

POLICE SCOTLAND – POST-INCIDENT MANAGEMENT

LAW & PRACTICE

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Section A – Legal framework

(i) Equality Act 2010

Further information

Aspects of the Equality Act 2010 and the public sector equality duty that are applicable to Police Scotland are covered within the law and practice research note for Hearing 1.¹ As far as possible, these areas have not been covered again within this note.

Public sector equality duty

The Equality Act 2010 includes provision for a “public sector equality duty”. This requires that:²

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.

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.³ Specific duties are imposed on public authorities in Scotland under The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012. The specific duties imposed on public bodies in Scotland are wide-ranging and include the requirement to publish equality outcomes⁴ and undertake impact assessments.⁵

The specific duties apply to “listed authorities” in terms of the 2012 Regulations.⁶ Police Scotland (as the Chief Constable of the Police Service of Scotland) is a listed authority and is therefore subject to the specific duties.

Equality Outcomes

Under the 2012 Regulations, Police Scotland are required to publish “equality outcomes” that it considers will enable it to better perform the public sector equality

¹ SBPI-00002 – Hearing 1 – Law and Practice – Research Note, (SBPI-00002) pages 28 – 32

² Equality Act 2010, section 149(1)

³ *Ibid*, section 153(3)

⁴ The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, regulation 4

⁵ *Ibid*, regulation 5

⁶ *Ibid*, Regulation 2. The “listed authorities” are set out within the Schedule to the 2012 Regulations.

duty.⁷ These require to be published at least as frequently as every four years,⁸ with reports on the progress made to achieve the equality outcomes published at least as frequently as every two years.⁹ In preparing a set of equality outcomes, listed authorities must:¹⁰

(a) take reasonable steps to involve persons who share a relevant protected characteristic and any person who appears to the authority to represent the interests of those persons; and

(b) consider relevant evidence relating to persons who share a relevant protected characteristic.

Police Scotland published a set of equality outcomes in 2013, as part of a wider report into equality and diversity.¹¹ The seven outcomes noted included: “people better recognise hate crimes and incidents and feel confident reporting them”, “individuals within and across protected groups feel safe and secure within their local communities” and “people from and across protected groups are meaningfully engaged with us and their views contribute to service improvements”.

Impact Assessments

Also under the 2012 Regulations, Police Scotland are required to carry out impact assessments in relation to new or revised policies and practices. The Regulation in question states:¹²

(1) A listed authority must, where and to the extent necessary to fulfil the equality duty, assess the impact of applying a proposed new or revised policy or practice against the needs mentioned in section 149(1) of the Act.

(2) In making the assessment, a listed authority must consider relevant evidence relating to persons who share a relevant protected characteristic (including any received from those persons).

(3) A listed authority must, in developing a policy or practice, take account of the results of any assessment made by it under paragraph (1) in respect of that policy or practice.

(4) A listed authority must publish, within a reasonable period, the results of any assessment made by it under paragraph (1) in respect of a policy or practice that it decides to apply.

(5) A listed authority must make such arrangements as it considers appropriate to review and, where necessary, revise any policy or practice that it applies in the exercise of its functions to ensure that, in exercising those functions, it complies with the equality duty.

⁷ The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, regulation 4(1)

⁸ *Ibid*, regulation 4(1)(b)

⁹ *Ibid*, regulation 4(4)(b)

¹⁰ *Ibid*, regulation 4(2)

¹¹ [Equality and Diversity in Police Scotland 2013](#), page 10 and Appendix 2.

¹² The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, regulation 5

(6) For the purposes of this regulation, any consideration by a listed authority as to whether or not it is necessary to assess the impact of applying a proposed new or revised policy or practice under paragraph (1) is not to be treated as an assessment of its impact.

In carrying out impact assessments, listed authorities require to:¹³

... assess the impact of applying a proposed new or revised policy or practice against the needs of the general equality duty. Therefore, the starting point for assessing impact is the three needs of the duty: ensuring that the policy does not discriminate unlawfully; considering how the policy might better advance equality of opportunity; and considering whether the policy will affect good relations between different groups.

In May 2015, Police Scotland had a standard operating procedure in place in relation to equality impact assessments.¹⁴ This identified that Divisional Commanders or Heads of Department had the responsibility of ensuring that equality impact assessments were conducted and that “all mitigating actions are undertaken and practices amended and implemented as required”.¹⁵

Considering relevant evidence

As noted above, listed authorities must consider “relevant evidence” relating to persons who share a relevant protected characteristic when publishing equality outcomes and carrying out impact assessments.¹⁶ The Equality and Human Rights Commission (EHRC) identifies that:¹⁷

Adequate and accurate equality evidence, properly understood and analysed, is at the root of effective compliance with the general equality duty. Without it, a body subject to the duty would be unlikely to be able to have due regard to the needs of the duty.

A balance needs to be struck between efforts to collect evidence and efforts to address equality issues,¹⁸ but it is not acceptable for an authority to say it cannot meet the duty due to a lack of evidence about the relevant issue: if there is not sufficient evidence to have the necessary “due regard” this will require to be obtained.¹⁹ In order to have evidence-based decision making, courts have made it “clear” that relevant information must be collated.²⁰

In May 2015, in gathering relevant evidence Police Scotland’s approach was to be “pragmatic, proportionate and practical and should make best use of information

¹³ *Assessing impact and the Public Sector Equality Duty: A guide for public authorities in Scotland*, EHRC ([guidance](#)), page 10

¹⁴ *Police Scotland Equality Impact Assessment (Pilot) Standard Operating Procedure*, version 1 (PS11547)

¹⁵ *Ibid*, paragraphs 8.1.1 and 8.1.2

¹⁶ The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, regulation 4(2)(b) and regulation 5(2) respectively

¹⁷ *Technical guidance on the Public Sector Equality Duty: Scotland*, EHRC ([Technical Guidance](#)), paragraph 5.17

¹⁸ *Ibid*, paragraph 5.23

¹⁹ *Ibid*, paragraph 5.20

²⁰ *Ibid*, paragraph 5.16 with reference to *R. (Rahman) v Birmingham City Council* [2011] EWHC 944

readily available to PSoS / SPA through established sources or open research prior to seeking more information”.²¹

It is not sufficient to simply collect relevant evidence, it must also be *considered* as well.²² The EHRC does not provide detailed information on how to consider and analyse data, but recommends that expert guidance from a “research or analytical colleague” be sought to carry out such analysis, if available, and a specialist researcher if not.²³ Statistical analysis can be used to summarise quantitative data.²⁴ As some “equality groups” have relatively small numbers of people, and the resulting quantitative data may be statistically unreliable, qualitative approaches to data collection can also be used to collect more detailed evidence.²⁵

In May 2015, Police Scotland’s Equality Impact Assessment Standard Operating Procedure (SOP) noted that once evidence had been gathered it required to be “critically reviewed” to ascertain what impact there might be on a particular policy and whether any “mitigating actions or monitoring of the impact of the policy” might be required.²⁶ The SOP did not provide any guidance as to how such a “critical review” was to be completed, however.

Collection of disaggregated data

Within its technical guidance on the public sector equality duty, the EHRC states that:²⁷

To improve the quality and availability of relevant evidence, listed authorities might wish to consider adapting their existing monitoring and information gathering arrangements to enable the impact of a policy or practice on persons who share a particular protected characteristic to be compared with other persons who do not share the characteristic.

This can be achieved through the “disaggregation” of evidence, with data broken down by equality group.²⁸

The report in which Police Scotland’s 2013 equality outcomes are contained²⁹ refers to Scotland’s National Action Plan for Human Rights (SNAP) and steps to be undertaken by Police Scotland in 2014 to meet one of SNAP’s priorities:³⁰

Police Scotland will identify opportunities to further embed human rights within the structures and culture of policing. These will include strengthening accountability for the respect of human rights as well as training on human

²¹ *Equality Impact Assessment (Pilot) SOP, supra*, paragraph 4.2.1

²² The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, regulation 4(2)(b) and regulation 5(2)

²³ *Evidence and the Public Sector Equality Duty: A guide for public authorities in Scotland*, EHRC, ([guidance](#)) page 25

²⁴ *Ibid.*, page 17

²⁵ *Ibid.*; also *Equality outcomes and the Public Sector Equality Duty: A guide for public authorities in Scotland*, EHRC, ([guidance](#)), page 19

²⁶ *Equality Impact Assessment (Pilot) SOP, supra*, paragraphs 4.3.1 and 4.3.2

²⁷ *Technical guidance on the Public Sector Equality Duty: Scotland, supra*, paragraph 6.54

²⁸ *Ibid.*, paragraph 5.25(2); *Evidence and the Public Sector Equality Duty, supra*, page 28

²⁹ *Equality and Diversity in Police Scotland 2013, supra*, page 15

³⁰ *Scotland’s National Action Plan for Human Rights 2013 – 2017 (SNAP)*, page 43 (meeting “SNAP Priority 6: Enhance respect, protection and fulfilment of human rights to achieve justice and safety for all”, at page 41).

rights for the police. It will, for example, help ensure legality and proportionality in the use of force and stop and search by Police Scotland through adequate training and monitoring, including the collection of disaggregated statistics.

For the first and third of Police Scotland's equality outcomes listed above from 2013,³¹ "key activities" noted included the collection of data that was able to be disaggregated by protected characteristic.

Monitoring use of force

Police Scotland's commitment to monitoring "equal opportunities" data in May 2015 was stated as follows:³²

The SPA/PSoS is committed to equality of opportunity both as an employer and as a service provider and recognises the value that a diverse workforce and community can bring. To assist with ensuring that the policies and practices are being development [sic] and applied effectively and efficiently for members of the SPA/PSoS and the public Equal Opportunities data is gathered and monitored in respect of the way in which the organisation performs.

What "equal opportunities data" might consist of and how it was to be gathered and monitored was not covered within the SOP.

Police Scotland's use of force form was updated to include the recording of "subject ethnicity" in November 2018.³³ This followed on from a stated intention in 2016 that data relating to the protected characteristics of sex, age and race would be "collated and analysed" in relation to the use of force.³⁴ Police Scotland now makes statistics relating to the use of force, including breakdowns based on the ethnicity of the subjects involved, publicly available on a quarterly basis and has done so since April 2021.³⁵

(ii) European Convention on Human Rights (ECHR)

Investigation of hate crimes

Authorities must take all reasonable steps to identify possible discriminatory motives when investigating violent attacks. In cases where there is an allegation of racially motivated violence, it is particularly important that an investigation is pursued with vigour and impartiality in order to reassert society's condemnation of racism and maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence.³⁶

³¹ Under "Equality Outcomes" on page 3 of this note.

³² *Police Scotland Equality, Diversity and Dignity Standard Operating Procedure*, version 1 (PS11113), paragraph 7

³³ Freedom of Information response, 12 May 2021, page 1 (no longer available online). Also confirmed [here](#).

³⁴ *Equality and Human Rights Impact Assessment, Use of Force SOP*, 28 November 2016 ([Impact Assessment](#)), page 2

³⁵ The figures for April to September 2022, for example, can be found [here](#). This notes, on page 4, that "subjects are asked to provide their ethnicity", so a subject's ethnicity is not determined by officers. Other figures can be sourced [here](#).

³⁶ *Guide on Article 2 – Right to Life*, *supra*, paragraph 192, with reference to [MENSON v. THE UNITED KINGDOM \(coe.int\)](#) and [GJIKONDI ET AUTRES c. GRÈCE \(coe.int\)](#)

The obligation on authorities to seek out possible links between racist attitudes and acts of violence is not only an aspect of the Procedural Obligation, but also the responsibility incumbent on States under Article 14 (prohibition of discrimination).³⁷

Procedural Obligation – Article 2 ECHR

It is intended that the Procedural Obligation of the State under Article 2 of the ECHR will be covered within a future law and practice note.

Section B – Police obligations

(i) Completion of notebooks

Hearing 1

There is some consideration of the obligations on officers to complete notebooks within the law and practice research note for hearing 1.³⁸ As far as possible, these areas have not been covered again within this note.

Correct use of notebooks

In May 2015, police notebooks were to “contain a record of matters which arise during a tour of duty and should not be used for any other purpose”.³⁹ Notes were to be made at the time of an incident or as soon as possible thereafter, with officers “on no account” to make notes elsewhere before subsequently copying them across to the notebooks.⁴⁰ Only one notebook was to be used at a time.⁴¹

In May 2015, in the context of death investigations:⁴²

The role of the initial attending officers is critical in all suspicious deaths. The information and circumstances which officers will be presented with at the outset of the enquiry are essential for allowing early decisions to be made. It is therefore of critical importance that the initial officers in attendance record all relevant details in their official police notebooks / PDAs and ensure that such information is passed to the appointed SIO without delay.

