

HEARING 1 - LAW & PRACTICE

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Section A – Powers, privileges and responsibilities of a police constable

(i) Detention and Arrest

In May 2015, the law in Scotland recognised “detention” and “arrest” as two distinct, but interlinked, concepts.¹ The existence of these two separate means of taking a person into custody was regarded as a “peculiar, if not unique, feature of modern Scots criminal procedure”.²

It has been acknowledged that “while every arrest involves a detention, the converse is not necessarily so”.³ Whilst distinct concepts, there existed some crossover between detention and arrest with, for example, both requiring reasonable grounds for suspecting⁴ that a person had committed a crime.⁵

Since unlawful or irregular deprivation of liberty (whether by arrest or detention) by a police officer may be resisted,⁶ and may give rise to civil liability for wrongful apprehension,⁷ it is important to be clear how both legal concepts are construed and what their limits are.

Detention⁸

Criminal Procedure (Scotland) Act 1995

The Criminal Procedure (Scotland) Act 1995 created a status of “detainee”, which was distinguishable from a person who was under arrest:⁹

Where a constable has reasonable grounds for suspecting that a person has committed or is committing an offence punishable by imprisonment, the constable may, for the purpose of facilitating the carrying out of investigations—

(a) into the offence; and

¹ Following the enactment of the Criminal Justice (Scotland) Act 2016, the concept of “detention” in this context no longer exists in Scotland.

² *The Carloway Review, Report and Recommendations*, [Carloway Review](#), paragraph 5.1.4

³ *Stair Memorial Encyclopaedia*, Police (2nd Reissue), paragraph 105

⁴ Suspicion is not defined in statute in Scotland, but it has been defined in other jurisdictions in the following way: “*Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: ‘I suspect but I cannot prove.’ Suspicion arises at or near the starting point in an investigation of which the obtaining of prima facie proof is at the end.*” *Hussien v Chong Fook Kam* [1970] AC 942, Lord Devlin at 948

⁵ See below for European Court of Human Rights case law in relation to “reasonable suspicion”. For discussion in relation to the concept of “reasonable grounds” for suspecting in Scots law, see *Criminal Procedure (6th Ed.)*, Renton and Brown, Chapter 6, paragraph 6.02-1. Pertinent case law includes: *Peggie v Clark* (1868) 7 M. 89; *Druce v H.M. Advocate* 1992 S.L.T. 1110; *Houston v Carnegie*, 2000 S.L.T. 333; *Miller v Jamieson* [2007] HCJAC 56; *HM Advocate v B*, 2013 S.L.T. 810; and *McKenzie v Murphy* [2014] HCJAC 132. The English case *R. v Da Silva (Hilda Gondwe)* [2006] EWCA Crim 1654 has looked at the distinction between merely “suspecting” and “having reasonable grounds to suspect”.

⁶ *Wither v Reid* 1979 SLT 192.

⁷ *Henderson v Moodie* 1988 SLT 361, OH; *McLaren v Procurator Fiscal for the Lothians and Borders* 1992 SLT 844.

⁸ The case of *Cadder v HMA* [2010] UKSC 43 (and subsequent, related cases) is an important one in the context of detention in Scotland, however, it has not been explored here in detail as its assistance would be limited, given the circumstances.

⁹ Criminal Procedure (Scotland) Act 1995, s. 14(1)

(b) as to whether criminal proceedings should be instigated against the person,

detain that person and take him as quickly as is reasonably practicable to a police station or other premises and may thereafter for that purpose take him to any other place and, subject to the following provisions of this section, the detention may continue at the police station or, as the case may be, the other premises or place.

Broadly, detainees were a class of persons who were suspected of an offence and who had been detained for investigation, but who had not (yet) been arrested.

There has been some judicial discussion around when such “detention” begins. It was held that detention “cannot be understood as being triggered by the utterance of the words ‘I detain you’, if the putative detainee then runs off and remains at liberty”¹⁰ and, quoting an earlier case, that:¹¹

The essential element of detention, within the proper meaning of that word, is the intervention of some outside agency to ensure that the person remains where he has been put. To detain somebody is to keep him in confinement or under restraint.

The 1995 Act explicitly provided that police officers could use “reasonable force” to ensure that detainees remained with them in accordance with the provisions set out within s. 14(1).¹² Police officers could also use that same level of force¹³ to compel suspects to remain with them for a more limited line of questioning – but not take them to a police station – under a separate provision within the 1995 Act.¹⁴

Searches for articles with a blade

At the time of the incident involving Sheku Bayoh in May 2015 there also existed additional, more specific, powers of detention that permitted police officers to detain individuals for the purposes of carrying out personal searches where there were reasonable grounds to believe that an individual was in illegal possession of certain items, for example, controlled drugs,¹⁵ firearms,¹⁶ offensive weapons,¹⁷ or articles with a blade.¹⁸

With reference to the carrying of articles with a blade, the legislation in question provides that:¹⁹

Where a constable has reasonable grounds for suspecting that a person has with him an article to which section 49 of this Act applies and has committed

¹⁰ *Gillies v Ralph* [2008] HCJAC 55

¹¹ *Brawls v Walkingshaw* 1995 SLT 139

¹² 1995 Act, *supra*, s. 14(8)

¹³ *Ibid.*, s. 13(4)

¹⁴ *Ibid.*, s. 13(1)

¹⁵ Misuse of Drugs Act 1971, s. 23(2)(a)

¹⁶ Firearms Act 1968, ss. 47, 49

¹⁷ Criminal Law (Consolidation) (Scotland) Act 1995, s. 48(1)

¹⁸ *Ibid.*, s. 50(1). This also includes articles that are “sharply pointed”. Knives can fall under the auspices of s. 50(1), but it depends on the facts and circumstances of each case. See *Woods v Heywood* [1988 SCCR 434].

¹⁹ *Ibid.*, s. 50(1)

or is committing an offence under subsection (1) of that section, the constable may search that person without warrant and detain him for such time as is reasonably required to permit the search to be carried out.

Whilst it is an offence for a person to intentionally obstruct a police officer in exercising their powers of search for such a bladed article,²⁰ and a person could be arrested if they committed such an offence in May 2015,²¹ there is no explicit reference within the legislation to police officers having the right to use force (reasonable or otherwise) in detaining a person under that provision.

Arrest

The power of arrest can broadly be split into two types: arrest with or without a warrant. The former – where a warrant to arrest a suspect is obtained from a court on the application of the procurator fiscal – is not pertinent to the incident involving Sheku Bayoh on 3 May 2015.

Common law

With certain, specific, exceptions, the concept of arrest without a warrant in Scotland was founded on common law principles at the time of the incident in 2015.²² Whilst common law authority was “somewhat sparse”,²³ courts were, on occasion, left to decide if someone had, in fact, been arrested.²⁴ Force, or threats making it clear that the offender has no alternative but to accompany or remain with the police, has often been necessary for this question to be decided in the affirmative.²⁵ The authors of the Stair Memorial Encyclopaedia note that:²⁶

In the absence of the use of actual force or of language which makes it abundantly clear to an individual he is under a compulsion to remain with an officer, it may be difficult on occasion to determine whether an individual has been arrested and is thus in legal custody. State of mind or belief of the citizen is not the crux of the test. In order to ascertain his exact status an individual may have to invite the use of forcible restraint by a police officer.

*Swankie v Milne*²⁷ suggests that the suspect is to be treated as free until there is a formal taking into custody, which may not be until he actually tries to leave the policeman and is prevented from doing so:²⁸

An arrest is something which in law differs from a detention by the police at their invitation or suggestion. In the latter case a person detained or invited to accompany police officers is, at that stage, under no legal compulsion to accept the detention or invitation. It may well be that in a particular case

²⁰ *Ibid.*, s. 50(4)(a)

²¹ *Ibid.*, s. 50(5). This provision was repealed by the Criminal Justice (Scotland) Act 2016, schedule 2, paragraph 12(d)

²² Subsequent to the incident involving Sheku Bayoh on 3 May 2015, the Criminal Justice (Scotland) Act 2016 created a broad statutory power of arrest, at s. 1(1).

²³ *Criminal Procedure (6th Ed.)*, Renton and Brown, Chapter 6, paragraph 6.03

²⁴ See *Muir v Hamilton Burgh* 1910 1 SLT 164

²⁵ *Ibid.*

²⁶ *Stair Memorial Encyclopaedia, Police* (2nd Reissue), paragraph 106

²⁷ *Swankie v Milne* 1973 J.C. 1.

²⁸ *Ibid.*, at 6.

refusal to comply could lead to formal arrest, but until that stage is reached there is theoretical freedom to exercise a right to refuse to accept detention at the hands of police officers who are not armed with a warrant.

The purpose of arrest is to bring the suspect before a court for examination. Arrest, unlike detention, was not permitted merely to take a suspect into custody for the purposes of further investigation or questioning by the police. Arrest had to be accompanied by a charge even if, for logistical reasons, there may have been a short time lapse between those events.²⁹

The Carloway Review provides a useful summary of when police officers had the power of arrest without a warrant under common law:³⁰

A police officer has the power to arrest without warrant where that is necessary for the purposes of preventing crime, the escape of the suspect or the destruction of evidence.³¹ This power is exercisable where there is a reasonable suspicion of a person having committed an offence.³² A police officer may arrest on credible information that a serious crime has recently been committed, or attempted, and the offender is likely to abscond.³³

As to what might constitute a reasonable suspicion in this context, *Renton and Brown* notes that this:³⁴

Need not rest upon personal ocular observation by the officer; [his suspicions] may stem from the observations of other persons, from 'information received' or from prior knowledge of the suspect's habits and background, as well as general knowledge of the area being policed.

Whilst both concepts require there to be reasonable suspicion of criminal activity, it is important to distinguish the common law power of arrest without a warrant with detention under section 14 of the Criminal Procedure (Scotland) Act 1995. Whilst a person could be detained (for a limited period) where there were reasonable grounds to suspect that he or she had committed a crime under section 14, this was only the case for an arrest in situations of urgency.

Statutory offences

Beyond these common law powers there existed powers of arrest in a limited range of statutory offences.³⁵ None of this legislation makes reference to the power of arrest being contingent on the existence of evidence, as distinct from suspicion, far less on a corroborated case.³⁶

²⁹ *Chalmers v HM Advocate* 1954 JC 66

³⁰ *The Carloway Review, Report and Recommendations*, paragraph 5.1.9

³¹ Hume ii, 75 et seq; *Criminal Procedure (6th Edition)*, Renton and Brown, at paragraph 7.05; *Peggie v Clark* (supra), Lord Deas at p 93

³² *Peggie v Clark* (supra)

³³ *Criminal Procedure (6th Edition)*, Renton and Brown, paragraph 7.05; *Peggie v Clark* (supra), Lord Deas at p 93

³⁴ *Criminal Procedure (6th Edition)*, Renton and Brown, paragraph A4. 27

³⁵ Under the Terrorism Act 2000, for example, which at s. 41(1) permits the arrest of suspects reasonably suspected by police officers to be terrorists (a provision which survived legislative reform in 2016) or under the Civic Government (Scotland) Act 1982, which at s. 59(1) permitted the arrest of persons suspected of committing crimes relating to theft or drunkenness (which did not survive the aforementioned legislative reform).

