

TRIBUNALS OF INQUIRY (EVIDENCE) ACT, 1921.

TRANSCRIPT OF PROCEEDINGS
AT THE PUBLIC INQUIRY

into

INCIDENT AT DUNBLANE PRIMARY
SCHOOL on 13th MARCH, 1996

before

THE HON. LORD CULLEN

on

TUESDAY, 25th JUNE, 1996

within

THE ALBERT HALLS,
DUMBARTON ROAD, STIRLING

.....

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APPEARING:- THE LORD ADVOCATE (The Rt. Hon. The Lord Mackay of Drumadoon, Q.C.), Mr. IAN BONOMOY, Q.C., Advocate Depute, with Mr. J.C. LAKE, Advocate, for the Crown;

MR. C.M. CAMPBELL, Q.C., with MS. L. DUNLOP, Advocate, for the families of the deceased children, the families of the injured children, the children absent from class, Mrs. Harrild and Mrs. Blake;

MR. A.T.F. GIBB, solicitor, Edinburgh, for the representatives of Mrs. Mayor (deceased), and the Educational Institute of Scotland;

MR. M.S. STEPHEN, solicitor, Glasgow, for the Association of Head Teachers in Scotland, and Mr. Ronald Taylor (Headmaster);

Mr. M.S. JONES, Q.C., for Stirling Council and Others;

MR. J.A. TAYLOR, Solicitor Advocate, Edinburgh, for the Central Scotland Police;

THE DEAN OF FACULTY (Mr. A.R. Hardie, Q.C.) with MR. G. KAVANAGH, solicitor, Hughes Dowdall, Glasgow, for individual officers of the Scottish Police Federation, and Lothian and Borders Police.

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TUESDAY, 25th JUNE, 1996.
TWENTIETH DAY.

BRIAN WILLIAM PILL, (55), Sworn,

EXAMINED BY MR. LAKE: I understand you live in Greenloaning? - That is correct.

What is your present employment? - Stirling Council Health and Safety Adviser.

Prior to working for Stirling Health Board, what was your employment? - I was a Central Regional Council Health and Safety Officer.

I understand in connection with the field of health and safety you hold a number of qualifications and affiliations? - Yes.

What are they? - It is a Member of the Institution of Occupational Safety and Health and I am a Registered Safety Person with those.

In your post as Health and Safety Adviser with Stirling Council are you involved in considering compliance by the Council with various Health and Safety Statutes? - That is correct.

And on that basis do you consider the application of such Statutes to schools within the Stirling Council area? - That is correct.

Which Statutes do you take into account as being applicable to schools? - The Health and Safety at Work Act, 1974 initially and then we would do now the Management of Health and Safety that came out in 1992.

And in broad terms, what steps are taken by the Council to comply with their obligations under the Health and Safety at Work Act, 1974? - The Region at that time had their own health and safety policy. The Council had their own statement and then the policy went on and explained what should be done in places of work. It was then left to the heads of service or department or they were in those days to get on, with our assistance, in carrying/

carrying out health and safety in the workplace.

Can I ask you to have in front of you a bundle of Productions numbering I think R48 to R56. Do you recognise those?

- Yes, I do.

Dealing with the first item which is R48, is that a statement by you or is that a health and safety policy? - No, that is a statement by myself taken on Friday morning of last week.

Well, look at the second item within that bundle which is R49. What is that? - That is the health and safety policy that was for Central Regional Council. The part you have here is the section at the front of the education health and safety policy.

When was that introduced? - That was introduced prior to my starting with the Council. It would be 1978. Round about 1978.

Without going into the details of what is contained in that policy, I understand it contains a general part at the front and then a number of annexes dealing with specific parts of the health and safety policy? - That is correct.

As part of that health and safety policy was consideration given to the dangers that might arise to employees as a result of persons entering school premises with a view to criminal assaults?

- I have to say that that is something which has never ever crossed our minds.

So it does not form part of this particular policy? - No.

I understand that that policy might be supplemented by a number of safety guidance notes?

- Yes.

How are they prepared? - When regulations actually come out we look at the regulations and we come up with guidelines and put it to the Council.

And how are these issued? - They are issued.....they used to be issued through the Personnel Department to all other Departments.

And/

And in so far as the safety guidance notes might relate to schools, to whom are they issued? - They are issued out to all head teachers.

So there would be a copy in every school? - There should be a copy in every school, yes.

And again without going into any detail, I would like to refer you to some of the documents which provide some safety guidance notes. Firstly, R50. Is that regarding general safety in classrooms? - Yes.

And R51 is a safety guidance note relating to janitorial staff? - That is correct.

R54 provides safety guidance in relation to physical education? - That is correct.

R53 provides details of safety guidance relating to the youth and community service? - That is correct.

And is it fair to say also that none of these safety guidance notes are intended to take account of the situation of deliberate assault upon a member of the Council staff? - That is correct.

Did the Council require to consider the dangers of assault in their staff in any other context? - Yes, they did.

Which context is that? - Once where there was the collection of money, it was looked at some years ago where janitors were taking finance to the bank.

Are there any other contexts? - Not that comes to mind.

Does the Council require to consider the issue of the security of schools with a view to health and safety? - Yes, there is a security aspect but we also have to consider access and egress and the safety of our personnel from that point of view.

What do you mean the safety of the.....? - That is actually from the gates, actually getting into the building, whatever we are doing in the/

the building until we actually leave the grounds.

And what dangers are concerned there? - That is from the structure of the building or car parking or whatever it may be or access to it.

Does the Council require to consider dealing with in any context unauthorised access in schools? - As far as I am aware it has not in the past because we have not had a situation like that other than people bringing their cars or vehicles into our properties when they should not have done so.

Does any difficulty arise with unauthorised access to school resulting in property damage rather than personal injury? - Only vandalism at night times or weekends as far as I'm aware.

Does the Council take any measures to deal with that?
- The property maintenance section certainly do have some systems but I'm afraid I can't help you with that.

I think you say in your statement that consideration has been given at some points to providing a ring fence around certain schools, is that correct? - It was certainly considered and the way that it was done at the time was in discussions with the police. The police were asked to go in and help us secure certain schools but there is no way with such large areas that we have that they could be fenced.

What would the difficulties be in fencing schools in that way? - Finance and then continued vandalism of that fencing.

You made reference also to the fact that the Management of Health and Safety at Work Regulations now apply to schools. What does that require of the Council? - The biggest section is Section 3 which is risk assessment.

And what do the Council have to carry out to comply with that? - To risk assess the actual risks or hazards within the place and what risks there are to our employees and that would come on to the children within that school.

And/

And has the Council carried out risk assessments of school premises? - Over the past few years we have been carrying out training and periods of risk assessment and we have been giving advice on risk assessment. I moved into education just over a year ago in my final year with Central Region whereby I made up risk assessment guidelines to actually put out to educational establishments.

Can I refer you to document R55 please. Is that a copy of the risk assessment guidelines which you have formulated?
- That is the ones which went out, yes.

I think you say there in the second paragraph "The purpose of the risk assessment as defined by Regulation 3 of MHSWR is to identify the measures that employers or self-employed persons must take in order to comply with their duties under all applicable health and safety legislation"? - That is correct.

And then in the fourth paragraph you identify two components of the risk assessment as identifying the hazards present and then evaluating the extent of the risks involved? - That is correct.

I think on the second page of that you indicate that the risk assessment should enable the employer to prioritise remedial measures by considering what are the most necessary measures to avoid in the Department? - Yes.

What particular risks are present priorities for the Council in relation to school premises? - If we go back prior to the incident, the biggest problem that I found in the first four months of going into education and looking at it was in the field of care to our children and by that I mean the issue of medication in schools and the control of asthma. There was the epi-pen, that is for allergy, and the other one was first-aid. That was the four we found to start with that we were really lacking a policy on and that is when we started that.

So is that a risk assessment that was not strictly within the terms of the health and safety requirements and which applied to the children? - That/

That was one that I felt there was a great need for when I started to go out to visit schools. I found the biggest need in schools was in this area for our pupils.

Do you consider that the health and safety legislation applies to protect the children in the schools or purely the employees? - It is for the employees but we have to cascade it down to our pupils within our properties because in other words if it is not safe for the children it is not going to be safe for the employees with that school.

Since the events of March of this year has consideration been given to the issue of intruders within school premises and the dangers which follow from that? - No, it has not. I have thought long and deep about it but I am going to wait until this Inquiry is over although it is discussed in the properties I drop into now and it is discussed how people feel they need to discuss it in the workplace but we are waiting to hear from this Inquiry.

Just some final matters. I understand there was a revision to the general policy for health and safety at the end of last year, is that correct? - That is correct. There was a legal requirement to do so because of the changeover of our Director so I updated the leading page to the Depute Director at the time to cover us from the legal point of view.

And if I can refer you to document R54. Is that the updated policy for health and safety? - That was the one I brought out just before Christmas to see us through until the end of Central Regional Council, yes.

And you will see that is dated December, 1995 and signed by Dr. Young? - That is correct.

I think the final matter within the documents produced is R56. What is that? - I felt we had to go to all our employees in the workplace within education so this is a leaflet that we designed within our own section to flood properties, educational properties and schools, with to try and give some advice to entice people to take more of an interest in health and safety and it was just to start the system rolling.

A/

A number of these documents, including that last one, were issued by Central Regional Council. Have any health and safety policies been formulated by the new Stirling Council? - Yes, prior to the new Council coming together, because there were more than five staff I made up an interim health and safety policy for them to work to. On the 1st of April we came in with a new health and safety policy. It is interim because in fact it has now been to the Management Team and Resources and we are going to start doing presentations to the unions and employees on our new policy.

You say there that was interim. Is that policy still in interim form? - It is still interim until it has been discussed with the employees and the new unions but we are working to it.

If/

10.20 a.m.

If I could refer you to R57, what is that? - That is Stirling Council's new Health, interim Health & Safety policy.

Is that a record of a meeting of the Resources Committee approving this? - Yes.

I think you see attached to that the interim policy itself? - Yes.

Within that policy in the general statements on the first page at item c(v) there is reference to the provision and maintenance of a working environment for employees that is, so far as is reasonably practicable, safe? - Yes.

Is that broad enough in your view to cover all considerations? - This is a straight take-off from the Health & Safety at Work Act, 1974, and we felt at times like this we should not change a good Act, as the Health & Safety at Work Act is, so we have copied that in, so our managers know of it.

Do you consider that is broad enough to consider dangers arising from intruders to the premises? - No. That would come out under risk assessment, if we considered there to be such a risk.

Am I correct in understanding that the danger of intruders is one that would be evaluated in the form of a risk assessment to schools? - Yes.

Is that risk assessment to be carried out on a broad basis whereby there would be one assessment that would cover all Council schools, or is on a school by school basis? - I firmly believe it would need to be done school by school, with someone like myself doing it, or advising the head teacher or any other staff available to do that.

In the course of this Inquiry we have heard some evidence relating to increases in security measures being carried out at certain schools. Is that risk assessment in any way linked to the increase in security measures? - The two will have to go hand in hand, because of the Fire Regulations/

Regulations as well.

CROSS-EXAMINED BY MR. GIBB: Are you aware that in 1990 the Health & Safety Commission produced a guidance form relating to violence to staff in the education sector? - Yes.

I am concerned to note there is no reference to that in the draft document for Stirling Council? - That is correct.

Can I ask you to confirm that that particular guidance will be considered as part of the final draft to be prepared? - I don't know if it should go in in the initial policy, because the policy will need to be short and sharp: but certainly there will need to be a section on that topic.

Will this be considered? - Yes.

LORD CULLEN: Perhaps you would be good enough to let me see that document.

MR. GIBB: I cannot let you see the document, sir, but I can certainly give more detail of this in my submissions.

LORD CULLEN: Thank you.

BY LORD CULLEN: With regard to school security you appreciate I will be considering whether and to what extent I should recommend any changes in the law, therefore I need to know what is the existing situation under the present law. As I understand your evidence, you accept the school security and the normal and personal safety of staff lies within the conditions covered by the 1974 Act and the 1992 Regulations; is that right? - Yes.

Therefore whatever may be the position after the 13th March requires to be covered by risk assessment; is that right? - Yes.

From the point of view of achieving that result as rapidly and as efficiently as possible do you think it sufficient simply to let matters take their course, with the various Authorities preparing their risk assessments, giving them an amount of priority they think is appropriate, or do you think that/

that some further measures may be required? - I think we have now got to start looking at risk assessments. I know our Property Section are looking at particular properties, and they will include the hazards which you are discussing here: but I don't know that they will put anything in place until they have heard from yourself.

I dare say; but I want to know whether I can simply draw attention to the law or whether there is something further that is desirable for me to say. That is why I am giving you an opportunity, if there is something you think ought to be considered by me; in that event I would be happy to deal with it? - In an ideal world our properties would be suitably fenced with gates which can close. That is something which is very difficult.

That is the nuts and bolts end of it. It is really a question whether the system is satisfactory for the moment to give sufficient impetus to any moves towards risk assessment which may be required in the area of school security? - It would all go back to design of our schools for security and safety. At the moment some schools are well spread out, and for security there is some difficulty.

There are two aspects: there will be the design of new schools and there will be looking at existing ones. I take the point that in relation to physical or organisational dangers you should take all reasonably practical steps, but there is no such measure in the sense of regulations or change in the law you have in mind for this purpose? - No, not really. The Health & Safety at Work Act and the management of Health & Safety is very clear, and there is very good guidance in law. It is actually getting it in place: finance is the difficult part.

If you look at the first page of your statement, in the first part of the text there is some bits obscured off the page. In the second line of the second paragraph it says "Whilst section", and then there is a blank, and something is missing there, I think. Can you give me the number? - Section 4 of the Health & Safety at Work Act imposes further duties in relation to all premises.

So "4" should appear at the end of the third/

third line; is that right? - Yes.

Then your statement says about Section 4 "So far as the latter is concerned I understand the ambit of the Section as governing non-employees working or using plant or substances on the premises. Consequently school children as such are not encompassed, but when in the course of schooling they use plant or substances, thus for example woodworking equipment, I would consider the Act has application"? - That is correct.

Is that a complete statement of the protection which the Act gives to people like school children? - We have always treated and the Act always treats them -- we have to treat them basically as an employee to give them the safety within our property.

Section 3 of the Act extends protection, does it not, to anybody who may be affected by the activity in question? - Yes.

Were you thinking of Section 3 in writing this? - Yes.

As far as I know, these sections do not limit protection to school children, to what happens when they are using plant and substances? - That is a general statement. Whatever they do on our property we have a responsibility for them.

It says "Consequently school children as such are not encompassed"; they just happen to be on the premises? - If they are on the premises they are covered by whatever.

You have been shown this morning a copy of the Regional policy, and it refers to visitors, so it could be anybody, a parent, a child, or someone coming in to do a job of work; is that right? - Yes.

Is the protection limited to those who are physically on the premises? - No. We have to protect those who are off our premises if we are going to put anything, emissions, into the air or whatever.

So whatever comes out your chimney....? - That/

That is our responsibility.

So as far as that is concerned, if there is any risk associated with the activity, people are protected whether they are on the premises or not or whether they are working on the premises or not? - Yes.

So that would have to be taken into account in any form of risk assessment? - Yes.

Is it right that under the 1992 Regulations this risk assessment is done in relation to not only the safety of employees but also any person who is affected by the provisions of the Act? - Yes; anyone who walks into our property at any time.

Can you make a statement about what the intentions of your Council are in relation to risk assessments insofar as they affect schools? - We are going to be carrying out training sessions for risk management, and head teachers hopefully will be attending these courses.

Can you tell me how long it might be until we reach the point where the risk assessment has been carried out with regard to school security? - It is certainly going to be between now and Christmas.

So you expect the process to be completed this year? - I would say within the next financial year would be safer to say.

When does your financial year run to? - April: by next April.

No re-examination.

ALLAN DICKSON (40) Sworn

EXAMINED BY MR. BONOMY: I work in Community Education.

What Authority do you now work for? - I work for East Dunbartonshire.

I think until the winding up of Strathclyde/

Strathclyde Region you worked as an area Community Education Officer with Strathclyde? - Yes.

Where was your office? - Kirkintilloch.

I think you dealt with an application by Thomas Hamilton to use premises in your area? - That is correct.

Which were the premises he was interested in? - He was interested in Thomas Muir High School and Kirkintilloch High School.

Could you look at a Production BSRC ES18? Can you confirm to me that that is a letter from Hamilton to the Community Education Service dated 27th July, 1995? - Yes.

You can see he has already been in touch with you, and this is him formally applying for permission to use your premises; is that right? - That is correct, yes.

Now, what was your response to that enquiry? - As I recall, I wrote back to him saying there was no accommodation available at that time.

At one stage Mr. Hamilton also applied for recognition as a youth organisation; is that right? - That is correct, yes.

Could you also look at the form ES2? Is that the application he submitted? - Yes, that is correct.

Do you know when you actually received that? - I think it was some time in July, late July.

It is not referred to in the letter, the letter I just asked you to look at, which is the 27th July? - No. The first original letter was an enquiry, and because we didn't have accommodation for him we didn't invite him to apply for the accommodation.

On this day, 24th, opposite his signature at the foot and on the top it is described as an application for recognition as an approved Community Education Services organisation? - Yes.

What/

What is involved in such recognition? - This is not the actual let application, that is the ES4 form. That is the form that would give him recognition as an approved organisation. It means he would be eligible to get a subsidised rate rather than paying the full rate for paying the accommodation.

What does he need to satisfy you about before you approve him? - Basically that he has a constitution, there is some form of qualification, and most importantly that he can provide two references in support of his application, who know him and who support his organisation.

Is that the most important element? - Yes, most important is the referees.

You then refer to "A copy of the constitution must be enclosed"? - Yes.

I think you then confirm you did get a copy of the constitution? - Yes.

He described his committee as 12 adults who are predominantly parents of members; is that right? - Yes.

I think he gave you the name of his secretary, Ian Boal; is that correct? - Ian Boal was the second leader.

Did he not also name him in this application as the secretary? - Possibly.

Well, could you look at the form to see if he is named as secretary, more or less in the middle of the page? - Yes.

He also has named various people whom he claims are committee members; is that right? - Yes.

D. McDonald, Mr. and Mrs. Woods, Mr. and Mrs. Hogan, Mr. Munro, Mr. K. Barker, Mr. and Mrs. Hill, Mr. T.W. Hamilton, that is himself, and Mrs. A Watt, who was his mother. You may not know that, but these are the names; is that correct? - That is correct.

I/

I think he also gave details of a bank account by saying "We do not operate a bank account. We did have a bank account with TSB, which is closed"? - Yes.

And the treasurer is named as Mrs. Watt? - Yes.

And his accountant's name is Mr. W. Freer, CA? - Yes.

You say the most important part in this is the bit on the next page? - Yes.

Why is that the most important part? - There are some organisations that we are not aware of within our area, and so we generally ask for references from people who know them. These people should be fairly prominent members of the local community who have some contact with and can support the application.

In the letter we looked at a moment ago Mr. Hamilton said he was not from your area, but there was a demand for his services coming from your area, and that is why he wanted to put his clubs into local schools? - Yes.

In a situation like that, who are you looking for references from? - I think we would be looking for references from his own area, in terms of support.

Yes? - We certainly knew there was a need within the area he was asking for, but because we did not know him it would be helpful for references to be given from his own area, from people who knew him.

There are two signatures you are looking for, people who can certify that "The leaders are known to be and worthy of support"? - Yes.

You are asking that the form in that part should be signed by two prominent persons from within the community, for example Regional and/or District Councillor, Minister of Religion, headmaster, JP, bank manager? - Yes.

On this form there is only one signature?/

signature? - Yes.

That is from Robert Campbell, JP? - Yes.

In Stirling? - Yes.

Because of that what did you do? - I sent the form back to him and asked him to complete it properly.

Was there some delay in getting a second signature?
- Yes. The second signatory he said was on holiday, and he couldn't contact him, but he would contact him when he returned from holiday.

Could you look at ES9? Is that a letter of the 26th July to Mrs. Carr in your office from Hamilton? - That is correct, yes.

And he is actually sending a completed let application form; is that right? - Yes.

Does he say "Tried to contact my Regional Councillor, Rob Ball, Chairman of Education Committee, Central Regional Council, to sign for me. He seems to be on holiday all week"? - That is correct.

"If you return the form I will get his signature after holiday period"? - Yes.

Now, did you then return the form? - Yes.

Did he get the signature? - Yes.

And he returned the form to you? - Yes.

Could you look at ES3 now, please? Is that the same form as ES2, which was probably a copy of it, and now completed in full? - Yes.

What is the additional signature? - That is Dr. Robert Ball, the Education Convener of Central Regional Council.

On what date has he signed that? - August 5th, 1995.

And that is certifying "The leaders are known/

known to me and worthy of support"? - Yes.

Now, when you got that form back in what did you do with it? - We basically would have approved the organisation, and Thomas Hamilton would become eligible for the reduced rate. We held it on file.

How did you go about approving the organisation? - I think a week or two after we got the form a games hall became available in Thomas Muir High School, and we phoned Thomas Hamilton to say it was available, was he still interested, and he said he was interested.

Yes? - Subsequent to that I then discovered that publicity had gone out via the local schools in the Bishopbriggs area without my authorisation, and at that point I became slightly perturbed that such a quick response had gone out, as a group should not publicise activities until they got confirmation in writing.

Yes? - At that point I thought I would look into this slightly further to see basically how valid the organisation was, and I contacted Central Regional Council and I spoke to William Houston, the Divisional Community Education Manager there, and he confirmed -- he basically advised me that Central Regional Council had had some difficulties with this organisation, and although there was nothing preventing him having lets he advised me that he needed to be monitored.