Responsibility for completion of notebooks

Whilst officers were responsible for completing their own notebooks to an acceptable standard,⁴³ line managers and supervisors were responsible for overseeing the “issue, use and storage” of notebooks.⁴⁴ The use of notebooks would be checked on a

³⁷ [NACHOVA AND OTHERS v. BULGARIA \(coe.int\)](#)

³⁸ SBPI-00002 – Hearing 1 – Law and Practice – Research Note, pages 15 - 18

³⁹ Police Scotland Notebooks and PDAs Standard Operating Procedure, version 2, paragraph 3.3 (PS10937)

⁴⁰ *Ibid*, paragraph 3.4

⁴¹ *Ibid*, paragraph 3.5

⁴² Police Scotland Investigation of Death Standard Operating Procedure, version 1.02, paragraphs 4.7 and 4.8 (PS11110)

⁴³ Notebooks and PDAs SOP, *supra*, paragraph 7.4

⁴⁴ *Ibid*, paragraph 7.3

“regular basis” by supervisors to ensure that they were being used correctly, although in May 2015 the process involved in carrying out such checks varied across different divisions of Police Scotland.⁴⁵ Within Fife,⁴⁶ in auditing notebooks it was noted that:⁴⁷

All supervisors will check notebooks of staff under their command to ensure officer compliance.

Sergeants were to examine their constables’ notebooks at least once every fortnight and inspectors were to examine their sergeants’ and constables’ notebooks at least once every three months.⁴⁸ No details were included within the Notebooks and PDAs SOP to clarify how this audit process took place and what happened if officers were found not be meeting the appropriate standard of notebook completion.

(ii) Completion of use of CS/PAVA spray and use of force forms

Hearing 1

There is some consideration of the obligations on officers to complete use of CS/PAVA spray and use of force forms within the law and practice research note for hearing 1.⁴⁹ As far as possible, these areas have not been covered again within this note.

Legal requirement to report use of CS/PAVA spray

One of the PIRC’s “general functions” under the Police, Public Order and Criminal Justice (Scotland) Act 2006 is:⁵⁰

where requested to do so by the Authority or the chief constable, to investigate and report on certain serious incidents involving the police.

A “serious incident involving the police” which the PIRC may investigate includes a circumstance in which:⁵¹

a person serving with the police has used a firearm or any other weapon of such description as the Scottish Ministers may by regulations specify.

A “firearm” in this context has the meaning given in the Firearms Act 1968.⁵² Within that Act, the definition of a “firearm” includes any “prohibited weapon”.⁵³ This includes:⁵⁴

any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing.

⁴⁵ *Ibid*, paragraphs 6.1 and 7.3

⁴⁶ As ‘P’ Division

⁴⁷ *Notebooks and PDAs SOP, supra*, Appendix C, paragraph 6

⁴⁸ *Ibid*.

⁴⁹ *SBPI-00002 – Hearing 1 – Law and Practice – Research Note*, pages 15 - 18

⁵⁰ Police, Public Order and Criminal Justice (Scotland) Act 2006, section 33A(c)

⁵¹ *Ibid*, section 41B(1)(b)(ii)

⁵² Firearms Act 1968, section 57(1)

⁵³ *Ibid*, section 57(1)(a). “Prohibited weapon” being defined within section 57(4) of the 1968 Act.

⁵⁴ 1968 Act, section 5(1)(b)

Whilst the drafting of the 2006 Act provides that PIRC “may” investigate the use of firearms by police officers “where requested to do so” by Police Scotland, within separate regulations a positive obligation to report serious incidents involving the police to the PIRC is imposed on the Chief Constable of Police Scotland:⁵⁵

*(1) The chief constable **must** request the Commissioner to investigate any serious incident involving the police which is a circumstance involving—*

(a) a constable; or

(b) a member of the police staff.

The legal requirement to request that serious incidents involving the police be investigated by the PIRC is imposed on the Chief Constable, rather than the officers directly involved in the incident (or their supervisors).

In May 2015, a matter was not a “serious incident involving the police”, however, if it was:⁵⁶

(a) a matter—

(i) which the Commissioner is investigating in pursuance of paragraph (b)(i) of section 33A; or

(ii) in respect of which criminal proceedings have been brought following such an investigation by the Commissioner; or

(b) a matter which is being, or has been, investigated—

(i) by the Commissioner in pursuance of paragraph (b)(ii) of section 33A; or

(ii) by any other person under section 1 of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (c.14).⁵⁷

Submission of documentation and information to the PIRC

A police officer or member of police staff⁵⁸ must, where required by the PIRC for the purposes of an investigation into a serious incident involving the police:⁵⁹

produce, in a form acceptable to the Commissioner, any document, record or other information the Commissioner may require.

⁵⁵ The Police Investigations and Review Commissioner (Investigations Procedure, Serious Incidents and Specified Weapons) Regulations 2013, regulation 3(1) (emphasis added)

⁵⁶ 2006 Act, section 41B(2)

⁵⁷ The present drafting of section 41B(2) now refers to the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 in place of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976

⁵⁸ Being included within the definition of a “relevant person” under the 2013 Regulations, regulation 5(2)(a)

⁵⁹ The Police Investigations and Review Commissioner (Investigations Procedure, Serious Incidents and Specified Weapons) Regulations 2013, regulation 5(1)(a)

Here, the obligation to produce documentation and information to the PIRC is imposed on individual officers, not the Chief Constable, and applies only to investigations into serious incidents involving the police (or those carried out in the public interest). The obligation does not apply to investigations instructed by the Crown Office and Procurator Fiscal Service (COPFS) under section 33A(b) of the 2006 Act. Dame Elish Angiolini has noted that “PIRC investigators therefore have weaker enforcement powers when undertaking an investigation instructed by COPFS” and has recommended that regulation 5 be amended to also give the PIRC the same powers for COPFS-directed investigations.⁶⁰

Separately, the PIRC has the power to require the SPA and/or Police Scotland to provide information and documents to assist with the completion of its investigations. Under the 2006 Act:⁶¹

The Authority and the Chief Constable must—

(a) provide the Commissioner with all such other information and documents specified or described in a notification given by the Commissioner to the Authority or, as the case may be, the chief constable; and

(b) produce to the Commissioner all such evidence and other things so specified or described,

as appear to the Commissioner to be required by the Commissioner for the purposes of the carrying out of any of the Commissioner's functions.

The information and documents requested by the PIRC in accordance with the above provisions must be provided or produced in such form, in such manner (including electronically)⁶² and within such period as required by the PIRC.⁶³ The SPA and Police Scotland are not required to provide any information or documents before the earliest time at which it is practicable to do so, however.⁶⁴

Submission of CS/PAVA forms

Whilst the 2006 Act and 2013 Regulations do not appear to provide a timeframe for reporting serious incidents involving the police to the PIRC, a memorandum of understanding entered into by the PIRC, Police Scotland and the Scottish Police Authority prior to the incident involving Sheku Bayoh provided that in cases of the use of “CS Spray” (as a serious incident involving the police) the PIRC was to be informed of the circumstances within two working days, whether or not any injury resulted.⁶⁵

⁶⁰ *Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing*, Final Report, November 2020, The Rt, Hon. Dame Elish Angiolini ([Final Report](#)), paragraphs 30.85 and 30.86

⁶¹ 2006 Act, section 44(2)

⁶² *Ibid*, section 44(5)

⁶³ *Ibid*, section 44(3)

⁶⁴ *Ibid*, section 44(4)

⁶⁵ *Memorandum of Understanding between The Police Investigations and Review Commissioner, The Police Service of Scotland and The Scottish Police Authority*, 2013, *General Protocol*, paragraph 5 (PS06953)

In May 2015, Police Scotland's use of force standard operating procedure went further than this and provided that:⁶⁶

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 ... Forms⁶⁷ 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.

The "legal requirement" that a report be submitted to the PIRC within 24 hours in these circumstances was also referred to within a memorandum issued by Police Scotland in April 2013.⁶⁸ Other guidance identified refers to a period of 24 – 48 hours for the submission of such reports.⁶⁹

Where an officer was "unavailable", a supervisor required to arrange for the completion of the relevant CS/PAVA form.⁷⁰ Completed forms were to be submitted by email to the Officer Safety Training team, from where they were then forwarded to PIRC.⁷¹

Within P Division (Fife) in May 2015, pro-forma use of force reports known as "baton" and "CS" reports were available to download.⁷² Forms were to be:⁷³

... completed by the officer and submitted, via their line manager, who will add suitable comments before forwarding to the Health and Safety Manager.

The SCOPE system was not used, with the forms instead completed and submitted via the officer's line manager.⁷⁴

Record keeping in relation to incapacitant sprays

Within P Division (Fife) in May 2015, the paperwork used to audit CS incapacitant sprays was set out within an appendix to Police Scotland's Use of Force SOP.⁷⁵ The paperwork included a daily control sheet used to monitor the issue and return of CS spray canisters, which noted that "all entries must be completed in full, then checked and signed by OIC⁷⁶ daily".⁷⁷

⁶⁶ *Police Scotland Use of Force Standard Operating Procedure*, version 1.03, (PS10933) paragraphs 6.4 and 6.5 (emphasis within original)

⁶⁷ *CS/PAVA Spray Discharge Report, Form 064-001* (PS11087) was the version in place in May 2015, prior to being superseded by an updated version the following month.

⁶⁸ *Memorandum from Wayne Mawson, Assistant Chief Constable, to Divisional Commanders and Heads of Departments*, dated 1 April 2013 (PS 001/13), page 1 (PS11500)

⁶⁹ *CS/PAVA Discharge Report – Completion Guidance*, 27 November 2014, PC Adam Dawson (PS11588), page 2

⁷⁰ Use of Force SOP, *supra*, paragraph 6.5

⁷¹ *Use of Force SOP*, *supra*, paragraph 6.6

⁷² *Ibid*, Appendix C, page 39

⁷³ *Ibid*.

⁷⁴ *Ibid*.

⁷⁵ *Use of Force SOP*, *supra*, Appendix C, page 38

⁷⁶ "Officer in Charge"

⁷⁷ *CS Incapacitant Daily Control Sheet, Form 064-007* (PS11089) was the version in use in May 2015. A separate daily control sheet was used for PAVA spray (*PAVA Irritant Spray Daily Control Sheet, Form 064-007A*, PS11090)

Within an investigation into the use of CS spray within Victoria Hospital, PIRC found that:⁷⁸

Police Scotland's procedures in relation to the issue, use and storage of CS Spray did not contain sufficient guidance for officers in Fife Division.

The investigation also found that Kirkcaldy Police Office was not following this limited guidance. PIRC recommended that Police Scotland should:⁷⁹

... ensure that it provides fuller guidance to officers in Fife Division in relation to the issue, use and storage of CS Spray and standardises these procedures throughout Scotland.

Later in 2015 an internal Police Scotland briefing paper set out recommendations on “how CS/PAVA should be stored and administered to ensure a national, standardised approach”.⁸⁰ In addition to providing recommendations, the briefing paper identified that within P Division (Fife) personal issue incapacitant spray was stored within Airwave lockers which had “not been purpose built to store incapacitant spray” and that there was “no sign out/weighing procedure”.⁸¹

Reporting baton strikes to PIRC

As noted above, one of the PIRC's “general functions” is to investigate “certain serious incidents involving the police”⁸² which would include circumstances in which an officer “has used a firearm or any other weapon of such description as the Scottish Ministers may by regulations specify”.⁸³ The Chief Constable must report such serious incidents involving the police to the PIRC.⁸⁴

Under the 2013 Regulations:⁸⁵

A straight, side-handled or friction lock truncheon (sometimes known as a baton) is a weapon for the purposes of section 41B(1)(b)(ii) of the 2006 Act.

Accordingly, the use of a baton by a police officer is classed as a “serious incident involving the police” and must be reported to the PIRC.⁸⁶

Use of force forms

⁷⁸ *Use of CS Spray Within Accident and Emergency Department, Victoria Hospital, Kirkcaldy, 18 October 2014, Operation Ciaran, December 2014, Police Investigations and Review Commissioner, (PIRC-04474), page 7*

⁷⁹ *Ibid*, page 8

⁸⁰ *Briefing Paper – CS/PAVA Storage and Administration, 16 September 2015, PS Jim Young (PS12214)*

⁸¹ *Ibid*, page 2

⁸² Police, Public Order and Criminal Justice (Scotland) Act 2006, section 33A(c)

⁸³ *Ibid*, section 41B(1)(b)(ii)

⁸⁴ The Police Investigations and Review Commissioner (Investigations Procedure, Serious Incidents and Specified Weapons) Regulations 2013, regulation 3(1)

⁸⁵ *Ibid*, regulation 7

⁸⁶ Unless the terms of section 41B(2) of the 2006 Act, quoted earlier within this note, apply.