³⁶ *The Carloway Review, Report and Recommendations*, paragraph 5.1.10

With reference to the incident involving Sheku Bayoh, the most pertinent offences where there existed a statutory power of arrest in May 2015 were those relating to possession of an offensive weapon³⁷ or a blade³⁸ in a public place. For both offences, it was possible for arrests to be made where a police officer had “reasonable cause”³⁹ to believe that an offence was being committed or where a person concealed,⁴⁰ or intentionally obstructed a police officer’s search for,⁴¹ the offensive weapon or blade in question.

Case law of note pertaining to these two classes of offence included a finding that it was not necessary for a person to have a weapon in their hand or on their person for it to be “with him”, rather the object in question must simply be readily available,⁴² and that where an article – for example a machete – had more than one purpose it would not automatically be regarded as an offensive weapon.⁴³

Elsewhere under statute, it is an offence for a person to assault a police officer,⁴⁴ or to resist arrest.⁴⁵

European Convention on Human Rights (ECHR)

The ECHR does not make a distinction between the concepts of detention and arrest and treats them somewhat interchangeably. Article 5(1)(c) of the ECHR states:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law ... the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

Article 5 identifies that a person may be arrested or detained “on a reasonable suspicion of having committed an offence”, which broadly matches the standard applied historically for both detention and arrest in Scotland.⁴⁶ The provision within Article 5 that permits arrest or detention where considered necessary to prevent an offence being committed, matches a similar power of arrest granted to police officers in Scotland under common law.

Case law

³⁷ Criminal Law (Consolidation) (Scotland) Act 1995, s. 47(3)

³⁸ *Ibid*, s. 50(3)

³⁹ *Ibid*, s. 47(3) and s. 50(3)

⁴⁰ *Ibid*, s. 48(2)(b) and s. 50(4)(b)

⁴¹ *Ibid*, s. 48(2)(a) and s. 50(4)(a)

⁴² *Hill v HMA* [2014] HCJAC 117 and *Smith v Vannet* [1998 SCCR 410]

⁴³ *Woods v Heywood* (supra)

⁴⁴ Police and Fire Reform (Scotland) Act 2012, s. 90(1)

⁴⁵ *Ibid*, s. 90(2)

⁴⁶ Reasonable suspicion continues to form the basis of the statutory power of arrest that is used today, under the Criminal Justice (Scotland) Act 2016, s. 1(1)

There has been a significant volume of case law that has looked at the interpretation of “reasonable suspicion” within the context of Article 5.⁴⁷ Within this authority, it has been established that a “reasonable suspicion” that a criminal offence has been committed presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence.⁴⁸ This strengthens the historic common law position in Scotland, where the courts generally did not look too closely at the objective strength or weakness of an officer’s suspicion at the relevant time; rather, provided it was shown that the suspicion was honestly held, it was for the accused to prove that the suspicion was unreasonable.⁴⁹

The European Court of Human Rights has also looked at the alternative basis for the legitimate deprivation of liberty that pertains to the prevention of an offence being committed. Here, it was necessary to demonstrate that the person concerned would in all likelihood have been involved in a “concrete and specific offence”, had its commission not been prevented by the detention.⁵⁰

Potential Offences

The actions of Sheku Bayoh on the morning of 3 May 2015 that resulted in the police being called to attend at Hayfield Road may have constituted certain offences under Scots law.

Carrying an article with a blade or point

Under the Criminal Law (Consolidation) (Scotland) Act 1995:⁵¹

Any person who has an article to which this section applies with him in a public place shall be guilty of an offence.

An “article” in this context means “any article which has a blade or is sharply pointed”,⁵² with certain, specific exceptions.⁵³

It is a defence to show that a person had a reasonable excuse or lawful authority for having the article with him in the public place,⁵⁴ or that the article was for use at work,⁵⁵ for religious reasons,⁵⁶ or as part of any national costume.⁵⁷

Carrying an offensive weapon

Also under the Criminal Law (Consolidation) (Scotland) Act 1995:⁵⁸

⁴⁷ For a comprehensive summary of this case law, see [Guide on Article 5 - Right to liberty and security \(coe.int\)](#), paragraphs 89 – 100.

⁴⁸ [FOX, CAMPBELL AND HARTLEY v. THE UNITED KINGDOM \(coe.int\)](#)

⁴⁹ *McLeod v Shaw* 1981 SLT (Notes) 93

⁵⁰ [GUZZARDI v. ITALY \(coe.int\)](#), at paragraph 102 and [S. V. AND A. v. DENMARK \(coe.int\)](#) (although this latter case postdates the incident involving Sheku Bayoh in May 2015)

⁵¹ Criminal Law (Consolidation) (Scotland) Act 1995, s. 49(1)

⁵² *Ibid.*, s. 49(2)

⁵³ *Ibid.*, s. 49(3) (“a folding pocketknife if the cutting edge of its blade does not exceed three inches”).

⁵⁴ *Ibid.*, s. 49(4)

⁵⁵ *Ibid.*, s. 49(5)(a)

⁵⁶ *Ibid.*, s. 49(5)(b)

⁵⁷ *Ibid.*, s. 49(5)(c)

⁵⁸ *Ibid.*, s. 47(1)

Any person who has with him in any public place any offensive weapon shall be guilty of an offence.

An offensive weapon in this context means any article:⁵⁹

(a) made or adapted for use for causing injury to a person, or

(b) intended, by the person having the article, for use for causing injury to a person by—

(i) the person having it, or

(ii) some other person,

It is a defence to show that a person had a reasonable excuse or lawful authority for having the weapon with the person in the public place.⁶⁰

Threatening or abusive behaviour

Under the Criminal Justice and Licensing (Scotland) Act 2010:⁶¹

A person (“A”) commits an offence if—

(a) A behaves in a threatening or abusive manner,

(b) the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and

(c) A intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm.

Such an offence may be committed as a result of “behaviour of any kind including, in particular, things said or otherwise communicated as well as things done”.⁶² The behaviour in question can consist of a single act,⁶³ or a course of conduct.⁶⁴

It is a defence for a person to show that the behaviour was, in the particular circumstances, reasonable.⁶⁵

Breach of the peace

Conduct that breaches the peace is:⁶⁶

⁵⁹ *Ibid.*, s. 47(4)

⁶⁰ *Ibid.*, s. 47(1A)

⁶¹ Criminal Justice and Licensing (Scotland) Act 2010, s. 38(1)

⁶² *Ibid.*, s. 38(3)(a)

⁶³ *Ibid.*, s. 38(3)(b)(i)

⁶⁴ *Ibid.*, s. 38(3)(b)(ii)

⁶⁵ *Ibid.*, s. 38(2)

⁶⁶ *Smith v Donnelly* (2001 SCCR 800)

Conduct severe enough to cause alarm to ordinary people and threaten serious disturbance to the community ... conduct which does present as genuinely alarming and disturbing, in its context, to any reasonable people.

There is some overlap between breach of the peace and the statutory offence of “threatening and abusive behaviour” referred to above.

Vandalism

Under the Criminal Law (Consolidation) (Scotland) Act 1995:⁶⁷

Any person who, without reasonable excuse, wilfully or recklessly destroys or damages any property belonging to another shall be guilty of the offence of vandalism.

Malicious mischief

Malicious mischief is the common law crime of damaging or destroying the property of another, or interfering with it to the detriment of the owner or lawful possessor.⁶⁸ Most acts of damage or destruction which constitute malicious mischief will also be chargeable as the statutory offence of vandalism.⁶⁹

(ii) Legal Custody

The concept of a person being in “legal custody” was, at the time of the incident in 2015, defined in legislation as:⁷⁰

Any person required or authorised by or under this Act or any other enactment to be taken to any place, or to be detained or kept in custody is, while being so taken or detained or kept, in legal custody.

In the context of the instruction of investigations into fatal accidents and sudden deaths, at the time of the incident in May 2015 a person was regarded as being in “legal custody” if:⁷¹

(a) he is detained in, or is subject to detention in, a prison, remand centre, detention centre, borstal institution, or young offenders institution, all within the meaning of the Prisons (Scotland) Act 1952; or

(b) he is detained in a police station, police cell, or other similar place; or

(ba) he is detained in, or is subject to detention in, service custody premises (within the meaning of section 300 of the Armed Forces Act 2006);

(c) he is being taken—

⁶⁷ Criminal Law (Consolidation) (Scotland) Act 1995, s. 52(1)

⁶⁸ *Stair Memorial Encyclopaedia*, Criminal Law (2nd Reissue), paragraph 378. For case law, see *Ward v Robertson* 1938 JC 32.

⁶⁹ *Stair Memorial Encyclopaedia*, Criminal Law (2nd Reissue), paragraph 378

⁷⁰ Criminal Procedure (Scotland) Act 1995, s. 295

⁷¹ Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, s. 1(4)

(i) to any of the places specified in paragraphs (a), (b) and (ba) of this subsection to be detained therein; or

(ii) from any such place in which immediately before such taking he was detained.

Since the incident, a new definition of “police custody” has been introduced, which starts from the point a person is arrested by a police officer.⁷²

New legislation around the holding of fatal accident inquiries, which also was not in force at the time of the incident involving Sheku Bayoh, contains an amended definition of “legal custody”.⁷³

From an examination of responses to Freedom of Information requests, it appears that Police Scotland’s Professional Standards Department work on the basis of a specific definition of “custody” for the purposes of reviewing deaths in custody (as opposed to deaths following police contact).⁷⁴ Official guidance containing this definition has not yet been identified, so it is currently unclear if this interpretation was also used at the time of the incident involving Sheku Bayoh in May 2015.