Yes? - At that point I discussed with Mr. Houston -- I asked if he could check the signatures for me to ensure they were valid before I processed the let in writing to Mr. Hamilton.

Yes? - Mr. Houston did do that. I faxed the signatures to him, and he confirmed that both of the signatures seemed valid, but he followed up Dr. Robert Ball's signature and in discussion, William Houston in discussion with Robert Ball, he approached him and asked him did he sign the application form. He said Dr. Ball said yes, he was in support of the organisation.

Yes? - William Houston phoned me back to say the signatures were valid, and Dr. Ball had confirmed his support of the organisation. On that basis I then approved the let of Thomas Muir in writing.

Did/

10.40 a.m.

Did Houston actually say to you that Dr. Ball was approving the Organisation? - Yes.

Were these the words he used? - Mr. Houston approached Dr. Ball and said -- this was all done by telephone, and my telephone call to Mr. Houston -- I don't know if Mr. Houston -- well, I believe Mr. Houston saw Dr. Ball in person, but again I can't substantiate that, but basically Dr. Ball said yes, he was supporting this Organisation, and I think Mr. Houston said "After all we've been through", and Dr. Ball said "Well, he's one of our constituents, isn't he", and that's the way it was.

What then was the attitude of you and your Authority to allowing him then to take the let of premises? - Well, there was nothing actually to prevent him taking the let of premises.

He met all the requirements of our letting procedures, so in that sense, at that stage I didn't know -- as far as I was concerned, it was an approved Organisation, although there was a question mark. The main advice I was given was not to allow Thomas Hamilton more or less exclusive access to the games hall, so prior to confirming the let in writing to him, I actually made a decision not to give him the games hall in Thomas Muir, because if he had access to the games hall, he would have more or less access to the games complex. I then offered the large gym in Thomas Muir, and offered the games hall to another Organisation called Rosevale Boys' Club, which is a local Boys' Club in Bishopbriggs which attracts quite a significant number of boys. I felt by doing that that if there was any doubt about safety of local children, then that would ensure there would be a minimal risk attached to that. However, having contacted Thomas Hamilton to say he wasn't going to get the games hall, but the large gym, he took exception to that and actually wrote to the local Regional Council for that area complaining in terms of our administration.

Could you look at ES4 now please? Is that a letter from a Councillor Tom Rae, who would be a Strathclyde Regional Councillor, to Mrs. Carr, letting officer? - That is correct, yes.

Dated 2nd October 1995? - Yes.

Was/

Was Mrs. Carr working in the same office as you? -
Yes, she's my senior clerical assistant who acts on my behalf.

And that letter enclosed a letter from Thomas Hamilton to Mr. Rae dated 27th September 1995? - Yes, that is correct.

And what was the nature of the complaint? -
Basically that Thomas Hamilton felt that he should be allocated the games hall because that was promised to him, and he basically felt it was unfair and he couldn't understand why this other Organisation were being given it when he was first in line for the hall as he saw it.

Did that problem become more difficult or less difficult to resolve after that? - It placed slightly more pressure on our local office, the fact that there was now a Councillor involved with the situation.

Did Hamilton actually take up the let? - Yes, eventually he accepted the large games hall.

In the intervening period, was there any problem about someone cancelling part of the let? - Yes.

What was the problem? - One of the remaining -- there was one remaining group within Thomas Muir. The Thomas Muir complex, there is a games hall, a large gym and a small gym, and one of the small gyms was being used for a keep-fit group, and they cancelled, which effectively meant there were no Organisations using the Thomas Muir games complex at that time, and it wasn't the policy of the Regional Council to let accommodation where there was only one group because it wasn't good use of Council money to open up premises for one group, so we tried to get basically two or three groups in the building, so this other group cancelled, so effectively we were unable to let the halls, so that further delayed the process, and that's when Rosevale Boys' Club, who were on the waiting list and were looking for more accommodation, we approached them and they were happy to take the games hall, therefore allowing Thomas Hamilton the large gym.

Now, /

Now, thereafter, I think you had a number of other dealings with Hamilton. First of all, did you resolve the problem that had been raised by the Councillor and give him the games hall at any stage? - No.

So he just accepted the gym eventually, did he? - Yes, eventually, yes.

Did you have occasion to deal with damage? - Yes.

And did Hamilton accept responsibility for some damage caused by some of the activity? - Yes, he accepted full liability for it.

Were there any other problems after that? - The only complaint which I received was to do with the issue of medals. Basically six boys within the Club did not receive medals whereas the rest of the boys in the Club received medals, so effectively six boys as far as I could see were being discriminated against, and I raised that issue with him and said that that wasn't -- I didn't expect Organisations to operate in that fashion where it could be perceived as individuals being discriminated against, and he put that right and he basically sent medals to the six boys.

Did one other parent raise an issue over the safety of transporting the children? - Yes. That was another question in terms of the insurance regarding the mini-bus trips which was actually taking place outwith the terms of the let. This was something he was organising really off his own back.

So the boys were being transported somewhere else? - Yes, on a Thursday evening.

Now, a parent asked about that, did she? - Yes.

And were you able to check up on the position? - I checked with Mr. Houston in Central Regional Council regarding the insurance because I discovered that the bus he was using was a bus from Central Region garaged at Bridge of Allan, and it was confirmed by Mr. Houston that the bus was covered third party, fire and theft, and that Hamilton/

Hamilton was a registered driver.

Did you get the chance to inspect the bus? - Yes.

And what was it like? - It was first class. It met all our regulations. It had seatbelts and it had a proper log, a log-book.

How many times did you actually meet Hamilton? - Twice.

Did either of these meetings cause you to be concerned about him? - I think when I first -- the first contact I had was on the phone, and I felt -- his tone of voice was really a monotone and I thought that was slightly strange. However, when I did meet him, I thought he was a bit shy and maybe a bit repressed in some way, but he didn't lead me to believe that what was to transpire, that he had that within him, but he was quite a plausible character, I would say. He was believable to some degree.

I think at one stage you sought some evidence of his membership of the British Amateur Dramatics Association? - Yes, I asked him to present that at the office, which he did, and we photocopied. He was a current member.

I think you sought a CV for his assistant, who was Mr. Boal? - Yes, I asked him for that to ensure there was proper training going on, and he produced that also.

So each time you asked him to vouch something, he was able to do so? - Yes, he cooperated at all times.

No cross-examination.

WILLIAM/

WILLIAM ALEXANDER HOUSTON (43), Sworn:

EXAMINED BY MR. BONOMOY: Are you William Alexander Houston? - That is correct.

What age are you, Mr. Houston? - I am 43.

And I think you are a staff development officer with Stirling Council? - That is correct.

Or staff development training officer; is that more accurate? - That is correct.

In July, August, September and October 1995, did you work for Central Regional Council? - That is correct.

Which post did you hold? - I was the Divisional Manager with the Stirling and Clackmannan area community education.

And/

11.00 a.m.

And was part of your responsibility the letting of community education property? - Yes.

Now, we have had some evidence in the Inquiry about various different arrangements for the letting of property depending on the premises in question. It might be a School Board or it might be a head teacher acting through an Area Officer and so on. There were different arrangements? - Yes, there were.

Where did you fit into these schemes for letting property? - Historically..... initially the task of school letting was the responsibility of the Area Officer and Legal and Admin. Services. In the early 1970s community education began to establish Councils which were representatives of the local community. Local community groups and local music groups and the community sections and latterly the community wings in secondary schools became involved in decision-making locally and they were technically a sub-committee of the Education Committee formed under the same Education Act which formed the college councils and they would decide on letting matters. The duty of community education was (a) to form such councils and (b) to support such councils. That ran up until the formation of the School Boards in 1989 and thereafter you had really three separate people who could grant lets of educational premises.

Who were they? - You had the Area Officers from Legal and Admin. You had the School Boards who dealt with the school parts and you had the centre councils. In the case of Dunblane it was the centre council and the wing council in Dunblane High School.

If it was the Area Officer, was he actually doing the work that was the responsibility of the head teacher of the school? - I don't quite understand the question. The Area Officer would be from the Legal and Admin. Department who had the responsibility for administering lets.

Yes, but we have seen Area Officers' signatures on lets. We have been given the impression by at least one witness that that was simply giving effect to what was in theory at least the/

the decision of the head teacher to let the premises. Is that wrong?
- I don't think that is correct, no.

So the Area Officer had the responsibility of dealing with the let itself? - The Area Officer had responsibility to deal with the let in the absence of a School Board or in the absence of a centre council.

Now, is it possible in some instances there might have been a School Board but they simply left it to the Area Officer to deal with? - Yes, that is certainly possible. Yes, that happened on a number of occasions.

Did you know much about the operation of the Dunblane High School wing council? - Yes.

Can you confirm whether Thomas Hamilton was on it?
- Latterly he joined the wing council following difficulties over an application for let in 1993. He attended I think three meetings because the Council was open to any group within the area to join.

And what were the difficulties about the let in 1993? Very briefly? - The difficulties briefly? After the event I looked over the papers and I spent about three days trying to figure that one out. It would appear that previously Mr. Hamilton had applied to the Area Officer for let to hold a summer camp. On the occasion in 1993, we are not sure who he applied to because the School Board didn't sanction it. The community wing didn't sanction it. It would appear the signature to sanction on the let form was the janitor's and we don't know on what authority that let was sanctioned. The let itself was conflicting because the wing council or the centre council if we could call it that had already agreed a let for the Quakers at the same time as Mr. Hamilton had requested a let for his summer camp.

And did that mean that they would be in part of the premises at least during part of the time he was supposed to have or at least thought he had the whole let? - That is correct.

And that was eventually resolved after a lot/

lot of correspondence and meetings, is that right?

- Yes.

Apart from that, did your Department receive any communications from Hamilton? - Yes.

Were they always letters directly to you? - No.

What were they? - What I received were copies of letters to everybody else from him.

For what purpose? - I suspect to enlighten me to his views. He certainly sent me copies of letters to the Ombudsman, copies of letters to Michael Forsyth and copies of letters to whoever he happened to be writing to.

Now, I think that during the period I asked you about, that is July to October, 1995, you had some communication with Mr. Dickson from Strathclyde Region? - That is correct.

And he was the one to contact you? - Yes.

Did you know each other before then? - We didn't know each other but I previously held the position he was in. I worked as Area Officer in the Strathkelvin area before coming to Central Region and when Mr. Hamilton approached Strathkelvin for a let, they were unsure of him and telephoned me because they knew me and I was in the Stirling Council or Central Regional Council area.

Now, when he contacted you, what was the state of play between the Community Education Department in Central and Hamilton? - The community education staff were under an instruction and the instruction was that any dealings with Mr. Hamilton had to be directed through Legal and Admin., through Mr. Flett in Legal and Admin. We were not permitted, unusually, to approach Mr. Hamilton for any purpose and we were to refer all conversations and all correspondence to Legal and Admin. That was unusual.

Was it actually exceptional, so that he was the only one? - He was the only person that this kind of arrangement happened for.

And/

And by that period in 1995, had that direction applied to every application for let that Hamilton made? - No, that is separate from let applications. When he applied for a let application, my staff were instructed to contact Legal and Admin. and advise them of the fact that Mr. Hamilton had applied for a let and to proceed with the let in the normal way but other correspondence and all other meetings with Hamilton was to be noted and reported to Legal and Admin.

So what was it you were initially telling me had to be referred to the Legal and Admin. through Mr. Flett? - Any correspondence from Mr. Hamilton and leaflets he was putting out into the community. Any interface with Mr. Hamilton at all.

Was there any policy, and I use that in the broadest sense, to either encourage or discourage Hamilton from making use of Central Region's premises? - There was a practice of discouraging Mr. Hamilton, a widespread practice.

One way of course is by making it difficult for him by re-routing applications and so on but that didn't happen? - No, we didn't re-route applications as such. What we encouraged staff to do and Alva would be an example of that, where Mr. Hamilton applied for a let we couldn't prevent the let because of the way in which we operated so we allowed the let to run for a period of six weeks to the summer holidays and then I instructed members of staff to ensure that we had a more deserving group utilising that let after the summer holidays.

And did that actually happen? - That actually happened, yes.

And it happened where in particular? - It happened in Alva.

And was that within your area? - That was within my area, yes.

Were you only dealing with part of the Central Region area? - I was dealing with Stirling and Clackmannan.

And I take it that throughout the Education/

Education Department it would be known that Hamilton was to be discouraged if possible? - Yes.

And obstacles were to be put in his way, albeit this could not be done officially? - Yes. obstacles in the sense that if Mr. Hamilton applied for a let we encouraged our staff to ensure that somebody else was utilising that let but any other kind of discouragement we couldn't do.

Do you remember when it was Mr. Dickson phoned you? - I would have to look at my notes.

Roughly? - 1994 but I can't.....

Well perhaps you could check your notes just to be clear if you have got them with you? - Yes. It would be August of 1995.

And what did he want to know? - In the first instance it was his secretary, Cath, who I knew who had previously worked for me.

What is her second name? - Cath Carr. She phoned and said "I've just had Mr. Hamilton in the office and I feel uncomfortable about it. He has applied for a let here. Do you know anything about the man?" and I explained what I knew of him and she just said "You'll need to speak to Mr. Dickson" so I spoke to Mr. Dickson at length.

And what did you tell him about Hamilton? - I told him what the working practices in Stirling Regional Council were and that we would attempt to prevent him from gaining access to school premises and to young people. I told him that a number of officers within the Council had been looking at various photographs that I hadn't seen but I had heard of. I told him that a meeting of senior officers had taken place and my understanding of the situation was that they were making a decision about whether or not they would attempt to exclude Hamilton completely from Central Region and we were awaiting the result from that. I told him that I would not let my kids go to a club that Hamilton was responsible for and I would advise him to try and put obstacles in his course to prevent him from gaining access. A few days later he phoned me again and then told me that he had received a form back, a sponsorship form, and told me/

me who the signatures were on the form and asked me if I could authenticate the signatures, did I know who they were.

And did you authenticate them? - Well, I only contacted one person. I contacted Councillor Robert Ball.

Now, authenticating a signature might mean just saying that it looks like his signature? - No.

It sounds as if you were going to do more than that? - I telephoned Robert Ball. I got him at his office in the University. I explained why I was phoning and I explained the background and Robert Ball advised me yes, that he had signed the form.

Was there any more to your discussion than that? - Well, Councillor Ball explained to me why.....I mean, I had said to him that my understanding of the practice within the Council was that we were trying to prevent Hamilton getting access but Councillor Ball advised me that he had seen photographs and that there was nothing illegal about taking photographs of young people and until there was hard evidence against him he felt he had a duty to sign it. He was one of his.....I think the word he used was one of his "punters". I think what he meant by that was that he was one of his constituents.

At that stage was Councillor Ball one of the meeting you have just told us about among Legal and Admin. and other Departments discussing the question of Hamilton? - I don't know. I didn't discuss that with Councillor Ball. Councillor Ball told me why he had signed it and I just left it at that.

In your statement which you gave to the police you indicated that he had actually attended a meeting with Legal and Admin. and other Departments to discuss the question of Hamilton having access to community education property. Is that not right? - I had been told that by my own line managers, that he was involved or had attended. I am really not sure whether he attended or not because I didn't attend.

Did/

Did you phone Mr. Dickson again after you spoke to Mr. Ball? - Yes.

And what did you tell Mr. Dickson? - I telephoned Mr. Dickson and advised him that the signature was authentic and that he had the Chair of the Education Committee of Central Region's signature on the form and it was very difficult for us to say any more.

CROSS-EXAMINED BY MR. JONES: Can you look please at a document D3H(v). You were asked some questions about the scheme for letting and I wonder if you could explain to us what this is. It is headed "Central Regional Council: Education Services. Scheme for the Letting of Educational Premises". Is that something you have seen before? - It is something I have seen before, yes.

And it was a Central Regional Council policy document I think, is that right? - It is a Central Regional Council policy document.

Can you describe to us what it is and what its purpose was? - I mean, it is just an outline of what you must do when you take a let of educational premises.

I think it sets out the general principles firstly, is that right? - Yes.

And within that set of general principles it establishes priorities for letting of Council premises, is that right? - That is correct.

And there are priorities allocated according to the type of premises and the timing, is that correct? - That is correct, yes.

And if we go on to the second page, the conditions of let are then set out, is that right? - That is correct.

And they continue through I think to the end of the document? - Yes.

Now, was that the only policy document that existed in relation to lets up until the time when Central Regional Council ceased to exist? - There was another document which I remember seeing. I/

I certainly don't have it with me but there was another document which laid out the priorities that these lets will be free and these lets will cost so much and it was lists and lists and lists of various types of group. There was that kind of document and that was a kind of working document that we used for everyday letting because it allowed us to say that youth groups were a priority and as Mr. Hamilton was working with children's groups, not youth groups, because children were defined as under 12 and youths were defined as broadly secondary school and over, we were able to utilise that part of it to prevent him getting access because we could put a youth group into a gap in the programme.

An essential feature of the document you have in front of you is an encouragement for use of Council premises by the community, is that right? - Yes, that is correct.

No re-examination.

MR. BONOMOY: In the light of that evidence, sir, I would propose to recall Robert Ball who has already given evidence.

LORD CULLEN: Yes.

ROBERT BALL, (Recalled),

LORD CULLEN: You are still on oath.

EXAMINED BY MR. BONOMOY: There is one matter I should have asked you about when you were here before which I would like to ask you about now. Can you please have in front of you a document which is DSRC-ES3 and if you could go to the second page of that. Can you confirm your signature there dated the 5th of August, 1995? - Yes, that is correct.

And you will see that that is a signature to the effect inter alia "Leaders are known to me and worthy of support"? - Yes.

Now, you gave us some information the last time about the state of play between Hamilton and the Regional Council early in 1995 when you yourself were anxious to be told about any matters of concern affecting/

affecting Hamilton? - Yes.

Can you clarify for me whether at the time you signed this document you did consider that he was still worthy of support?
- I think the questions that were looked into in 1995 had perhaps been resolved and no further action taken. This was basically an application for a hall let and I found it was difficult to refuse to sign it given the number of hall lets he has had for the period of time he had with Central Region although I did have misgivings about signing it at the time. I did not feel happy about it.

If you look at the front page you will see this one is not actually for a let. It is for recommendation as an approved Community Education Service organisation which one might think is a bit more formal than a let? - Yes.

Well,

11.20 a.m.

Well, I thought it was a late application.

Did you not give much attention to the form? - I perhaps didn't give it as much attention as I should have done.

Do you think if you had read this carefully you would have signed it? - It is very difficult to say what you would have done in other situations. If it had been a bit more formal I might have had further reservations.

Do you mean if you had looked at it more formally you might have had further reservations? - Possibly.

We have also had evidence that one of your staff, Mr. Houston, raised with you the question whether it was appropriate for you to sign this form; is that possible? Do you remember that conversation? - No, I don't, but I am sure he said he rang me up about it.....

No, he indicated you told him you had looked at the photographs yourself, and there was nothing overtly indecent and nothing you could say was improper. Do you remember that conversation? - I don't remember any of that conversation, but I am sure if he said that, that conversation took place. We were in a busy time, remember, with Local Government reorganisation.

Do you remember signing the form? - Yes. I can remember very well Mr. Hamilton arrived on the doorstep asking me to sign the form.

Was it just done on the doorstep? - Yes. He arrived and knocked on the door just as I was about to leave to go to a meeting.

So that means you didn't actually read this form? - I briefly looked through it. Perhaps I didn't read it as carefully as I might have done.

No cross-examination.

MR. BONAMY: Sir, that completes the oral evidence available this morning. You did indicate/

indicate yesterday evening that further consideration should be given to the matters arising out of the statement I made and it may be this is the appropriate time to deal with it.

LORD CULLEN: Earlier this morning I granted Mr. Campbell an opportunity to prepare some remarks. Perhaps he is ready now?

MR. BONOMOY: I would welcome five minutes on another separate matter, which is linked to this, which I propose to deal with at the same time after you have resolved the issues arising from yesterday's statement, sir.

LORD CULLEN: Would five minutes suffice, Miss Dunlop?

MISS DUNLOP: Yes, sir, five minutes would suffice.

LORD CULLEN: Very well.

After a short adjournment.

LORD CULLEN: Yesterday I deferred consideration of the statement made on behalf of the Lord Advocate to give parties an opportunity to consider the position. I of course have taken the opportunity of looking at what was put before me yesterday and studying the statement made. Now, Mr. Campbell, do you wish to address me?

MR. CAMPBELL: Thank you, sir, yes. Can I say at the outset that what I have to say in this regard is said purely with a view to assisting you, sir, on a matter which has arisen, though I am confident that those whom I represent would wish the fullest scrutiny of the whole background to the Dunblane tragedy as can properly take place.

Sir, you are well aware that you are a Tribunal set up by both Houses of Parliament under the 1921 Act, with the function of reporting to Parliament on the issues arising from the events on the 13th March. So far as the submissions made yesterday are concerned, the Lord Advocate is a Minister of the Crown, and accountable to Parliament for the conduct of the Public Prosecution Service in Scotland, including the Procurator-Fiscal Service.