In May 2015, a use of force form was to be used when reporting uses of force.⁸⁷ In this context, a “use of force” was defined as being:⁸⁸

*... use of the baton to strike an individual or individuals or the operational discharge of CS Incapacity Spray.*⁸⁹

Use of an incapacitant spray, therefore, required the submission of both a CS/PAVA spray form and a use of force form. The Use of Force SOP notes that operational discharges of CS spray “must” be recorded⁹⁰ and baton strikes “should be recorded on a use of force form”.⁹¹

The Use of Force SOP in force in May 2015 did not refer to a timeframe for completion of use of force reports within P Division (Fife). Within a SOP published after the incident involving Sheku Bayoh, such a timeframe is noted, with all staff required to complete use of force forms on SCOPE prior to the end of their shift,⁹² with the forms then automatically forwarded to the National Operational Safety Training Unit for review.⁹³

Whilst in P Division (Fife) use of force forms were to be submitted via an officer’s line manager,⁹⁴ there was no provision within the SOP that required a supervisor to submit a use of force form on an officer’s behalf when they were unable to do so. Additionally, there was no reference to there being any personal consequence of failing to submit use of force or use of CS/PAVA spray forms.

Standard Prosecution Report (SPR)

In May 2015, after an arrest a SPR was to be prepared providing evidence to justify the arrest and the charges libelled.⁹⁵ Within the SPR:⁹⁶

Details of any force used are usually contained within the narrative next to the details of the subject’s behaviour ... Recollection of the incident will be central to the disposal of the incident and officers/staff may have to justify reasoning, action taken and amount of force used ... If anything, more time and effort are needed to document the use of force than to prove an offence.

Standards of Professional Behaviour

The Police Service of Scotland (Conduct) Regulations 2014 include a Standard of Professional Behaviour that provides that:⁹⁷

⁸⁷ *Use of Force SOP, supra*, paragraph 6.3

⁸⁸ *Ibid*, paragraph 6.2

⁸⁹ As noted within the law and practice research note for hearing 1 at footnote 129, the definition of a “use of force” was broadened within a subsequent use of force SOP.

⁹⁰ *Use of Force SOP, supra*, paragraph 19.4

⁹¹ *Ibid*, paragraph 18.8

⁹² *Police Scotland Use of Force Standard Operating Procedure*, version 2.00 ([SOP](#)), paragraph 6.2

⁹³ *Ibid*, paragraph 6.3

⁹⁴ *Use of Force SOP, version 1.03, supra*, Appendix C, page 39

⁹⁵ *Use of Force SOP, version 1.03, supra*, paragraph 5.1.1

⁹⁶ *Ibid*, paragraphs 5.1.1, 5.1.2 and 5.1.3

⁹⁷ The Police Service of Scotland (Conduct) Regulations 2014, Schedule 1

Constables are diligent in the exercise of their duties and responsibilities.

The guidance associated with the 2014 Regulations identifies that, in complying with the above Standard of Professional Behaviour:⁹⁸

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.

Further to this, with regard to senior officers:⁹⁹

Police supervisors, managers and leaders, should take all reasonable steps to ensure that their staff carry out their professional duties correctly.

Police supervisors, managers and leaders, have a specific responsibility to promote and maintain professional standards through their timely use of advice, remedial or other relevant informal or formal action.

(iii) Provision of operational statements

Police officers' duties

It is part of the duties of a constable:¹⁰⁰

to take such lawful measures, and make such reports to the appropriate prosecutor,¹⁰¹ as may be needed to bring offenders with all due speed to justice.

Beyond this duty, Dame Elish Angiolini is of the view that:¹⁰²

A constable's duties are set out in the 2012 Act (in the declaration that each constable makes on taking up office),¹⁰³ in Police Scotland's Code of Ethics,¹⁰⁴ and in the statutory Standards of Professional Behaviour,¹⁰⁵ all of which to some extent express or imply a statutory, ethical or procedural duty on that person to assist in the investigation of a serious incident and uphold Convention Rights.¹⁰⁶

⁹⁸ *Police Service of Scotland (Conduct) Regulations 2014 Guidance*, 1 April 2014 ([Guidance](#)), paragraph 3.7.4. Also, *Police Scotland Police Service of Scotland (Conduct) Regulations 2014 Standard Operating Procedure*, version 2.00 (PS11558), Appendix 'E', page 54

⁹⁹ *Police Service of Scotland (Conduct) Regulations 2014 Guidance*, *ibid*, paragraphs 3.7.7. and 3.7.8; *Police Service of Scotland (Conduct) Regulations 2014 SOP*, *ibid*, Appendix 'E', page 54

¹⁰⁰ Police and Fire Reform (Scotland) Act 2012, section 20(1)(d). Under section 22(3) of the 2012 Act, "it is an offence for a constable to neglect or violate the constable's duty".

¹⁰¹ Being the Lord Advocate or Procurator Fiscal (2012 Act, section 99(1))

¹⁰² *Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing*, *supra*, paragraph 7.106.

¹⁰³ Police and Fire Reform (Scotland) Act 2012, section 10(1). The declaration is quoted in full on page 14 of *SBPI-00002 – Hearing 1 – Law and Practice – Research Note*.

¹⁰⁴ [Code of Ethics for Policing in Scotland](#)

¹⁰⁵ The Police Service of Scotland (Conduct) Regulations 2014, Schedule 1

¹⁰⁶ The Independent Review's recommendations include that there be a statutory assumption of co-operation, including within the constable's declaration. (Preliminary Report Recommendation 14, pages 473 – 474).

The Independent Review states that, whilst the Standards of Professional Behaviour, constable's duties and Code of Ethics do not explicitly refer to any duty to assist in investigations, "such a duty can be inferred".¹⁰⁷ This being the case:¹⁰⁸

Except in circumstances where the right to silence applied, a constable who failed to provide a statement in respect of an incident in which he was involved as a participant or witness would be failing to assist in investigations.

Standards of Professional Behaviour

As noted within the law and practice research note for hearing 1,¹⁰⁹ "it is for the police officer to justify his or her use of force".¹¹⁰

Any failure by an officer to comply with the Standard of Professional Behaviour that force be used "only to the extent that it is necessary, proportionate and reasonable in all the circumstances" requires, in turn, other constables to report or challenge the behaviour in question:¹¹¹

Constables report, challenge or take action against the conduct of other constables which has fallen below the Standards of Professional Behaviour.

Police Scotland Standard Operating Procedures

Provision of statements following deaths

In May 2015, where a "death occur[ed] within the custody environment" there were a number of points for the "Custody Officer" to consider, including:¹¹²

Ensure the welfare requirements of custody staff and arresting officers are met, however, they will be witnesses and should not be relieved from duty until an operational statement has been written and permission is given from the SIO. This will however be determined on a case by case basis, in some circumstances, it may not be possible to obtain operational statements nor indeed advisable. It should also be detailed that officers have the right to seek advice prior to providing an operational statement.

¹⁰⁷ *Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing*, supra, paragraph 7.116. The Independent Review recommends that the Standards of Professional Behaviour be amended to include an explicit statutory duty on officers to assist during investigations. (Final Report Recommendation 12, page 456; and paragraph 30.56). It also recommends that the Scottish Government propose an amendment of the Police and Fire Reform (Scotland) Act 2012 to provide for an explicit duty of candour on the police to co-operate fully with all investigations into allegations against its officers. (Final Report Recommendation 10, page 456). The Review notes that police officers now have a statutory duty of co-operation in England and Wales under the Police (Conduct) Regulations 2020, Schedule 2. A majority of respondents to the subsequent consultation on police complaints, investigations and misconduct agreed with recommendations 10 and 12 that there should be a statutory duties of candour and co-operation ([Police Complaints, Investigations and Misconduct: Analysis of Consultation on Legislation](#), November 2022, pages 14 and 15).

¹⁰⁸ *Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing*, supra, paragraph 7.116.

¹⁰⁹ SBPI-00002 – Hearing 1 – Law and Practice – Research Note, pages 13 – 14

¹¹⁰ *Police Service of Scotland (Conduct) Regulations 2014 Guidance*, supra, paragraph 3.5.3

¹¹¹ The Police Service of Scotland (Conduct) Regulations 2014, Schedule 1

¹¹² *Police Scotland Death or Serious Injury in Police Custody Standard Operating Procedure*, version 1.01, paragraph 5.15 (PS11295)

In May 2015, it was noted in a separate SOP that, within five divisions of Police Scotland, officers were to complete operational statements prior to the completion of their tours of duty in all cases where there had been a suspicious death or suicide.¹¹³ P Division (Fife) was not one of the five divisions in question.

Post-incident procedures

In May 2015, in the context of the post-incident procedures for firearms incidents, detailed accounts would not normally be obtained from officers until at least 48 hours after the incident.¹¹⁴ In cases where PIRC wished to take detailed statements, officers choosing to provide their own statements were to do so “as soon as reasonably practicable and in any case within 7 days of the incident under investigation”.¹¹⁵

Complaints

In May 2015, when handling complaints made about officers locally:¹¹⁶

The Enquiry Officer should obtain operational statements from all relevant personnel. Police officers have a duty to provide an account of their operational activity. However, distinction has to be made as to whether an officer is a witness or subject to a complaint. Officers against whom allegations are made should not be compelled to provide an operational statement but can, if they wish, provide one. Officers who are witnesses must provide a full operational statement addressing the allegations made and must be their own version of events, not a copy of a statement from other witnesses.

Police Scotland memoranda

Two Police Scotland memoranda dated 26 March 2015 set out Police Scotland’s approach to obtaining operational statements from officers under investigation for “on-duty” criminal complaints in May 2015. The memoranda did not cover the submission of statements by officers who were witnesses to incidents; only those who were suspects.

The first Police Scotland memorandum stated:¹¹⁷

Direction has been provided to PSD¹¹⁸ from the Crown Office and Procurator Fiscal Service (COPFS) to the effect that the practice of obtaining statements from officers subject to ‘on duty’ criminal complaints must cease with immediate effect.

¹¹³ *Investigation of Death SOP*, version 1.02, *supra*, Appendix G, paragraph 5

¹¹⁴ *Police Scotland Post Incident Procedures Standard Operating Procedures*, version 1, paragraph 10.1 (PS10934)

¹¹⁵ *Ibid*, paragraph 10.2

¹¹⁶ *Police Scotland Complaints About the Police Standard Operating Procedure*, version 2.00, paragraph 6.8.10 (PS10959)

¹¹⁷ *Memorandum from Neil Richardson, Deputy Chief Constable (Designate) to Divisional Commanders and Heads of Department*, dated 26 March 2015 (PS 053/15), page 1 (PS10953)

¹¹⁸ Police Scotland’s Professional Standards Department

Should a statement be required from a subject officer for on duty criminal complaints, this must be done under SARF (Solicitor Access Recording Form) conditions after consultation with a PSD Chief Inspector.

...

This change does not alter the requirement for the investigating officer to include any other available information in respect of the subject officer. For example, information from the officers' operational statement in respect of the incident itself generated prior to the criminal allegation about the subject officer being made, information from the SPR, use of force form, CS discharge form etc. It must be clear on the CAP report that this information has been gleaned from other sources and not submitted to directly address the allegations.

A further, more detailed, internal memorandum was issued to ensure "a greater understanding of the requirement placed upon Police Scotland and how this should be achieved".¹¹⁹ Adherence to the memoranda was "**not optional**, and is in compliance to a Crown instruction".¹²⁰ SOPs would be updated accordingly "in due course".

The second memorandum stated that:¹²¹

The decision in simplistic terms is the gathering of evidence, and in turn the aforementioned operational statements to the point of submission to CAAPD¹²² can be considered no different from gathering a statement from any suspect in a criminal investigation; and this facet is an operational matter for Police Scotland.

...

When taken in context there is no investigative benefit by requesting an operational statement from the Subject Officer, but significant risk to Police Scotland that they infringe the basic rights against self-incrimination through requesting the operational statement. Cadder v HMA requires to be considered as the signpost to ethical fairness. The Subject Officer need only be given the same rights as any suspect, which when necessary allows them the opportunity to explain their version of events within the correct process for gathering usable evidence in a criminal enquiry, without this being conceived as obtained through 'trick or deed'.

The second memorandum set out the process to be followed when criminal complaints were made against on-duty police officers, including where officers were to be interviewed under caution.¹²³

¹¹⁹ Memorandum from Eleanor Mitchell, Chief Superintendent Professional Standards to Divisional Commanders and Heads of Department, dated 26 March 2015 (PS 054/15), page 1 (PS10954)

¹²⁰ *Ibid*, page 1 (emphasis within original)

¹²¹ *Ibid*, pages 1 and 2

¹²² Criminal Allegations Against Police Division, COPFS

¹²³ *Ibid*, pages 2-3. Interviews under caution "will be seen as the exception".

In cases where CAAPD had made the decision to mark a case “No Proceedings”:¹²⁴

... unless there are non-criminal allegations (move to Non-criminal complaint) to be enquired into no operational statement will be requested from a Subject Officer. The Subject Officer rights are still engaged and any further evidence, including self-incrimination would result in the matter being referred back to CAAPD.