(iii) Use of Force and Restraint

Broadly, any use of force by the police in the performance of their duties and responsibilities must be reasonable. What can be classed as reasonable will depend on the particular circumstances of each case.⁷⁵

Detention

As noted above, police officers had the right to use “reasonable force” to ensure that detainees under section 14(1) of the Criminal Procedure (Scotland) Act 1995 remained with them.⁷⁶ This was also the case in circumstances where there were reasonable grounds for suspecting that a person had committed or was committing an offence and the police required to obtain information from the suspect.⁷⁷

Arrest

Historically, the level of force that could be used in effecting an arrest in Scotland was determined under common law.⁷⁸ According to the authors of the Stair Memorial Encyclopaedia:⁷⁹

The general principle in effecting arrest or detention or otherwise dealing with prisoners in police custody is that a constable must act within the scope of

⁷² Criminal Justice (Scotland) Act 2016, s. 64(1)

⁷³ Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016, s. 2(5)

⁷⁴ For example: [FOI Response](#). Here it is stated that a “death in custody” includes “circumstances where a death occurs in a custody facility, or when a person has been arrested/detained by police and is no longer free to go about their business”.

⁷⁵ *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, by Dame Elish Angiolini, November 2020, paragraph 14.75: “What actions constitute reasonable use of force in one circumstance might in other circumstances, where there is no threat or risk to the officer or the public, constitute an assault”.

⁷⁶ Criminal Procedure (Scotland) Act 1995, s. 14(8)

⁷⁷ *Ibid*, s. 13(4)

⁷⁸ See, by way of an example, *Marchbank v Annan* 1987 SCCR 718

⁷⁹ *Stair Memorial Encyclopaedia*, Police (2nd Reissue), paragraph 70.

his authority and never use any greater force than is necessary; arrest or detention without lawful authority may amount to abduction⁸⁰ and unwarranted or unreasonable force may constitute assault⁸¹ although a court will be willing to overlook any unfortunate or genuine mistake made by a constable.⁸²

It is worth noting that the degree of force that would be unlawful in cases involving the police is less than that which would defeat a plea of self-defence, where only “cruel excess” will have that consequence.⁸³ From a civil perspective, the unwarranted use of force by a police officer has been found to be sufficient grounds for establishing civil liability.⁸⁴

Since 2016, police officers have been permitted to use “reasonable force” to effect an arrest under statute.⁸⁵

European Convention on Human Rights (ECHR)

It is essential to consider the European Convention on Human Rights (ECHR) when determining the legitimacy of a use of force that results in the death of a person. Article 2(2) of the ECHR states:

Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- a. in defence of any person from unlawful violence;*
- b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
- c. in action lawfully taken for the purpose of quelling a riot or insurrection.*

The key points for the Inquiry to be mindful of here are that any use of force must be “no more than absolutely necessary ... in order to effect a lawful arrest or to prevent the escape of a person lawfully detained”.

Case law

As for the concept of “reasonable suspicion” within the context of Article 5, there exists a significant body of case law around the legitimate use of force in the context of Article 2.⁸⁶ Here, it has been held that the use of force must be no more than “absolutely necessary” for, and “strictly proportionate to”, the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c) of Article 2.⁸⁷ Additionally, the legitimate aim of effecting a lawful arrest can only justify putting human life at risk in

⁸⁰ *Elliot v Tudhope* 1988 SLT 721

⁸¹ *Bonar v McLeod* 1983 SCCR 161

⁸² *McLean v Jessop* 1989 SCCR 13

⁸³ See *Fraser v Skinner*, 1975 SLT (Notes) 84

⁸⁴ *Mason v Orr* (1901) 9 SLT 269 and *Hill v Campbell* (1905) 13 SLT 731

⁸⁵ Criminal Justice (Scotland) Act 2016, s. 45(a)

⁸⁶ For a comprehensive summary of this case law, see paragraphs 101 – 116 [Guide on Article 2 - Right to life \(coe.int\)](#).

⁸⁷ [McCANN AND OTHERS v. THE UNITED KINGDOM \(coe.int\)](#)

circumstances of “absolute necessity”.⁸⁸ There can be no such necessity where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence, even if a failure to use lethal force may result in the opportunity to arrest the individual concerned being lost.⁸⁹ When examining the actions of a police officer the principal question to be addressed is whether the person had an honest and genuine belief that the use of force was necessary and that the belief was subjectively reasonable.⁹⁰

Article 2 case law with relevance to the incident involving Sheku Bayoh concerns cases where a person has died in the course of being, or having previously been, arrested.⁹¹ The case of *Saoud v France*, for example, concerned the death by gradual asphyxia of a young man who was handcuffed and held face down on the ground by police officers for over thirty minutes.⁹² Here, the court held that there had been a violation of the positive obligation to protect Saoud’s life under Article 2.⁹³

Restraint

Looking at the use of restraint, the unnecessary use of handcuffs or other physical restraints can, under certain conditions, amount to inhuman or degrading treatment (in breach of Article 3 of the ECHR).⁹⁴ Article 3 states:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Measures of restraint such as handcuffing do not normally give rise to an issue under Article 3 where they have been imposed in connection with lawful arrest or detention and do not entail the use of force, or public exposure, exceeding what is reasonably considered necessary in the circumstances. In this regard, it is of importance, for instance, whether there is reason to believe that the person concerned would resist arrest or try to abscond or cause injury or damage or suppress evidence.⁹⁵

There has been some judicial consideration of the use of irritant spray on prisoners within the context of Article 3.⁹⁶

Article 8, which protects the right to physical integrity, states:

Everyone has the right to respect for his private and family life, his home and his correspondence.

⁸⁸ [KAKOULLI v. TURKEY \(coe.int\)](#)

⁸⁹ *Ibid.*

⁹⁰ [ARMANI DA SILVA v. THE UNITED KINGDOM \(coe.int\)](#) (although this authority postdates the incident involving Sheku Bayoh).

⁹¹ See paragraph 117 of [Guide on Article 2 - Right to life \(coe.int\)](#) for a full list of cases.

⁹² [SAOUD c. FRANCE \(coe.int\)](#), although the official case report here is only available in French, a short summary of the case in English can be found within the European Human Rights Law Review [E.H.R.L.R. 2008, 1, 147-149] (available on Westlaw).

⁹³ The case of [SCAVUZZO-HAGER ET AUTRES c. SUISSE \(coe.int\)](#) is also noteworthy as it concerns drug use and the arrest and subsequent death of a person who was “very agitated”. The case report is again in French and, unfortunately, there appears to be limited English reporting of the case on Westlaw.

⁹⁴ [HENAF v. FRANCE \(coe.int\)](#). There are a number of cases where the Court has found that no justification for the use of shackles or handcuffs existed: [Guide on the case-law - Prisoners’ rights \(coe.int\)](#), paragraph 188

⁹⁵ [SVINARENKO AND SLYADNEV v. RUSSIA \(coe.int\)](#)

⁹⁶ [TALI v. ESTONIA \(coe.int\)](#)

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

It has been recognised that the aspects of moral and physical integrity of a person, as part of the concept of private life under Article 8 of the Convention, extend to situations of deprivation of liberty, including the use of measures of restraint. However, the use of measures of restraint such as the handcuffing must affect a prisoner physically or mentally or must be aimed at humiliating him or her in order for an issue to arise under Article 8.⁹⁷

When looking at Article 8, the Joint Committee on Human Rights – Third Report found that:⁹⁸

Article 8, which protects the right to physical integrity, requires that action that interferes with physical integrity should be in accordance with established law and guidelines, that it should be for a legitimate purpose, and that it should be necessary for and proportionate to that purpose. For a physical intervention to be considered proportionate, it must be the least intrusive measure possible in the circumstances. Proportionality therefore requires both that any form of restraint should be a last resort only; and that where there must be recourse to restraint it is the minimum necessary, and applied for the shortest time necessary, to ensure safety.

Regulations pertaining to Police Scotland

The Police Service of Scotland (Conduct) Regulations 2014 govern the conduct of police officers up to and including the rank of Chief Superintendent. The 2014 Regulations came into force on 1 April 2014 and were in place at the time of the incident involving Sheku Bayoh in May 2015. Similar Regulations govern the conduct of police officers above this rank.⁹⁹ Both sets of Regulations outline various “Standards of Professional Behaviour”, including around the use of force:¹⁰⁰

Constables use force only to the extent that it is necessary, proportionate and reasonable in all the circumstances.

A breach of the Standards of Professional Behaviour will amount to misconduct or, in serious cases, gross misconduct.¹⁰¹

Guidance has been published by the Scottish Government in support of the 2014 Regulations.¹⁰² These “misconduct procedures” were prepared by a Scottish Government-led Working Group with representatives of Police Scotland, the Scottish

⁹⁷ [RANINEN v. FINLAND \(coe.int\)](#)

⁹⁸ [Joint Committee On Human Rights - Third Report](#) at paragraph 232

⁹⁹ The Police Service of Scotland (Senior Officers) (Conduct) Regulations 2013

¹⁰⁰ Within the Regulations' respective Schedules 1

¹⁰¹ The Police Service of Scotland (Conduct) Regulations 2014, regulation 2

¹⁰² [Police Service of Scotland \(Conduct\) Regulations 2014, Guidance](#)

Police Federation and the Association of Scottish Police Superintendents. This provides additional guidance around police officers' use of force.¹⁰³

The guidance acknowledges that “there will be occasions when police officers may need to use force in carrying out their duties, for example to effect an arrest or prevent harm to others”¹⁰⁴ and goes on to state that:¹⁰⁵

It is for the police officer to justify his or her use of force but when assessing whether this was necessary, proportionate and reasonable all of the circumstances should be taken into account and especially the situation which the police officer faced at the time. Police officers use force only if other means are or may be ineffective in achieving the intended result.

To date, no pertinent judicial consideration of the guidance supporting the 2014 Regulations has been identified.

Police officers' declaration

Police officers make the following declaration upon their appointment:¹⁰⁶

I, do solemnly, sincerely and truly declare and affirm that I will faithfully discharge the duties of the office of constable with fairness, integrity, diligence and impartiality, and that I will uphold fundamental human rights and accord equal respect to all people, according to law.

The reference to “according to law” within this declaration has been held to include adherence to the Standards of Professional Behaviour as set out within, *inter alia*, the 2014 Regulations.¹⁰⁷

Code of Ethics for Policing in Scotland

Whilst non-statutory in nature, and described as being a “practical set of measures”, Police Scotland's Code of Ethics for policing in Scotland covers the use of force as follows:¹⁰⁸

I will not undertake high-risk activities or use force other than where strictly necessary in order to attain a legitimate objective and only after I have balanced all the competing priorities I am aware of. (Article 2)

International standards

¹⁰³ At paragraph 3.5

¹⁰⁴ Paragraph 3.5.2

¹⁰⁵ Paragraph 3.5.3

¹⁰⁶ Police and Fire Reform (Scotland) Act 2012, s. 10(1)

¹⁰⁷ *B C and Others v Chief Constable Police Service of Scotland and Others* [2019] CSOH 48, at 62

¹⁰⁸ [Code of Ethics for policing in Scotland - Police Scotland](#)

Other international standards relating to the use of force by police officers includes the UN's Code of Conduct for Law Enforcement Officials¹⁰⁹ and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.¹¹⁰

Police Scotland Standard Operating Procedure

Police Scotland have a Use of Force Standard Operating Procedure. Whilst the present version (Version 2.0) is publicly available,¹¹¹ the version that is understood by the Inquiry to have been in force in May 2015 (Version 1.03) is not.