Sir,/

Sir, in this context I would refer you to an article written in the Law Quarterly Review for 1938 by the then Lord Justice General, Lord Normand, set out at page 345, particularly the passage at the foot of page 353. This article is entitled "The Public Prosecutor in Scotland", and at the foot of page 353 his lordship says "Since at least the middle of the sixteenth century the Lord Advocate has held an important position in the political hierarchy of Scotland. He is not only the public prosecutor; he is also the chief law officer or legal adviser of the Government in Scotland. Before the union of the English and Scottish Parliaments in 1707 he was an important member of the Scottish Government, and since the Union he has always been a member of the British Government, almost invariably with a seat in the House of Commons. It is essential that the conduct of so important an official as the public prosecutor should be subject to the criticism of Parliament, and it is manifestly advantageous that the public prosecutor should himself be in Parliament and able to answer in person any attack made upon him there. The vital importance of the responsibility of the Lord Advocate to Parliament for his official conduct is obvious, for there is now no other effective check upon his powers. But it is equally important, if the administration of justice is not to be corrupted by political and party considerations, that the public prosecutor should exercise his powers judicially and that he should not be interfered with in his duties by the executive government for political reasons", and the learned author goes on to discuss matters in that general context.

My lord, I note the passage where the view is expressed that the conduct of so important an official should be subject to the criticism of Parliament and to the manifest advantage of the accountability of the Minister to Parliament: so in that context this is in a sense a Parliamentary Tribunal.

Sir, there is therefore an identifiable tension or potential conflict between on the one hand the public prosecutor's independent, impartial role and on the other hand the accountability of the law officer to Parliament.

Reference was made by my learned friend yesterday/

yesterday to the statement to the House of Commons by the then Prime Minister Harold McMillan in relation to the WATERS case; and it is plain in my submission from what was said there that the emphasis is upon the need to avoid pressure or influence on the independent decisions of the public prosecutor.

In my submission it is plainly right that the Courts and Parliament and indeed everyone else should be careful not to interfere with or influence the independent and impartial exercise of the public prosecutor's quasi-judicial discretion as to whether or not to institute a prosecution or to abandon a prosecution once commenced. Most if not all of what might be regarded as restrictive comments made in either Court proceedings by judges or in Parliament arise in this particular context, and in my submission should be so understood.

However, my lord, it is one thing to leave it to the Lord Advocate or to the Procurator-Fiscal to decide whether or not a prosecution should take place in particular circumstances: it is however another matter altogether whether in appropriate circumstances and in the public interest it is proper to examine decisions already taken. Thus, to elaborate for a moment, it does not follow in my submission from the Lord Advocate's role as an independent public prosecutor that he has an absolute veto on all scrutiny or comment on the acts or omissions of public prosecutors in Scotland. Indeed, it may be considered that the essence of Parliamentary accountability is not only that full explanations can be required but also that conclusions can be drawn and lessons learned for the future.

As I understood it, underlying the statement read out yesterday is a submission that there exists a rule of law which inhibits your lordship and others from scrutinising the merits of decisions taken. As I will elaborate it in a moment, with your lordship's permission, it is in my submission notable that the case law referring to for example, the scope for a private prosecution does not provide support for any such absolute rule of law.

The case law does not indicate that the Court/

Court can never call upon the Lord Advocate to explain his reasons, nor in my submission does it indicate that the Court should never scrutinise the merits of decisions made either by or on behalf of the Lord Advocate or by members of the Procurator-Fiscal's Service. What however is quite clear is that the Court will not act with a view to influencing the public prosecutor's conduct, but rather in limited circumstances it will permit a private prosecution in the absence of the Lord Advocate's concurrence. In other words, my lord, the Courts along with other organs of our constitution are jealous to guard the independence of the public prosecutor, and it is no part of what I have to say that that independence should be threatened by outside influence or interference.

However, as I indicated at the outset, this Inquiry is in the context of a Tribunal constituted by resolution of both Houses of Parliament under the 1921 Act, set up to examine as a matter of urgent and public importance the issues arising from the Dunblane tragedy.

LORD CULLEN: That is a separate consideration from what you say are the limitations of the rule. In other words, what I think you are saying is that there is a limit to what the Court would feel itself inhibited from doing, but you are also I think referring to the origins of this particular Inquiry?

MR. CAMPBELL: Indeed.

LORD CULLEN: Now, is that not a separate argument?

MR. CAMPBELL: I am not sure it is a separate argument.

LORD CULLEN: If you can satisfy me that the rule had limits of the sort you are indicating would it matter whether it was set up in the way it has been set up or not? The fact that it is set up in this way might provide you with an additional argument, even if the first argument is not valid; I don't know. I want to know where you are seeking to go.

MR. CAMPBELL: The relevance as I understand/

understand it of the origin of this Inquiry is that it is rooted in Parliament, in that there has been a decision of both Houses of Parliament that this Tribunal should carry out the investigation and report back to Parliament: so there is a clear link in my submission between what is happening here and accountability of the public prosecutor to Parliament to answer for the conduct of the public prosecution system. Whether that is a separate or additional point I confess I am uncertain about.

What I am anxious to establish, my lord, or to submit is that there is nothing in the Minister's Parliamentary accountability which infringes his undoubted privilege to independent and impartial decision-making.

LORD CULLEN: And of course, as you stated earlier, quite correctly, there is a tension there.

MR. CAMPBELL: Yes.

LORD CULLEN: And that tension might emerge if the Lord Advocate was taken to task before Parliament in regard to what decisions he made. I am not sure how that would be resolved before the House of Parliament, or even the House of Lords. That is where the two points come into collision with each other.

MR. CAMPBELL: It would be resolved in this way, as I understand it: that if what Parliament is seeking to do in criticising or questioning the Lord Advocate's decision was to interfere or influence his independent, impartial decision-making process then that would be improper conduct by Parliament or by any other body.

LORD CULLEN: I see that. That rather suggests, therefore, that we come back to the first point, which is that the position of the Courts may essentially be the same as the position of Parliament ought to be.

MR. CAMPBELL: Yes.

LORD CULLEN: I wondered whether there was any magic in the fact this happened to be set up consequent on a decision of Parliament.

MR./

MR. CAMPBELL: No. I do not see any magic. I can now understand my lord's point.

My lord, on that same face, this Tribunal's purpose is not to influence a public prosecutor's decision or decisions in this or any other cases, but rather to assist Parliament in considering the full circumstances of what has happened, and more importantly than that, to assist Parliament in learning any necessary lessons and making any necessary reformation, all in the public interest.

One can note the obvious fact that there will never now be a prosecution of Thomas Hamilton.

Sir, before turning to the cases, dealing for a moment with the statement which was read out yesterday, if I may, certain reasons are given in the statement, particularly at pages three and four, for the position which has been adopted. If I may deal with one or two of those at this stage.

At the foot of page three it is said "Although the considerations underlying the principle against subjecting to critical scrutiny prosecution decisions apply most obviously to the interests of potential accused persons, they also affect victims and witnesses". I take it that emphasis is placed there on victims and witnesses for the reason that there can be no prejudice to the interests of the potential accused person, who is now deceased.

Sir, in my submission it is not easy to see how in the present circumstances the interests of victims and witnesses arises as a practical problem or issue, and no explanation has been provided as to why this is a difficulty.

LORD CULLEN: That illustrates a point that is of some concern to me, and it is this. We are discussing on the one hand this scopeable role and what its limits are, but we are also at some point concerned with the ability of freedom of the Lord Advocate to waive his insistence on some sort of privilege that he has. If you touch on a point that there is no indication of how the interests of potential victims or witnesses are involved, we may be in an area where we are not talking about the role,/

role, we are talking about whether or not it may be waived.

It is one thing to say -- I can follow your submissions as far as the rule is concerned, but that is a different thing from saying I should embark on some sort of examination of the Lord Advocate's discretion, over which I have no control. Do you understand what I mean? If the rule applies to a certain matter, the waiving of it is for him and not for me; is that right?

MR. CAMPBELL: If the rule applies.

LORD CULLEN: So we come back to the scope of the rule.

MR. CAMPBELL: Yes, I accept that. There may be circumstances -- I will come on to this later -- where even if the rule does apply the Lord Advocate may nonetheless have discretion whether or not to waive it, and your lordship may or may not invite the Lord Advocate to reconsider his position.

LORD/

12.00 p.m.

LORD CULLEN: But of course, that will be as far as it goes.

MR. CAMPBELL: That could be as far as it goes. On the other hand, if your lordship is with me on the limitations of the rule, it does not necessarily follow that your lordship would then ignore the Lord Advocate's position, because if one assumes that "Your lordship has freedom if he so wishes to listen to submissions as to the soundness or otherwise of decisions, and if indeed your lordship has freedom in his report to pass comment upon those decisions rather than simply record the facts of what they were, your lordship may nonetheless in the exercise of his discretion as the master of these proceedings, decide not to do so for whatever reason, and therefore considerations such as this may again be relevant.

It is no part of my submission that your lordship is bound to act contrary to the position which has been taken by the Lord Advocate because your lordship will always be in charge of the procedure in this Inquiry in the same way as your lordship would be on other perhaps less controversial matters, so on the assumption that this issue may arise in either or both of those contexts, as well as the absence of any explanation for the relevance and the reference to victims and witnesses, in any event in my submission, any consideration of the interests of victims and witnesses would at first sight in any event appear to provide a justification for providing no information upon the matter at all rather than an embargo upon scrutiny of the information once all the other details in relation to information etc. has been produced.

Secondly, my lord, at the top of Page 4, perhaps a slightly different point is taken -- "If decisions on criminal cases are not taken privately, without the pressure of public scrutiny and on the basis of an independent assessment of the quality of evidence and credibility of witnesses, prosecutors could be inhibited from taking difficult decisions, which they must take in the exercise of an independent discretion". It is not difficult to see the potential force in that remark, but it is a very/

very extreme opposition. It would mean that there could never be any scrutiny of decisions taken by public prosecutors, and the logical result there would be that the Lord Advocate is accountable to no one, so it may be that there is a matter of balance to be exercised, assuming of course that the matter is not trammelled by a binding rule of law, and if it is helpful in this context, it may be thought that the public interest in the independence and impartiality of the public prosecutor in this context is satisfied both by what I have said so far and the immunity from civil suit which is given to the Lord Advocate and all acting in his name. That would include Crown Counsel and Procurators Fiscal in a solemn procedure. I needn't go to it, but the relevant authority on that is the case of Hester v. McDonald 1961 Session Cases at 370, decision of the first Division, and so far as the decision of Procurators Fiscal raising proceedings in their own name in the Sheriff Court in Summary Procedure, this particular matter is governed by Section 456 of the Criminal Procedure (Scotland) Act 1975, and I can provide my lord in due course with a copy of the relevant Section in Renton and Brown dealing with that, but in summary, the Section provides that "No judge, clerk of court or prosecutor in the public interest shall be found liable by any court in damages for or in respect of any proceedings taken, act done, or judgment, decree or sentence pronounced under this Part of this Act", unless certain criteria are satisfied, firstly, there has been imprisonment, that the judgment or whatever has been quashed, and most important in this context, that "the person suing shall specifically aver and prove that such proceeding, act, judgment, decree or sentence was taken, done or pronounced maliciously and without probable cause". I note the reference there to the probable cause, so that is a distinction between the immunity given to the Lord Advocate and those acting in his name on the one hand, an absolute uninhibited immunity, and on the other hand a more limited, but nonetheless extensive immunity given to judges and Procurators Fiscal acting in their own name rather than in the name of the Lord Advocate, and one notes that the Statutory Provision expressly recognises that in any civil suit, one issue which may be ventilated is whether or not a decision was taken with or without probable cause, which one might imagine necessarily involves consideration of similar issues to those which we have/

have been discussing in this Inquiry in this context.

Sir, it does occur to me that although time has not permitted a concluded view on the matter, that in this whole area, there may be relevant differences between the Lord Advocate on the one hand and the Procurators Fiscal Service, which is now, as I understand it, seen as a branch of the Civil Service, but I don't make any specific submission based upon any such distinction.

LORD CULLEN: Are you drawing a distinction here between summary and solemn procedure?

MR. CAMPBELL: There is a clear distinction drawn in the context of immunity from civil suit.

LORD CULLEN: Quite so, but as far as the present problem is concerned, are you drawing a distinction?

MR. CAMPBELL: No, my lord. More generally, sir, in the context of the Lord Advocate's statement, in my submission it is not easy to understand the rationale or purpose of providing a full explanation, or a full account perhaps more accurately, a full account of what happened, giving full disclosure of all relevant documentation, and indeed evidence, albeit to a limited extent, from the Fiscals themselves, as to the facts of what happened, but then to deny the Tribunal and Parliament the opportunity to consider the merits of what was done.

Reference is made to Mr. Vannet's review, but as the Tribunal will have seen if it has looked at that, the document is strictly speaking not a review as such. It is the nature of an account or a summarised compilation of what I might term Precognitions, and again just generally speaking, it is not easy to understand why Mr. Vannet was asked to do this if the intention was not to provide a review in a proper sense of the conduct of the Fiscals involved.

Sir, I am about to turn to the cases, but before I do so, for the avoidance of doubt, I should/

should make it clear that while in my submission serious questions do arise as to the soundness of the decisions taken by the various Fiscals involved, I am not in a position to assert that there is not or can be no justification for the decisions which were taken, or no good justification for the decisions which were taken, and it may be thought unfortunate that the Crown should lead evidence which raises these serious questions, but then refuse to explain them or to permit these decisions to be the subject of comment or scrutiny. This situation creates a risk that persons will draw quite reasonable and natural conclusions from the evidence presented without the benefit of a satisfactory explanation, always assuming that such a satisfactory explanation does in fact exist, so we seem to be in the realms of a half-way house which on the one hand might be regarded from one point of view as the best of all worlds for the Crown, but on the other hand may in fact be the worst of all worlds for everybody involved, so turning to a consideration of the rules of law as it has been presented by and on behalf of the Crown, my lord has my submission that the law, putting it at its lowest, as to the scope for comment by this Tribunal on the extent of the actions and the omissions of the Procurator Fiscal Service is not as clear-cut as my learned friend might suggest.

LORD CULLEN: Your position is that the rule applies only to those cases there there is a risk of a decision yet to be taken being influenced by some improper consideration.

MR. CAMPBELL: Or perhaps more generally, that on-going proceedings might be influenced.

LORD CULLEN: And I suppose one might include other cases where the decision had been taken, but it wasn't too late to extract from that, in other words no commitment had been given which would mean that the matter was completely foreclosed.

MR. CAMPBELL: Indeed; whereas in my submission, my lord, any submission by Parties at this Inquiry, and more importantly, any comments by the Tribunal in its report to Parliament as to the conduct of the Procurators Fiscal involved, would not/

not amount to a challenge upon the independence of the Lord Advocate or others acting as public prosecutors in Scotland. Such would not amount to an attempt to bring about a prosecution which the public prosecutor had decided should not take place. Such would not amount to an attempt to over-turn or reverse a decision already taken. In summary, it would not prejudice the impartial and exclusive jurisdiction of the Lord Advocate or other public prosecutor in this or in other cases. Similarly, it would not be an invitation to Parliament to influence any decisions in this particular case or to put pressure upon the future conduct of the public prosecution system in Scotland.

My lord, the first case that I want to refer to is the case of J & P Coats Ltd. v. David Brown, a decision of the full bench of the High Court, reported at 1909 Justiciary Cases at Page 29.

My/

12.15 p.m.

My lord will see from the rubric that the case involves circumstances in which a full Bench, with Lord McLaren dissenting, to authorised a private party to institute prosecution by way of Criminal Letters in the High Court of Justiciary without the concurrence of the Lord Advocate which had been refused. It is perhaps unnecessary to deal with the details of the specific case which involved an alleged fraud.

Turning to the opinion of the Lord Justice Clerk, Lord MacDonald, at page 33 he says "The prosecution of crime in Scotland has for so long a period been practically in the hands of the King's Advocate, and of subordinate public prosecutors acting under his control, and this procedure has been attended with such satisfactory results to the administration of the criminal law, that private prosecutions for serious crime is practically unknown, the public being well satisfied that as a general rule the interests of justice are well guarded by the Lord Advocate's Department. The question now arises for the first time for very many years whether a private prosecution shall be allowed to proceed, seeing that the Lord Advocate declines to take up the case or to give his concurrence to a prosecution at the instance of the party who alleges that a criminal wrong has been done to his injury.

A citizen desiring to institute a prosecution at common law for crime requires by law to be in the position - (1) that he as applied to the Lord Advocate to obtain his concurrence to the prosecution and (2) that the crime alleged be a wrong towards himself. By these rules the accused citizen is safeguarded from malicious or vindictive prosecution by private individuals, the Lord Advocate, or those who represent the public interests under him in the inferior Courts, being responsible for the proper exercise of their office in any question relating to the granting of concurrence to a private prosecutor's action.

But there is not vested in the public prosecutor an absolute right of veto. It is the right of the citizen to complain to the High Court of Justiciary against a refusal by the public prosecutor to grant his concurrence to a private prosecutor where he has declined to take up the prosecution on behalf of the Crown. The Lord Advocate/

Advocate frankly conceded this at discussion. He must, if called on, shew cause for his declinature, and the Court can consider the question whether the withholding of the concurrence in the circumstances may involve a wrong to the citizen complaining, and a failure of public justice. For the citizen desiring to prosecute is seeking to invoke the law not for reparation to himself, but ad vindictam publicam, and this is clearly expressed in the Criminal Letters granted to him. If he desires personal reparation he must seek that in a Civil Court. It is only for the purpose of preventing the right to prosecute being used for vindictive or malicious ends that he must ask for the Lord Advocate's concurrence.

It is in that state of the law that in the present case the complainer presents to this court a complaint and form of charge by Criminal Letters, and asks that a private prosecution shall be sanctioned by the court, either without the concurrence of the Lord Advocate, or by the Court ordaining the Lord Advocate to grant his concurrence. At the debate the Lord Advocate said that if in the end either of these courses commended itself to the court, he would act as the court might order.

It seems to me not to be a question of serious importance which of these courses is to be adopted, if the ultimate decision of this case should be that a prosecution is to be allowed. In either case the prosecution would proceed in exactly the same manner".

His lordship goes on to deal with this question of procedure and the result is that if the court is so minded it would not require the Lord Advocate to concur contrary to his will. It would rather simply sanction a private prosecution.

At the foot of page 34, "Upon the question whether, on the papers and the arguments which are before the court, the complainers should be allowed to obtain the Criminal Letters they asked for, I have come to be decidedly of opinion that the case is one in which the Court ought to allow the case to proceed."

His lordship then goes on to deal with specific/

specific circumstances of the case.

"I can have no doubt that the charge so made is a relevant charge" and then there is a discussion about the case of Alexander Bannatyne about fraud and then in the middle of page 35, "No doubt it may be said that there may be many cases in which a thing is done where the criminality would be small and perhaps such that the public prosecutor might in his discretion not think it necessary that the act done should be followed by a criminal prosecution. Further, it might be said that explanations might be given which would give a complexion to the case that might justify holding back from public prosecution. But in this case I do not think that there is ground for giving weight to such considerations".

His lordship goes on to explain why he comes to that view but it is plain, in my submission, that the Court is embarking upon a consideration of the merits of the case or at least the merits of whether or not there should be a prosecution.

At the foot of the page, "The Lord Advocate told the court that if the complainers would proceed to endeavour to obtain reparation by a civil action, he would consider the proceedings in such a case, and if he saw ground for a criminal prosecution in them, would reconsider his determination. I confess I was not able to follow the line of thought indicated by such statements".

His lordship explains why he is unimpressed by that proposal. "It is quite contrary to the order of procedure in criminal law administration that the whole circumstances of a case should first be thrashed out in a Civil Court, with possibly a succession of proceedings of review, ending, it may be, in the House of Lords after a litigation extending over years, and that then the question of criminal prosecution should be finally determined".

My lord, the judgment of the Lord Justice Clerk was that subject to the concurrence, my lord can see at page 39, Lord Kinneir, Lord Low and Lord Pearson, the only dissenting judgment is that of Lord McLaren.

I/

I dwell on this case just for a moment because it is a most authoritative decision in this area of the law, being a decision of the full Bench and it may be interesting to note the basis upon which Lord McLaren dissented. It was not on a matter of principle but was rather on the particular facts of the case.

At the foot of page 37, "No case was cited by the Complainers' counsel, and I know of no case, in which the Court has granted the prayer of a Bill for Criminal Letters without the concurrence of His Majesty's Advocate. But the absence of direct authority does not in any way militate against the power of the court, which is undoubted. It only proves that this is an extraordinary remedy for an extraordinary and unprecedented occurrence, viz the undue and arbitrary exercise by an Officer of the Crown of a power entrusted to him for public purposes."

LORD CULLEN: Is that the test?

MR. CAMPBELL: I would not accept that is the test, my lord, no.

LORD CULLEN: He does rather come out with it as if it is the test.

MR. CAMPBELL: Yes, he does. At the top of page 38, "That I may not be supposed to suggest a doubt as to the powers of the court, I note that the power has been very distinctly recognised in two modern cases, in one of which I was present as a Judge, but in neither case was the party complainer successful in challenging the Lord Advocate's decision to refuse his concurrence to the desired prosecution.

I will make one other general observation. Hume is a very high authority, but personally I should be disposed to go further than the dictum of Hume. If the Lord Advocate should state as his reason for not giving his concurrence to a Bill that the statements contained in the Bill did not in his judgment disclose a crime according to the law of Scotland, and if we were of opinion that the Bill did disclose a prima facie relevant charge of crime, I think we might sustain the Bill, leaving the relevancy of the charge to be further considered at the/

the trial, I say this, because I think that in the case of a pure question of law the Supreme Court of Criminal Jurisdiction may act on its own judgment, and is not bound by the Lord Advocate's opinion. In such a case I do not doubt that the Lord Advocate would give his concurrence, if desired by the court". And that is a theme which emerges again in some of the later cases, the potential distinction between on the one hand the issue of law pure and simple and on the other hand the question of whether or not the courts will review or repeat an examination of the evidence or witnesses carried out by the public prosecutor and I will elaborate, if I may, upon my submission on the distinction when I come to the relevant cases.

