the presence of the Chair. Present at the meetings were members of the family who, like their principal legal adviser, were witnesses before the Inquiry. Discussions took in the

evidence of the family but also that of other witnesses. The Chair requires to make assessments of the evidence of all of these individuals. Their interests do not align.

113. On more than one occasion there was discussion at meetings about witnesses having lied. There was discussion of the impact on the family of that, and of the events under investigation. There was a reminder of that impact and of its suggested cause – lying – shortly before the PIRC/Crown chapter of hearings. On occasion, the Chair is noted to have recorded the impact of the family's descriptions of events upon him. There is also a strong expression of support from one of the assessors. Overall, the minutes indicate a desire to gain and to then maintain the trust of the family, and the Inquiry is congratulated at the conclusion of its investigations for having achieved this.

114. An explanation from the Inquiry for the meetings rather confirms that it did indeed see the family's confidence in the process as being the key measure of the investigation's effectiveness. The fair-minded observer would question whether that was consistent with a stated intention to proceed in a way that was entirely impartial and independent of any person. The obligation within Article 2 to enable participation of the family did not require private discussions of the sort indicated. Overall, the observer is unlikely to be reassured by the Inquiry's response to the concerns raised.

115. It also seems unlikely that the observer would find the required reassurance in other aspects of the surrounding context. She is unlikely to find that the Inquiry has always been seen to take as balanced an approach as reasonably possible to its investigation; she is likely to see, on occasion, the appearance of support for one party's position; she is unlikely to find, on what she now knows of the meetings, that transparency and openness were always at the heart of the Inquiry.

116. The comparison with the Warren Fenty FAI is apt. It is also stark. In all the circumstances, and with repeated regret, this submission has come to the view that the concerns about apparent bias, about the risk of the appearance of influence on the Chair, and about unfairness require to be acknowledged as valid.

Alastair Duncan KC

22 May 2025