The Use of Force Standard Operating Procedure (Version 1.03) identifies that:¹¹²

Any force used by a Police Officer or member of Police Staff must be legal, proportionate, and reasonable in the circumstances and the minimum amount necessary to accomplish the lawful objective concerned.

The Standard Operating Procedure goes on to state that:¹¹³

An arrest should be made as unobtrusively as possible. In no circumstances must a prisoner be harshly treated or have greater force used towards that person than is absolutely necessary to restrain them.

(iv) Completion of Notebooks, Use of Force and Use of CS/PAVA Spray Forms

Disclosure of Evidence

The Crown Office and Procurator Fiscal Service's Code of Practice pertaining to Disclosure of Evidence in Criminal Proceedings¹¹⁴ contains various standards and principles that police officers require to have regard to.¹¹⁵ The "Third Principle of Revelation" contained within the Code of Practice identifies that, in order to comply with the principle in question:¹¹⁶

The police must record and retain all information obtained or generated during the course of an investigation in order that the relevancy of that information can be kept under review.

Part B of the Code of Practice imposes additional duties and responsibilities on the police to ensure compliance with provisions within the Criminal Justice and Licensing (Scotland) Act 2010.¹¹⁷ This includes the obligation that police:¹¹⁸

¹⁰⁹ Which, within Article 3, identifies that "Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty" ([Code of Conduct for Law Enforcement Officials | OHCHR](#))

¹¹⁰ [Basic Principles on the Use of Force and Firearms by Law Enforcement Officials | OHCHR](#)

¹¹¹ [Use of Force SOP \(v.2\)](#)

¹¹² Police Scotland Use of Force Standard Operating Procedure (Version 1.03), paragraph 2.2

¹¹³ *Ibid*, paragraph 2.4

¹¹⁴ Issued in accordance with the Criminal Justice and Licensing (Scotland) Act 2010, s. 164(1)

¹¹⁵ Under ss. 164(2) and 164(3) of the 2010 Act police officers "must have regard to the code of practice for the time being in force in carrying out their functions in relation to the investigation and reporting of crime and sudden deaths".

¹¹⁶ Code of Practice, *Disclosure of Evidence in Criminal Proceedings*, at paragraph 5.2

¹¹⁷ 2010 Act, ss. 117 and 119

¹¹⁸ Code of Practice, *Disclosure of Evidence in Criminal Proceedings*, at paragraph 16.1

*Record, retain, review, reveal and, where appropriate, provide all information which **may**¹¹⁹ be relevant to the Crown.*¹²⁰

Regulations pertaining to Police Scotland

Within the “Standards of Professional Behaviour” contained within The Police Service of Scotland (Conduct) Regulations 2014 it is noted, under “duties and responsibilities”, that “constables are diligent in the exercise of their duties and responsibilities”.¹²¹

The guidance associated with the 2014 Regulations elaborates on what this standard means in practice and includes the requirement that:¹²²

Police officers ensure that accurate records are kept of the exercise of their duties and powers as required by relevant legislation, Service policies and procedures.

This requirement to keep accurate records would encompass the completion of use of force and CS/PAVA Spray forms and the completion of service notebooks. As noted above, a breach of the Standards of Professional Behaviour will amount to misconduct or, in serious cases, gross misconduct.¹²³

Police Scotland Standard Operating Procedures and Guidance

Use of Force Standard Operating Procedure (SOP)

The Police Scotland Use of Force SOP that is understood by the Inquiry to have been in place in May 2015 includes provisions relating to the recording of use of force or CS spray by officers.

With reference to the completion of use of force forms, the Use of Force SOP states that:¹²⁴

If reporting a use of force¹²⁵ then this should be done on the ‘Use of Force Form’ which should be submitted as per the legacy force arrangements (i.e. SCOPE, or hard copy / electronic copy form).

For the recording of the use of CS spray and the completion of the associated paperwork:¹²⁶

*On **every** occasion where CS Incapacitant spray is discharged operationally, there is a legal requirement to record the incident and report it to the Police Investigations and Review Commissioner (PIRC) within 24 hours ... Forms*

¹¹⁹ Emphasis in original.

¹²⁰ Further discussion of this obligation can be found within Chapter 3 of COPFS’s [Disclosure Manual](#)

¹²¹ As noted above, similar Regulations govern the conduct of police officers above the rank of Chief Superintendent.

¹²² [Police Service of Scotland \(Conduct\) Regulations 2014, Guidance](#), paragraph 3.7.4

¹²³ The Police Service of Scotland (Conduct) Regulations 2014, s. 2

¹²⁴ Police Scotland Use of Force Standard Operating Procedure (Version 1.03), paragraph 6.3

¹²⁵ A “use of force” is defined within the Use of Force SOP (Version 1.03) as: “*use of the baton to strike an individual or individuals or the operational discharge of CS Incapacitant spray*” (paragraph 6.2).

¹²⁶ Police Scotland Use of Force Standard Operating Procedure (Version 1.03), paragraphs 6.4 and 6.5 (emphasis within original)

must be submitted as soon as reasonably practical after the incident but no later than the end of the discharging officer's tour of duty. If the officer is unavailable then a supervisor must arrange its completion.

With reference to the completion of notebooks, the Use of Force SOP identifies that:¹²⁷

It is recognised as good practice for Police Officers and Police Staff to record details in their notebooks of all instances involving the use of force and the reasons why force was necessary.

A subsequent Use of Force SOP, published in November 2016, outlines the obligation on officers to record details of use of force in their notebooks and to complete use of force forms as follows:¹²⁸

*Police Officers should record details of all use of force¹²⁹ in their notebooks including the reasons why force was necessary. **Additionally, all staff must complete the electronic Use of Force Form on SCoPE, prior to the end of their shift.***

The provisions pertaining to the completion of irritant spray forms contained within the Use of Force SOP (Version 2.00)¹³⁰ are broadly similar to those around the recording of the use of CS spray contained within the previous Use of Force SOP (Version 1.03).

From the information currently available to the Inquiry, it is understood that Police Scotland also had a Notebooks and PDAs Standard Operating Procedure in force at the time of the incident.¹³¹ Whilst this Standard Operating Procedure does not impose a specific obligation on officers to record uses of force within their notebooks, it does provide that:¹³²

All staff issued with a notebook should use their notebook to document action they have taken as well as decisions why action was not taken.

Irritant Spray Guidance

Whilst not in force at the time of the incident, it is noteworthy that Police Scotland have had a guidance document in place in relation to irritant spray since 2016.¹³³ This identifies that there is a "statutory legal requirement" to record the use of an irritant spray and to report the matter to PIRC within 24 hours,¹³⁴ separate to the

¹²⁷ *Ibid*, paragraph 2.3

¹²⁸ Police Scotland Use of Force Standard Operating Procedure (Version 2.00), *supra*, paragraph 6.2 (emphasis within original)

¹²⁹ The definition of a "use of force" within the Use of Force SOP (Version 2.00) is: "any physical use of force, except non-resistant handcuffing and "come along hold" and includes: empty hand techniques; batons; irritant sprays (including draws); leg restraints; spit hoods; Personal Protective Equipment (PPE) shields" (paragraph 6.1).

¹³⁰ Use of Force SOP (Version 2.00), paragraphs 6.4 and 6.5

¹³¹ Notebooks and PDAs Standard Operating Procedure (Version 2.00). The Standard Operating Procedure has now been archived and replaced by a [National Guidance Document](#)

¹³² Notebooks and PDAs Standard Operating Procedure (Version 2.00), paragraph 3.3

¹³³ Police Scotland [Irritant Spray Guidance Document](#)

¹³⁴ *Ibid*, paragraphs 8.3.2 – 8.3.3.

requirement to complete a use of force form.¹³⁵ It appears that there was no guidance document in place in relation to irritant spray in May 2015.

It is unclear which statutory provision this guidance is referring to, although it may be such recording is regarded as having taken place where PIRC requires to investigate certain “serious incidents” involving the police,¹³⁶ as defined within legislation¹³⁷ and associated regulations.¹³⁸ PIRC regard the use of an irritant spray as falling within the scope of this definition of a “serious incident”.¹³⁹

Self-incrimination

Although not specifically mentioned in Article 6 of the European Convention of Human Rights (ECHR), the right to remain silent and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6.¹⁴⁰ Whilst a state’s procedural duty to investigate breaches of Article 2 requires co-operation in good faith by individual officers, Dame Elish Angiolini came to the conclusion that:¹⁴¹

The police officer’s right to silence under Article 6 is not overridden by the investigative duty placed upon the state under Article 2. Equality before the law is fundamental to the operation of the criminal law and denying the right to silence to police officers who are under suspicion of having committed an offence would breach that principle.

Admissibility of self-incriminating statements

It is now “well settled” that the admissibility of self-incriminating statements made to the police by suspects or accused persons will depend on general considerations of fairness.¹⁴² The general rule is that a person’s self-incriminating answers to police questioning will be admissible in evidence unless they have been extracted by “unfair means”.¹⁴³

Renton and Brown notes, however, that defining what constitutes unfairness is a question that is:¹⁴⁴

... almost impossible to answer, especially as it is apparently not a question of law, but one of fact and degree.

What is fair is a question of circumstances, with the rights of the accused balanced against the public interest in the administration of justice.¹⁴⁵ The stage of the

¹³⁵ *Ibid*, paragraph 8.3.5

¹³⁶ Police, Public Order and Criminal Justice (Scotland) Act 2006, s. 33A(c)

¹³⁷ *Ibid*, s. 41B (including the “discharge of a firearm” by a police officer at s. 41B(1)(b)(ii))

¹³⁸ The Police Investigations and Review Commissioner (Investigations Procedure, Serious Incidents and Specified Weapons) Regulations 2013

¹³⁹ [Investigation FAQs](#), under “What does use of a firearm mean”

¹⁴⁰ [Guide on Article 6 - Right to a fair trial \(criminal limb\) \(coe.int\)](#), paragraph 203

¹⁴¹ *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, November 2020, Dame Elish Angiolini, paragraph 7.115

¹⁴² *Stair Memorial Encyclopaedia, Evidence (Reissue)*, paragraph 254

¹⁴³ *Ibid*.