Then the dissenting judgment. At the foot of page 38, "In such circumstances I am confronted with the question, how am I to form an independent opinion on the fact as to whether there are or are not grounds for a criminal prosecution? It is one thing to say that we may give redress against an arbitrary refusal of the Lord Advocate's concurrence or a refusal on legal grounds which are disclosed to us; and it is quite a different proposition that we are to review the Lord Advocate's decision that the facts do not warrant a prosecution. If it were intended by the Constitution of the country that this court should undertake such a review, we should either have the power of calling for the Crown precognition, or of employing an agent to institute an independent enquiry and to report to us. Nothing of the kind has ever been done, and your lordships are not proposing to make such an enquiry.

It was argued for the complainers that the charge of fraud depended on documentary evidence, which he says discloses a prima facie case.

In my opinion the documents prove nothing." And that is essentially where his lordship dissented. "I do not doubt that the Defender made use of a colliery certificate that was untrue in fact, but we have only the complainers' statement in the Bill for the all-important point that the document was uttered knowing it to be false, and with intent to defraud. Now, I may be altogether wrong, but I must frankly say that on the question whether there is a prima facie case for prosecution,/"

prosecution, I prefer the dispassionate meaning of the Lord Advocate who has studied the case, to the unsupported statements of Messrs. Coats, who no doubt honestly believed that they have been defrauded, but who are not the best judges in their own case."

Towards the very end of his opinion, his lordship says "I may add with utmost deference to the opinions of other members of the court, that personally I should deprecate very strongly the notion that this Court is to be a Court of review of the work of the Lord Advocate's Department, a task for which, by its constitution and means of informing itself, the Court is alike unfitted; and my opinion is that the Bill should be refused."

Now, if my lord will allow me, the final judgment in the case is the opinion of the then Lord Justice General, Lord Dunedin.

It is plain that this was a very strong Court and your lordship may gain some assistance from this relatively short opinion. "Your lordships have already decided this case by a majority, and as, according to the Constitution of this Court, I have no deliberative vote, no opinion of mine can have an operative effect upon the fate of the case. But it is in accordance with precedent that I should state my opinion, and I therefore do state my opinion that I concur with the result at which the majority of your lordships have arrived.

The gravamen of the case seems to me entirely to turn upon this use of the certificate. Lord McLaren has said, quoting from the speech of the Lord Advocate, that the line was a difficult and narrow one which separated the province of civil and criminal responsibility, and that he had come to the conclusion that this case was one where criminal responsibility was not involved. Seeing that there can be no doubt whatsoever as to the relevancy of the statements as to there being a crime -- for I think it would be a very unfortunate thing if it should go out in a commercial country that there was any doubt whatsoever entertained here that the issuing of a certificate known to be false, to be used for the purpose of getting a payment which otherwise would not have been got, was anything less than a crime -- seeing that is so, I must say that I think what the Lord Advocate said then was not altogether/

altogether consistent with what he said immediately or soon afterwards, namely that if this case was tried civilly he would then reconsider the position. But the chief reason which has influenced my brother Lord McLaren in his dissent from the majority of your lordships has been his extreme repugnance of the idea that this Court should sit as a Court of review of the discretion of the Lord Advocate. I do not think there is any difference of opinion upon this matter. It is no light matter to interfere with the discretion of the Lord Advocate, and I can conceive very few cases in which we would so interfere.

But we are bound, nonetheless, to direct our minds to the particular case that has been brought before us, and I agree with the Lord Justice Clerk in thinking that the actual written documents that are here brought before us go very far to establish the case. Of course I do not wish to say too much on that matter, because I am not going to prejudice the defence which may be finally brought forward. But when my brother Lord McLaren went on to say that he thought that the whole matter would turn upon whether it was shewn that the party charged here really knew or did not know that this certificate was false, I am compelled to observe, first of all, that the complainer says so most distinctly, and that, if the Lord Advocate in the exercise of his discretion chooses to maintain a more than usual reticence, I am afraid he must take the consequence of that reticence. It seems to me nothing would have been easier than for the Lord Advocate to have said -- if he could say it -- that upon a consideration of the whole circumstance, he had come to the conclusion that the party charged here was under the belief that the certificate was true. If the Lord Advocate had said he was satisfied of that, or even if he had gone so far as this, that he had not brought before him any evidence which would lead to the conclusion that the party charged knew that the certificate was false, I imagine -- at least speaking for myself -- that I would not have interfered with the discretion of the Lord Advocate. The Lord Advocate says none of those things, and he leaves us -- and that is a matter for him to judge -- completely in the dark as to what the form of defence is to be. Under these circumstances the disagreeable necessity -- as I think I must call it -- is laid upon us of affirming that/

that this is a case where a subject has seemingly been wronged and no real reason has been laid before us why a prosecution should not be allowed".

So, my lord, one sees a line of approach there which first of all recognises the competence or the scope of the court to review a decision by the Lord Advocate or if review is perhaps not the correct word, at least to consider the merits of what happened but also a recognition that their Court will be reluctant to alter or to do anything which interferes with..... again, that is not the right word, which produces a different result than the decision of the Lord Advocate but there is no absolute veto on the sanctity of the Lord Advocate's decision-making process which elevates it above the jurisdiction of the court.

LORD CULLEN: How does that assist us in looking at the present problem?

MR. CAMPBELL: Well, it assists us, my lord, in this way; in that as I understood at least the main basis for the Lord Advocate's position, it is by reference to a rule of law propounded it is said in the case of McBain v. Crichton which I am coming to next and the fact that the court cannot review the merits or soundness of the Lord Advocate's discretionary decisions and as I understand it it is submitted that by parity of reason this Tribunal cannot do likewise.

LORD CULLEN: But in the case we have just been looking at what you have got is the court looking at certain material and expressing a view in regard to that material and as against that the knowledge that the Lord Advocate has not elected to prosecute and as the Lord Justice General said, it was not a light matter to interfere in the sense of insisting that there should be a prosecution despite the Lord Advocate's decision but this case does not show us the feelings of the court, so to speak, looking behind the door to find out in detail what was the process of reasoning or even indeed in demanding to know what the process of reasoning was that led to the actual result. Do you see what I mean? It is exercising its own judgment, knowing of course that it won't lightly interfere with the decision reached but I am looking to see whether the court looked as it were and demanded an explanation to/

to know what the inner thinking was and then looked at that.

MR. CAMPBELL: Well, I take my lord's observation. What the court seems to be saying is that it is a matter for the Lord Advocate as to how much information he is prepared to disclose and the Lord Advocate may take the risk if he feels fit to fully explain what has happened but that he may take the consequences.

LORD/

12.35 p.m.

LORD CULLEN: It might lead to the fact the Court might reach a decision it might not otherwise have done.

MR. CAMPBELL: Absolutely. On the other hand, I do not understand the Court to be saying that the mere provision of an explanation will itself necessarily prevent the Court coming to a different view.

In a broad sense, we may be in a similar situation in the present case, where the Lord Advocate has chosen to present a considerable body of evidence as to what happened, and factual evidence as to the decisions which were taken, but is apparently not proposing to explain or justify those decisions. So we might be in a similar situation here, where the Lord Advocate takes the consequence of that policy. That is a possibility, depending on the view of the Tribunal.

LORD CULLEN: You might be asking this Tribunal not to enquire into what the Procurator-Fiscal thought about to reach his own judgement as to whether or not Mr. Hamilton should have been prosecuted, assuming of course I impose on myself the very high test THE Court applied, that it was a quasi situation. Does that advance your argument about wanting to know exactly what went on in the minds of the Procurators-Fiscal?

MR. CAMPBELL: I for my part am not proposing to make any application, but if the Crown choose not to lead the Procurators-Fiscal I invite the Court to call them to give evidence.

LORD CULLEN: What do you want to achieve?

MR. CAMPBELL: My principal concern -- although I am bound to say it is a matter for the Crown whether or to lead the Fiscals; I am essentially neutral on that. My principal concern is not so much that but that there should be no inhibition in my submissions to the Tribunal, and the Tribunal should not be inhibited in its report to Parliament from commenting on the evidence it has heard.

LORD/

LORD CULLEN: So you want to be free to make submissions, and likewise you want me to be free to comment on the decisions reached in the light of the evidence, whatever it might be, we have heard?

MR. CAMPBELL: That is correct. I am bound to say -- although it is not a matter for me -- that it is a pity I feel that if the Fiscals do have good justification or explanations that the Tribunal should not hear it.

LORD CULLEN: I simply want to know whether you are appealing past me to the Lord Advocate or whether you are asking me to make any ruling on the matter. As I understand it, what your position is is you are saying you want freedom to submit on the basis of the evidence already adduced?

MR. CAMPBELL: That is the essence of my position. There may be a distinction between on the one hand freedom to make submissions on the evidence and on the other hand the idea of putting a Fiscal in the witness box and cross-examining him on his line of thinking.

LORD CULLEN: Take this case we are looking at as an example. There does not seem to have been any question of the Court having the right to know or thinking they had the right to know what went on in the inner councils of the Crown Office or the Procurator-Fiscal's Office. There is no evidence on that. On the other hand, it felt free in the context of that particular case to express the view that there should be a private prosecution, which involves passing some form of judgement on the information available to the Court. It is that aspect of the case you are interested in?

MR. CAMPBELL: Indeed. Turning to the case of McBAIN V. CRICHTON 1961 JC25, my lord will see from the rubric that this was a case involving the DH Lawrence's book "Lady Chatterly's Lover" and an attempt was made by a private individual to obtain the sanction of the Court for a private prosecution, based upon the alleged indecency and obscenity of that book. From the rubric my lord will see it was held that it was not the function of the Court to view the Lord Advocate's exercise of his discretion in refusing to concur in a private prosecution, /

prosecution, nor to examine the reasons which had affected that exercise; and that the only wrong alleged by the complainer was of a general and public nature, and that he had failed to show that peculiar and special personal interest in the alleged wrong which was necessary to sustain a private prosecution. That is the case which is particularly founded upon by the Lord Advocate in his statement to the Tribunal.

If one turns to the judgement of the Lord Justice General, Lord Clyde, at page 28, "This Bill for criminal letters has been presented to the High Court of Justiciary by Mr. A.G. McBain, chartered accountant, Glasgow, asking for criminal letters to enable him to initiate a prosecution against a certain bookseller in Glasgow for exposing for sale and selling in his place of business a book called *Lady Chatterly's Lover*, by D.H. Lawrence, which he alleges is lewd, impure, gross and obscene, and contains passages contrived and intended to corrupt the morals of the lieges, and particularly of the youth of both sexes.

"Since the Lord Advocate has refused his concurrence to the proposed prosecution, this Court ordered intimation of the Bill to be made to the Lord Advocate, as is the custom, and appointed a day for the Hearing of the Bill. The Lord Advocate has appeared in person at this Hearing and has informed the Court that he has fully investigated the matter more than once and, in the exercise of that wide discretion which is invested in the Lord Advocate, he has come to the conclusion that a prosecution would not be justified in connection with this matter. He has therefore decided not to prosecute at his own instance and not to give his concurrence to the private prosecution which the present complainer desires to raise.

"The Lord Advocate is quite entitled to take up this position. In this country he is the recognised prosecutor in the public interest. It is for him, in the exercise of his responsible office, to decide whether he will prosecute in the public interest and at the public expense, and under our constitutional practice this decision is a matter for him, and for him alone. No one can compel him to give his reasons, nor order him to concur in a private prosecution. The basic principle of our system of criminal administration in Scotland is to submit/

submit the question of whether there is to be a public prosecution to the impartial and skilled investigation of the Lord Advocate and his Department, and the decision whether or not to prosecute is exclusively within his discretion. This system has operated in Scotland for centuries, and -- see Alison on Criminal Law, Volume ii page 88 -- the result has completely proved the justice of these principles, for such has become the public confidence in the decision of the Lord Advocate and his Deputes on the grounds of prosecution, that private prosecutions have almost gone into disuse. It is utterly inconsistent with such a system that the Courts should examine, as it was suggested it would be proper or competent for us to do, the reasons which have affected the Lord Advocate in deciding how to exercise his discretion, and it would be still more absurd for this Court to proceed to review their soundness. Any dicta indicating that such a course is open to any Court are, in my view, quite unsound".

Now, the decision of the Court is explained not so much in that passage but in what follows, based upon the lack of title of the complainer to raise the matter in the criminal Courts, it being a purely public matter. That decision relates to the argument presented by the Lord Advocate, which is to be found at page 27. I won't take up the Tribunal's time by reading through the decision of the Lord Justice General on that matter; but what it does mean is that the comments at the top of page 29, however they are to be interpreted or in what context they are to be placed, are obiter dicta rather than part of the ratio of the decision.

LORD CULLEN: But in any event, take the second passage that you referred to, the second passage it is founded upon. That seems to be directed to an internal examination of how the Lord Advocate reached his decision, or those acting on his behalf reached their decisions, and secondly it is concerned with the absurdity of a Court reviewing their soundness. Now, as you have pointed out, it is well established that the Court does not review, in the sense of being the next Court one goes to after the Lord Advocate has finished with the case, but there may be certain circumstances where the Court will step in.

MR./

MR. CAMPBELL: Yes.

LORD CULLEN: So there are certain circumstances where the Court will pronounce on the matter whether or not there should be a prosecution, without going into the internals of what went on in the Lord Advocate's Office or in his name.

MR. CAMPBELL: Indeed. In other words, this passage should be seen in the context of the reluctance of the Court to interfere with the impartiality and independence of the prosecution decision itself. It does not mean that there may be no comment upon the decision itself, as opposed to a review of, as my lord has put it, the internal workings.

LORD CULLEN: That brings me to a point of some concern to me, and I think I will know how you will answer it, and it is this. If we have comment from you and comment from me, which may reflect on the individuals who took the decisions, and if they are not giving evidence, at least not giving evidence in regard to the justification of the decision they have reached, could that be said to be illogical or unfair? What is your position?

MR. CAMPBELL: There could be many occasions where unfairness in that general sense can arise from particular decisions taken.

LORD CULLEN: You see the point concerning me, that we have if you like something happening for our purposes we will assume behind closed doors. You say we know enough about the decision and we know enough about the statement of the particular reasons you say to comment on that. Now, that is supposed to be a one-sided comment, because the person who is involved has not given evidence, or if he does give evidence won't be asked about that. What do you say to that?

MR. CAMPBELL: If there is unfairness, the unfairness may be more than outweighed by the public benefit which may be derived from the comment.

As my lord has observed, if I am right in indicating there is no absolute veto on these matters being explored, then the remedy for the unfairness/

unfairness or potential unfairness lies in the hands of the Crown.

LORD CULLEN: This is rather an odd case, because as you have pointed out already, we have already received, heard evidence as to the stated reasons, and there appears to be no problem as far as the evidence relating to the stated reasons is concerned: that is made clear in the statements.

LORD CULLEN: Yes. So, my lord, any discretion which may on the face of it appear to arise from what is said by the Lord Justice General in McBAIN may disappear.

If this passage is considered in what I would submit is its proper context, as set out at the beginning of the passage, mainly that the Court will not interfere with the impartial and skilled investigation of the Lord Advocate and his Department in matters which are exclusively within his discretion, again one has an emphasis on "Don't interfere with the independent and impartial discretionary powers of the Lord Advocate". But it doesn't follow that there can never be any comment upon the outcome of that discretionary power.

I must say that the bald statement that the Lord Advocate can never be called upon to provide reasons for his decision is not supported by subsequent authority. It may not matter a great deal.

The only other member of the Court to express a view was Lord Guthrie: Lord Carmont simply concurred in the judgement of the Lord Justice Clerk. I don't think Lord Guthrie's judgement provides any direct support for what might be said to be a more extreme interpretation of the dicta of the Lord Justice General.

Sir, the next case is MEEHAN V. INGLES AND OTHERS 1975 JC page 9. The facts of this whole matter are somewhat difficult to summarise, and indeed obviously they are complicated, and it is perhaps not necessary for me to go into them. The case however involved an attempt by a complainer to obtain the exercise of the Court's discretion to grant a Bill of criminal letters where the Lord Advocate/

Advocate had refused to provide the necessary concurrence.

Perhaps just to summarise the position, my lord, I could go through the rubric. "One, serving a term of life imprisonment in respect of his conviction upon a charge of murder in October, 1969, presented on his own behalf two identical Bills for criminal letters, by which each in turn, he sought the Court's authority to raise a private prosecution against three police officers, alleged by him to have committed perjury as Crown witnesses at his trial, and in relation thereto to have conspired to pervert the course of justice. The Lord Advocate had refused to prosecute the officers for the offences alleged, and had further refused to concur in a private prosecution directed to that same end. On the first Bill the complainer contended (1) that he as a private individual had a right to initiate a criminal prosecution, since the Lord Advocate had not the exclusive right to do so; (2) that he could qualify an interest by showing that he had suffered injury of a substantial, particular, special and peculiarly personal nature beyond all others, as a result of the alleged criminal acts of the three police officer respondents; and (3) that ex facie of the Bill he has made out a prima facie case of the commission of a crime or crimes by the said respondents. On the second Bill the complainer further contended, having been unsuccessful in respect of his contentions under the first Bill, that the Court had proceeded upon the view, and wrongly, that the Lord Advocate was not obliged to give the Court his reasons for refusing to concur in the desired private prosecution.

"Held (1) that only in very special circumstances would the Court sanction a private prosecution; that the crimes which it was sought so to prosecute, viz. perjury and perverting the course of justice, were crimes pre-eminently suited to impartial rather than to ex-parte investigation and to such upon all the available evidence rather than upon what might be the choice of an interested party; and that plainly the very special circumstances before desiderated had not been made out; (2) that while it was undoubtedly the law that where the Court is considering a Bill for criminal letters the Lord Advocate is expected to state his reasons/

reasons for not concurring therein, the Lord Advocate, through his Depute, had in fact stated very fully to the Court his reasons for refusing to concur in the prosecution sought; and that the Bills must be refused".

My lord, I do not think it is necessary to go through the detail of their lordship's judgements on the matter. Curiously, exactly the same Bill, for reasons that were stated, came up a second time in the Court of Appeal with the Lord Justice General in the chair, exactly the same Bill, for reasons that were explained by the Lord Justice General at pages 13 and 14. It may be of help briefly to look at the Lord Justice General Lord Emslie's opinion on this matter.

LORD CULLEN: We better do that after lunch. We will adjourn until ten minutes to two.

After an adjournment for lunch.

LORD/

1.50 p.m.

LORD CULLEN: Yes, Mr. Campbell. When you are ready?

MR. CAMPBELL: Thank you, sir. Over lunch I was reminded that before lunch I referred you, sir, to repealed legislation in the form of the Criminal Procedure (Scotland) Act 1975 rather than the modern version. I dare say I could attempt to justify that on the basis that was the provision in force at the time.

LORD CULLEN: Is it to the same effect today?

MR. CAMPBELL: I am assuming so, sir, but I will certainly check that by tomorrow but I would anticipate that that provision, Section 456, which I think did mention predecessors will have been repeated in the new Act but I will certainly check it. I would be very surprised if there was any material change.

Sir, I was referring to Meehan v. Inglis in 1975 JC Cases. The only passage that I would be dwelling upon is in the opinion of the Court delivered by the Lord Justice General, Lord Emslie, at Page 14, halfway down the page. "In our opinion Mr. Meehan's proposition is without substance. It is undoubtedly the law that where the Court is considering a Bill for Criminal Letters, the Lord Advocate is expected to state his reasons for refusing to give his concurrence. One corollary is that a private party will not be permitted to proceed unless some very special cause is shown for interference by the Court, where the Lord Advocate has refused his concurrence and has stated his reasons for that refusal. Another corollary is that where the Lord Advocate offers no reasons to the Court it may be presumed that he has none. Contrary to Mr. Meehan's assertion, however, the Court on 11th October 1974 laboured under no error on this matter and, indeed, as the opinion itself disclosed the Court proceeded to judgment only after the Lord Advocate by his Depute had stated very fully to the Court his reasons for refusing to concur in the prosecution sought by Mr. Meehan. Further the dictum of the Lord Justice General (Clyde) in McBain is not to the effect contended for by/

by Mr. Meehan. Lord Clyde did not say that the Lord Advocate was not obliged to give his reasons for refusing to concur in a private prosecution. What he said was that it is utterly inconsistent with our system which is essentially one of prosecution in the public interest that 'the quotes should examine.....the reasons which have affected the Lord Advocate in deciding how to exercise his discretion and it would be still more absurd for this Court to review their soundness.' we see no reason to differ from that expression of opinion in so far as it is directed to cases where the Lord Advocate's reasons for refusing concurrence are derived from an exercise of his impartial judgment after exhaustive investigation of all sources of evidence. The position would, of course, be otherwise if the reasons turned upon a question of law or relevancy or, as in J. & P. Coats Ltd., upon the construction of documents".

Sir, in my submission that passage has to be read in the context of the case in which it is stated, namely an expression of the approach when considering whether or not to scrutinise the soundness of an impartial exhaustive investigation of all sources of evidence in the context of in effect bringing in a positive result in the nature of a fresh prosecution.

I can derive some comfort from the qualifications upon it which are stated at the foot of the page but, in any event, in my submission it should not be read beyond its context as for example whether the scope or the potential for improper influence or interference with an impartial investigation is past, it doesn't prevent for example this Tribunal or Parliament looking to the past and seeking to learn lessons for the future. So I invite my lord to treat this passage as indeed others to similar effect, as simply examples of situations where the Court may be reluctant to sanction a private prosecution rather than necessarily an example where it would be improper to comment upon past events where any risk of prejudice to the impartial position by a public prosecutor arises.