It was reported that PIRC first became aware of this policy change through media coverage in June 2015.¹²⁵

Self-incrimination

“It is a sacred and inviolable principle ... that no man is bound to incriminate himself.”¹²⁶ In accordance with this principle, a witness is entitled to refuse to answer a question if the true answer will render him liable to prosecution and conviction for a crime.¹²⁷ Such a question may be framed directly or in such a way that a response might indirectly infer guilt or may form links in a chain of evidence.¹²⁸ The privilege applies to any piece of information or evidence on which the prosecution would wish to rely in making their decision whether to prosecute.¹²⁹

Renton and Brown notes that:¹³⁰

A witness is not obliged to answer any question if the answer would incriminate him in a crime for which he has not been dealt with or granted immunity.

The right not to incriminate oneself, however:¹³¹

... is not absolute, and may be overborne by the need to protect other rights, provided that the use of incriminating statements is proportionate to the harm which the relevant offence is intended to prevent.

In May 2015, there was a statutory privilege against self-incrimination for witnesses at fatal accident inquiries.¹³²

Article 6 of the ECHR¹³³

Although not specifically mentioned within the right to a fair trial set out in Article 6 of the ECHR, the right to remain silent and the privilege against self-incrimination are

¹²⁴ *Ibid*, pages 3-4

¹²⁵ [PIRC learned of policy change through media - Scottish Legal News](#)

¹²⁶ *Livingstone v Murrays* (130) 9 S 161; per Lord Gillies at 162

¹²⁷ *Stair Memorial Encyclopaedia, Evidence (Reissue)*, paragraph 193; Walker and Walker, *The Law of Evidence in Scotland*, paragraph 12.13.1

¹²⁸ Dickson, *Evidence (3rd Edition)*, paragraph 1789

¹²⁹ *Den Norske Bank ASA v Antonatos* [1999] QB 271

¹³⁰ Renton and Brown, *Criminal Procedure (6th Edition)*, Volume 1, Chapter 24, 24-158

¹³¹ *Ibid*, Chapter 9A, 9A-27. The example given in Renton and Brown relates to section 172 of the Road Traffic Act, with reference to *Brown v Stott* 2001 SLT 59.

¹³² Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, section 5(2). A similar provision is included within the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016, at section 20(6)

¹³³ A comprehensive guide to Article 6, together with the relevant case law, can be found here: [Guide on Article 6 - Right to a fair trial](#)

“generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6”.¹³⁴

Anyone accused of a criminal offence, from the simplest to the most complex,¹³⁵ has the right to remain silent and not to contribute to incriminating himself.¹³⁶ The right to remain silent applies from the point at which a suspect is questioned by the police.¹³⁷

The privilege against self-incrimination “does not protect against the making of an incriminating statement *per se* but against the obtaining of evidence by coercion or oppression”.¹³⁸ The imposition of penalties for a failure to answer questions would be one scenario that might give rise to a finding of improper compulsion in breach of Article 6.¹³⁹ The privilege against self-incrimination is not confined to statements that are directly incriminating.¹⁴⁰

The rights flowing from Article 6 will apply where there is a “criminal charge”.¹⁴¹ A “charge” is defined as the “official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”.¹⁴² A person questioned in the context of a border patrol, in the absence of a need to determine the existence of a reasonable suspicion that she had committed an offence, was not considered to be under a criminal charge.¹⁴³

In assessing whether a charge is “criminal” in nature, it is necessary to look at the classification of the offence in domestic law; the nature of the offence; and the severity of the penalty that the person concerned risks incurring.¹⁴⁴ It has been held that an offence against military discipline, carrying a penalty of committal to a disciplinary unit for a period of several months, falls within the ambit of the criminal head of Article 6,¹⁴⁵ but that disciplinary proceedings resulting in the compulsory retirement or dismissal of a civil servant were not “criminal” within the meaning of Article 6.¹⁴⁶ It is usually the case that the criminal limb of Article 6 will not apply to disciplinary proceedings.¹⁴⁷

As noted within the law and practice research note for hearing 1,¹⁴⁸ Dame Elish Angiolini concluded that, in cases where an officer is under suspicion of having

¹³⁴ [JOHN MURRAY v. THE UNITED KINGDOM \(coe.int\)](#). Also quoted within the *Guide on Article 6*, *ibid*, at paragraph 203

¹³⁵ [SAUNDERS v. THE UNITED KINGDOM \(coe.int\)](#)

¹³⁶ [O'HALLORAN AND FRANCIS v. THE UNITED KINGDOM \(coe.int\)](#) and [FUNKE v. FRANCE \(coe.int\)](#)

¹³⁷ [JOHN MURRAY v. THE UNITED KINGDOM \(coe.int\)](#)

¹³⁸ *Guide on Article 6*, *supra*, paragraph 207

¹³⁹ [HEANEY AND MCGUINNESS v. IRELAND \(coe.int\)](#)

¹⁴⁰ *Guide on Article 6*, *supra*, paragraph 209. [IBRAHIM AND OTHERS v. THE UNITED KINGDOM \(coe.int\)](#)

¹⁴¹ ECHR, Article 6(1), 6(2) and 6(3). The civil limb of Article 6 is not considered within this note.

¹⁴² [IBRAHIM AND OTHERS v. THE UNITED KINGDOM \(coe.int\)](#) and [ECKLE v. GERMANY \(coe.int\)](#). See *Guide on Article 6*, *supra*, paragraph 18 for a list of cases relevant to determining when a person is “charged with a criminal offence”.

¹⁴³ [BEGHAL v. THE UNITED KINGDOM \(coe.int\)](#)

¹⁴⁴ [ENGEL AND OTHERS v. THE NETHERLANDS \(coe.int\)](#). Case law containing consideration of these three criteria can be found within the ECHR's *Guide on Article 6*, *supra*, at paragraphs 23 – 27

¹⁴⁵ [ENGEL AND OTHERS v. THE NETHERLANDS \(coe.int\)](#)

¹⁴⁶ [MOULLET v. FRANCE \(coe.int\)](#) and [PIŞKİN v. TURKEY \(coe.int\)](#)

¹⁴⁷ *Guide on Article 6*, *supra*, paragraphs 28 – 36

¹⁴⁸ SBPI-00002 – Hearing 1 – Law and Practice – Research Note, page 18

committed an offence, the officer's right to silence under Article 6 is not overridden by the investigative duty placed on the state under Article 2.¹⁴⁹

The admissibility of self-incriminating statements

There is some consideration of the admissibility of self-incriminating statements in the law and practice research note for hearing 1.¹⁵⁰

Determination of status of officer – witness or suspect

PIRC investigators have all the powers and privileges of a constable in Scotland.¹⁵¹ Constables may identify a person as a suspect, as opposed to a witness, where they have "reasonable grounds" to suspect that that person has committed or is committing an offence.¹⁵²

Notwithstanding the fact that COPFS have the authority to determine the status of police officers following a death in custody, COPFS are of the view that, in investigations directed by COPFS,¹⁵³ PIRC investigators "would be expected, and would have authority, to determine" the status of an officer, either alone or in consultation with COPFS.¹⁵⁴ Similarly, the PIRC are of the view that the status of an officer is an operational decision and, where they are the investigating agency, "PIRC will be responsible for making such decisions".¹⁵⁵ Whilst predominantly such decisions will be made without recourse to COPFS, there will be occasions where COPFS are consulted, for example to seek a view as to whether or not there is sufficient evidence to treat officers as suspects.¹⁵⁶

A memorandum of understanding (MOU) entered into between the PIRC, Police Scotland and the SPA in 2020, and consequently not in place in May 2015, sets out the processes that the PIRC will follow in confirming an officer's status as a witness or suspect, including notifying Police Scotland or the SPA of its decisions in this regard.¹⁵⁷ Police Scotland or SPA will notify officers when they are the subject of a criminal investigation unless the investigation may be hampered in doing so.¹⁵⁸

PIRC powers to compel witnesses

¹⁴⁹ *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, supra, paragraph 7.115

¹⁵⁰ *SBPI-00002 – Hearing 1 – Law and Practice – Research Note*, pages 18 -19

¹⁵¹ Police, Public Order and Criminal Justice (Scotland) Act 2006, Schedule 4, paragraphs 7A(6)(a) and 7B(3)(a)

¹⁵² Criminal Procedure (Scotland) Act 1995, section 13(1). Section 1 of the Criminal Justice (Scotland) Act 2016, which was enacted after the incident involving Sheku Bayoh took place on 3 May 2015, also provides that constables may make arrests on having "reasonable grounds" to suspect that an offence has been, or is being, committed.

¹⁵³ Under the Police, Public Order and Criminal Justice (Scotland) Act 2006, section 33A(b)

¹⁵⁴ *Hearing 1 Position Statement on behalf of The Lord Advocate*, 1 April 2022, paragraph 4

¹⁵⁵ *Sheku Bayoh Public Inquiry, Written Submissions for Police Investigations and Review Commissioner, Re: Position Statement 5*, 1 April 2022, paragraph 5

¹⁵⁶ *Ibid.*

¹⁵⁷ *Memorandum of Understanding between The Police Investigations and Review Commissioner and Police Scotland and The Scottish Police Authority*, dated 31 July 2020, ([MOU](#)), paragraphs 10.5 and 11.21

¹⁵⁸ *Ibid.*, paragraph 10.5

As noted above, in all investigations the PIRC has the power to require the SPA and/or the Chief Constable of Police Scotland (not individual officers) to provide information and documents to assist with the completion of its investigations.¹⁵⁹

Also as noted above, the PIRC has additional powers to require police officers and members of police staff to produce documentation, records or other information required by PIRC, but only for the purposes of investigations into serious incidents involving the police and investigations in the public interest (not those instructed by COPFS into alleged criminality or deaths in custody).¹⁶⁰ The MOU entered into between the PIRC, Police Scotland and the SPA in 2020 identifies that the PIRC may require officers who are witnesses to matters that it is investigating under section 33A(c) or (d) of the 2006 Act to produce information in the form of a witness statement.¹⁶¹ Where a police officer refuses “without reasonable excuse” to co-operate with a PIRC investigation through the provision of information, the PIRC will notify Police Scotland for their consideration of misconduct or disciplinary proceedings.¹⁶²

Within her Independent Review, Dame Elish Angiolini recommended that:¹⁶³

Where a serious incident is being investigated by the PIRC, the investigators should also have a power, where it is necessary and proportionate, to compel police officers to attend within a reasonable timescale for interview.

The Review noted that the PIRC supported the introduction of “some form of undertaking or obligation on police officers to co-operate with an investigation of a death or serious incident within a reasonable timescale”.¹⁶⁴

(iv) Unsatisfactory performance and misconduct

Unsatisfactory performance

The Police Service of Scotland (Performance) Regulations 2014 set out the procedures to be followed in circumstances where the performance of an officer is “unsatisfactory”. The interpretation of “unsatisfactory performance” under the regulations is necessarily broad and requires, on the balance of probabilities,¹⁶⁵ a finding that there is, or has been, an “inability or failure of the constable to perform the duties of the constable’s role or rank (or both) to a satisfactory standard”.¹⁶⁶

¹⁵⁹ Police, Public Order and Criminal Justice (Scotland) Act 2006, section 44(2) (see footnote 61 above)

¹⁶⁰ The Police Investigations and Review Commissioner (Investigations Procedure, Serious Incidents and Specified Weapons) Regulations 2013, regulation 5(1)

¹⁶¹ *Memorandum of Understanding between The Police Investigations and Review Commissioner and Police Scotland and The Scottish Police Authority*, 2020, *supra*, paragraph 9.10

¹⁶² *Ibid*, paragraph 9.12

¹⁶³ *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report, supra*, Preliminary Report Recommendation 15, page 474. A majority of respondents to the subsequent consultation on police complaints, investigations and misconduct agreed with this recommendation (*Police Complaints, Investigations and Misconduct: Analysis of Consultation on Legislation, supra*, page 16).