¹⁴⁴ *Criminal Procedure (6th Ed.)*, Renton and Brown, Chapter 24, paragraph 40

¹⁴⁵ *Miln v Cullen* 1967 SLT 35

investigation at which the questioning occurred¹⁴⁶ and the circumstances in which the questioning took place¹⁴⁷ will be of importance in determining the issue. With regard to the former, a statement made by a person at the stage of initial investigation will not be inadmissible by virtue of the fact that he is later charged and tried for the offence under investigation.¹⁴⁸

The absence of a caution is only one circumstance to be considered in assessing fairness.¹⁴⁹ In a case involving departmental investigators, and not police officers,¹⁵⁰ the court held that:¹⁵¹

There is no ... rule of law which requires that a suspect must always be cautioned before any question can be put to him by the police or anyone else by whom the enquiries are being conducted. The question in each case is whether what was done was unfair to the accused.

Determining admissibility

It has now been “authoritatively decided” that questions of the admissibility of evidence, including statements by an accused, are for determination by the judge and not by the jury.¹⁵² Defence objections as to the admissibility of evidence may be resolved by raising a preliminary issue¹⁵³ in advance of a trial,¹⁵⁴ or by way of a trial within a trial.¹⁵⁵ If the question of fairness is raised by the defence the onus is then on the Crown to establish that the confession was fairly obtained.¹⁵⁶

Section B - Management of suspects under the influence/suffering from ABD

Acute Behavioural Disorder/Disturbance (ABD)

There remains limited legislation, guidance and authority pertaining to the management of suspects under the influence/suffering from ABD in Scotland, although there has been increased discussion around this issue in the years following the incident involving Sheku Bayoh in May 2015.¹⁵⁷

Dame Elish Angiolini is of the view that:¹⁵⁸

¹⁴⁶ *Stair Memorial Encyclopaedia, Evidence (Reissue)*, paragraphs 255 - 257

¹⁴⁷ *Stair Memorial Encyclopaedia, Evidence (Reissue)*, paragraph 258

¹⁴⁸ *Chalmers v HM Advocate*, 1954 J.C. 66

¹⁴⁹ *Pennycuik v Lees* 1992 SLT 763

¹⁵⁰ *Stair Memorial Encyclopaedia, Evidence (Reissue)*, paragraph 262. “The test of fairness is also applicable to the admissibility of statements to officials of public departments engaged in the investigation of an apparent irregularity in the conduct of a public service.”

¹⁵¹ *Pennycuik v Lees*, *supra*, at p. 765H

¹⁵² *Criminal Procedure (6th Ed.)*, Renton and Brown, Chapter 24, paragraph 57

¹⁵³ Criminal Procedure (Scotland) Act 1995, s. 79(2)(b)(iv). See also *HM Advocate v Rudling* 2010 SCCR 155 and *HM Advocate v G* 2010 SLT 239.

¹⁵⁴ In solemn proceedings, prior to the relevant first diet (1995 Act, s. 71(2)) or preliminary hearing (1995 Act, s.72(6)(b)(i)) stage. In summary proceedings, objections to the admissibility of evidence may be entered into the record of the proceedings (1995 Act, s. 157(2)).

¹⁵⁵ *Criminal Procedure (6th Ed.)*, Renton and Brown, Chapter 24, paragraphs 59 – 62; *Chalmers v HM Advocate*, *supra*; *Thompson v Crowe*, 2000 J.C. 173

¹⁵⁶ *Black v Annan* 1996 SLT 284

¹⁵⁷ It is noteworthy that The Royal College of Psychiatrists released a statement on 23 June 2021 identifying that it believed the concepts of excited delirium and ABD to be “fundamentally flawed”. The College has, however, now withdrawn that statement “pending further consideration of the matters to which it refers” ([Follow-up on our statement regarding ABD](#)).

¹⁵⁸ *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, November 2020, paragraph 24.77

*There should be no circumstances where a person suffering from Acute Behavioural Disturbance is taken to a police station, even if their behaviour is 'difficult to manage'. The key is for police officers being sufficiently trained to be able to recognise a serious medical emergency.*¹⁵⁹

The Royal College of Emergency Medicine has released guidance in this area, although it post-dates the incident involving Sheku Bayoh.¹⁶⁰ Within this guidance, ABD is identified as a “time critical medical emergency” requiring immediate transfer to an emergency department¹⁶¹ and that de-escalation¹⁶² should be attempted.

In response to a Freedom of Information request pertaining to training on ABD and mental health, Police Scotland have provided some details in relation to the training provided to officers in 2015.¹⁶³ It is unclear from this response whether specific guidance or instruction on ABD was provided to trainees as part of this training in 2015. To date, no such guidance or instruction has been identified by the Inquiry.

Restraint

The Royal College of Emergency Medicine consider that restraint “should be viewed as an intervention of almost last resort”,¹⁶⁴ but recognise that a person presenting with ABD may be highly agitated and aggressive, and that:¹⁶⁵

Physical restraint to facilitate their initial management may be inevitable. This should be kept to an absolute minimum using a level of force that is justifiable, reasonable and proportional ... and rapidly followed by sedation with close monitoring of vital signs ... particular care must be exercised to ensure that at no time the patient's airway is compromised, this is particularly likely if the patient is kept in a face down position with pressure applied on the patient's neck or shoulder region. Keeping the patient in a prone position MUST be avoided.

Dame Elish Angiolini considered that a person presenting with ABD “should not be restrained (except in the most extreme, life-threatening circumstances)”.¹⁶⁶ This view is supported by the College of Policing, whose own guidance states that such restraint should take place “only in an emergency”.¹⁶⁷

Police Scotland Standard Operating Procedures

¹⁵⁹ *The Report of the Independent Review of Deaths and Serious Incidents in Police Custody*, January 2017, by Dame Elish Angiolini contains additional discussion around acute behavioural disturbance/excited delirium at paragraphs 2.36 – 2.45.

¹⁶⁰ The Royal College of Emergency Medicine Faculty of Forensic and Legal Medicine, *Acute Behavioural Disturbance: Guidelines on Management in Police Custody*, April 2019. ([RCEM, Acute Behavioural Disturbance: Guidelines on Management in Police Custody](#))

¹⁶¹ *Ibid*, p. 1

¹⁶² *Ibid*, p. 2: “A collaborative process involving verbal and non-verbal techniques designed to reduce agitation and distress.”

¹⁶³ [FOI Response](#)

¹⁶⁴ The Royal College of Emergency Medicine, *Best Practice Guideline: Guidelines for the Management of Excited Delirium/Acute Behavioural Disturbance*, May 2016, p. 5 ([RCEM, Guidelines for the Management of Excited Delirium / ABD](#))

¹⁶⁵ *Ibid*, pp. 5 – 6

¹⁶⁶ 2017 Report, *supra*, paragraph 2.45

¹⁶⁷ [Detention and custody risk assessment](#)

The version of Police Scotland's Use of Force Standard Operating Procedure (SOP) in force in May 2015 includes a section on "excited delirium".¹⁶⁸ Echoing the view of Dame Elish Angiolini above, this notes that a person suspected of suffering from excited delirium "is to be taken directly to hospital once control has been established".¹⁶⁹ Within the same section, the SOP also provides some limited background on excited delirium and how the condition could impact on persons' interaction with the police.

Other police forces beyond Scotland have addressed this issue through the introduction of more comprehensive policies and guidance.¹⁷⁰

Management of persons suffering from mental disorders

Looking beyond ABD, police officers have the power to remove persons – not just persons suspected of committing offences – from public places if they are suffering from a mental disorder, are in immediate need of care or treatment and require to be removed to a place of safety.¹⁷¹ A "mental disorder" means any mental illness, personality disorder or learning disability "however caused or manifested".¹⁷²

Police Scotland have in place a Mental Health and Place of Safety Standard Operating Procedure that expands on police officers' powers and responsibilities when dealing with suspects and persons suffering from mental disorders, including the powers outlined above.¹⁷³

Section C – Police Response

Duties

There are a number of "general duties" of a constable outlined within the Police and Fire Reform (Scotland) Act 2012:¹⁷⁴

- (a) to prevent and detect crime,*
- (b) to maintain order,*
- (c) to protect life and property,*
- (d) to take such lawful measures, and make such reports to the appropriate prosecutor, as may be needed to bring offenders with all due speed to justice,*

¹⁶⁸ Use of Force Standard Operating Procedure (Version 1.03), s. 21.3

¹⁶⁹ s. 21.3.8

¹⁷⁰ In particular, The Police Service of Northern Ireland's Manual of Policy, Procedure and Guidance on Conflict Management ([Conflict Management Manual](#)), which contains a dedicated appendix in relation to positional asphyxia and acute behavioural disturbance ([Appendix E](#)). This includes information around the management and care of suspects that exhibit symptoms of ABD. It is difficult to ascertain definitively what guidance PSNI had in place around ABD in May 2015. Kent Police also have a Standard Operating Procedure relating to Acute Behavioural Disturbance ([ABD SOP](#)) and the Police Complaints Authority in England and Wales produced guidance around the policing of ABD in 2002 ([PCA ABD Guidance](#)).

¹⁷¹ Mental Health (Care and Treatment) (Scotland) Act 2003, s. 297(1)

¹⁷² *Ibid.*, s. 328(1)

¹⁷³ [Mental Health and Place of Safety SOP](#). From the information currently available to the Inquiry, a prior version of this SOP (Version 2.00) is understood to have been in force at the time of the incident in 2015.

¹⁷⁴ Police and Fire Reform (Scotland) Act 2012, s. 20. The provision is quoted on the basis of the legislative position in May 2015.

(e) where required, to serve and execute a warrant, citation or deliverance issued, or process duly endorsed, by a Lord Commissioner of Justiciary, sheriff, justice of the peace or stipendiary magistrate in relation to criminal proceedings, and

(f) to attend court to give evidence.

It is an offence for a constable to neglect or violate the constable's duty.¹⁷⁵

Health and safety

Police officers are covered by the protections contained within UK health and safety legislation¹⁷⁶ and are treated as the equivalent of "employees" in this context.¹⁷⁷ It is an "employer's duty" to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his "employees".¹⁷⁸ It is also necessary for chief constables, as "employers" of police officers, to take account of the risks posed to the health and safety of members of the public, as follows:¹⁷⁹

*It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.*¹⁸⁰

It is an offence for a person to fail to discharge the duties referred to above, in relation to ensuring the health and safety of employees and members of the public.¹⁸¹ It is, however, rare for the police to be prosecuted under sections 3 or 33 of the Health and Safety at Work etc. Act 1974.¹⁸²

Under the broad scope of the UK's health and safety legislation, there are specific provisions that are of particular relevance to police officers and police operations. In May 2015, these included regulations in relation to the provision of personal protective equipment,¹⁸³ the use of suitable work equipment¹⁸⁴ and the completion of appropriate risk assessments.¹⁸⁵ In responding to violent incidents, including those involving a knife or suspected terrorist activity, it would have been necessary for the police to take account of the provisions within these regulations.