In any event, again I note that it is in a sense simply a reluctance to embark upon corridors and passages of the decision making process itself rather/

rather than necessarily any reluctance to comment upon the decision itself.

Some support for that approach can perhaps be gained on Page 15, towards the end of the first paragraph. "The Lord Advocate's refusal to support private prosecution was based upon the exercise of his impartial judgment after this exhaustive investigation and we were reminded, further, that quite apart from this careful review of the matter raised by Mr. Meehan on this occasion, the Lord Advocate and two of his predecessors had previously fully examined the allegations now made and had decided against public prosecution". So, my lord, in my submission it may be one thing in those circumstances for the Court not to sanction a private prosecution. It doesn't follow that in subsequent years it would then be improper for Parliament to scrutinise what happened and to comment upon it if that was thought appropriate in the public interest.

Sir, there is the well known case of X v. Sweeney in 1983 SLT48, the Glasgow rape case, but I don't think it advances matters for present purposes. The issues which were discussed at length in that case don't arise at all in the present context but I can provide my lord with a copy of that decision for consideration if that would be helpful.

The only other case that I wish to mention in any detail is a case in which my lord was involved in Court. It is McDonald v. HMA reported in 1988 SLT at Page 713. My lord can see what seems on the face of it to be a somewhat unusual case where not only was the person attempting to seek the sanction of a private prosecution but the prosecution was to be against both the Lord Advocate and, if my lord looks halfway down the first column of Page 174, a particular Procurator Fiscal who may now be doubting the common wisdom about lightning not striking twice.

If my lord looks at the rubric. "The complainer was convicted after trial in the High Court and appealed against conviction on the ground inter alia that in the course of the evidence of a Crown witness who was giving evidence exculpatory of the complainer (but in conflict with the witness's earlier/

earlier statements to the police), the Advocate Depute instructed

that the witness be charged with attempting to pervert the course of justice by having earlier given the police a false statement which was different from his evidence in Court, and thereby rendering the complainer liable to suspicion and arrest. Neither the complainer and his representatives nor the trial judge were advised that the witness had been charged, and the Crown case was presented to the jury on the basis that the earlier statement was in fact the truth. The appeal was refused. The complainer thereafter brought a Bill craving the High Court to issue Criminal Letters to permit him to institute a private prosecution of the Lord Advocate and the Procurator Fiscal at Stirling for subornation or perjury at the original trial and perjury by misleading the Appeal Court. The Lord Advocate's concurrence in the Bill was sought but refused. Held, (1) that since the Lord Advocate's concurrence had been refused, the Court had to consider the facts alleged in the Bill to decide whether the circumstances therein set forth were such an exceptional remedy should be allowed to the complainer; (2) that the action which was taken during the trial in relation to the witness was not an attempt to induce him to give perjured evidence but an attempt to persuade him to tell what the Crown believed with every justification to be the truth and accordingly the action did not amount to attempted subornation of perjury; (3) that since the crime of perjury was the judicial affirmation of falsehood upon oath and neither of the respondents gave evidence upon oath, the allegation of perjury was irrelevant and misconceived; and Bill refused".

Sir, I need not take up a lot of time on this. I refer to it principally because it would appear to be an example of cases in this general context with particular relevance to the judgment of the Lord Justice Clerk, Lord Ross, at Page 718, an example where the Court did in fact enter into the merits of the decision not to concur in the prosecution rather than simply proceeding simply upon the basis that the Lord Advocate had decided not to concur in the prosecution. Plainly, this is a somewhat special case given the identity of the proposed accused.

Sir,/

Sir, those are all the cases that I wish to refer to. Some reference was made in the Lord Advocate's statement to the statement to Parliament by the then Prime Minister, Harold McMillan, on the 16th of February, 1959 in connection with the Tribunal of Inquiry set up to investigate the John Waters case. I have a copy of that passage from Hansard which I can make available to my lord if that would be helpful.

LORD CULLEN: I think I have that already. I have been given a copy in that context. Yes, I have it.

MR. CAMPBELL: I'm obliged. All I would say with reference to the passage in Hansard is that one sees towards the foot for example of the first column that emphasis is placed upon the dictum of Lord Simon in an English case in a similar context, that the Attorney General in England should absolutely decline to receive orders from the Prime Minister or the Cabinet or anybody else that he should prosecute.

LORD CULLEN: What column is that?

MR. CAMPBELL: I'm sorry, it is the bottom of the first column. Column 31 towards the foot. "In reaching his decisions the Lord Advocate's duty in Scotland, like the Attorney General's in England, is to act in a quasi-judicial capacity, whether the person involved is a public functionary or a private citizen. In the words of Lord Simon he should 'absolutely declined to receive orders from the Prime Minister or Cabinet or anybody else that he should prosecute'." That passage and indeed the opening paragraph in the Prime Minister's submissions emphasises that the Prime Minister's main concern, namely to avoid improper influence on the decision-making powers of the Lord Advocate of the day and, my lord, in my submission there is no risk of such in the context of the immediate matter at hand.

So, sir, in conclusion, my submission is neither this Tribunal nor Parliament are inhibited by any rule of our law that prevents scrutiny and comment upon the conduct and decisions taken by the Public Prosecutor in respect of Thomas Hamilton and to/

to embark upon this exercise would, in my submission, do no harm to the underlying rationale of such restrictions which have been enunciated in the past, namely the importance of preserving the Constitutional position of Public Prosecutors as both independent and impartial.

Sir, it is not in dispute that the circumstances of the Dunblane tragedy are exceptional and the public concern and public interest and scrutiny of all relevant circumstances leading to the awful events needs no emphasis by me and unless I can assist you, sir, on any further subject that is all I wish to say.

LORD CULLEN: Thank you, Mr. Campbell. Does any other party wish to speak on this matter? Mr. Bonomy, do you wish to respond?

MR. BONOMOY: I think I ought to respond, sir. Obviously I subscribe wholeheartedly to the concluding remarks of Mr. Campbell about the exceptional nature of the events we are investigating here. However, I do not consider that anything else that has been said in his submission can, sir, alter the approach that the Lord Advocate has decided to take and which I invite you to endorse.

I have already advanced the authority I consider appropriate to support the principle. The principle either exists or it doesn't exist. It is impossible to define strategic limits to such a principle depending on the circumstances of the individual case. In my submission, there is no distinction between leaving a decision to a Procurator-Fiscal and not interfering with it and what has been sought to be shown to be a separate issue of later examining that decision critically. The two in my submission are identical. That is illustrated by the way in which a number of points have been made in the course of Mr. Campbell's submissions. For example, he has I think upon a couple of occasions today said things similar to assuming a satisfactory explanation exists in a Procurator-Fiscal's decision or words like "We will possibly never hear whether they have good explanations for their decisions". These, in my submission, are clearly examples of what would be the result of infringing the principle that every decision/

decision made would be made under the threat of being called upon to account at a later date. So it matters not whether a question can only be posed or pressure placed before the decision is taken, the very threat of questioning later imposes exactly the same pressure in my submission on a Fiscal and that is most clearly highlighted in the very question on Friday which gave rise to my intervention. You may remember, sir, that the question posed was "Let us just assume for the moment that your view of the law is correct and the view put forward by Mr. Gallagher was wrong. Would you agree that in that situation there are really only two explanations that would happen, that Mr. Gallagher misunderstood or didn't know the law or he was giving you a pretext for a decision which was based on other reasons?" Now, that that should be raised later imposes exactly the same pressure on the Procurator-Fiscal before he makes his decision.

LORD CULLEN: Sorry, I don't quite understand that. We're talking about an examination when the matter is so to speak dead.

MR. BONOMOY: Yes.

LORD CULLEN: What Mr. Campbell is doing is saying that this is a situation where there will be no current pressure and we may have something to learn, he says, from going at least some distance into the subject.

MR. BONOMOY: But it means, sir, that every decision hereinafter made, if there is no such principle recognised, will be made under the threat of that pressure being brought to bear at a later stage.

LORD CULLEN: But he says I think that one can compare the threat, if that is the right word, which could arise if somebody elected to try to apply for a private prosecution.

MR. BONOMOY: Well, I'm about to deal with that and in my submission there is a clear distinction between investigating a decision and what is behind a decision and in the circumstances to which reference has been made this morning and this afternoon to granting authority to bring a private prosecution, in my submission the decision to/

to grant a Bill for Criminal Letters is quite a separate issue from the issue which arises in the present case. It is coincidental that it is in the case of McBain v. Crichton which involves a private prosecution that the principle was declared by the High Court so specifically. It does not follow that the principle is something which is inherent to the question of whether or not a private prosecution should be brought only. In each of the cases which have been referred to it is, in my submission, clear that the court has refused to examine the reasons which have been given and indeed it is recognised that it was open to the Lord Advocate to give no reasons for refusing to concur. If, however, the reasons given, that is stated reasons do not on the face of them justify a decision, that is on the face of the stated reasons or if no stated reason was given at all then the court has taken the view that that does not prevent it from making its own judgment about the law that ought to apply to the facts before them and the relevancy of any charge that might be brought in deciding whether or not to authorise a private prosecution. Now, it would in my submission be impossible for the court to do otherwise. The court could never sanction a private prosecution without being satisfied that there was a relevant charge to be brought and, in my submission, the opinions that have been referred to today go no further than that. In Meehan v. Inglis, 1975 at page 14, we are at the foot of the page, as Mr. Campbell directed your attention, it says "The position would, of course, be otherwise if the reasons turned upon a question of law or relevancy or, as in J. & P. Coats Ltd. upon the construction of documents. What we have said so far is sufficient to dispose of the proposition....." In other words the court has to be satisfied in a case of a private prosecution that there is a relevant charge to be brought or there is on the face of the document evidence to support a charge.

LORD CULLEN: Yes, but these are cases where the court is exercising its own judgment, knowing the decision that has been taken and the stated reasons and not going beyond the stated reasons.

MR. BONOMOY: And what it has not done, in my submission, is said the Lord Advocate or the Procurator-Fiscal erred in some way in the exercise of/

of the discretion he had. All that the cases say is that there may be situations where we decide as a matter of law that there could be a relevant charge brought and in these circumstances that will be one factor to be taken account of by the court in arriving at the decision on a Bill for Criminal Letters.

LORD CULLEN: So could Mr. Campbell invite me on the basis of the evidence to decide whether a relevant charge could have been brought?

MR. BONOMOY: That in my submission would be one area that your lordship may be invited to make a decision on if there was sufficient material available on the basis of what has already been presented to the Inquiry.

LORD CULLEN: Yes, I am not talking about anything other than what has already been disclosed in evidence.

MR. BONOMOY: Yes, and the way in which you, sir, phrased the question was whether a relevant charge could have been brought.

LORD CULLEN: Yes.

MR. BONOMOY: Now, that is a matter of fact in my submission on which findings could be made.

LORD CULLEN: You see, we are getting to the point where you come very close to what Mr. Campbell is wanting to make submissions about.

MR. BONOMOY: Yes, that may be one point on which he does want to make submissions, in which case the position is clear and it is not making any inroads, in my submission, in this case, into the principle which has been stated, whether or not the facts could have supported a charge.

LORD CULLEN: So what by contrast would represent an inroad?

MR. BONOMOY: Whether or not a charge ought to have been brought.

LORD CULLEN: And is that because it involves factors beyond strictly the matter of relevancy?

MR./

2.20 p.m.

MR. BONOMOY: Yes. What the Lord Advocate has chosen to do in this case, and the exceptional nature of the course taken cannot be emphasised enough, has been to present material which is normally confidential, such as police reports into an investigation, the investigations carried out by them, and that of course presents the Inquiry with material which may enable the Inquiry to draw certain factual conclusions, but it would be wrong in my submission for the Inquiry to review the decisions made in this case on reviewing the exercise of discretion that was undertaken by the Procurators Fiscal, or for the Inquiry to actually endeavour to do the job of the Procurator Fiscal and decide what course of action would have been appropriate in the circumstances, and you, sir, will have noticed in particular that I have not endeavoured at any stage to interrupt evidence which related to the communication of material from the Procurator Fiscal to third parties, including police officers, again material which would normally be regarded as confidential and which you, sir, have seen witnesses themselves giving evidence, asked carefully whether they ought to answer the question before proceeding to answer it because they know very well the confidential way in which that material was conveyed to them.

Now, having got that far, in my submission it is appropriate for the Tribunal to draw conclusions that are appropriate from all the material, and I appreciate that it presents certain difficulties in deciding in what areas it is wrong, into what areas it is wrong to transgress, but I think that it will be possible to distinguish clearly between conclusions that may be drawn as matters of fact from the material presented, and by that, in that category, I include deciding whether the evidence was sufficient for example to constitute a relevant charge, and distinguish between these conclusions and conclusions about the way in which decisions were arrived at, which in my submission it would be wrong for the Inquiry to enter into.

Now, sir, in my submission there is a distinction, therefore, demonstrated in the cases we have been looking at between reviewing the decisions made/

made and deciding what the substance of the evidence before the Court amounts to.

LORD CULLEN: But in cases in which the Court has decided to sanction a fresh prosecution, it must have reached the point at which they were satisfied that a relevant charge could be brought on the basis of the information before it; is that right?

MR. BONOMY: They would have to do that, sir.

LORD CULLEN: But what happened to the rest of it, the discretion which the public prosecutor exercised?

MR. BONOMY: Well, the test is entirely different in relation to bringing a private prosecution. The Court has also got to be satisfied that there are exceptional circumstances which justify authorising the prosecution, and within exceptional circumstances are a whole host of considerations, and it is because of the application of that particular criterion that there have only been two private prosecutions in the course of this century. The most recent case.....

LORD CULLEN: But does a consideration of those exceptional circumstances mean that the Court eventually comes into the same position as the public prosecutor was or would have been?

MR. BONOMY: Well, we are now looking at a particular subject which in my submission doesn't assist the determination of the issue for the Inquiry. The Court would obviously have to be satisfied that it was appropriate to proceed before deciding to proceed, but generally speaking, that issues has been approached as a combination of the clarity of the material before the Court supporting the proposed charge, and the exceptional circumstances justifying an individual being authorised by the Court to bring his own prosecution.

Now, we have seen the circumstances of J. & P. Coats where the Court was particularly impressed by the strength of the case, and the clarity of the case, and the lack of any explanation for/

for not proceeding. The only other example, which has also been referred to in passing, is the case of X v. Sweeney, which involved, as your lordship is aware, very clear evidence in respect of the circumstances, and quite independent issues which led to the failure to prosecute, and a very significant change in circumstances which gave rise to the exceptional circumstances which led to the prosecution, so in both of these cases, which are the only two that really provide any guidance on this, the strength of the evidence to support the case was such that there probably would have been very little question of discretion involved. Certainly there was no question of discretion significantly involved in the Courts deciding to authorise the private prosecution.

LORD CULLEN: It would obviously be very difficult in a case in which it was obvious that there was a number of discretionary factors available to the prosecutor, I suppose the Court in those circumstances might be very slow indeed to interfere.

MR. BONOMOY: That of course is particularly true in relation to summary proceedings. The matter may be easier to determine in relation to the more serious cases, but in the present circumstances, it may be just, I think, helpful to say, to state the obvious, but to remind everyone of the obvious factor that before a prosecution can result in a conviction, there has to be proof of guilt beyond all reasonable doubt, and that therefore the fact that there is sufficient evidence to bring a charge is far from being the only material consideration in the mind of a Procurator Fiscal in deciding whether or not to proceed.

There are very important additional considerations to be borne in mind, and that of course means that so far as the two examples in this Inquiry are concerned of decisions not to prosecute, there would be a very significant element of discretion to be exercised by the Fiscal, even if he accepted there was sufficient evidence to proceed.

Now, sir, in my submission there is a clear distinction, therefore, to be drawn between inquiring into what is behind the decisions and the Court/

Court itself drawing conclusion from the material which the Lord Advocate has authorised to be presented to the Tribunal.

I invite you, sir, to accept the statement of principle which was made yesterday, and also in the course of the further procedure at the Inquiry, to apply that principle. That of course means either deciding to accept the presentation of the evidence in the form proposed, that is in the statement which has been made available to you, or, and this is not necessarily an alternative of course, but it is the obvious additional way at least of doing it, or calling for some evidence from Procurators Fiscal who were directly involved if you, sir, feel that that would aid the investigation that you have been appointed to carry out. I have ensured that such witnesses as are available are here in case your lordship should decide that that evidence -- some evidence is required to be given orally by them.

LORD CULLEN: Thank you very much. One other matter, Mr. Campbell -- perhaps I should have asked you what your position was in the light of your submissions this morning, what is your position about the recall or non-recall of Detective Constable Taylor, because you made it quite clear to me, I think, that your main concern is with regard to making submissions.

MR. CAMPBELL: I think it is highly unlikely that I would ask for him to be recalled, sir, but something may depend upon the terms of your decision.

LORD CULLEN: Yes, well, I am going to rise for a period. It will be a relatively short period, in order to consider the submissions that I have received, and when I come back, I shall deal with the matters that I have been asked to deal with.

After/

2.40 p.m.

After a short adjournment.

LORD CULLEN: Can I say first of all that I am most grateful to Counsel for their very clear submissions to me in regard to the problem which has arisen at this comparatively late stage in the Inquiry.

In considering the dispute which arises today, it seems to me in the background there are two main considerations. The first is the consideration that in exercising his independent quasi judicial role he should not be subject to pressure or influence from outside sources. The locus classicus for that rule can be found in the speech of the Prime Minister, Harold McMillan, in the passage to which I was referred.

Mr. Campbell has submitted to me, however, that this is not a case in which that arises, because we are not considering here a case in which a decision has not yet been taken or a case in which a decision is still open to re-consideration, nor are we dealing with pending proceedings.

The second consideration which seems to arise is the question of confidentiality. It is I think well settled that information which becomes available to the prosecutor in the course of the performance of his work is and should remain normally confidential to him. That is referred to in the statement made by the Lord Advocate at the foot of page three, where he says "Prosecutors are required to make judgements on their credibility and on the weight to attach to individual pieces of their evidence. Prosecutors are also entitled to take account of other information placed before them, which may be confidential", and so on.

Now, in this particular case Mr. Campbell did not seek to have the inward thinking of the prosecutors explored in this case, no doubt for perfectly good reasons. His submission was that he should be entitled to make comment on the decisions not to prosecute or in the case of one of the Procurators-Fiscal the decision not to grant a warrant.

Now, /

Now, Mr. Campbell drew my attention to a number of cases dealing with this, dealing with these very special circumstances in which the Supreme Court has decided whether or not to allow a private prosecution to proceed; and he pointed out that in these cases the Court was able to reach its own view as to whether prosecutions should take place, in order to secure that justice was carried out. By implication I think he was suggesting that this was a comment on the Lord Advocate's decision to decline to prosecute. On the other hand, Mr. Bonomy has pointed out that in cases of that sort, while it was expected that the Lord Advocate should explain his reasons, he was not required to do so, and he pointed out that there was no question in these cases of the Court seeking to usurp the position of a prosecutor by reviewing his decision. He accepted on the other hand that it would be open to the Court, and certainly open in this case, to consider what could be done on the basis of the material available. So in this case he accepted as I understood him that it would be open to this Inquiry to entertain submissions as to whether there was material on which a relevant charge could have been brought.

Now, it is plain that the material which is available to the Procurator-Fiscal covers a considerable wide range, from at the one end matters of law, matters of available evidence, to at the other end various considerations where his discretion has wide room for play.

I am satisfied that it would not on the one hand be proper for this Inquiry to require the prosecutors to justify their decisions, or to entertain submissions as to the sufficiency of what was put forward in justification of those decisions. On the other hand, I see no good reason why this Inquiry should not entertain submissions based on the available evidence. I am not going at this stage to draw any hard and fast line as to what can and cannot be submitted on the basis of the available evidence. It would certainly include on the basis of the possibility of sufficiency as to whether a relevant charge could have been granted or whether some other decision in the circumstances could have been taken. That is as far as I go. I merely illustrate what might be the subject of submissions.

I consider that in this case, as in any other case, where a submission can properly be made on the available evidence, there is no reason whatever why that should not be made. This is after all a free country. For that reason, therefore, I would not wish to inhibit submissions. But of course it has to be clearly understood that these submissions must be based on the available evidence and do not enter into a review in one form or another of the decisions reached by the prosecutors.

Turning to the invitation the Lord Advocate extended in his note, as far as I am concerned I am content that this Inquiry should not require the soundness of the decisions to be subject to detailed examination in submissions, but I do wish to hear submissions based on the available evidence insofar as submissions can properly be made on the basis of that evidence. Whether that can be described as a matter of fact, as Mr. Bonomy said, or whether it is not a matter of fact is of no consequence to me. I wish to hear what can properly be submitted on the evidence available.

That brings me to another matter. It is of course in a case of this sort for the Lord Advocate to decide to what extent he should adhere to any rule or principle against the disclosure of information available to or information about the prosecution system. That is a decision over which I have no right of control. In the present case, I note that the Lord Advocate's position is that it is appropriate that evidence should be available as to the information provided to and the inquiries made by the Procurators-Fiscal and the decisions taken by the Procurators-Fiscal and the stated reasons for these decisions.

I have seen Mr. Vannet's report, and with his usual thoroughness he has set out a considerable amount of detail as to these matters, and I am certain that that report will be of significant assistance to this Inquiry. At the same time, in his note which Mr. Bonomy read yesterday the Lord Advocate has given me an opportunity to invite individual members of the Procurator-Fiscal's Service who were concerned with these events to give evidence as to the facts set out in Mr. Vannet's report. I consider that in general it is not necessary, but I consider it would be desirable to have/

have evidence from two members of this Service who were apparently able to give evidence in regard to certain matters which have already been explored at this Inquiry. These two persons are Mr. Cardle -- I am thinking in particular of his evidence in regard to the linking of a report which Mr. Vannet refers to as report 1A -- and secondly Mr. Gallagher, as to the communications between him and Detective Constable Taylor in regard to report No. 4.