¹⁶⁴ *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report, supra*, paragraph 7.119

¹⁶⁵ The Police Service of Scotland (Performance) Regulations 2014, regulation 8

¹⁶⁶ *Ibid*, regulation 2

Poor standards of work, poor verbal or written communication and a consistent failure to achieve “reasonably agreed and realistic targets/objectives” are provided within a (non-exhaustive) list of conduct that might amount to “unsatisfactory performance”.¹⁶⁷

In May 2015, any unsatisfactory performance identified would be dealt with under the procedures set out within the 2014 Performance Regulations and the associated standard operating procedure.¹⁶⁸ At the end of the process of reviewing an officer’s apparent unsatisfactory performance, the options available included dismissal of the officer involved or a demotion in rank.¹⁶⁹

Any unsatisfactory performance of senior officers, being those at or above the rank of Assistant Chief Constable,¹⁷⁰ occurring in May 2015 was dealt with under The Police Service of Scotland (Performance) Regulations 2013.¹⁷¹ Any unsatisfactory performance of senior officers occurring on or after 1 April 2016 is dealt with under separate regulations.¹⁷²

Misconduct

The Police Service of Scotland (Conduct) Regulations 2014 outline how allegations of misconduct against police officers below the rank of Assistant Chief Constable are dealt with.¹⁷³ In May 2015, the provisions set out within the 2014 Conduct Regulations were supported by an associated Police Scotland standard operating procedure.¹⁷⁴

The 2014 Regulations contain a number of Standards of Professional Behaviour with which police officers require to comply:¹⁷⁵ Similar Standards of Professional Behaviour are imposed on senior officers (of Assistant Chief Constable rank and above) under separate regulations.¹⁷⁶ Conduct which amounts to a breach of the Standards of Behaviour, by constables or senior officers, will be misconduct, or potentially gross misconduct.¹⁷⁷ Some, but not all, of the Standards of Professional Behaviour are referred to within this note,¹⁷⁸ with the Standards broadly reflecting the expectations that the police service and the public have of how police officers should behave.¹⁷⁹

In circumstances where it can “reasonably be inferred that a constable may have committed a criminal offence” the Deputy Chief Constable:¹⁸⁰

(a) must refer the matter to the appropriate prosecutor; and

¹⁶⁷ *Police Scotland Capability (Attendance and Performance) (Police Officers) Standard Operating Procedure*, version 1.00, (PS17845), paragraph 3(c)

¹⁶⁸ *Ibid.*

¹⁶⁹ The Police Service of Scotland (Performance) Regulations 2014, regulations 40(a) and 40(b)

¹⁷⁰ The Police Service of Scotland (Performance) Regulations 2013, regulation 3(1)

¹⁷¹ *Ibid.*, regulation 23

¹⁷² The Police Service of Scotland (Senior Officers) (Performance) Regulations 2016

¹⁷³ The Police Service of Scotland (Conduct) Regulations 2014, regulation 3(1)

¹⁷⁴ *Police Service of Scotland (Conduct) Regulations 2014 SOP*, *supra*

¹⁷⁵ The Police Service of Scotland (Conduct) Regulations 2014, Schedule 1

¹⁷⁶ The Police Service of Scotland (Senior Officers) (Conduct) Regulations 2013, Schedule 1

¹⁷⁷ 2014 Regulations, regulation 2; 2013 Regulations, regulation 2. “Gross misconduct” means a breach of the Standards of Professional Behaviour so serious that demotion in rank or dismissal may be justified.

¹⁷⁸ Quoted at footnotes 97, 111, 363, 470 and 471.

¹⁷⁹ *Police Service of Scotland (Conduct) Regulations 2014 Guidance*, *supra*, paragraph 3.1.5. Also, *Police Service of Scotland (Conduct) Regulations 2014 SOP*, *supra*, Appendix ‘E’, page 50

¹⁸⁰ 2014 Regulations, regulation 9(1)

(b) may suspend or postpone any proceedings under these Regulations until the appropriate prosecutor intimates that—

(i) criminal proceedings are not to be brought in respect of any matter mentioned in the misconduct allegation; or

(ii) any criminal proceedings which have been brought have been concluded.

In May 2015, in general terms it was “unlikely that Police Scotland would investigate misconduct while there [were] on-going criminal proceedings”.¹⁸¹ Where such criminal proceedings resulted in an acquittal, “consideration will then need to be given as to whether [to] instigate misconduct proceedings”.¹⁸² Relevant factors to be considered in these circumstances included whether it was in the public interest to instigate such proceedings; whether the allegation was in substance the same as that which was determined during criminal proceedings; and where the evidence available did not reach the criminal standard of proof beyond reasonable doubt, but did demonstrate sufficient evidence on the balance of probabilities.¹⁸³

With regard to the responsibilities of senior officers:¹⁸⁴

Those entrusted to supervise manage and lead others are role models for delivering a professional, impartial and effective policing service. They have a particular responsibility to maintain standards of professional behaviour by demonstrating strong leadership and by dealing with conduct which has fallen below these standards in an appropriate way, such as by improvement action or the formal misconduct process. Above all else police managers should lead by example.

Suspension

Under the 2014 Conduct Regulations:¹⁸⁵

A constable may be suspended from the office of constable by a senior constable¹⁸⁶ if an allegation comes to the senior constable’s attention from which it can reasonably be inferred that any conduct of the constable may—

(a) constitute a criminal offence; or

(b) amount to misconduct or gross misconduct.

Senior officers must not suspend other constables, however, unless an effective criminal or misconduct investigation may be prejudiced if the constable is not suspended and/or the suspension is required in the public interest.¹⁸⁷

¹⁸¹ *Police Service of Scotland (Conduct) Regulations 2014 SOP, supra*, paragraph 8.3.2

¹⁸² *Police Service of Scotland (Conduct) Regulations 2014 Guidance, supra*, paragraph 4.5.1

¹⁸³ *Ibid.* The list of factors within the guidance is identified as being “non-exhaustive”.

¹⁸⁴ *Ibid.*, paragraph 3.1.5

¹⁸⁵ The Police Service of Scotland (Conduct) Regulations 2014, regulation 8(1)

¹⁸⁶ Being a constable of higher rank than the suspended constable (*Ibid.*, regulation 8(9))

¹⁸⁷ *Ibid.*, regulations 8(2) and (3)

In May 2015, the provisions relating to suspension within the 2014 Conduct Regulations were supported by a Police Scotland standard operating procedure.¹⁸⁸ This identified that “in normal circumstances” an officer subject to a misconduct investigation with no criminal allegation involved would not be suspended.¹⁸⁹ Suspension would also not follow simply because an officer was the subject of a report from the Procurator Fiscal.¹⁹⁰ The standard operating procedure identified that, in general, “only the more serious cases will lead to suspension”¹⁹¹ and set out a list of matters to be considered prior to a suspension being imposed.¹⁹²

Completion of notebooks and use of force reporting

A position statement on behalf of the Chief Constable identifies that The Police Service of Scotland (Performance) Regulations 2014 and the Police Scotland Capability (Attendance and Performance) (Police Officers) SOP could have been used to address underperformance in circumstances where officers failed to complete their notebooks or properly report their use of force.¹⁹³ The position statement does not identify if an officer’s failure to complete their notebook or report their use of force could have been regarded as a breach of the Standards of Professional Behaviour that amounted to misconduct.¹⁹⁴

Section C – Engagement with family members and friends

(i) Delivery of death message

In May 2015, providing support to the family of a deceased was considered by Police Scotland to be one of the most important considerations during the investigation of a death.¹⁹⁵ The importance of the initial contact with a family was stressed across a number of Police Scotland’s standard operating procedures, with it “laying the foundations” for the subsequent relationship with the family.¹⁹⁶

In cases where a person had died in police custody or following contact with the police, Police Scotland were responsible for notifying the next of kin. The relevant Police Scotland standard operating procedure in May 2015 identified that:¹⁹⁷

¹⁸⁸ *Police Scotland Suspension from Duty Standard Operating Procedure*, version 1.01 (PS11562). This SOP refers to the Police Service of Scotland (Conduct) Regulations 2013, rather than the 2014 Regulations that superseded them, but was nevertheless in force at the time of the incident involving Sheku Bayoh in May 2015. It is assumed that the same procedures were used following the introduction of the 2014 Regulations.

¹⁸⁹ *Ibid*, paragraph 4.1

¹⁹⁰ *Ibid*, paragraph 4.3

¹⁹¹ *Ibid*, paragraph 5.2

¹⁹² *Ibid*, Appendix ‘M’

¹⁹³ *Position Statement on behalf of the Chief Constable, Police Scotland, in The Sheku Bayoh Inquiry*, 31 March 2022, paragraph 31 (SBPI-00173)

¹⁹⁴ As noted above, in complying with the Standards of Professional Behaviour, officers are to “ensure that accurate records are kept of the exercise of their duties and powers as required by relevant legislation, Service policies and procedures” (*Police Service of Scotland (Conduct) Regulations 2014 Guidance*, *supra*, paragraph 3.7.4).

¹⁹⁵ *Police Scotland Family Liaison Standard Operating Procedure*, version 2.01, paragraph 2.1 (PS10991)

¹⁹⁶ *Ibid*, paragraph 10.6.1. See also *Investigation of Death SOP*, version 1.02, *supra*, paragraph 20.3

¹⁹⁷ *Police Scotland Death or Serious Injury in Police Custody SOP*, *supra*, paragraph 5.5. The same wording continues to be used in the [national guidance](#) that is currently in place (within section 5, page 5).

Notification of the death to next of kin should not be delayed until after PIRC have been notified. The responsibility for notifying the next of kin lies with the police.

In 2015, PIRC were also of the view that Police Scotland were responsible for delivery of the death message to next of kin.¹⁹⁸

In May 2015, in allocating responsibility for delivery of the death message:¹⁹⁹

Families of bereaved persons should be informed of the fact of death as soon as is practical by an appropriately briefed officer ... As a general rule a family liaison officer should not be deployed to deliver a death message as this may delay the process of informing the family.

The deployment of a family liaison officer (FLO) to deliver a death message was considered to conflict with the requirement that a risk assessment be completed prior to a FLO's deployment to a family and, accordingly, this responsibility was usually allocated to another officer.²⁰⁰ This officer was required to gather and record information to enable a "suitable and sufficient" risk assessment to be completed prior to the FLO's deployment.²⁰¹

SIOs were required to brief and de-brief officers tasked with making initial contact with a victim's family, in particular those officers tasked with passing a death message.²⁰²

Statement taking

No guidance has been identified by the Inquiry regarding the length of time that officers should wait after delivery of a death message before taking statements from the recipients of that death message.

(ii) Appointment and deployment of Family Liaison Officers (FLOs)

In May 2015, in the event of a death that was followed by a police investigation, the police had a "positive duty to communicate effectively and inclusively with the bereaved family".²⁰³ On most occasions this was achieved through the deployment of a trained FLO who would, amongst other things, work to secure the confidence and trust of the family in order to enhance their contribution to the investigation.²⁰⁴ It was considered best practice for FLOs to be deployed in pairs, to ensure continuity.²⁰⁵ Where FLOs were to be deployed, intelligence checks were to be carried out to establish as much information as possible about the premises, occupants and family members involved.²⁰⁶

¹⁹⁸ *PIRC Family Liaison Officer Standard Operating Procedure*, version 1, page 2 (PIRC-03885). Note that this standard operating procedure was brought into force shortly after the incident involving Sheku Bayoh.

¹⁹⁹ *Police Scotland Family Liaison SOP*, *supra*, paragraphs 6.2.1 and 6.2.2

²⁰⁰ *Ibid*, paragraphs 6.2.3 and 6.2.4

²⁰¹ *Ibid*, paragraph 8.6.3

²⁰² *Ibid*, paragraph 8.6.5

²⁰³ *Ibid*, paragraph 3.1

²⁰⁴ *Ibid*, paragraph 3.2

²⁰⁵ *Ibid*, paragraphs 6.1.6 and 6.1.7

²⁰⁶ *Ibid*, paragraph 8.6.7

Police FLOs were to be deployed in every instance of a death in custody.²⁰⁷ This was intended to provide support to a family and ensure that they received relevant information connected with the inquiry and were able to direct questions to the SIO.²⁰⁸ Deployment was to take place “at the earliest possible moment after a risk assessment has been conducted”.²⁰⁹

In May 2015, with regard to the interaction between Police Scotland and PIRC FLOs following a death in custody:²¹⁰

The PIRC may elect to deploy their own FLOs, however; it may be that, for logistical reasons, a police FLO will require to be deployed in the initial stages. Discussions and careful negotiations will take place between the PIRC Senior Investigator and the SIO; ideally an independent FLO will be deployed.

In cases where COPFS directed an independent investigation following a death in custody, independent FLOs would be deployed by the PIRC.²¹¹

Handover to PIRC

Within a SOP published shortly after the incident involving Sheku Bayoh, PIRC identified that after the delivery of the death message by Police Scotland:²¹²

Police Scotland would normally deploy a FLO to the family should the death have occurred following police contact. However, immediately it is known that the PIRC will be carrying out an independent investigation, Police Scotland will liaise with the PIRC and arrange a handover of FLO responsibilities.

The PIRC SOP identified that such a handover to PIRC’s FLOs was to be done face-to-face and outlined the information that was to be passed to the PIRC FLOs at this time.²¹³ Completion of handovers by telephone was only to take place “when all other alternatives have been exhausted”.²¹⁴ To ensure a “smooth transition” it was recommended that the police and PIRC FLOs meet the family together for introductions to take place, although it was “accepted that there may be occasions where this is totally inappropriate”, for example where the family wished to have no contact with the police.²¹⁵

No such guidance relating to the handover from Police Scotland FLOs to the PIRC, or FLO cooperation between the two organisations more generally, is included within Police Scotland’s Family Liaison Standard Operating Procedure.

Liaison with COPFS

²⁰⁷ *Death or Serious Injury in Police Custody SOP, supra*, paragraph 5.6

²⁰⁸ *Death or Serious Injury in Police Custody SOP, supra*, paragraph 5.6

²⁰⁹ *Police Scotland Family Liaison SOP, supra*, paragraph 8.1.3. The process of carrying out such a risk assessment is set out within paragraph 8.6 of the same SOP.