Personal Protective Equipment (PPE)

Under The Personal Protective Equipment at Work Regulations 1992:¹⁸⁶

¹⁷⁵ *Ibid*, s. 22(3)

¹⁷⁶ Principally those under the Health and Safety at Work etc. Act 1974

¹⁷⁷ *Ibid*, s. 51A(1)

¹⁷⁸ *Ibid*, s. 2(1)

¹⁷⁹ *Ibid*, s. 3(1).

¹⁸⁰ Further discussion around the balance that is to be struck between the operational and health and safety duties of the police service can be found here: [Striking the balance between operational and health and safety duties in the Police Service](#).

¹⁸¹ Health and Safety at Work etc. Act 1974, s. 33(1)

¹⁸² See discussion of this within *Da Silva v United Kingdom* (5878/08) [2016] 3 WLUK 735, in relation to the death of Jean Charles de Menezes. See also, discussion in relation to the death of Thomas Orchard ([Office of Chief Constable of Devon & Cornwall Police sentenced for breach of health & safety following the death of Thomas Orchard | Inquest](#))

¹⁸³ The Personal Protective Equipment at Work Regulations 1992

¹⁸⁴ The Provision and Use of Work Equipment Regulations 1998

¹⁸⁵ The Management of Health and Safety at Work Regulations 1999, regulation 3

¹⁸⁶ The Personal Protective Equipment at Work Regulations 1992, regulation 4(1)

Every employer shall ensure that suitable¹⁸⁷ personal protective equipment is provided to his employees who may be exposed to a risk to their health or safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective.

The 1992 Regulations were subsequently amended by the Police (Health and Safety) Regulations 1999, which added the following caveat to the above Regulation in relation to policing:¹⁸⁸

Where the characteristics of any policing activity are such that compliance by the relevant officer with the requirement in paragraph (1) would lead to an inevitable conflict with the exercise of police powers or performance of police duties, that requirement shall be complied with so far as is reasonably practicable.

Within the same Regulations, it is identified that employers require to provide employees with suitable information, instruction and training in relation to the use of PPE¹⁸⁹ and to take “reasonable steps” to ensure that such PPE is “properly used”.¹⁹⁰

Work Equipment

The Provision and Use of Work Equipment Regulations 1998 include provisions in relation to the use, maintenance and management of work equipment.¹⁹¹ Under the 1998 Regulations, employers must ensure that work equipment is “so constructed or adapted as to be suitable for the purpose for which it is used or provided”.¹⁹² Of relevance to the incident involving Sheku Bayoh is a subsequent amendment and extension to the interpretation of “suitable”.¹⁹³

In this regulation “suitable”–

(a) subject to sub-paragraph (b), means suitable in any respect which it is reasonably foreseeable will affect the health or safety of any person;

(b) in relation to–

(i) an offensive weapon within the meaning of section 1(4) of the Prevention of Crime Act 1953 provided for use as self-defence or as deterrent equipment; and

(ii) work equipment provided for use for arrest or restraint, by a person who holds the office of constable or an appointment as police cadet, means

¹⁸⁷ For a discussion of “suitability” in the context of PPE and police officers, see *Blair v Chief Constable of Sussex Police* [2012] EWCA Civ 633

¹⁸⁸ The Personal Protective Equipment at Work Regulations 1992, regulation 4(1A)

¹⁸⁹ *Ibid*, regulation 9(1)

¹⁹⁰ *Ibid*, regulation 10(1)

¹⁹¹ Within the context of the 1998 Regulations, “work equipment” is “any machinery, appliance, apparatus, tool or installation for use at work (whether exclusively or not)” (regulation 2(1)).

¹⁹² The Provision and Use of Work Equipment Regulations 1998, regulation 4(1)

¹⁹³ *Ibid*, regulation 4(4), as amended by The Police (Health and Safety) Regulations 1999, regulation 5

suitable in any respect which it is reasonably foreseeable will affect the health or safety of such person.

Within the 1998 Regulations there are additional provisions pertaining to the provision of information and instructions¹⁹⁴ and training¹⁹⁵ to persons who use relevant equipment in the course of their work.

Risk Assessments

Under The Management of Health and Safety at Work Regulations 1999, it is provided that:¹⁹⁶

Every employer shall make a suitable and sufficient assessment of—

(a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and

(b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,

for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions¹⁹⁷ and by Part II of the Fire Precautions (Workplace) Regulations 1997.

The 1999 Regulations also include provisions relating to the provision of health and safety training to employees.¹⁹⁸

(i) Risk assessment of incident by control room

HM Inspectorate of Constabulary in Scotland (HMICS) completed an Independent Assurance Review into call handling by Police Scotland in November 2015,¹⁹⁹ having been directed to do so by Scottish Ministers.²⁰⁰ This contained a detailed overview of the call handling systems and procedures used by Police Scotland in 2015, as well as providing thirty associated recommendations. HMICS have published two subsequent reports to assess the implementation of these recommendations.²⁰¹

With regard to the use of risk and vulnerability assessments within Police Scotland, HMICS found that:²⁰²

¹⁹⁴ The Provision and Use of Work Equipment Regulations 1998, regulation 8

¹⁹⁵ *Ibid*, regulation 9

¹⁹⁶ The Management of Health and Safety at Work Regulations 1999, regulation 3(1)

¹⁹⁷ As defined within the Health and Safety at Work etc. Act 1974, s. 53(1)

¹⁹⁸ The Management of Health and Safety at Work Regulations 1999, regulation 13

¹⁹⁹ *HMICS Independent Assurance Review Police Scotland – Call Handling, Final Report*, November 2015 ([HMICS Independent Assurance Review Police Scotland - Call Handling Final Report.pdf](#))

²⁰⁰ Under the Police and Fire Reform (Scotland) Act 2012, s. 74(1)

²⁰¹ [HMICS Independent Assurance Review Police Scotland – Call Handling - Update Report \(2017\)](#) and [HMICS Independent Assurance Review Police Scotland - Call Handling Update Report \(2018\)](#)

²⁰² *HMICS Independent Assurance Review Police Scotland – Call Handling, Final Report*, November 2015, p. 7

Risk and vulnerability assessment is strong within the area control room environment, with ongoing re-evaluation of levels of risk as incidents are dispatched and managed. I have however found that this process could be strengthened by an increased focus in the service centre environment. Service advisors rely on their own experience to assess risk and vulnerability and whilst supporting ICT systems provide information and guidance, the process lacks a more systematic approach.

Having found that no formal methodology had been introduced for service advisors²⁰³ to assess risk and vulnerability when handling calls,²⁰⁴ HMICS recommended that:²⁰⁵

Police Scotland should adopt a more formalised risk and vulnerability assessment model for service advisors, reflecting this in both general and specialised awareness training.

This recommendation was closed in September 2017, with HMICS finding that training had been introduced for service advisors (and to Area Control Room staff) on the assessment of risk and vulnerability.²⁰⁶ In response to a further recommendation from HMICS,²⁰⁷ Police Scotland began phase 1 of its implementation of a Contact Assessment Model – which incorporates a more formalised risk and vulnerability assessment model – in June 2019.²⁰⁸

(ii) Responding to violent incidents

Thus far, no distinct legislation or statutory guidance has been identified in relation to Police Scotland's response to violent incidents.

(iii) Responding to incidents involving a knife

Thus far, no distinct legislation or statutory guidance has been identified in relation to Police Scotland's response to incidents involving a knife.

(iv) Responding to terrorism incidents

There is a large body of legislation²⁰⁹ and guidance pertaining to counter-terrorism. As far as this relates to the police, however, such legislation and (publicly available)

²⁰³ Service advisors receive and assess calls from members of the public to decide what type of police response is required. Area Control Rooms receive incidents from the service centre and are responsible for the command and control of those incidents.

²⁰⁴ *Ibid*, paragraph 340, p. 90

²⁰⁵ *Ibid*, recommendation 24, p. 15. Further discussion of risk and vulnerability assessments; call grading and prioritisation; and incident handling and dispatch in relation to Police Scotland's call handling procedures, can be found on pages 89 – 94 of the report. With reference to call grading, the incident involving Sheku Bayoh was given "grade 1" status with immediate priority (there being "an ongoing incident where there is an immediate or apparent threat to life or a serious crime in progress"). This form of call grading is to be replaced as part of the implantation of the new Contact Assessment Model referred to above.

²⁰⁶ *HMICS Independent Assurance Review Police Scotland – Call Handling, Final Report*, November 2015 p. 19, paragraph 79.

²⁰⁷ *Ibid*, recommendation 6

²⁰⁸ The HMICS review of the early implementation of the Contact Assessment Model can be found [here](#). The Contact Assessment Model is based on the THRIVE assessment framework widely used in England and Wales, which considers six elements to assist in identifying the appropriate response grade based on the needs of the caller and the circumstances of the incident (see, *inter alia*, paragraph 6 of the HMICS review for discussion of this).

²⁰⁹ Including the Terrorism Act 2000, Anti-Terrorism, Crime and Security Act 2001, The Prevention of Terrorism Act 2005, Terrorism Act 2006, Counter-Terrorism Act 2008, Terrorism Prevention and Investigation Measures Act 2011 and Counter-Terrorism and Security Act 2015.

guidance appears to be more concerned with police powers, rather than how the police should respond in the event of a terrorist incident.

Within legislation, the Terrorism Act 2000 contains some limited details about establishing police cordons²¹⁰ as part of a “terrorist investigation”²¹¹ and the use of stop and search in the context of policing terrorist incidents.²¹² Police officers are permitted to arrest a person without a warrant where they “reasonably suspect” that person of being a terrorist.²¹³

There appear to be reports and guidance that are of relevance to the policing of terrorist incidents, but that are not publicly available for reasons of national security.²¹⁴

(v) Deployment of Armed Response Vehicle (ARV) and/or dog unit

Armed Response Vehicle

Although the majority of policing in Scotland is devolved, firearms legislation is reserved to Westminster.²¹⁵ The management, command and deployment of armed policing in Scotland has, therefore, continued to follow policies and guidance used within the wider United Kingdom, as published by the College of Policing.²¹⁶

The carriage of firearms in the UK is regulated by the Firearms Act 1968, which authorises the possession of firearms by police officers in the “exercise of police functions”.²¹⁷

HMICS Review

HMICS completed an Independent Assurance Review into the standing firearms authority of armed response vehicle crews within Police Scotland in October 2014.²¹⁸

Within this review it is noted that in October 2014 Police Scotland released a statement identifying that ARV officers would no longer be deployed to non-firearms-related duties in Scotland unless there was an immediate threat to life.²¹⁹ It is noted elsewhere within the review, as one of its “key findings”, that:²²⁰

²¹⁰ Terrorism Act 2000, ss. 33 – 36

²¹¹ *Ibid*, s. 32

²¹² *Ibid*, ss. 43, 43A and 47A and the associated [Code of Practice](#).