I hope this is sufficient to enable the Crown to identify the matters about which I am interested, but I leave it entirely to Mr. Bonomy to decide what further evidence in fact might usefully be taken from those two witnesses when they enter the witness box.

MR. BONOMOY: Thank you, sir. Shortly I will ask you to adjourn briefly while I take stock of the direction you have now issued for these two witnesses to give evidence, and to organise events accordingly. It should be possible to deal with them this afternoon, possibly completely, but if necessary it may extend into tomorrow.

May I however now that this issue has been resolved say something about one matter connected with it, which is causing me concern. Yesterday afternoon I explained the position in relation to the review carried out by Mr. Vannet to which you have just referred. It has been suggested in the Press that Mr. Vannet's review had not been known of, apart from by the Crown, at all before recent enquiries appeared in the Press, and that it would never have come to light had it not been for recent publicity.

You will appreciate the great detail into which that report goes, sir, and the time which would be taken to compile it and the period of time which must have been covered to provide so much detail.

I wish to make it clear for the record that the fact that this was being undertaken was made known to all parties to the Inquiry at an early stage, and that the Tribunal and all parties to the Inquiry were informed in writing by me at the time of first issue of paperwork to parties that Mr. Vannet was carrying out this review, he was named in the/

the notice to parties, and that any material relevant to the investigation would be issued. That notice was sent out in the middle of May.

It has also been suggested in the Press that important witnesses have not been called to give evidence to the Inquiry. Now, I would like now yet again to repeat the invitation which was given by the Lord Advocate at the Preliminary Hearing, that any people who consider that they know of witnesses or other evidence relevant to the issues to be considered by the Inquiry which has not been led should contact the Procurator-Fiscal forthwith so that action can be taken to ensure that that evidence is led.

Could I now have a brief adjournment, sir, to organise matters?

LORD CULLEN: One other matter. Mr. Campbell, you said you might be able to tell me whether you wanted to have the witness Mr. Taylor back once you heard what I had to say. Do you wish to have him called?

MR. CAMPBELL: No, sir.

LORD CULLEN: Very well. How long are you likely to take, Mr. Bonomy?

MR. BONOMY: 10 minutes.

LORD CULLEN: Very well. 10 minutes.

After a short adjournment.

MR./

3.20 p.m.

MR. BONOMOY: Sir, the course of action I propose to follow now is to lead the two witnesses that were mentioned in your decision, and thereafter to have the report read. I expect it will be necessary to read the report in full. That depends a little on the evidence we hear, but I suspect it will still be necessary to give the complete context to read it in full. The first witness I propose now to lead is James Cardle.

JAMES CARDLE (62), Sworn:

EXAMINED BY MR. BONOMOY: Are you James Cardle? - I am.

Do you live in Cardross? - I do.

Are you 62 now? - Yes.

And you are retired, retired from the post of Procurator Fiscal at Dumbarton? - That is correct.

When did you retire? - August 1994.

How long were you the Fiscal at Dumbarton? - From February 1980, so that was 14 years.

How long in total were you a member of the Procurator Fiscal's Service? - From August 1967.

And when were you first legally qualified? - 1956.

You have already been asked, I think, by Mr. Vannet, a number of questions about the involvement of your office in cases, a case reported against Thomas Hamilton? - Yes, I was.

I want to ask you about one particular part of that Inquiry, but I think to give it proper context, I should invite you to have two sets of papers before you, which are R59 and R60. Now, if we/

we take first of all R59, do you recognise these as papers relating to the report of a case against Thomas W. Hamilton, 7 Kent Road, Stirling? Do you recognise these papers as papers from the Dumbarton, or copies of papers from the Dumbarton Fiscal's Office relating to a complaint against Thomas W. Hamilton? - Yes, they are.

And does that case have a Fiscal's case number? - Yes -- 0359/88. It's on the backing.

Now, you took a decision about whether or not to prosecute that case. Can you tell us what your decision was? - The decision eventually was "No proceedings".

At some stage, the papers came back to you; is that right? - Sorry, I don't understand the question?

Well, perhaps if you look at the other Production, R60? - Yes.

And you take the two together, can we deduce from both that at some stage this case in some form was re-reported to your office? - No.

Well, did it come back into your office? - Depending which number you are talking about. R59 never left my office. R59 was kept in my office and filed away. In the fullness of time, this other report, R60, arrived in my office on its own.

Now, can you tell me whether someone brought it to your office or it was sent in? - I personally did not receive it. It's possible that a police officer came and left it in my office personally, but he did not speak to me. Are you talking about R60?

Yes? - Yes.

Can we tell from the papers when it was brought, or when it came into your office? - There's no stamp on this because as soon as it arrived on my desk, I realised it should not have come to me. I see there is a stamp on Page 19 of the report which has the Deputy Chief Constable of Strathclyde Police, and the date on that is the 16th June/

June 1989, so it must have been some time after the 16th June 1989, but I can't say when it actually arrived in my office.

What was it about that report that made you think you ought not to deal with it? - It was a complaint against the police.

And why should you not deal with a complaint against the police? - Because complaints against the police are not dealt with by the District Procurator Fiscal. They are dealt with by the Regional Procurator Fiscal.

Is he a Fiscal that has responsibility for a number of Courts? - Yes.

And yours was one of those within a particular Region? - North Strathclyde.

And who was the Regional Procurator Fiscal for North Strathclyde? - Robert Lees at Paisley.

So a complaint against the police goes to him? - It does.

That complaint was instigated by Thomas Hamilton? - It would appear to be.

Against, can you tell from these papers, which police officers? - I would -- well, if you look at Page 1 of the report, it's against Constable George Gunn and Constable Donna Duncan, both of the police office, Balfron, which would of course be Central Scotland Police.

I think you have there actually the complete police report, which I wasn't referring to at the moment? - This is the one which has R60 on the face of it. These are the papers that were presented to me, the entire matter.

Well, what I was wanting you to look at exclusively was the Procurator Fiscal's papers. Now, perhaps I can have that re-organised just now? You should have two separate bundles, R59 and R60? - I have.

And the R60 -- it seems to consist of a police/

police report as well as correspondence? - It does indeed, yes.

And is it more or less there in the bulk and form in which it came into your office? - It would come in like so.

What did you do with it? - I had a quick glance at it, immediately realised it was a complaint against the police, and as such, fell to be dealt with by the Regional Procurator Fiscal, and there are good reasons why the Regional Procurator Fiscal deals with these matters and not the District Procurator Fiscal.

So/

3.40 p.m.

So what did you do with it? - I looked at page 19 of the report.

If you look at it, you will see handwriting beside "Deputy Chief Constable, Strathclyde Police", a datestamp, and there is a handwritten note, which is "Chief Superintendent Discipline. Please have a senior officer take this report to P.F. Dumbarton and for any further enquiry necessary to be carried out".

MR. BONOMOY: The witness is referring to D2K which is the original version of the report of investigation into Hamilton's complaint, then he has the additional material. I think for present purposes he is referring to the part copied in D2K.

EXAMINATION CONTINUED BY MR. BONOMOY: You have a reference there to a note by a police officer? - Yes. It was addressed from the Chief Superintendent, Discipline. "Please have a senior officer take this report to P.F. Dumbarton and have any further enquiry necessary carried out", and it is initialled.

So he took it to the right place by the sound of it, as far as his instructions were concerned? - Yes, that was in accordance with the note.

What did you do? - I phoned up Strathclyde Police Headquarters and asked for Complaints and Discipline. In fact I asked for the Chief Superintendent, Complaints and Discipline.

Yes? When the phone was answered it was a Chief Inspector Brockie who answered the phone. Now, I knew Chief Inspector Brockie from his days as a police officer in Dumbarton. I asked to speak to the Chief Superintendent, who was not apparently available, and Mr. Brockie said "Can I help you?". I said "I have received a set of papers which appear to be a complaint against the police from Central Scotland Police, and there is a note to the effect that a senior officer from Discipline should take this to me, the P.F., Dumbarton. This should not have come to me, Mr. Brockie", and his words were "It should have gone to Mr. Lees, Mr. Cardle", and I said "That is my feeling as well", and he said "Don't/

"Don't worry, I will arrange to have it uplifted".

Yes? - As far as I remember, I phoned Mr. Lees and told him about it, because it should not have come to me. It was uplifted and taken from my office to Mr. Lees in Paisley, and thereafter was dealt with by Mr. Lees in Paisley.

Was that the end of your involvement with that report?
- With that report, yes.

Now, the problem with this is that in that report there are statements from witnesses who had not been interviewed at the time of the original report against Hamilton, which you did consider and marked "No Proceedings"; is that right? - Yes.

Is it possible it was the police intention that you should reconsider the case against Hamilton in the light of this additional material? Would a Procurator-Fiscal normally do that? - No.

Why? - For two reasons. The first reason is that I had already marked this case "No Proceedings". This decision was not intimated direct to Mr. Hamilton, but was made known to the police, and I believed had got through the various Departments in the local authority, Social Work Department and that sort of thing, that I was taking no proceedings.

Yes? - That being so, that was the end of the matter. No proceedings could be taken against Mr. Hamilton. It was therefore a futile exercise to consider any further evidence, because the decision had already been taken that no proceedings should be taken against him.

Yes? - That is the first reason. The second reason is that it is quite clearly laid down and has been approved by the Appeal Court the procedure whereby the Regional Procurator-Fiscal investigates complaints against the police, because under no circumstances should information which has become available arising out of investigations into complaints against the police, these results should not be made known to the person who is dealing with any criminal case against a complainer in a complaint against the police. They are kept completely separate.

Yes?/

Yes? - The Regional Procurator-Fiscal should not be aware of any information which has come to light as a result of police enquiries into complaints against the police.

Can we be clear about the extent of that? Let us assume that in connection with some complaint against the police involving minor conduct, a minor assault by the police, and the complainer himself is the subject of investigation for a minor assault, but in the course of the investigation into the complaint against the police someone confesses to murder unconnected with that investigation. Are you saying that that would never get back to the Procurator-Fiscal? - That is an entirely different matter.

Why is it different? - This complaint against the police we are dealing with here arises out of the same set of circumstances as a criminal case involving Thomas Hamilton.

So that is the limit of that rule, that if you get material in an investigation of a complaint against the police that relates to the same set of circumstances it cannot be used against the complainer? - Yes.

Going back to R59 for a minute, the top item on it is a note typewritten with your initials at the bottom dated 20th March, 1990? - Yes.

Can you tell us the import of that note? - What happened was that on the 19th March, 1990 a letter was received at my office from the Director of Education of Lothian Regional Council, and that is in the correspondence there, attached to R59, a letter dated 13th March, 1990, when he specifically asked what happened.

Yes? - Now, in the letter he refers in the last paragraph, which starts "You will see that, according to Mr. McMaster", of Strathclyde Police, "a report by Inspector Keenan of the Central Scotland Police was submitted to the Procurator-Fiscal, 3 High Street, Dumbarton. The report was submitted by Strathclyde Police, as far as I am aware. I understand that this took place at some point between May and July, 1989".

Yes?/

Yes? - Now, as far as I could see from the Director of Education's letter, he was enquiring as to an outstanding case involving Thomas Hamilton.

Yes? - My office had no note of any report received in May, 1989, and that is why there is a note with that letter which says "No report submitted J.R. 19/3/90" -- "J.R." is the office manager in Dumbarton.

Yes? - She checked and ascertained that in fact there was no report received here in 1989.

Yes? - She showed it to me, and I recollected from looking at this it was clear it was a Central Scotland Police matter, and I recollected that that report was now in regarding a complaint against the police, R60: I remembered that.

Yes? - I phoned up Paisley, and I wrote beside the last paragraph on the letter of 19th March, 1990 "O8.89RDF/DH/89/10748" in my hand-writing. I had obviously phoned up Paisley and ascertained that that was the matter referred to in May and July? - Yes.

Now, I had not had anything to do with that, but I wrote a letter dated 20th March, 1990 to the Director of Education, and I did point out that I had received.....

I think you should read that letter? - "I refer to your letter of 13th March, 1990 and to my subsequent telephone conversation with your Mr. John Perry" -- I must have phoned Mr. Perry up.

Yes? - "I understand that you wish to know the position regarding any criminal proceedings which may have arisen out of a summer camp run by Mr. Hamilton on Inchmoan Island, Loch Lomond in July, 1988".

Yes? - "I would confirm that I did receive a report from Strathclyde Police arising out of this camp and, after considering this, I decided not to take any criminal proceedings against Mr. Hamilton in respect of that camp."

Yes? - "I trust that this information is sufficient/

sufficient for your purposes".

Yes? - Now, I had no response to that. Thereafter, for the sake of having something to file, I dictated that note, which is also on the file, which is headed "Thomas W. Hamilton, 7 Kent Road, Stirling".

Could we determine when it was roughly that the decision to take no proceedings against Hamilton was actually taken in relation to the first report you received? - It would be towards the end of 1988.

And for the reason you have explained, it was never reconsidered? - Yes.

CROSS-EXAMINED BY MR. CAMPBELL: Just a few questions, if I may. So far as the matter of the material coming back to you, the bundle.....? - Is this R59?

No, this is R60, the material on your right? - That is the complaint against the police?

Yes. Can you remind me what was said by the document addressed to you when the material came to you? - There was no correspondence, no letter with this. It arrived in this form, which is a folder with blue ends on it, and that is it.

Yes? - It came in, as any police report would normally come in. It just arrived. It was put on my desk, I looked at it and immediately saw it was a complaint against the police. I looked at it, it rang a bell, and I had a closer look at it, but I didn't read it in its entirety, I skimmed through it, because the idea it was a complaint against the police, which included Inchmoan Island, I knew what had happened on Inchmoan Island with Thomas Hamilton, I saw this note at page 19, someone asking a senior officer to take this report to the P.F., Dumbarton to have any further enquiry carried out.

Is this the note of 16th June, 1989? - It has got a datestamp opposite it with "Deputy Chief Constable, Strathclyde Police" round it.

Can I look at it? - Yes.

So/

So having read that, what action did you take? - My view was that it should not have come to me. It was a complaint against the police, and should have gone to the Regional Procurator-Fiscal.

So you simply sent it to the Regional Procurator-Fiscal, and that was it? - Yes. I took no further part in it.

You made reference in your evidence-in-chief to certain considerations relating to how you had already marked "No Proceedings" anyway? - Yes.

Was that a factor which came into your thought processes at that time? - In relation to this?

Yes? - No, not really. I looked at it basically as a complaint against the police, and it should not have come to me. The fact it may have contained further information about Hamilton arising out of this was entirely irrelevant.

I am just trying to get at the facts of this. If you look again please at the handwritten note, can you tell us what the document says? - "I'm aware that he still wishes to see me to fully discuss his complaint and answer any questions I may have. I seek your advice and guidance on this matter, and it may be that criminal charges are a possibility against the complainer, and I do not wish to prejudice any enquiry Strathclyde Police may wish to investigate".

Yes? - "I submit this report and attached papers for your information and attention. I would also add that the attached documentary file has been collated from a number of sources and contains additional information not held on Headquarter's file".

Did you get that? - Quite possibly I did. As far as I was concerned this case had been marked "No Proceedings", and there was no question of further enquiry into that matter. I can't remember consciously doing so, but if I did look at it that would be my attitude.

Did this question of having already marked it "No Proceedings" arise at that time or not? - I don't/

don't know.

As a matter of your best recollection of events, is the position simply this, that you received this material, saw it was relating on the face of it to a complaint against the police and decided it was not a matter which you should look at, that it should be sent to the Regional Procurator-Fiscal at Paisley? - I may have applied my mind to the fact of that second-last paragraph, but if I did I would just take the view that the previous case was finished and done with, nothing else could happen at that time, we had marked it "No Proceedings", and that point was irrelevant. That being so, the whole matter was a complaint against the police, and a matter for the Regional Procurator-Fiscal. I cannot now remember to what extent I did do so, but that would be my thought processes.

Well, this is all somewhat speculative, isn't it? - I have already said I can't remember.

You see, the difficulty is that we have had evidence from Mr. Keenan, who gave evidence in the Inquiry on Day 7 at page 781 and page 782 to the effect that not only was there some material in this bundle which was new but that it related, some of it related, to different boys on a different week of this same summer camp? - I cannot comment on that. I was not here.

If you had contacted Mr. Keenan he might have told you that? - As far as I was concerned this matter referred to Strathclyde Police. My contact was with Strathclyde Police, and that was it.

Did you at any time know that Thomas Hamilton possessed a Firearms Certificate? - No, never: not until the day of the disaster.

In general terms, would you consider it relevant for a Fiscal to be made aware of the fact that the subject matter of the police report held a Firearms Certificate? - It all depends on what case you are talking about. In some cases it could be completely irrelevant.

In what case might it be relevant? - In cases/

cases involving violence; that type of thing.

Assault? - Perhaps, depending on the severity of the assault.

Any other kinds of case? - I can't think offhand, to be perfectly honest.

No further cross-examination.

No re-examination.

WILLIAM/

4.00 p.m.

WILLIAM GALLAGHER, (37), Sworn,

EXAMINED BY MR. BONOMOY: Are you William Gallagher? - I am, yes.

And are you 37 years of age? - Yes.

And are you an assistant solicitor in Crown Office, Edinburgh? - That is correct.

And how long have you been in the Procurator-Fiscal's Service, Mr. Gallagher? - Since 1980.

And how long have you been legally qualified? - Since that time.

I think between August, 1991 and July, 1994, you worked in the Fiscal's Office in Stirling? - Yes.

What was the position you held there? - I was Procurator-Fiscal Depute.

I want to ask you about one matter you dealt with during your period there, and to do that, it would be helpful if you could have R61 in front of you. Now, you will see that that is a bundle of papers, the top one of which is a ADZA, a police report, or at least an inter-police memo? - Yes.

Which has certain enclosures or attachments after the signature of Detective Constable Taylor? - Yes.

And it also has a backing? - Yes.

On the backing, do we see your hand-writing? - That is correct, yes.

And on the right-hand side of the backing as we look at it, is all the writing yours? - Yes.

And just to be clear about that, on the left there is a case number and the name of Hamilton, and the word "Information". That is not your writing? - No, that's not mine.

And the writing consists of two entries; is/

is that correct? - My entries, yes.

What is the first one? - The first one reads "Warrant refused meantime", and the next entry is "BU 3 months", and my initials and the date, which is the 11th of June, 1993.

You have written both these things at the same time?

- Yes.

What does "BU 3 months" mean? - It means to bring the papers back to me in three months, so that would be taken from me into the general filing system in the office, and there would then be a system whereby the papers would then be brought back to me in three months.

And do we see the next entry indicating that that appears to have happened? - That is correct.

And what is the next entry? - It is dated the 10th of September, 1993 and it has a marking of "No Pro.", no proceedings, and again my initials.

To what proceedings do these papers relate? - You mean the marking?

Yes? - The marking relates to the police information which is the initial document that you have referred to, the so-called AD2A prepared by Detective Constable Taylor, and it is dated the 9th of June, 1993 as well.

Do you remember that form being brought to your office? - Yes.

And do you remember who actually brought it to your office? - Yes, it was Detective Constable Taylor.

And do you remember discussing the terms of it with him? - Yes.

What was the purpose of his visit to the office? - His purpose was to bring the report with him and to discuss what was contained in it in order to pursue what is being sought by the report, namely that a warrant to search premises should be sought/

sought from the court.

Now, whose premises were these? - These were premises, if I recall the detail of the report, Mr. Hamilton's house I think was being the area or the premises that the police wanted to search.

And we see the heading of the AD2A is Hamilton's name? - Yes.

And his address? - Yes.

So I take it all these papers apart from the backing would be brought in by Taylor? - Yes.

And all brought in at the one time? - Yes.

Was that a lengthy discussion? - Yes, I think it was. I think he was with me for perhaps 30 to 40 minutes, something of that order.

And was he concerned about one criminal subject only, and by that I mean criminal type of charge, or was he concerned about the possibility of more than one criminal charge? - No. You will see from page 4 of the original document that he has highlighted a number of potential criminal offences which were, if I recall it, discussed to a greater or lesser extent.

And these included crimes of dishonesty? - Yes.

As well as breach of the peace and lewd, indecent and libidinous practices and behaviour? - Yes, and a Contravention of the Children and Young Persons Act.

Now, what did you understand from Mr. Taylor was the purpose proposed for the search? - The purpose was to seek, as I understood it, to obtain photographs which the police thought were likely to be in Mr. Hamilton's possession.

Was there any indication given to you that any other documents might be sought to be included in such a search warrant? - No. There is mentioned in the report, and there was, as I recall it, some brief discussion in relation to the question/

question of some offence of dishonesty, or offences of dishonesty, and if I remember correctly, there was perhaps some mention of some other document in that area, but I have no clear detailed recollection of him looking for anything other than photographs.

In the past, have you seen photographs that Hamilton had taken? - Yes.

When was that? - I think it was perhaps several months or perhaps even a year or two prior to that when I had seen a number of photographs, a substantial number of photographs.

So you knew the nature of the type of photographs that Hamilton took, at least some types of photograph that Hamilton took? - Yes; I had had some previous experience, and there was some suggestion in the report itself as to the sort of material that was likely to be shown in the photographs.