²¹⁰ *Death or Serious Injury in Police Custody SOP, supra*, paragraph 5.8

²¹¹ *Police Scotland Family Liaison SOP, supra*, paragraph 6.1.2

²¹² *PIRC Family Liaison Officer SOP, supra*, page 2

²¹³ *Ibid*, pages 2 and 3

²¹⁴ *Ibid*, page 2

²¹⁵ *Ibid*, page 3

Police Scotland's cooperation with COPFS in relation to family liaison in 2015 was documented within a joint protocol.²¹⁶ This identified that Police Scotland FLOs "will be" deployed in a number of circumstances, including following deaths in custody.²¹⁷ The joint protocol outlined the responsibilities of Police Scotland's FLOs,²¹⁸ the role of COPFS's Victim Information and Advice (VIA) service,²¹⁹ and the liaison and subsequent handover between the two.²²⁰ The joint protocol identified that the "primary function" of the FLO is that of an investigator, with the needs of the family balanced with gathering evidence and preserving the integrity of the investigation.²²¹

The PIRC was not a party to the joint protocol, and it is unclear how Police Scotland and COPFS's cooperation and family liaison responsibilities would have been affected by PIRC's involvement in an investigation into a death in custody.

(iii) Family Liaison Strategy

In May 2015, in circumstances where FLOs were deployed following events that could have led to potential hostility towards Police Scotland, or questions about their impartiality, it was noted with Police Scotland's Family Liaison SOP that the importance of a family liaison strategy "cannot be overstated" and might extend beyond the scope of criminal investigation to include police complaints and misconduct enquiries.²²²

Police Scotland's senior investigating officer (SIO) was responsible for the formulation and implementation of the family liaison strategy.²²³ Formulation of the strategy was "essential" prior to any FLO deployment and set the objectives for the liaison between the family and the investigation, including the means of gathering information, keeping the family updated, and ensuring the investigation was not compromised by the disclosure of information.²²⁴ The strategy would take into account a number of important factors, including the selection and appointment of FLOs; communication with the family; media strategy; and exit strategy for the FLO.²²⁵

PIRC's Family Liaison SOP issued shortly after the incident involving Sheku Bayoh identified that Police Scotland's family liaison strategy was to form part of the handover of FLO responsibilities from Police Scotland to PIRC and the subsequent agreement of strategy where there might be parallel deployment of FLOs by PIRC and Police Scotland.²²⁶

The memorandum of understanding (MOU) entered into between the PIRC, Police Scotland and the SPA in 2020 (and, accordingly, not in place at the time of the incident

²¹⁶ *In Partnership, Managing Family Liaison, Joint Protocol between Association of Chief Police Officers in Scotland (ACPOS) and Crown Office and Procurator Fiscal Service (COPFS) (COPFS-05725)*

²¹⁷ *Ibid*, paragraph 1 (emphasis within original)

²¹⁸ *Ibid*, paragraph 4. This includes advising the family on the progress of an investigation and explaining police investigation and legal procedures, as appropriate.

²¹⁹ *Ibid*, paragraph 5

²²⁰ *Ibid*, paragraphs 10 - 32

²²¹ *Ibid*, paragraph 3

²²² *Police Scotland Family Liaison SOP, supra*, paragraph 6.1.5

²²³ *Police Scotland Crime Investigation Standard Operating Procedure*, version 2.00, paragraph 12.1 (PS11059)

²²⁴ *Police Scotland Family Liaison SOP, supra*, paragraph 8.1.1

²²⁵ *Ibid*, paragraph 8.1.4

²²⁶ *PIRC Family Liaison Officer SOP, supra*, page 2

involving Sheku Bayoh in May 2015) includes some information on the transfer of responsibility for family liaison from Police Scotland to the PIRC in instances where the PIRC is to take on an investigation,²²⁷ as well as the requirement to “take cognisance” of the needs of persons who have relevant protected characteristics and to support such persons with any necessary or reasonable adjustments.²²⁸

(iv) Updating the family throughout the investigation

Article 2

One aspect of the Procedural Obligation under Article 2 of the ECHR requires the participation of next-of-kin in the investigation process. As noted above, it is intended that the Procedural Obligation will be covered within a future law and practice note.

Police Scotland Standard Operating Procedures

In May 2015, families were not to be “deliberately misled”, and contact required to be honest and, as far as possible, open.²²⁹ Within an investigation:²³⁰

One of the primary concerns of family members will be the need for information. The trauma of bereavement can be compounded by the frustration of not knowing the surrounding facts. The victim's family must be provided with the timely sharing of all possible information so far as the investigation permits. The FLO should have direct communication with the SIO/SIM in connection with their role and issues concerning the family. Any information released to the family must first be authorised by the SIO/SIM.

In cases where direct dialogue with a family had been ineffective, strained or had broken down, a SIO could consider involving “local advocates” to facilitate communication.²³¹

Beyond the deployment of a FLO, the SIO was to “meet the family as soon as practicable and in conjunction with the wishes of the family”, with such a meeting being a “main priority” during the initial stage of the investigation to establish personal links with the family and ensure their needs were being met.²³² “The crucial importance of this meeting cannot be over emphasised”.²³³ To build trust with the family, any commitment or assurance given require to be documented, carried out and the result relayed to the family.²³⁴ The onus was on the SIO to overcome barriers or difficulties encountered in maintaining direct dialogue with a family.²³⁵ Following the introductory meeting, the SIO was to offer to visit the family at regular intervals.²³⁶

²²⁷ Memorandum of Understanding between The Police Investigations and Review Commissioner, Police Scotland and The Scottish Police Authority, 2020, *supra*, section 16.12

²²⁸ *Ibid*, section 16.13

²²⁹ Police Scotland Family Liaison SOP, *supra*, paragraph 10.6.2

²³⁰ *Ibid*, paragraph 10.6.4

²³¹ *Ibid*, paragraph 10.7.1

²³² *Ibid*, paragraphs 8.12.1 and 8.12.2

²³³ *Ibid*.

²³⁴ *Ibid*, paragraph 8.12.6

²³⁵ *Ibid*, paragraph 8.13.2

²³⁶ *Ibid*, paragraph 8.12.8

The Victims and Witnesses (Scotland) Act 2014

Some of the provisions within The Victims and Witnesses (Scotland) Act 2014 were in force in May 2015.²³⁷ The 2014 Act provides certain rights and support for persons who appear to be victims and witnesses in relation to criminal investigations or criminal proceedings, implementing Directive 2012/29/EU of the European Parliament and the Council.²³⁸ The 2014 Act applies to the Chief Constable of Police Scotland, as well as the Lord Advocate.²³⁹

The 2014 Act does not define the term “victim”, although it is identified that this may include prescribed relatives.²⁴⁰ The Directive, however, does include a definition in this regard that extends to cover “family members²⁴¹ of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person’s death”.²⁴²

Under the 2014 Act, Police Scotland must have regard to certain principles including victims and witnesses being able to obtain information about what is happening in an investigation or proceedings²⁴³ and having an ability to participate effectively in the investigation and proceedings.²⁴⁴ Since 23 December 2015,²⁴⁵ regard must also be had to the principle that victims be treated in a respectful, sensitive, tailored, professional and non-discriminatory manner.²⁴⁶

In implementation of part of the 2014 Act, the Victims’ Code for Scotland was first published by the Scottish Government in December 2015 and has subsequently been updated.²⁴⁷ The material sections, however, have remained unchanged in each version of the document. Additionally, since 2016, the Scottish Government has published Standards of Service for Victims and Witnesses.²⁴⁸

(v) Religious and cultural sensitivities

To comply with the Standards of Professional Behaviour police officers require to treat members of the public with respect and courtesy.²⁴⁹ Officers need to respect all individuals and their traditions, beliefs and lifestyles provided that such are compatible with the rule of law.²⁵⁰ More broadly, it is one of Police Scotland’s statutory policing principles that its policing should be “engaged with” local communities.²⁵¹

²³⁷ A summary of when provisions of the Act were brought into force may be found [here](#).

²³⁸ [Directive 2012/29/EU of the European Parliament and of the Council](#)

²³⁹ The Victims and Witnesses (Scotland) Act 2014, section 1(2), 2(2)

²⁴⁰ *Ibid*, section 2(6)

²⁴¹ Directive 2012/29/EU, Article 2(1)(b)

²⁴² Directive 2012/29/EU, Article 2(1)(a)(i)

²⁴³ 2014 Act, section 1(3)(a)

²⁴⁴ 2014 Act, section 1(3)(d)

²⁴⁵ The Victims’ Rights (Scotland) Regulations 2015 regulations 1(2), 2

²⁴⁶ 2014 Act, section 1A(2)(a)

²⁴⁷ [Victims’ Code for Scotland](#). Published in accordance with the 2014 Act, section 3B

²⁴⁸ [Standards of Service for Victims and Witnesses](#). Published in accordance with the 2014 Act, section 2(1).

²⁴⁹ The Police Service of Scotland (Conduct) Regulations 2014, Schedule 1

²⁵⁰ *Police Service of Scotland (Conduct) Regulations 2014 Guidance, supra*, paragraph 3.4.3. This is echoed within Police Scotland’s [Code of Ethics](#), which provides that: “I will show respect for all people and their beliefs, values, cultures and individual needs.”

²⁵¹ Police and Fire Reform (Scotland) Act 2012, section 32(b)(i)

In May 2015, Police Scotland's Diversity Booklet provided guidance to police officers in relation to a number of protected characteristics, including race, religion and faith, to assist them to "understand and respond appropriately to" different communities.²⁵²

Within the Diversity Booklet, reference was made to African / African Caribbean communities generally operating within "an extended family system".²⁵³ With regard to Muslim communities, it was noted that:²⁵⁴

Islam prescribes quite precise rules for conduct between the sexes, requiring that men and women do not mix together in ways that compromise their modesty and integrity. Communication may be more effective if the Officer is of the same gender as the person they are dealing with.

...

Many Muslim women may not be comfortable in mixed company and will tend to avoid being in a room if men are present. As such, any cross gender communication may cause difficulties or offence;

Family Liaison

In cases where there had been a death in custody in May 2015, cultural and religious sensitivities were to be a consideration throughout the family liaison process, along with the feelings and privacy of the family.²⁵⁵

In all cases of family liaison, a SIO was to establish as much information about a family prior to first meeting them, including determining any relevant cultural considerations, religious beliefs or communication requirements.²⁵⁶ In deploying a FLO, where a victim was from a minority group consideration was to be given to "having independent advice to assist with effective communication"²⁵⁷ and to the deployment of a FLO with specific knowledge and experience of the community in question,²⁵⁸ whilst striving to avoid such a deployment being seen as "tokenism".²⁵⁹ The gender of a FLO was identified as potentially being a "critical factor" for cultural and operational reasons.²⁶⁰

Community Advisors²⁶¹

Community Advisors are a group of volunteers from the community, police officers and staff members who provide advice on diversity issues, including around race and

²⁵² *Police Scotland Diversity Booklet – A Practical Guide*, version 1.00, 14 August 2013, page 4 (PS11300)

²⁵³ *Police Scotland Diversity Booklet – A Practical Guide*, *ibid*, page 81

²⁵⁴ *Ibid*, page 33 and page 35

²⁵⁵ *Death or Serious Injury in Police Custody SOP*, *supra*, paragraph 5.7

²⁵⁶ *Police Scotland Family Liaison SOP*, *supra*, paragraph 8.3.3

²⁵⁷ *Ibid*, paragraph 8.4.5

²⁵⁸ *Ibid*, paragraph 8.7.2

²⁵⁹ *Ibid*, paragraph 8.7.3

²⁶⁰ *Ibid*, paragraph 8.7.2

²⁶¹ Also referred to as "Lay Advisors" or "Community Lay Advisors" *Police Scotland Lay-Community Advisors Standard Operating Procedure*, version 2, paragraph 1.1 (PS11955)

religion.²⁶² The use of Community Advisors by Police Scotland stems from the content of the MacPherson Report.²⁶³

In May 2015, Community Advisors provided SIOs with advice and guidance in relation to diversity issues within their own area of expertise, for example the potential impact of an incident on specific communities or the impact of a proposed course of action by the police.²⁶⁴ Their use was to be “considered” in cases where there had been a death in custody, particularly when “dealing with families of persons with protected characteristics”.²⁶⁵ Community Advisors did not necessarily have to represent the community on which they were asked to advise; they might simply have particular knowledge of that community group.²⁶⁶ They were to be utilised in an advisory capacity, rather than as mediators or advocates.²⁶⁷ They were also not to act as an intermediary to aid communication with a victim, family or witness; this being the role of a FLO.²⁶⁸

The procedures, roles and responsibilities of Community Advisors varied across different parts of Scotland, although there was an intention to move towards standardisation in this area.²⁶⁹ Within P Division (Fife), there were 24 members sitting on the “Lay Advisors Group” who assisted with the ongoing enquiry into “hate crime of serious proportions”.²⁷⁰ Beyond this, Community Advisors’ roles could include the provision of advice on critical incidents, reviewing equality impact assessments and providing advice on policies and procedures.²⁷¹

Community Impact Assessments

Community Impact Assessments (CIAs) are a “tool to help record, monitor and take appropriate action in relation to community tensions”.²⁷² In May 2015, they were mandatory in all cases where a “critical incident” was declared,²⁷³ being:²⁷⁴

*Any incident where the effectiveness of the police response is likely to have significant impact on the confidence of the victim, their family and/or the community.*²⁷⁵

²⁶² *Crime Investigation SOP, supra*, paragraph 9.1

²⁶³ *Lay-Community Advisors SOP, supra*, paragraph 1.2

²⁶⁴ *Crime Investigation SOP, supra*, paragraph 9.2

²⁶⁵ *Death or Serious Injury in Police Custody SOP, supra*, paragraphs 5.9 and 5.10

²⁶⁶ *Lay-Community Advisors SOP, supra*, paragraph 1.3

²⁶⁷ *Crime Investigation SOP, supra*, paragraph 9.4

²⁶⁸ *Lay-Community Advisors SOP, supra*, paragraph 3.4

²⁶⁹ *Lay-Community Advisors SOP, supra*, paragraphs 1.5 and 1.6. In 2013 it was identified that guidance was issued to forces as far back as 2005 “in an attempt to standardise the use of these advisors across Scotland” (*Equality and Diversity in Police Scotland 2013, supra*, page 14).