²¹³ Terrorism Act 2000, s. 41(1)

²¹⁴ Including *The command and control arrangements and supporting infrastructure used by the police forces of England, Wales and Scotland in response to a terrorist attack – 2017* and *A joint inspection of the effectiveness of the CT Network in providing the ‘bridge’ between the national and local levels of policing in England, Wales and Scotland to reduce the risk from terrorism – 2018* (both referred to here: [Counter-terrorism inspections](#)) and the Home Office’s *National counter-terrorism contingency planning guidance* (referred to here: [Surveillance and counter-terrorism](#))

²¹⁵ Scotland Act 1998, Schedule 5, s. B4

²¹⁶ [Armed policing](#) contains the current Authorised Professional Practice in this regard. Due to the devolved nature of policing in Scotland, Police Scotland’s engagement with the College of Policing was in 2014 – and may continue to be – on a voluntary rather than a statutory basis (see *HMICS Review of Standing Firearms Authority for Armed Response Vehicle Crews within Police Scotland*, 2014, page 20, paragraph 10)

²¹⁷ Firearms Act 1968, s. 55

²¹⁸ [HMICS - Review of Standing Firearms Authority for Armed Response Vehicle Crews within Police Scotland, 2014](#)

²¹⁹ *Ibid*, p. 38, paragraph 65. It appears that the original Police Scotland statement has been removed from its website.

²²⁰ *Ibid*, p. 7

The procedures for ARV officer deployment to firearms-related incidents are fully compliant with the College of Policing and ACPO guidelines. Whilst there have been no written criteria for ARV officers to perform non-firearm duties, there have been sufficient operational safeguards in place.

The review notes that police forces are required to produce an annual Firearms Strategic Threat and Risk Assessment (FSTRA),²²¹ which should be reviewed at least every six months.²²² The purpose of the risk assessment is to establish operational requirements for the police use of firearms and less lethal options within the force.

Police Scotland Standard Operating Procedures

From the information currently available to the Inquiry, Police Scotland's Standard Operating Procedure in relation to Armed Policing Operations (Version 1.02) and its Standard Operating Procedure in relation to Armed Policing Training (Version 1.00) are understood to have been in place in May 2015.

The Armed Policing Operations Standard Operating Procedure contains some guidelines in relation to ARVs, identifying that their operational remit "is to provide an immediate armed response to appropriate incidents".²²³ No further guidance is provided in relation to what such "appropriate incidents" would be, but it is identified that ARVs will carry out armed deployments in keeping with the Strategic Firearms Commander or Tactical Firearms Commander's "stipulated tactical parameters".²²⁴

Dog Unit

From information published by the College of Policing (which largely provides guidance to the police service in England and Wales that is not normally applicable in Scotland), the deployment of a Dog Unit is seen as one of a number of "less lethal options" available to the police in responding to incidents.²²⁵ It is, however, unclear at this stage what policies and guidance Police Scotland had in place in relation to such deployment in May 2015 and no primary legislation or statutory guidance has been identified in this area.²²⁶

Section D – Issues pertaining to race

The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing completed by Dame Elish Angiolini identified that:²²⁷

²²¹ This now appears to be known as an "Armed Policing Strategic Threat and Risk Assessment" (APSTRA) ([Armed policing strategic threat and risk assessment \(APSTRA\)](#))

²²² At the time of the review the FSTRA in place for Police Scotland was dated 30 April 2014. It may be that an updated version of the FSTRA was in place at the time of the incident involving Sheku Bayoh in May 2015.

²²³ Police Scotland Armed Policing Operations Standard Operating Procedure (Version 1.02), paragraph 16.2

²²⁴ *Ibid.*

²²⁵ [Use of force, firearms and less lethal weapons](#). This limited guidance is current, however, and may not reflect the position in May 2015.

²²⁶ Although there are some limited references to such deployment within the Police Scotland Armed Policing Operations Standard Operating Procedure (Version 1.02) referred to above.

²²⁷ *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, by Dame Elish Angiolini, November 2020, paragraphs 9.86 – 9.87

The evidence presented to the Review in relation to complaints and misconduct matters is that discriminatory attitudes and behaviours are present within Police Scotland, as they are in many organisations, and that such attitudes and behaviours are also exhibited by some members of the public in the way they treat police officers. The question to be addressed and the challenge to be met is how the police service should root out such attitudes.

Equality Act 2010

“Race” is treated as a protected characteristic by the Equality Act 2010²²⁸ and is defined within the Act as including colour, nationality and ethnic or national origins.²²⁹

The 2010 Act introduced statutory definitions of direct²³⁰ and indirect²³¹ discrimination, harassment²³² and victimisation.²³³ Race discrimination is direct discrimination because of race; or indirect discrimination where the protected characteristic is race.²³⁴

Of these categories of prohibited conduct, there would be direct discrimination if it could be shown that, on account of his race, the police officers treated Sheku Bayoh less favourably than they would have treated others.²³⁵ Under the 2010 Act, when making comparisons to determine whether there has been direct (or indirect) discrimination, there must be “no material difference between the circumstances relating to each case”.²³⁶

It is clear that the definition of direct discrimination is broad enough to cover cases where someone is perceived to have a particular protected characteristic; it is not necessary for the person to, in fact, have that protected characteristic (discrimination by perception).²³⁷

Liability

The 2010 Act provides that:²³⁸

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

²²⁸ Equality Act 2010 s. 4

²²⁹ *Ibid.*, s. 9(1)

²³⁰ *Ibid.*, s. 13

²³¹ *Ibid.*, s. 19

²³² *Ibid.*, s. 26

²³³ *Ibid.*, s. 27

²³⁴ *Ibid.*, s. 25(6)

²³⁵ Under 2010 Act s. 13(1), there is direct discrimination if “because of a protected characteristic, A treats B less favourably than A treats or would treat others”.

²³⁶ *Ibid.*, s. 23(1)

²³⁷ Equality Act 2010, Explanatory Notes, paragraph 59 (which gives statutory effect to the CJEU's decision in the case of *Coleman v Attridge Law* (Case C 303/06) [2008] ECR I-5603, [2008] All ER (EC) 1105).

²³⁸ Equality Act 2010, s. 109

It is a defence for the employer to show that they took all reasonable steps to prevent their employee from doing that thing or doing anything of that description.²³⁹

With specific reference to police officers:²⁴⁰

The chief constable is liable in respect of any unlawful conduct on the part of any person falling within subsection (2) in the carrying out (or purported carrying out) of that person's functions in the same manner as an employer is liable in respect of any unlawful conduct on the part of an employee in the course of employment.

*Provision of services and exercise of public functions*²⁴¹

The 2010 Act prohibits discrimination by “service providers” as follows:²⁴²

A person (a “service-provider”) concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

A service-provider (A) must not, in providing the service, discriminate against a person (B):²⁴³

(a) as to the terms on which A provides the service to B;

(b) by terminating the provision of the service to B;

(c) by subjecting B to any other detriment.

The 2010 Act includes similar prohibitions against harassment²⁴⁴ and victimisation²⁴⁵ by service-providers.

In addition to the provision of a service:²⁴⁶

A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation.

This provision is a broad one and would cover, for example, refusing to allow someone to benefit from the exercise of a function, or treating someone in a worse

²³⁹ *Ibid*, s. 109(4)

²⁴⁰ Police and Fire Reform (Scotland) Act 2012, s. 24(1)

²⁴¹ Detailed information pertaining to the provision of services and the exercise of public functions can be found within the following [Statutory Code of Practice: Services, public functions and associations: Statutory Code of Practice](#), Equality and Human Rights Commission, 2011. This includes advice on ways in which services providers are more able to comply with their duties under the 2010 Act and prevent their employees discriminating against service users or customers (at paragraph 3.41).

²⁴² Equality Act 2010, s. 29(1)

²⁴³ *Ibid*, s. 29(2)

²⁴⁴ *Ibid*, s. 29(3)

²⁴⁵ *Ibid*, ss. 29(4) and (5)

²⁴⁶ *Ibid*, s. 29(6)

manner in the exercise of a function.²⁴⁷ A public function is a function that is a function of a public nature for the purposes of the Human Rights Act 1998.²⁴⁸

*Public sector equality duty*²⁴⁹

The 2010 Act also includes provision for a “public sector equality duty”. This requires that:²⁵⁰

A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The broad purpose of the public sector equality duty is to “integrate consideration of the advancement of equality into the day-to-day business of all bodies subject to the duty”.²⁵¹ The duty is anticipatory, rather than reactive, with public authorities required to take active steps to eliminate discrimination, advance equality of opportunity and foster good relations. This latter duty to foster good relations involves tackling prejudice and promoting understanding.²⁵²

Police Scotland (and PIRC) are subject to the public sector equality duty,²⁵³ which applies to the performance of any function of a public authority, not just the exercise of a statutory function under specific legislation.²⁵⁴ This means that the general equality duty will apply to decisions made by the employees or agents of bodies subject to the duty in their day to day activities. Bodies subject to the duty need to decide how they enable those working for them to be aware of their responsibilities under the general equality duty (for example, through training).

Much of the case law around the public sector equality duty surrounds the interpretation of “due regard”, which is highly dependent on the particular facts and circumstances of each case.²⁵⁵

²⁴⁷ *Services, public functions and associations: Statutory Code of Practice*, Equality and Human Rights Commission, 2011, paragraph 11.26

²⁴⁸ Equality Act 2010, s. 31(4)

²⁴⁹ [EHRC Technical Guidance](#). This technical guidance provides detailed information in relation to the public sector equality duty within a Scottish context. Paragraph 5.38, for example, provides guidance around the provision of training to ensure that relevant staff (including “decision makers”) understand the duty. Each of the three requirements that make up the public sector equality duty are considered in more detail in Chapter 3 of the technical guidance. The current version of the guidance is dated May 2021, so has been updated since the incident involving Sheku Bayoh in May 2015.

²⁵⁰ Equality Act 2010, s. 149(1)

²⁵¹ [EHRC Technical Guidance](#), paragraph 2.10.

²⁵² Equality Act 2010, s. 149(5)

²⁵³ *Ibid*, Schedule 19, Part 3

²⁵⁴ *Barnsley MBC v Norton* [2011] EWCA Civ 834, Lloyd LJ at para 15.