Now, when you have to decide whether or not to apply to the court for a warrant, can you help us with the general test that you would apply, legal test? - You would normally begin with the question as to whether or not there was constituted a criminal offence, and if you didn't get over that hurdle, then there is no pursuit that I would take beyond that. There would then be a number of other features that may be considered, depending upon the individual type of warrant which is being sought. You will be aware clearly that warrants can be obtained for a variety of areas, whether in relation to common law matters or in relation to specific statutory offences, and the consideration may vary according to what particular offence is under consideration.

In relation to photographs in the context of this case, what other considerations would you have to apply, or other tests would you have to apply, assuming there is evidence of a criminal act? - I would need to have clearer indication as to where the property was likely to be recovered, what basis there was for reaching that conclusion as to where the property was so that could be properly specified to the court when I sought to obtain the warrant, and an indication of the basis on which I was seeking to obtain the recovery of the warrant.

Would/

Would that relate to the nature of the witness? - Yes; it would normally contain a specification as to what I would understand the photographs would contain as a means to going towards establishing the offence that I was seeking to pursue.

After you had discussed the matter with Mr. Taylor, did you then reach a conclusion about whether or not an application should be made for a warrant? - At that stage, yes.

And what conclusion did you reach? - The answer was that it shouldn't.

Did you tell him why? - Yes.

And what indication did you give to him? - I indicated to him that I didn't consider that we had before us information to establish that a crime or crimes had been committed, and I should emphasise probable crime because while the question of dishonesty was mentioned, it wasn't pursued particularly seriously in my recollection.

Did that view of yours surface early in this discussion or only at the end of it? - It would be difficult to give an estimation of that because the time involved in reading the report would be four or five minutes in any event, so to that extent, before I formed any view, I would have to have gone through the report, and as I recall the way matters were discussed, Mr. Taylor brought the report, I was reading through it, and he was amplifying it as we went, so to that extent it wouldn't be immediate. It would be in the middle part of the discussion.

Was there a debate in which you were explaining your view and he was perhaps trying to persuade you to the contrary? - I don't recall him seeking particularly to pursue a view that I was saying that I said "No, I don't accept that". The position might have been that I would be saying "Well, is this the situation", and he would give an amplification of what was contained in the report, and we would then form a view, or I would form a view based upon that developed information.

Do/

Do you remember saying anything to him about the nature of the conduct as you saw it, and why it didn't amount to a crime on the face of his evidence? - Not in detail. I was discussing the number of offences and indicating to him my view that while this was clearly behaviour that was potentially the cause of concern, would be a cause of concern, it didn't cross the boundary into a criminal offence.

And when you say behaviour that was the cause of concern, what behaviour did you have in mind? - The behaviour that was described in the report, the conduct that was ascribed to Mr. Hamilton in relation to the particular boy or boys that were mentioned in the report, commented in relation to the earlier information which Detective Constable Taylor attached to the report, which was an earlier report which had been submitted by another officer.

That was Mr. Hughes, I think? - Yes.

Have you any recollection of discussing with Mr. Taylor the question of who it was being suggested was either alarmed, distressed or annoyed by the conduct which was described in his report? - I have some recollection of discussing with him what the perspective of the boy or boys was, and what the nature of their reaction was to it, yes, and I would clearly be interested in relation to that in relation to what was going on and how the boys perceived it and what was happening, yes.

Was there any discussion that you can recollect about the effect of the conduct on the adults or the parents? - I have a vague recollection -- it's not in any strong detail -- of some discussion about how the information came to light and what the view of the parents was in bringing this matter to their attention, and what their position was in relation to that, yes, to that extent, but no, if you are meaning in relation to at the time when the information may have been given to them by their children, no, I don't recall a discussion of that nature.

For example, do you remember a discussion about whether it was a crime to behave in the way that was described in the report, not to distress the/

the children, but to distress the parents as a result? - No.

Now, do you say that that didn't happen or you don't remember it happening? - I don't remember it happening.

Were you aware that Hamilton had a Firearms Certificate by this time? - It is mentioned in the report, yes, so to that extent, I would have been aware of it.

Do you remember if that was discussed between you and Mr. Taylor? - No, I have no recollection of that being discussed at all.

Do you remember very clearly at all how this discussion actually ended? - I remember that, and it is based upon what I have written in the marking as well, that my indication to Mr. Taylor was that I wasn't prepared to go to the court on the basis of the information we had to seek applying for a warrant, but that was not to be seen to be the final end of the matter, and if there were other matters that could be brought back, then that would be something that we could potentially review in the light of other information, and that was the period that I had given, the three month period, and I would have some discussion with him to that effect as well, to say I would take the papers back again at some indeterminate time in the future, and if there was something he wanted to bring to me, to bring it back.

Was there anything beyond the three months? - I don't recall seeing him again and I don't recall having discussed it, but I suspect I would have made some other effort before the mark of "No Pro." through someone else finally, to ensure there were no further matters Mr. Taylor wanted to bring back to me.

Do you remember whether there was any discussion with him about the circumstances in which he either ought or ought not to bring further reports back to you? - No.

For example, whether there would have to be some material change in circumstances before he should report back to you? - It may have been that he/

he would suggest, and I think it is contained in the report, that there were other potential witnesses who might have been going to be seen at that stage, and other information, and it may have been we had some discussion on saying "Look, if that's the information and it's all of an identical description and there's no additional information or there's no clearer character of a criminal offence, then I would not be giving a different decision", but that if there was something different, then I would be prepared to look at that again.

Do/

4 p.m.

Do you remember if that happened? - I can't remember in detail that a discussion of that nature took place, but it would have been something that I would have normally discussed with an officer who was clearly concerned, a report, saying "I am saying no just now, but by all means come back to me if there is something else".

CROSS-EXAMINED BY MR. CAMPBELL: Did Mr. Taylor explain his purpose in appending to the report information relating to the 1991 investigation by Detective Sergeant Hughes? - As I recall it, I think he explained that this was a concern in relation to a person that the police had already had some dealings with, and in order that I could understand as fully as possible the background I think he brought the additional information with him.

Did he explain why he considered it relevant to make sure you had that additional background available to you, or did you appreciate why he was doing that? - The understanding, I think -- I don't recall any detailed discussion about it -- would have been in terms of saying "This is a complete picture which you should have. This is an earlier report that another officer in this area had previously reported".

Did you read that earlier report? - Inasmuch as it was contained within this report, yes.

For example, at page four of the earlier report we see halfway down the page "In view of the concerns expressed by the witness Emslie, the accused was asked at this stage to hand over all photographic equipment that he had with him at the camp for inspection purposes. Whilst he handed over a video camera and a number of other cameras, he maintained that no still photographs had been taken during the course of the camp to date and handed over no photographs or undeveloped film at that time to the witness Kirk"? - Yes.

Am I right in understanding that subsequent investigation showed that indeed photographs had been taken and turned up later? - Yes, /

Yes, I think that is correct, in relation to the earlier report.

So we have a history of obstruction in the police investigation in that regard? - Well, you have a history which indicates that the person has not previously been as forthcoming or as demonstrative in relation to material that they had, yes.

Is it common for police officers to attend personally upon the Procurator-Fiscal when sending a report in? - It varies according to the area of the country. In Stirling it was not that uncommon.

What does that mean? Can you give us some indication? - I would expect a police officer to bring a report directly in a smaller area generally, where it is a more manageable area. Stirling is fortunate in having Police Headquarters and the police offices in close proximity to the Procurator-Fiscal's Office.

Yes? - It is difficult to give you an estimate of a figure, because it would not be a run-of-the-mill case, it would not be a general type of report case, it would be something specific.

Yes? - There may well be a police officer choosing to come down and discuss something like that once, twice a month, maybe something like that; whereas in a bigger area it might be more difficult for the officer concerned to come and report to a particular Fiscal.

Would that tend to tell you anything about the officer's approach to the matter in hand? - It would indicate clearly he was interested in the report or wanted to obtain an urgent decision about the matter, or it was a particular area he wanted to explain. Perhaps there was an urgency to it, or perhaps the report has not been typed fully or the officer might want to give further information.

In your evidence-in-chief you say the officer was clearly concerned about the report? - Yes.

So/

So that would tend to indicate concern by the officer about the report? - The fact he did go through the process of bringing the report down and also the fact we had a lengthy discussion on it --

We have had the benefit of a report which has been prepared by Mr. Vannet, who I take it you would meet at some earlier stage in connection with this? - Yes.

I'm not going to take you through the details of that report, but amongst other things we are told that "Mr. Gallagher does not now recollect details of the discussion with the reporting officer"; is that true? - Yes. I don't remember the detail word for word, what was said.

We are told that "Mr. Gallagher's recollection is that he was concentrating on whether some form of indecency was going on"? - Yes.

Is that true? - Yes.

MR. CAMPBELL: Sir, I am unable to frame any further question without transgressing your lordship's ruling.

LORD CULLEN: I also bear in mind what you said earlier about what your intentions were.

No further cross-examination.

RE-EXAMINED BY MR. BONOMOY: The 1991 circumstances would be well-known to you? - Yes.

You indeed marked the 1991 case? - Yes. I think the 1991 case had initially been considered by another Procurator-Fiscal, but when the final marking was put on it I think it was myself who marked it.

And at that stage had you also seen the document attached to this AD2a? - Yes, because it formed part of this original report.

MR. BONOMOY: Sir, I am conscious of the hour. However, in my submission it would be unfortunate to leave matters today, and it would be rather inconsistent. What I propose is at this stage Mr. Lake should read Mr. Vannet's report. On reflection,/

reflection, I think it should be read in its entirety, subject to the omission of references to specific named complainers or witnesses or indeed potential accused who are named in the report.

LORD CULLEN: Do parties have any views about that? Carry on, Mr. Lake.

MR. LAKE: "Introduction. General. On 22nd April, 1996 I was directed by the Crown Agent on behalf of the Lord Advocate to review the various reports concerning Thomas Hamilton made by Police to Procurators-Fiscal and to report thereon.

"I ascertained that reports and subject sheets had been submitted by Strathclyde Police and Central Scotland Police to the Procurators-Fiscal at Dumbarton and Stirling. I have been furnished with copies of these reports which have been recovered and have had access to the originals of two of them. In the course of my enquiries I have recovered from the Regional Procurator-Fiscal of North Strathclyde at Paisley a Report prepared by Inspector Keenan of Central Scotland Police in connection with a complaint against the police by Thomas Watt Hamilton. That Report was submitted to the Regional Procurator-Fiscal by the Deputy Chief Constable of Strathclyde Police in June, 1989 and concerned the investigation of complaints by Hamilton in relation to the police enquiries the previous summer into the camp at Inchmoan Island, Loch Lomond.

"I have interviewed Mr. James Cardle, formerly the Procurator-Fiscal at Dumbarton and now retired, Mr. Keith Valentine, formerly Procurator-Fiscal at Stirling and also now retired, Mr. William Gallagher, formerly Procurator-Fiscal Depute at Stirling and now Assistant Solicitor, Crown Office and Mr. Robert Lees, formerly Regional Procurator-Fiscal of North Strathclyde at Paisley and now of Lothian and Borders at Edinburgh. I am grateful to them for the information which they were able to provide. It is of note that they all remembered the particular reports they dealt with and that without resort to the papers at the outset of the interviews had a good recollection of them. All had been concerned at the subject matters of the report, and had given them anxious consideration.

"In the course of my enquiries no further reports/

reports have come to light, been drawn to my attention or been referred to by those to whom I have spoken. Further, on enquiring, I have been advised by the Crown Office that no trace can be found of any reports to or correspondence with that office concerning Thomas Hamilton.

"The reports. I have considered the following four reports or subject sheets which have been recovered, namely:-

Report 1. Strathclyde Police -- Subject Sheet dated 30th August, 1988 by Detective Sergeant Ian McBain submitted to the Procurator-Fiscal, Dumbarton and headed:- 'Complaints received by Police in relation to summer camp held on Island of Inchmoan on Loch Lomond';

Report 2. Central Scotland Police -- Copy Police Report against Thomas Watt Hamilton submitted to the Procurator-Fiscal, Stirling in September, 1991 by Detective Sergeant Paul Hughes;

Report 3. Central Scotland Police -- Copy Subject Sheet dated 3rd July, 1992 from Sergeant J. Fleming, Dunblane to the Chief Superintendent, A Division (copied to the Procurator-Fiscal, Stirling and Reporter to the Children's Panel) and headed:- 'Youth Camp at Dunblane High School run by Thomas Hamilton';

Report 4. Central Scotland Police -- Subject Sheet dated 9th June, 1993 from Detective Constable Taylor CPU Bannockburn to Detective Superintendent, Crime Management Services and subsequently submitted to the Procurator-Fiscal, Stirling and headed: 'Thomas Watt Hamilton (39) born 10.5.52 at Glasgow, unemployed 7 Kent Road, Stirling'.

"I have also had regard to the very full Central Scotland Police report dated 22nd May, 1989 into Hamilton's complaint against the police arising from police enquiries into the 1988 Inchmoan Island camp. The Report was prepared by Inspector Keenan and submitted to the Deputy Chief Constable of Strathclyde Police. I shall refer to it as Report 1A.

"Report 1. Description. This takes the format of a police Subject Sheet rather than a crime report,/"

report, although the Subject Sheet was submitted together with full statements from 16 of the boys attending the camp, statements from some of the parents and statements from persons, both parents and police officers, who had visited the camp. Also included were copies of circular letters to parents from Hamilton and a copy of a letter to him from Luss Estates Company.

"The police involvement commenced on 17th July, 1988 after police at Alexandria received a complaint about the running of the camp. Initial enquiries were made and expressions of concern were received from several parents. On 21st July the police contacted 10 sets of parents of boys at the camp and put in place arrangements for them to meet their sons at Dumbarton Police Office and ascertain from them direct whether there were grounds for concern or complaint. Six out of the 10 sets of parents took advantage of this arrangement. None of the boys made any complaint at this time. Four refused to leave the camp. Several felt homesick and were taken home, in some cases reluctantly, by their parents. Hamilton was present, and spoke with all the parents. None was prepared to make complaint, and indeed some praised him.

"The Subject Sheet does not summarise the contents of the statements. However, it does record Hamilton's position in the matter. He informed the police of the 'qualifications' to run such a camp and his lengthy experience in doing so -- this being, according to him, his 55th camp in 15 years. He expressed some concern about the complaints, but maintained he was not acting improperly. He appears to have been quite frank with Detective Sergeant McBain, admitting that he had struck some of the children, but maintaining that this had been done in the course of disciplining the boys. He indicated that a number of the boys were bullies, disruptive and cheeky. So far as arrangements in relation to the camp were concerned, he admitted that there was no telephone on the island and that he had not made any contingency arrangements with any local doctors or hospitals in the event of a medical emergency on the island.

"There is no reference anywhere in these papers to Hamilton being the holder of a firearms licence or, indeed, any reference to firearms at all./

all.

"Brief reference is made in paragraph 6 to allegations that two 'helpers' at the camp, a Stephen Williams and a Kyle Zielenski, had exposed their private parts to some of the boys and rubbed their private parts in the boys' presence. The comment was made that these allegations are uncorroborated.

"The two concluding paragraphs are of particular note. Detective Sergeant McBain pointed out that although many of the complaints were non-criminal in themselves it did seem that the camp conditions were extremely privative with the lack of ease of access and communication being a prime concern. He expressed the view that 'In this respect it could be argued there is serious concern for the boys' moral and physical wellbeing'. He concludes the penultimate paragraph by stating clearly that 'As yet no charges have been preferred'.

"In the last paragraph he requests that the Sub-Divisional Officer, a Chief Inspector Campbell, forwards the report together with the attached statements and accompanying leaflets in connection with the summer camp to the Procurator-Fiscal, Dumbarton and the Reporter to the Children's Panel, Dumbarton for their information and any further action they may deem necessary.

"Involvement of Procurator-Fiscal. The papers recovered from the Procurator-Fiscal's Office, Dumbarton bear a 'backing' sheet with a reference number 0/359/88. The front of the Subject Sheet is date stamped 1st September, 1988, which I take as the date of receipt. The paper are described on the backing sheet as referring to 'Holiday Camp on Island of Inchmoan'.

"The only other marking on the backing sheet is "No Pro JC". Mr. Cardle, then Procurator-Fiscal at Dumbarton, confirmed this to be in his handwriting and to indicate his decision of No Proceedings. Unfortunately this marking is undated.

"Mr. Cardle recollects this matter and the nature of the complaints. Although at the end of the day he decided not to institute criminal proceedings/

proceedings against Hamilton he was concerned about the matters revealed in the report. He took the view that the Local Authority, Social Work Department and Reporter had an interest in these matters, and so advised the police.

"However, Mr. Cardle's recollection of events includes two episodes not disclosed from the papers which have been recovered.

"His first recollection of this matter is of a meeting in his office with a CID officer some time before receipt of the Subject Sheet of 30th August. While it may have been DS McBain, Mr. Cardle's recollection is that it was a DS Harry Bell. The officer came to see Mr. Cardle 'out of the blue' not long after Mr. Cardle had returned to the office after a period of illness. This puts the meeting as occurring, by Mr. Cardle's estimate, some time in the week of 18th July, 1988. The officer was looking for guidance and assistance from the Fiscal in connection with complaints about the camp, and had with him a Subject Sheet seeking a Warrant for police to go on to the island and search for and 'take possession' of the children. Needless to say, this was a most unusual application, and Mr. Cardle had a clear recollection of it. Mr. Cardle remembers the Subject Sheet as being in a similar format to and of a similar length to the one dated 30th August. The contents were similar and referred to the unease and concern about the running of the camp on Inchmoan Island. Following complaints from parents the police wanted authority to go on to the island, look for the children then taking part in the camp and remove them.

"Having discussed the matter with the officer, he advised him that on the basis of the information then available he did not consider there to be grounds for seeking a Warrant.

However, /

4.20 p.m.

However, he was troubled by the circumstances surrounding the running of the camp and suggested to the officer that the matter was more appropriate for the Social Work Department and Reporter to the Children's Panel. He understood that the police were either already in touch with these agencies or would be drawing the matter to their attention. Mr. Cardle advised the officer to take statements from the boys when they came off the island and thereafter let him have a further report.

"As Mr. Cardle was quite definite in his recollection of this earlier subject sheet I asked the current Procurator-Fiscal at Dumbarton to make a further search in his office to see if any further papers relative to this matter and Hamilton could be found. A further search has been carried out and I am informed that no further papers relating to this matter can be found. Mr. Cardle himself has recently gone into the Dumbarton Office and searched but has been unable to locate the subject sheet. Mr. Cardle was of the view that the subject sheet would have been given a miscellaneous reference number and filed in the office. It may be that as the officer brought it straight in to Mr. Cardle it was not booked in in the normal way and given Mr. Cardle's decision the officer took the subject sheet away with him. That is speculation on my part but this view is shared by Mr. Cardle. I understand that the police have made a search of the Central Registry at Dumbarton Police Office, but no record of an earlier subject sheet can be found.

"Having received on or about first September 1988 the subject sheet from D.S. McBain dated 30th August and having considered it in detail, Mr. Cardle decided to have some of the witnesses, from whom statements had been submitted, precognosed before reaching a decision. No crime report had been submitted against Hamilton and he had not been charged with any crime or offence by the police. Nonetheless Mr. Cardle considered the matter worthy of further Inquiry. His purpose in having the witness precognosed related to obtaining full information about the alleged "assaults" by Hamilton and endeavouring to see if some of the discrepancies between some of their accounts could be reconciled. Virtually all the boys spoke to being/

being struck by Hamilton and/or seeing other boys being struck. In a number of statements some of the boys were unable to name the boys they had seen being struck. Some boys described events happening to other boys which these boys did not refer to themselves. Mr. Cardle decided to send out for precognition, the statements of boys who had been at the camp and also the statements of the adults who had visited the camp. He saw no need to precognose the police witnesses.

"Mr. Cardle sent the witness statements out to the Procurators Fiscal in whose jurisdictions they resided with requests that they be precognosed on his behalf. This involved principally the Fiscals at Dunfermline and Stirling. Without seeing the papers Mr. Cardle recollected that he had also sent a statement or statements to the Fiscal at Linlithgow. The only witness in that area appears to me to have been a parent who had visited the camp and who had been highly critical of Hamilton. Her son had attended the camp but either no statement had been taken from him or it had not been included with those submitted to Dumbarton.

"In due course Mr. Cardle received back the precognitions of the witnesses. His recollection is that after precognition the discrepancies between some of the boys' accounts were even greater. Assault were either not corroborated or there were discrepancies between accounts, i.e. boy A would speak to boy B being slapped in his presence but boy B would not recall this, and vice versa. Not all the boys spoke up to their police statements and some of the accounts at precognition were vague.

"Having considered all the papers carefully Mr. Cardle reached the decision that he would not institute criminal proceedings against Hamilton arising out of the events disclosed in the subject sheet of 30th August. He remained concerned at the situation which had been revealed in the papers but was aware it had been drawn to the attention of other agencies who would have a direct interest in these matters and the power to take action themselves, if so advised. He remembers indicating to the police that they should take these matters up particularly with the Social Work Department, the Reporter to the Children's Panel and also/

also the Education authorities who were involved in the letting of the school premises for the Clubs. His recollection is being informed by these other agencies were already aware of the matters. He was aware of the Reporter's powers to institute his own proceedings in connection with the care and protection of children.

"His recollection is that while after precognition there may have been one or two incidents for which there was corroborated evidence there were many others where accounts were vague or inconsistent. He did not consider it appropriate to select from the whole picture one or two incidents where there was on paper an apparent sufficiency of evidence. In any event, his recollection is that the one or two incidents for which there was corroborated and consistent evidence were very minor indeed and did not merit criminal prosecution.