²⁷⁰ *Ibid*, Appendix C, paragraphs 2.1 and 2.2

²⁷¹ *Lay-Community Advisors SOP, supra*, paragraph 3.1. Within ‘C Division (Forth Valley), for example, “appropriate” standard operating procedures were forwarded to Lay Advisors as part of the Equality Impact Assessment process (Appendix A, paragraph 2.7).

²⁷² *Police Scotland Community Impact Assessment Standard Operating Procedure*, version 2.00, paragraph 1.3, (PS11107)

²⁷³ *Ibid*, paragraph 2.1

²⁷⁴ *Ibid*, paragraph 3.3

²⁷⁵ The same definition is contained within the *Police Scotland Critical Incident Management Standard Operating Procedure*, version 2.01, (PS11003), at paragraph 2.1. This SOP acknowledges that it is a “deliberately broad definition” and provides some guidance on how it should be interpreted (paragraphs 2.2 – 2.5)

For deaths in custody, involving the community at an early stage would “lessen the impact of a Critical Incident and provide a bridge between the police and the deceased’s family and the wider community”.²⁷⁶ The SIO could consider conducting a CIA in these circumstances.²⁷⁷

In May 2015, CIAs were most commonly used after an event so that interventions could be made to restore “tranquillity/normality” to an area or group affected by a critical incident.²⁷⁸ CIAs required the completion of a risk assessment²⁷⁹ and, where risks were identified, consideration could be given to using particular measures in response.²⁸⁰

It was for the SIO to identify the person responsible for the strategic oversight of a CIA and ensure it is completed at specific points.²⁸¹ CIAs had to be made “within a reasonable timescale from the occurrence of a major crime or significant incident and be completed as soon as possible thereafter”.²⁸² They would be reviewed at least every seven days thereafter until the CIA is closed or archived.²⁸³

Within a separate SOP, it was provided that following a major incident which might have a significant impact upon the community an initial assessment required to be compiled “at the earliest opportunity” once the incident had been contained and the affected area identified.²⁸⁴ This would normally be within four hours of the event and, in any case, within the first 24 hours. Additional assessments would be conducted thereafter.²⁸⁵

Section D – Investigative powers and recovery of evidence

(i) Powers of entry and search

Article 8 of the ECHR states:

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

2. 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 national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for

²⁷⁶ *Death or Serious Injury in Police Custody SOP, supra*, paragraph 5.12

²⁷⁷ *Ibid*, paragraph 5.13

²⁷⁸ *Community Impact Assessment SOP, supra*, paragraph 2.7

²⁷⁹ *Ibid*, paragraphs 6 and 7

²⁸⁰ *Ibid*, paragraph 8. This includes, for example, meetings with key family members where high or medium risks are identified.

²⁸¹ *Ibid*, paragraph 10.1

²⁸² *Ibid*, paragraph 10.2

²⁸³ *Ibid*, paragraph 10.4

²⁸⁴ *Crime Investigation SOP, supra*, paragraph 10.3

²⁸⁵ *Ibid*, paragraph 10.4

*the protection of health or morals, or for the protection of the rights and freedoms of others.*²⁸⁶

It has been held that the actions of the police when entering homes must be “lawful”²⁸⁷ and proportionate to the aim pursued.²⁸⁸ Measures involving entry to private homes must be “in accordance with the law”,²⁸⁹ must pursue one of the legitimate aims listed in Article 8,²⁹⁰ and must be “necessary in a democratic society” to achieve that aim.²⁹¹

Search of premises

Premises can be searched by police officers on various legal bases, notably following receipt of a warrant; with the consent of the person in charge of the premises; in cases of urgency; and to prevent the commission of offences.

Warrants

Search warrants may be granted on their own either before or after the arrest of the accused, and even where there is no known accused, provided that the justice is satisfied that they are necessary for the investigation of crime and/or are authorised by any statute under which they are sought.²⁹²

Once officers are carrying out a search under a warrant, they are permitted to seize items unrelated to the specific charge on the complaint if those items are suspicious or indicate other offences, and the finding of such items would be admissible evidence in any further proceedings.²⁹³

Under the Misuse of Drugs Act 1971, a warrant may be granted permitting an officer to search a property (and persons therein) where there are reasonable grounds for suspecting that controlled drugs are in the possession of a person on any premises.²⁹⁴ Controlled drugs found in the course of the search may be seized.²⁹⁵

Irregular searches may be excused and the result admitted in evidence whether or not they purported to proceed on a warrant,²⁹⁶ with the trial judge given discretion to take account of the degree of invasion of privacy,²⁹⁷ the good faith of the searcher,²⁹⁸ and the materiality of the evidence seized,²⁹⁹ amongst other factors.

²⁸⁶ A guide to the case law relevant to home visits, searches and seizures in the context of Article 8 can be found within the ECHR’s [Guide on Article 8](#) at page 63 and pages 116 to 119.

²⁸⁷ [BOSTAN c. RÉPUBLIQUE DE MOLDOVA \(coe.int\)](#)

²⁸⁸ [McLEOD v. THE UNITED KINGDOM \(coe.int\)](#)

²⁸⁹ [PANTELEYENKO v. UKRAINE \(coe.int\)](#)

²⁹⁰ [KILYEN v. ROMANIA \(coe.int\)](#)

²⁹¹ [CAMENZIND v. SWITZERLAND \(coe.int\)](#)

²⁹² Renton and Brown, *Criminal Procedure*, *supra*, Volume 1, Chapter 5, 5-05. A concise summary of the law in relation to warrants relating to the search of premises can be found in paragraphs 5-01 to 5-06.

²⁹³ *HM Advocate v Hepper* 1958 JC 39

²⁹⁴ Misuse of Drugs Act 1971, section 23(3)

²⁹⁵ *Ibid.*

²⁹⁶ Renton and Brown, *Criminal Procedure*, *supra*, Volume 1, Chapter 7, 7-26

²⁹⁷ *Laverie v Murray* 1964 (SLT) Notes 3

²⁹⁸ *HM Advocate v Baillie* 2013 SCCR 285

²⁹⁹ *Hoekstra v HM Advocate (No. 5)* 2002 SLT 599

The procedures that officers were recommended to follow in applying for search warrants in May 2015 included those set out within joint guidance between COPFS and the Association of Chief Police Officers in Scotland (ACPOS).³⁰⁰

Consent

Police officers may enter premises with the consent of the owner or occupier. Where such consent is refused, the police will require to obtain a warrant, or rely on statutory or common law authority, to overcome the refusal.³⁰¹ There is no legal requirement on the police to advise someone specifically of their ability to refuse a police request to enter a private property unless he is in the same position as a suspect who would be entitled to refuse to answer questions.³⁰² The police cannot, however, secure consent through deliberate misrepresentations of fact, including a suggestion that a warrant is not required or that they already have one.³⁰³

Within the COPFS and ACPOS joint guidance, it was noted that searches by consent:³⁰⁴

... should be avoided. There are very few circumstances where it is appropriate. Search by consent is more likely to lead to arguments in court, and the possible collapse of a case, than a search under warrant.

To avoid any allegations of undue pressure being placed on the person from whom consent was requested, officers were advised to ensure that the consent to the search be properly recorded in their notebook.³⁰⁵ The relevant entry was to be signed by the person giving consent and to specify that consent was freely given. Where there was any doubt that consent was being freely given it was recommended that a warrant be sought.

Urgency

In certain circumstances, police officers may enter premises without a warrant or consent where such entry is justified by the urgency of the need to obtain, or prevent the loss of, certain evidence.³⁰⁶ In the case of *Cairns v Keane*, for example, it was held that police officers were justified to enter a property without a warrant in order to administer a breathalyser test.³⁰⁷

Within the COPFS and ACPOS joint guidance, it was noted that where a suspect was in custody “the urgency attached to any search is diminished”.³⁰⁸ If the police wished to search the home of the accused, or a third party, in those circumstances they were

³⁰⁰ *Crown Office and Procurator Fiscal Service (COPFS) and Association of Chief Police Officers in Scotland (ACPOS) Joint Guidance on Search Warrants*, pages 12 – 24 (PS18500)

³⁰¹ *Gillies v Ralph* 2008 SCCR 887, at paragraph [9]

³⁰² *Freeburn v HM Advocate* 2012 SCCR 809

³⁰³ *Lawrie v Muir* 1950 JC 19

³⁰⁴ *COPFS and ACPOS Joint Guidance on Search Warrants*, *supra*, paragraph 2.5 at page 5

³⁰⁵ *Ibid*, paragraph 2.5 at page 6

³⁰⁶ *McPherson v HM Advocate* 1972 SLT (Notes) 71 and *HM Advocate v M’Guigan* 1936 JC 16

³⁰⁷ *Cairns v Keane* 1983 SCCR 277

³⁰⁸ *COPFS and ACPOS Joint Guidance on Search Warrants*, *supra*, paragraph 2.8 at page 9

recommended to obtain a warrant “unless they had compelling reasons to suspect that a third party would interfere/dispose of any evidence”.³⁰⁹

Prevention of the commission of offences

The police are entitled to use force to enter premises without a warrant in order to fulfil their duty to protect life and property in terms of section 20 of the Police and Fire Reform (Scotland) Act 2012.³¹⁰

In addition to this, police officers have the power to enter private premises to stop the commission of offences:³¹¹

At common law a police-officer who has information that an offence is being committed, may, if necessary, with or without a warrant, enter upon private property for the purpose of ascertaining the fact, of stopping the commission of the offence, and if necessary of apprehending the wrongdoer.

Entry must be with this intention as “an officer who enters premises in order to investigate crime or to act otherwise than within the ostensible scope of his duties may be doing so without lawful authority and thus as a trespasser”.³¹² “There is no absolute rule that police officers may only enter premises if they have a warrant or statutory authority to do so”, but if they do so enter, “the question whether what they have done was unlawful and went beyond the execution of their duties” depends on all the circumstances.³¹³

Diversity issues when carrying out searches

In May 2015, the procedures to be followed by police officers in carrying out searches were set out within the Search Standard Operating Procedure.³¹⁴ When planning “building searches”, it was noted that, amongst other factors, account was to be given to the identity of the occupants, with consideration given to “diversity factors” such as language barriers and the gender of searchers.³¹⁵ No further guidance was provided as to how officers were to account for such factors.

In May 2015, Police Scotland’s Interpreting and Translating Services SOP did not make it mandatory that a qualified interpreter be used to facilitate communication with a person whose first language was not English when a property was to be searched.³¹⁶ Where there was doubt about whether the services of an interpreter were required, advice was to be sought from a supervisor and “the principle of fairness to the accused

³⁰⁹ *Ibid.*

³¹⁰ *Paton v Dunn* 2012 SCCR 441

³¹¹ *Shepherd v Menzies* (1900) 2 F 443, at 445, 446, per Lord Kellachy. *Stair Memorial Encyclopaedia*, Police (2nd Reissue), paragraph 100, notes that there is some uncertainty about the scope of this power and the test that requires to be met to permit an officer to enter premises in these circumstances.

³¹² *Stair Memorial Encyclopaedia*, Police (2nd Reissue), paragraph 113, with reference to *Great Central Rly Co v Bates* [1921] 3 KB 578 and *Davis v Lisle* [1936] 2 KB 434

³¹³ *Turnbull v Scott* 1990 SCCR 614 at 617, per Lord Cowie.