²⁵⁵ In *R. (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141 at para 31 Dyson LJ said due regard meant ‘the regard that is appropriate in all the particular circumstances’. See also: *Johnson v Solihull Metropolitan Borough Council* 2015 UKSC 30 and *R. (Brown) v. Secretary of State for Work and Pensions* [2008] EWHC 3158.

The Equality and Human Rights Commission states that:²⁵⁶

A significant factor in determining whether a public authority is able to justify what may be indirect discrimination is the extent to which the authority has complied with their public sector equality duties.

Specific duties

In addition to the general public sector equality duty noted above, the 2010 Act permits the imposition of “specific duties” on public authorities for the better performance of the general duty.²⁵⁷ The specific duties imposed on certain public bodies in Scotland²⁵⁸ are wide-ranging and include various reporting²⁵⁹ and data collection²⁶⁰ obligations. Central to the public equality duty in Scotland is the requirement to undertake impact assessments and to act on their findings.²⁶¹ The authors of the Stair Memorial Encyclopaedia summarise this requirement as follows:²⁶²

Whenever a public body in Scotland is proposing to revise a policy, or to introduce a new policy, consideration must be given to the impact it will have on each of the protected groups. This duty is prescriptive in its terms and requires a listed authority to consider relevant evidence; to take account of the results of the impact assessment; and to publish the results within a reasonable period. Public authorities must also put in place arrangements to review and if necessary revise existing policies to ensure compliance with the equality duty.

This would require Police Scotland to review and revise its policies, practices, guidance and standard operating procedures to ensure compliance with its obligations under the 2010 Act.²⁶³

Versions of Police Scotland’s Equality and Human Rights Impact Assessment Standard Operating Procedure²⁶⁴ and Equality, Diversity and Dignity Standard Operating Procedure²⁶⁵ are publicly available. From the evidence provided to the Inquiry, it appears that prior versions of these standard operating procedures were in force in May 2015.²⁶⁶

European Convention on Human Rights (ECHR)

²⁵⁶ *Services, public functions and associations: Statutory Code of Practice*, Equality and Human Rights Commission, 2011, paragraph 5.36

²⁵⁷ Equality Act 2010, s. 153(3)

²⁵⁸ The Schedule to the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 sets out a list of the relevant public authorities. This includes the chief constable of the Police Service of Scotland.

²⁵⁹ The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, regulations 3 and 4

²⁶⁰ *Ibid*, regulation 6, which requires public bodies to gather information on the protected characteristics of their employees (for example, the race of candidates applying to join Police Scotland and that of its existing employees) and to use such information to improve their performance of the general duty.

²⁶¹ *Ibid*, regulation 5

²⁶² *Stair Memorial Encyclopaedia, Discrimination Law (Reissue)*, paragraph 182

²⁶³ By way of an example, Police Scotland completed an impact assessment of its Use of Force Standard Operating Procedure in November 2016: [Equality and Human Rights Impact Assessment](#)

²⁶⁴ [Equality and Human Rights Impact Assessment SOP](#)

²⁶⁵ [Equality, Diversity and Dignity SOP](#)

²⁶⁶ Equality Impact Assessment (Pilot) Standard Operating Procedure (Version 1.00) and Equality, Diversity and Dignity Standard Operating Procedure (Version 1.00)

The provisions of the Equality Act 2010 must be considered in light of the ECHR and the case law of the European Court of Human Rights.²⁶⁷

Discrimination on the grounds of race is expressly prohibited by Article 14 of the ECHR, which states:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The European Court of Human Rights has set out the principles for establishing whether discrimination has occurred: that is, a difference in treatment of individuals in analogous situations without reasonable and objective justification.²⁶⁸ This is wide enough to encompass indirect discrimination, and, unlike domestic law, allows direct discrimination to be justified. Certain 'suspect classes', including race, will, however, require particularly weighty reasons for discrimination to be justified.²⁶⁹

More specifically, the Court has dealt with a number of cases of racist violence committed by the police.²⁷⁰

Regulations pertaining to Police Scotland

The Police Service of Scotland (Conduct) Regulations 2014²⁷¹ include a Standard of Professional Behaviour around equality and diversity:²⁷²

Constables act with fairness and impartiality. They do not discriminate unlawfully or unfairly.

Future hearing

A broader discussion and consideration of the issues covered within this Section D ("Issues pertaining to race") will be covered within a future hearing. This will include a more detailed review of the law, practice and guidance in this area.

Section E – Scottish Police Federation

(i) Relationship with Police Scotland

The Scottish Police Federation (SPF) is governed by The Police Federation (Scotland) Regulations 2013.²⁷³ The policy note that accompanies the 2013 Regulations describes SPF as a "staff association".²⁷⁴

²⁶⁷ Human Rights Act 1998, s. 2

²⁶⁸ *Stair Memorial Encyclopaedia, Discrimination Law (Reissue)*, paragraph 8

²⁶⁹ *R (on the application of Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37

²⁷⁰ [Guide on Article 14 and on Article 1 of Protocol No. 12 - Prohibition of discrimination \(coe.int\)](#), at paragraphs 108 and 243 - 244

²⁷¹ See also, The Police Service of Scotland (Senior Officers) (Conduct) Regulations 2013

²⁷² Within Schedule 1

²⁷³ Enacted under the Police Act 1996, s. 60

²⁷⁴ [Policy Note](#), The Police Federation (Scotland) Regulations 2013

Under regulation 4(1)(a) of the 2013 Regulations, all police officers holding the rank of constable, sergeant or inspector in Scotland are members of SPF.²⁷⁵ All special constables and all police cadets undergoing training to become police constables are also members of SPF.²⁷⁶

Beyond clarifying SPF's membership, the 2013 Regulations broadly cover the membership and proceedings of various committees, representative bodies and a joint central conference and, accordingly, are of limited relevance for the Inquiry's purposes.

Police officers below the rank of Assistant Chief Constable have the right to be represented by a police representative from, *inter alia*, the "Police Federation for Scotland" under regulation 6(2)(b) of the Police Service of Scotland (Conduct) Regulations 2014.²⁷⁷ Such police representatives may:²⁷⁸

(a) advise the constable throughout any proceedings under these Regulations;

(b) accompany the constable to any interview, meeting or hearing which the constable attends under these Regulations;

(c) unless the constable is entitled to be legally represented and chooses to be so represented, make representations on the constable's behalf at any meeting or hearing under these Regulations (including asking questions of any witness where the constable would be entitled to do so); and

(d) make representations to the deputy chief constable concerning any aspect of the proceedings under these Regulations.

There is Legal Advice and Assistance Guidance publicly available on SPF's website.²⁷⁹ The current guidance is dated 2016 and, at the present time, it is not known if similar guidance was published at the time of the incident in 2015.

SPF currently provides "conduct advice" on its website, which is meant to assist police officers where they are a witness, suspect or accused in an investigation into a possible criminal offence.²⁸⁰

Included within the guidance, SPF state that:²⁸¹

A senior officer cannot order you to violate your right to remain silent other than to seek an operational statement.

²⁷⁵ The associated policy note, *Ibid.*, clarifies that "inspectors" includes chief inspectors.

²⁷⁶ The Police Federation (Scotland) Regulations 2013, regulation 4(1)(b) and regulation 4(1)(c)

²⁷⁷ Regulation 3 of the Police Federation (Scotland) Regulations 2013 identifies that the Police Federation for Scotland is to be known, and referred to, as the "Scottish Police Federation".

²⁷⁸ Police Service of Scotland (Conduct) Regulations 2014, regulation 6(4)

²⁷⁹ [Legal Advice and Assistance, Guidance](#)

²⁸⁰ [Conduct Advice](#)

²⁸¹ *Ibid.*

At the present time, it is not known if SPF offered similar guidance to police officers at the time of the incident in 2015.

(ii) Issues pertaining to race

The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing completed by Dame Elish Angiolini heard evidence that:²⁸²

The Scottish Police Federation (SPF) did not represent all its members equally and that they did not represent Black, Asian and minority ethnic officers well. They were described as lacking empathy for minority groups and reliant on other support groups in relation to race issues.

Part 7 of the Equality Act 2010 applies to associations. The 2010 Act makes it unlawful for an association to discriminate against its members, potential members, associates, guests and potential guests.²⁸³ In the context of the 2010 Act, an “association” is an association of persons:²⁸⁴

(a) which has at least 25 members, and

(b) admission to membership of which is regulated by the association's rules and involves a process of selection.

As there is no admission process for SPF, and all officers of certain ranks are members, it appears likely that SPF would not constitute an “association” in terms of the 2010 Act.²⁸⁵

Section F – Miscellaneous

(i) Criteria for service as a police officer

The Police Service of Scotland Regulations 2013 set out the minimum criteria that require to be met to be appointed as a police officer.²⁸⁶ The historic height restriction has now been removed, along with all age restrictions beyond having attained the age of 18 years.²⁸⁷

A standard of eyesight requires to be met, as determined by the Scottish Ministers.²⁸⁸

Regulation 6(1)(c) requires that candidates be certified by a medical practitioner to be mentally and physically fit. In response to a Freedom of Information request,

²⁸² *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, by Dame Elish Angiolini, November 2020, paragraph 9.56

²⁸³ Equality Act 2010, s. 101

²⁸⁴ *Ibid*, s. 107(2)

²⁸⁵ *Stair Memorial Encyclopaedia, Discrimination Law (Reissue)*, paragraph 127. “... in practice, most private book clubs will not fall within the ambit of the Act, whereas it is very likely that a registered political party would. The charging of a fee does not necessarily mean that a club will fall within these provisions; what is important is whether membership is selective.”

²⁸⁶ The Police Service of Scotland Regulations 2013, regulation 6

²⁸⁷ *Ibid*, regulation 6(1)(b)

²⁸⁸ [Eyesight Standards: Police Recruitment](#)

Police Scotland confirmed that police officers do not undergo annual fitness tests, with probationary officers the only officers required to undergo fitness testing.²⁸⁹ Such testing of probationary officers takes place in terms of the Police Service of Scotland Regulations 2013.²⁹⁰

Whilst not referred to within the 2013 Regulations, Police Scotland's website identifies that an officer's Body Mass Index (BMI) should be 18 – 30.²⁹¹ It is not specified when this requirement was introduced.

²⁸⁹ [FOI Response](#), at paragraph 3. In England and Wales, there are requirements for officers to take an annual "job-related fitness test" where they require personal safety training as part of their role ([Job-related fitness standards](#))

²⁹⁰ Regulation 9. Further information on the fitness testing of probationary officer may be found within Police Scotland's [National Fitness Standard Guidance](#)

²⁹¹ [Essential criteria - Police Scotland](#)