"As previously indicated, a further search of the Dumbarton Office has failed to find the precognitions of the witnesses or any correspondence in that connection. During his recent visit to the Dumbarton Office Mr. Cardle found that the papers remaining in the office from that period had been "weeded" in accordance with office practice. Time has not permitted inquiry being made with the Dunfermline, Falkirk and Linlithgow Offices but with the passage of time it is doubtful in my experience whether these offices would still retain any paperwork in connection with precognitions undertaken for another office.

"2.3 Report 1A.

With the papers comprising report 1 was an exchange of correspondence in March 1990 between the Director of Education, Lothian Regional Council, Edinburgh and Mr. Cardle.

"On 13th March 1990 the Director of Education wrote to the Procurator Fiscal, Dumbarton, explaining that in 1989 the Regional Council had suspended Hamilton's let of accommodation at Linlithgow Academy for a boys' Club he was running there in the evenings. The let had been suspended because/

because of concern arising from reports that the police were investigating Hamilton's conduct of a camp on Inchmoan island. The Regional Council wished to ascertain whether the investigation had concluded and whether there were to be any proceedings arising from it. They have written to both Central Scotland Police and Strathclyde Police. The reply from an Assistant Chief Constable of Strathclyde Police dated 4th August 1989 started the confusion by referring to a report submitted to the Procurator-Fiscal, Dumbarton, by an Inspector Keenan of Central Scotland Police. The Director of Education understood that report to have been submitted between May and July 1989. In light of that the Regional Council had decided to take no further action pending a decision on proceedings. In the meantime Hamilton had contacted the Ombudsman. The Regional Council wished to know if there were to be proceedings against Hamilton. The decision on the Inchmoan island report had of course been taken by Mr. Cardle in the autumn of 1988. The report referred to by the ACC of Strathclyde Police was in fact the report on Hamilton's complaints against police officers arising out of the enquiries into the Inchmoan island camp.

There/

There is a handwritten note on the Director of Education's letter -- "No report submitted JR 19/3/90". Mr. Cardle tells me that the note is in the handwriting of the then office manager at Dumbarton and that the initials are hers. There is also a pencil note in the margin -- "17th October '89 RPF/PH.89.10748". This is the Regional Procurator-Fiscal's reference in connection with Inspector Keenan's report on Hamilton's complaints against the police.

On 20th March 1990 Mr. Cardle wrote to the Director of Education confirming that he had received a report from Strathclyde Police arising out of the camp and had decided not to take any criminal proceedings against Hamilton in respect of that camp. Mr. Cardle was of course referring to DS McBain's report of 30th August 1988.

There is also with the papers a typed file note dated 20th March 1990 -- the same date as Mr. Cardle's letter to the Director of Education. The note bears Mr. Cardle's initials (typed) and indicates that the report by Central Scotland Police referred to in the letter, although initially brought to the Dumbarton office, had been uplifted by Chief Inspector Brockie of Discipline Branch (Strathclyde Police) and taken to the Regional Procurator-Fiscal at Paisley (Mr. Lees) as the whole tenor of the report related to complaints against the police by Hamilton. The note recorded Mr. Cardle's understanding that Mr. Lees had written to Strathclyde Police on 17th October 1989 advising that he did not consider that the report contained any allegations of a criminal nature involving Strathclyde Police. A report concerning an investigation into a complaint against police officers falls to be considered by a Regional Procurator-Fiscal and not a local District Procurator-Fiscal.

As previously indicated I recovered that report from the Regional Procurator-Fiscal's Office at Paisley and have spoken to Mr. Lees about it. It is a very full and comprehensive report of the investigations into various complaints made by Hamilton against the police officers who were involved in the enquiries into the summer 1988 camp at Inchmoan Island.

There/

There is one matter worthy of comment in relation to Report 1A. On page 19 at the end of his summary Inspector Keenan discusses whether he should meet with Hamilton and interview him about his complaint. It appears that Hamilton had earlier given a very lengthy statement to another officer about his complaint but it had strayed a great deal from the substance of the complaints. Inspector Keenan wrote in his report which was addressed to the Deputy Chief Constable -- "I seek your advice and guidance on this matter as it may be that criminal charges are a possibility against the complainer (Hamilton) and I do not wish to prejudice any enquiry Strathclyde Police may wish to instigate. The page bears a date stamp -- "Deputy Chief Constable Strathclyde Police 16 JUN 1989" and a handwritten note -- "C/Supt Discipline Pse have a senior officer take this report to PF Dumbarton and have any further enquiry necessary carried out". The initials are indecipherable but do not appear to be the initials of the then Deputy Chief Constable Peter Mitchell. While Mr. Lees could not identify the initials he believed them to be those of one of the Assistant Chief Constables who presumably had been standing in for the DCC.

The reading of the note is that the author is particularly directing the report to the Procurator-Fiscal Dumbarton rather than the Regional Fiscal because of Inspector Keenan's reference to the possibility of criminal charges against the complainer, Hamilton. If that be so then the report was not dealt with or treated in that way either by the senior officer or by the District or Regional Fiscal.

It appears that when the report arrived with Mr. Cardle -- and he has no recollection of it being personally delivered to him by a senior officer -- he saw at once that it concerned complaints against police officers, a matter which would not be dealt with by him but by the Regional Fiscal. He looked no further but contacted the Discipline Branch of Strathclyde Police and asked them to uplift the report and deliver it to Mr. Lees in Paisley. He also thinks that he phoned Mr. Lees to advise him of what had happened and to expect the report. Chief Inspector Brockie referred to in Mr. Cardle's note of 20th March 1990 worked previously in the Dumbarton area and was known to Mr. Cardle.

Mr./

Mr. Lees recollects receiving the report and that Mr. Cardle may have phoned him in advance about it. Having considered the report he reached the view that there was nothing of a criminal nature brought out in it so far as the conduct and actings of the police were concerned and marked the papers "No proceedings". He appears to have intimated his decision to the Discipline Branch by phone. Subsequently at their request he wrote to the Discipline Branch on 17th October 1989 confirming his decision. The letter was addressed to Chief Inspector Brockie. If the handwritten note of 16th June 1989 intended that further consideration be given to proceedings against Hamilton in relation to the Inchmoan Island camp then the report was not dealt with in that way either by the Chief Superintendent Discipline to whom the note was addressed, any senior officer tasked to deliver the report, or the Fiscal, Dumbarton, or Regional Fiscal, Paisley.

Mr. Cardle had long since taken his decision not to prosecute. In any event, standing the strict separation of criminal enquiries and enquiries into complaints of criminal conduct by police officers, any information gained in the investigation of Hamilton's complaints by Inspector Keenan could not have been used to further a criminal case against Hamilton. Complaints of criminal conduct against police officers are investigated in Scotland by the Regional Fiscals. As a matter of long standing practice, information elicited in the course of the investigation of a complaint against a police officer or officers remains confidential to the Regional Fiscal's enquiries and is not disclosed to a District Procurator-Fiscal or his staff who may be considering a report against the person making the complaint arising out of the same incident or indeed conducting the prosecution of the complainer. The Procurator-Fiscal Service Regulations, practice and procedures in this area were approved by the High Court of Justiciary in the Opinions in MacLeod v. Tiffney, NORMAND V. RAMAGE, and McINTOSH V. NORMAND.

3. Report 2./

3. REPORT 2.

3.1 Description.

This report is a Central Scotland Police Crime Report against Hamilton, the reporting police officer being a Detective Sergeant Paul Hughes. The report lists ten proposed charges against Hamilton arising out of incidents at a summer camp run by Hamilton at Millarochy Caravan Park, Balmaha, Loch Lomond. The charges are described as 'proposed' as Hamilton had not been cautioned and charged with them by the police. The report includes full statements from some of the boys at the camp. It appears the report was submitted to the Procurator-Fiscal at Stirling around the beginning of September, 1991.

The police enquiries followed a complaint made to the Stirling Police Office on 23rd July, 1991 by a parent on behalf of her 11 year old son who had attended the camp. The parent had been led to believe, like other parents, that the camp would be supervised by some four to six adults. In the event it appears that Hamilton was the only adult supervising this group of boys.

The parent complained inter alia that her son had been slapped/struck by Hamilton in the course of the camp.

As in 1988 Hamilton had insisted that the boys wore small black swimming trunks during the camp. He had taken a large number of photographs of the boys and indeed of one boy in particular. He had also attempted to make a video film of the boys acting out a "boys shipwrecked on deserted island" story. This had been attempted on an inclement day and the boys who were wearing only the small black swimming trunks issued to them by Hamilton complained of being cold and wet. One boy in particular had been made to lie in cold water while Hamilton filmed him.

Apart from the complaints of assault the police were concerned about the number of photographs taken of the boys by Hamilton. Two photographic shops had contacted the police to express concern about the large number of photographs of small boys lodged with them for processing by Hamilton. Many were recovered by the police including a large number of photographs and/

and slides from Hamilton himself. While none of these is described as being indecent there was obvious concern about Hamilton's motives in amassing such a large collection.

There were no complaint of indecent conduct or behaviour by Hamilton to the boys.

In relation to the complaints of assault on the boy, whose mother had complained, Hamilton when interviewed by police on 23rd July at the campsite admitted he had slapped the boy on the face and then on the backs of his legs. He maintained he had been disciplining the boy for an accumulation of bad behaviour.

On page 1 of the summary part of the report in the second paragraph of the introduction reference is made in the following terms to previous investigations -- "There have been previous police investigations into concerns of parents which resulted in a report being submitted to the Procurator-Fiscal at Dumbarton".

3.2 Involvement of Procurator Fiscal

As previously indicated the report was submitted with Hamilton being interviewed about all the allegations or cautioned and charged with offences. At the end of August, 1991 having completed most of his enquiries, DS Hughes went into the Fiscal's Office at Stirling to discuss the stage his enquiries had reached and seek advice and guidance on whether he should interview Hamilton. He appears to have been concerned about interviewing Hamilton given the picture he had built up of him and the fact that Hamilton had apparently complained about Hughes' handling of the case. DS Hughes does not remember who he saw but Mr. Valentine has a recollection of meeting him on this matter. In any event, the advice given was that Hughes should approach Hamilton and invite him to attend voluntarily for interview.

The police report records that such an approach was made to Hamilton but he flatly refused to be interviewed.

DS Hughes then submitted his full report to the Procurator-Fiscal's Office. Mr. Valentine remembers/

remembers the report coming in and of having a meeting with Hughes about it. It is likely that Hughes took the report in personally. There is no datestamp on the papers but Mr. Valentine accepts DS Hughes' statement that it was brought in on 6th September, 1991.

By that time Mr. Valentine had received a letter from Hamilton about the enquiries into the camp, that letter being dated 26th August, 1991. It is with the papers. Hamilton expresses his concern that any police report submitted "Will be misleading and inaccurate". He appears to have enclosed copy correspondence about the matter which he had sent to parents. The Procurator-Fiscal replied on 29th August acknowledging the letter, advising that a report had not yet been received and that accordingly the photographs could not be returned at that time.

Mr. Valentine discussed the report with DS Hughes and considered the papers fully. He had doubts whether the report revealed sufficient evidence of criminality to merit court proceedings. However, he decided to have further enquiry made and to have the boys precognosed before reaching a final decision. As with Mr. Cardle in 1988, Mr. Valentine was troubled by the contents of the report and the situation that was revealed. He was concerned to know that the situation had been drawn to the attention of other agencies that might have an interest, namely the Social Work Department, the Reporter to the Children's Panel and the local authority Education Department.

The report was passed to his Depute, Mr. Gallagher, to deal with, and towards the end of September Mr. Gallagher wrote to the Procurator-Fiscal at Dunfermline with copies of the statements asking that certain of the boys be precognosed on his behalf. Mr. Gallagher had discussed the matter with Mr. Valentine and it was agreed that only the witnesses speaking to significant matters required to be precognosed.

At this stage mention should be made of a note in the papers from another Depute in the Stirling Office, Mr. Coyne. Mr. Coyne is now retired and I have not interviewed him. Mr. Gallagher's recollection is that before the papers went/

went to Dunfermline, Mr. Coyne was asked to consider them and prepare a note. Mr. Coyne reached the view that there was not a great deal to substantiate many of the charges proposed by the police, with the exception, perhaps, of the charges of assault on the boy previously referred to and a breach of the peace charge relating to Hamilton shouting and swearing at the boys.

On 25th September Mr. Gallagher wrote to the Procurator-Fiscal at Dunfermline enclosing a copy of the police summary, the charges proposed by the police and copies of the statements of eight of the boys. He asked that the boys be precognosed stating 'As I indicated, the circumstances are far from clear and I would wish to have precognitions obtained before any other proceedings are instituted. Given the ages of the children, it may be that you will be arranging to have them precognosed in the presence of their parent and it might be useful to obtain any additional information that the parents are able to give in relation to the background to these incidents.' He also enclosed a copy of a letter which Hamilton had sent to his Member of Parliament and which he had copied to the Fiscal. The witnesses to be precognosed were carefully selected.

The precognitions were returned to the Stirling Office on 14th November. The precognition officer, Mr. Burns, who had interviewed the boys, commented that none of the parents had anything to add to their statements and some had shown concern at the thought of Hamilton being suspected of anything untoward. They had not stopped their children going to Hamilton's clubs. He felt that there were no real grounds for a charge against Hamilton in relation to an assault on the boy. Further, he had difficulty in seeing what charge could lie against Hamilton in connection with the taking of photographs of the boys. These comments were of course only by way of assistance to the Stirling Office whose responsibility it was to assess the whole matter in light of all the information available including the precognitions and reach a decision thereon. It was not considered necessary to precognose or have precognosed any other witnesses.

On 18th November, 1991 having considered all/

all the material Mr. Gallagher decided to take no criminal proceedings against Hamilton and marked the papers 'No Pro., No Crime Libelled, Not in the Public Interest'. On the same date he wrote to Hamilton advising him of the decision and that the police had been instructed to return to him his photographs.

Mr. Gallagher's marking reflected his view that in relation to some of the allegations he did not consider that the evidence available indicated criminality and that where criminality was indicated the circumstances -- taken at their highest -- were not such as to require prosecution in the public interest.

The backing sheet of the papers also bears a note "Accd has made a comp v Police. Please phone Ch. Inspector Ferguson at Falkirk. B/U to me please 19/3/1992, WG9/3/92'. The first part of the note is in the handwriting of the Office Manager and the second part -- from B/U -- in Mr. Gallagher's writing. His recollection of this is that some time after his decision in the matter his attention was drawn to the fact that Hamilton had made a complaint against the police. He recollects seeing an officer concerned with a disciplinary enquiry -- probably Chief Inspector Ferguson. His marking on the papers would indicate his request on 9th March, 1992 for the papers to be brought to him on 19th March for a meeting.

Both Mr. Valentine and Mr. Gallagher had a good recollection of this report which had been discussed between them on several occasions and also considered by Mr. Coyne.

Both indicated that while the contents of the report had troubled them they were of the view that the conduct revealed had approached but not crossed the border of criminality.

Both were certain that the decision not to institute proceedings against Hamilton had been communicated to the police but could not remember who had done this or how it had been accomplished. Both were prepared to accept DS Hughes' account that the decision had been conveyed by Mr. Coyne.

4. REPORT 3

4.1 Description.

This/

This Central Scotland subject sheet dated 3rd July, 1992 was sent by Sergeant J. Fleming, Dunblane to the Chief Superintendent, A Division. It concerned a youth camp run by Hamilton at Dunblane High School and in particular the fact that three young boys had been found by police at 10.15 p.m. on 29th June dressed only in pyjamas and sitting on the pavement in Old Doune Road, Dunblane. It transpired that they had run away from Hamilton's camp and had phoned their parents asking them to come and collect them. The police waited with the boys until their parents arrived.

Sergeant Fleming had called at the school the next day and spoken to Hamilton. No further action was taken in connection with this matter. On 2nd July an officer of the Child Unit at Dunfermline had received a complaint from a parent regarding her 10 year old son who had been at the camp. She had complained about the regimentation and lack of supervision at the camp. The officer had been informed of the incident involving the three boys and was arranging to take statements from them. The Child Protection Unit at Bannockburn had been informed and were in contact with their counterparts in Fife.

"The/

4.40 p.m.

"The Subject Sheet bears date stamps of 6th July, 1992 (Callander Police Office) and 9th July, 1992 (Detective Superintendent Headquarters). There is a handwritten note instructing that the Subject Sheet be copied to the Detective Superintendent and to the Deputy Chief Constable for information. DS Hughes has also written a note on page two -- copy to Mr. Valentine P.F. Stirling -- dated 28th July.

"The first copy which I saw bears a stamp at the top of the first page -- Copy To Reporter for information. I have also seen a copy which bears the date stamp of the Regional Reporter Fife Region of 10th August, 1992. It bears a handwritten note apparently in DS Hughes' writing -- Copy to PF.

"Involvement of Procurator-Fiscal. Mr. Valentine recollects the report and deciding it required no action by him. On this occasion the report was dealt with solely by Mr. Valentine and was not seen by Mr. Gallagher. Given the previous report about Hamilton, Mr. Valentine may have mentioned it to him.

"The report was submitted to him for information only. He marked on it 'No Pro. Not a crime'.

"The statements shed light not only on the camp at the High School but also on the clubs run by Hamilton. However, Mr. Valentine took the view that nothing of a criminal nature was indicated.

"Mr. Valentine knew that the matter had also been reported to the Reporter for his information, and recollects advising the police that it appeared to him to be a matter more appropriate to the Reporter's Office and also for the school to consider in connection with the let of its facilities to Hamilton.

"Report 4. Description. The last report is a Central Scotland Police Subject Sheet dated 9th June, 1993 from Detective Constable Taylor CPU (Child Protection Unit) Bannockburn to Detective Superintendent, Crime Management Services.

"It/

"It refers to a number of complaints having been received about Hamilton's Clubs and the operation of them. Complaints also concerned the activities in which the boys were required to participate and in particular the fact that they were made to wear small, ill-fitting trunks which Hamilton provided for them. Concern had also been expressed about Hamilton photographing the boys when they were participating in activities at the clubs.

"The report provided background information about Hamilton and referred to reports previously submitted to the Procurators-Fiscal at Dumbarton and Stirling. A copy of DS Hughes' report to the Stirling office (Report 2) was included.

"This is the only one of the four reports or Subject Sheets which makes reference to Hamilton being the holder of a firearms certificate.

"The Subject Sheet concluded with a request that it be submitted to the Procurator-Fiscal at Stirling for consideration to be given to obtaining a Warrant to search Hamilton's house for photographs, photographing equipment, documentation and other items which might be relevant to police enquiries.

"Concern had been expressed particularly about a situation where a parent found Hamilton alone in the gymnasium at Stirling High School with a nine-year-old boy. The boy was dressed only in swimming trunks and was being photographed performing press-ups. The boy was supposed to be attending five-a-side football, but it transpired that that had never taken place, and the gymnasium had not been booked by Hamilton for that activity.

"A further complaint concerned a nine-year-old boy being photographed at a club at Dunblane High School performing exercises with another boy.

"Involvement of Procurator-Fiscal. This Subject Sheet was considered by Mr. Gallagher. Mr. Valentine had no recollection of having seen it before and said he was not aware of it. On seeing the date of it, Mr. Valentine realised that he had been absent from the office at that time due to a personal tragedy.

"Mr./

"Mr. Gallagher considered the contents of the Subject Sheet and the request for a Search Warrant.

"Detective Constable Taylor had brought the Subject Sheet to the Fiscal's office personally and had the opportunity of discussing it with Mr. Gallagher. Having considered the information provided and having discussed it with the officer Mr. Gallagher reached the view that there was insufficient material to justify an application for a Warrant to search Hamilton's house. He remained of the view that while the conduct was of concern it did not yet cross the border into criminality. However, he expressed the view that the police should continue their enquiries and report further to him if any more evidence came to light.

"Mr. Gallagher marked the Subject Sheet 'Warrant refused meantime. B/U three months'. This marking is dated 11/6/93, which according to Mr. Gallagher was the date of the submission of the Subject Sheet to him. He intended to review the matter in three months to ascertain if matters had progressed. If the police discovered additional evidence or evidence of indecent or grossly improper conduct towards the boys then the matter would be reconsidered.

"Mr. Gallagher advised the reporting officer that he did not consider that the circumstances surrounding the taking of photographs revealed the commission of a crime by Hamilton. However, the matter would be reviewed if additional evidence was reported indicating a change in the character of the circumstances such as to merit their description as criminal. Meantime, the police were advised that they need not report further instances of the same conduct unless there was a change in the character of the circumstances, indicating criminality. Mr. Gallagher does not now recall the details of the discussions with the reporting officer. His recollection is that he was concentrating on whether some form of indecency was going on. I made Mr. Gallagher aware of the account of the meeting given by DS Gordon Taylor in his statement. While Mr. Gallagher could not say for certain that there had been no discussion about whether the crime of breach of the peace might be applicable, he indicated that he would frankly be surprised/

surprised if he had said that a breach of the peace could not be constituted where alarm had been caused to a third party.

"It is of note that as at this time no indecent photographs of boys had been recovered or seen in connection with this or previous enquiries. There was no doubt that Hamilton took an unusually large number of photographs of boys, but while the circumstances in which they were taken and the manner of the boys' dress were troubling, the photographs could not be described as indecent.

"According to the papers, Mr. Gallagher reviewed them again on 10th September, 1993, when he added the marking 'No Pro'. His recollection is that no further information had come to light by that time. He cannot remember whether he contacted the police at this time, but considers it probable that he would have".

LORD CULLEN: Thank you, Mr. Lake. That concludes matters for this afternoon. We will resume at 10 o'clock tomorrow morning.

Adjourned until tomorrow at 10 a.m.