³¹⁴ *Police Scotland Search Standard Operating Procedure*, version 2.00 (PS10995)

³¹⁵ *Ibid.*, paragraph 6.8.2

³¹⁶ *Police Scotland Interpreting and Translating Services Standard Operating Procedure*, version 1.01, paragraph 2.2.1 (PS11387). Whilst not contained within the “mandatory” grounds for provision of an interpreter within paragraph 2.2.1, the SOP identifies that “the need for the presence of interpreters when impressions, samples or photographs are obtained is self-evident” (paragraph 3.6.1).

or suspect should be the prime consideration”.³¹⁷ It was identified that it was possible to use friends, relatives or neighbours, or police officers with particular linguistic abilities, to assist with communication in “non-investigatory (informal) settings”.³¹⁸

The Victims’ Code for Scotland, which was first published in December 2015 (and, as a consequence, was not in place at the time the incident involving Sheku Bayoh took place), refers to a “right to interpretation and translation” that permits interpreters to be requested where necessary to, for example, help someone to understand questions they have been asked.³¹⁹

The Inquiry has not identified guidance that required persons to be provided with alternative accommodation when their property was searched in May 2015, or guidance about how persons with disabilities were to be supported whilst such searches are taking place.

Removal of articles

The Procurator Fiscal has a common law right to remove articles such as vehicles believed to be connected with a crime, at least for the purpose of examining them, where the person in whose custody they were – not necessarily the owner – consents.³²⁰ The police have no such power unless they are acting on the instructions of the Procurator Fiscal, meaning that the consent of the owner is required.³²¹

Articles which are open to view and thus do not need to be searched for may be taken by police who “come across them” while legitimately on premises, even where there is no search warrant in respect of them, but they are not entitled to carry out a search of the property, unless in cases of urgency.³²² A distinction can therefore be drawn between the legality of an entry to premises, for example in cases of urgency, and the legality of a search without warrant carried out during that entry.³²³

Unexpected finds

In May 2015, searching officers were recommended to have a strategy for dealing with “unexpected finds”, where items that weren’t covered by the original warrant were found in the course of the search.³²⁴ Where there was any doubt about whether an item was covered by the original warrant then the search in question should have ceased to allow a further warrant to be obtained, except in cases of urgency.³²⁵

Search of persons

The law relating to the search of persons is similar to that relating to the search of premises, as outlined above. It is, and was in May 2015, generally unlawful for the

³¹⁷ *Ibid*, paragraph 2.2.3

³¹⁸ *Ibid*, paragraphs 2.7.1 and 2.7.2

³¹⁹ [Victims' Code for Scotland](#), page 6

³²⁰ *Watson v Muir* 1938 JC 181, where consent was provided by the garage that held the vehicle, not the owner himself.

³²¹ *Mowbray v Valentine* 1992 SLT 416

³²² Renton and Brown, *Criminal Procedure*, *supra*, Volume 1, Chapter 7, 7-27.1

³²³ *Campbell v Vannet* 1997 SCCR 787

³²⁴ *COPFS and ACPOS Joint Guidance on Search Warrants*, *supra*, paragraph 6.5 at page 18

³²⁵ *Ibid*.

police to search without warrant a person who is not in their custody except with that person's consent or where there was an express statutory power to do so.³²⁶

Warrants may be granted to search a suspect who has not been arrested, or even someone who is not a suspect.³²⁷ The right to search extends to include the taking of mouth swabs, provided they are taken for the purpose of investigating the offence for which the suspect has been arrested.³²⁸

The police are not entitled at common law to search without warrant suspects who they have not apprehended, except in cases of urgency.³²⁹ Urgency is widely interpreted in favour of the police and, for example, has been held to cover the possibility that a suspect detained but not arrested may wash suspicious marks off his hands.³³⁰

Any requirement to obtain a warrant to search a person is rendered unnecessary by the consent of the person concerned.³³¹ Where a person whom the police are about to search has the right to refuse to be searched, they are obliged to tell him of that right only if he is in the same position as a suspect who would be entitled to a caution before being asked questions.³³²

Consent for a search is not required where the police are acting under statutory powers.³³³ At the time of the incident involving Sheku Bayoh it was possible, for example, for an officer to search a person where they had reasonable grounds to suspect that person was in illegal possession of an article with a blade;³³⁴ where they had detained that person;³³⁵ or where the person had been arrested and was in custody,³³⁶ in which case mouth swabs were specifically permitted to be taken.³³⁷

(ii) Recovery of productions, equipment and clothing

Recovery of productions

Following a death in custody in May 2015, responsibility for securing evidence and taking appropriate action in an investigation, including "preservation of scenes and productions", remained with the police "until such times as the PIRC [had] taken over the investigation".³³⁸

³²⁶ Renton and Brown, *Criminal Procedure*, *supra*, Volume 1, Chapter 7, 7-21.2

³²⁷ *Archibald v Lees* 1995 SLT 231; *Hay v HM Advocate* 1968 JC 40; *Renton and Brown Criminal Procedure*, *supra*, Volume 1, Chapter 5, 5-08

³²⁸ *Lukstins v HM Advocate* 2012 SCCR 787; *HM Advocate v Millar* 2017 SCCR 1

³²⁹ Renton and Brown, *Criminal Procedure*, *supra*, Volume 1, Chapter 7, 7-22

³³⁰ *Bell v Hogg* 1967 JC 49

³³¹ *Davidson v Brown* 1990 JC 324; *Devlin v Normand* 1992 SCCR 875

³³² Renton and Brown, *Criminal Procedure*, *supra*, Volume 1, Chapter 7, 7-23, with reference to *Brown v Glen* 1998 JC 4

³³³ *Chassar v MacDonald* 1996 SLT 1331

³³⁴ Criminal Law (Consolidation) (Scotland) Act 1995, section 50(1)

³³⁵ Criminal Procedure (Scotland) Act 1995, section 14(7)(b)

³³⁶ Criminal Procedure (Scotland) Act 1995, section 18(2)

³³⁷ Criminal Procedure (Scotland) Act 1995, section 18(6A). There is also a separate power that permits, in certain circumstances, mouth swabs to be taken from persons who are in police custody in order to test for Class A drugs (1995 Act, section 20A).

³³⁸ *Death or Serious Injury in Police Custody SOP*, *supra*, paragraph 4.6

It was “essential” that only necessary productions were seized.³³⁹ They were to be lodged as soon as possible after seizure in a designated secure storage area.³⁴⁰ Vehicles “should only be seized and retained if authorised by statute or if they are of **intrinsic evidential value**”.³⁴¹ There were specific circumstances in which vehicles could be removed, including where they were a “crime production”.³⁴²

When seizing evidentially important items that might have been subjected to DNA examination, officers required to ensure that “all steps [were] taken to avoid contamination” including “changing the disposable gloves worn **throughout the time when** handling and packaging the item”.³⁴³ If forensic analysis or photography of productions was required, “the Enquiry Officer will be responsible for arranging this and completing the necessary ERF”.³⁴⁴

Recovery of equipment and clothing

In May 2015, following a death in custody:³⁴⁵

Officers and staff involved in the situation may, dependent on circumstances, be requested to submit themselves to a medical examination and there might be a requirement for their clothing and other police equipment to be seized as a production pending the outcome of the investigation / Fatal Accident Inquiry. The reason for a medical examination and clothing / equipment seizure should be fully documented. There must be regular and ongoing liaison between the PIRC and the Police.

Where necessary to preserve evidence, such as clothing, from the officers involved in an incident, seizure was to take place “following any legal advice (if appropriate) and should not be delayed unnecessarily”.³⁴⁶

Whilst police uniforms and equipment issued to officers remained the property of Police Scotland, investigators required to show “respect and tact” when requesting clothing from officers.³⁴⁷ Personal clothing was not the property of Police Scotland and could not be seized “unless as evidence”.³⁴⁸ Such seizures were only to be considered “in exceptional circumstances” with the legal requirements the same as those for any criminal investigation.³⁴⁹

³³⁹ *Police Scotland Productions Standard Operating Procedure*, version 2.00, paragraph 1.4.1 (PS11427). It is noted elsewhere in this SOP that guidance from COPFS reiterates that only necessary productions be seized in sudden death cases (paragraph 6.17).

³⁴⁰ *Ibid*, paragraph 3.2.1

³⁴¹ *Police Scotland Seizure of Vehicles Standard Operating Procedure*, version 3.00, paragraph 1.3 (PS11953) (emphasis within original)

³⁴² *Ibid*, paragraph 5.1

³⁴³ *Productions SOP*, *supra*, paragraph 3.1.6 (emphasis within original)

³⁴⁴ *Ibid*, paragraph 3.3.5. An “ERF” is a Scottish Police Authority Forensic Services Examination Request Form.

³⁴⁵ *Death or Serious Injury in Police Custody SOP*, *supra*, paragraph 5.14

³⁴⁶ *Post Incident Procedures Standard Operating Procedures*, *supra*, paragraph 9.3

³⁴⁷ *Ibid*, paragraph 13.2

³⁴⁸ *Ibid*, paragraph 13.8

³⁴⁹ *Ibid*.

Requests for clothing required to be justified and recorded by the Post Incident Manager (PIM).³⁵⁰ The PIM would discuss the rationale for the seizure with the SIO and PIRC Senior Investigator (SI) before explaining this to the officers involved.³⁵¹ It was for the SIO and the PIRC SI to decide which items of clothing should be seized.

If there was a requirement for officers to wait during post-incident procedures they were to be permitted to “de-kit”, placing their equipment “in an agreed area where they have visual control over it”.³⁵²

Obtaining forensic samples from officers was to be considered on a case-by-case basis. For example:³⁵³

An incident may reveal that fibre transfer or footwear marks etc are crucial to the investigation and will help to provide a truthful and accurate account of what happened.

Requests for forensic samples were to be “relevant, borne out of sound rationale, documented and subject to legal advice where appropriate”.³⁵⁴

(iii) Searches of Police Scotland databases

In May 2015, under the Data Protection Act 1998:³⁵⁵

(1) A person must not knowingly or recklessly, without the consent of the data controller³⁵⁶—

(a) obtain or disclose personal data or the information contained in personal data,³⁵⁷ or

(b) procure the disclosure to another person of the information contained in personal data.

(2) Subsection (1) does not apply to a person who shows—

(a) that the obtaining, disclosing or procuring—

(i) was necessary for the purpose of preventing or detecting crime, or

(ii) was required or authorised by or under any enactment, by any rule of law or by the order of a court,

³⁵⁰ *Ibid*, paragraph 13.3. It is noted that a “desire to seize clothing simply as a contingency measure may not be seen as a valid reason”.

³⁵¹ *Ibid*, paragraph 13.4

³⁵² *Ibid*, paragraph 8.16

³⁵³ *Ibid*, paragraph 14.5.3

³⁵⁴ *Ibid*.

³⁵⁵ Data Protection Act 1998, section 55. Personal data was exempt from the provisions of this section where required for the purpose of safeguarding national security (1998 Act, section 55(8) and section 28(1)).

³⁵⁶ Defined within the section 1(1) of the 1998 Act as a person who “determines the purposes for which and the manner in which any personal data are, or are to be, processed”.

³⁵⁷ See the case of *R v Rooney* [2006] EWCA Crim 1841 in relation to the distinction between “personal data” and “information contained in personal data”.

(b) that he acted in the reasonable belief that he had in law the right to obtain or disclose the data or information or, as the case may be, to procure the disclosure of the information to the other person,

(c) that he acted in the reasonable belief that he would have had the consent of the data controller if the data controller had known of the obtaining, disclosing or procuring and the circumstances of it, or

(d) that in the particular circumstances the obtaining, disclosing or procuring was justified as being in the public interest.

(3) A person who contravenes subsection (1) is guilty of an offence.

In May 2015, subject to certain exemptions,³⁵⁸ it was the duty of a data controller to comply with the data protection principles³⁵⁹ in relation to all personal data with respect to which he was the data controller.³⁶⁰ The Chief Constable of the Police Service of Scotland is the data controller for Police Scotland.³⁶¹

In May 2015, under the Computer Misuse Act 1990:³⁶²

A person is guilty of an offence if—

(a) he causes a computer to perform any function with intent to secure access to any program or data held in any computer, or to enable any such access to be secured;

(b) the access he intends to secure, or to enable to be secured, is unauthorised; and

(c) he knows at the time when he causes the computer to perform the function that that is the case.

Regulations pertaining to Police Scotland

The Police Service of Scotland (Conduct) Regulations 2014 include a Standard of Professional Behaviour relating to confidentiality.³⁶³

Constables treat information with respect and access or disclose it only in the proper course of their duties.

In May 2015, officers who were unsure if they should access information were to consult with their manager or data protection department before accessing same.³⁶⁴

³⁵⁸ Set out within the Data Protection Act 1998, Part IV

³⁵⁹ Data Protection Act 1998, Schedule 1

³⁶⁰ Data Protection Act 1998, section 4(4)

³⁶¹ [Data Protection Register](#)

³⁶² Computer Misuse Act 1990, section 1(1)

³⁶³ The Police Service of Scotland (Conduct) Regulations 2014, Schedule 1

³⁶⁴ *Police Service of Scotland (Conduct) Regulations 2014 Guidance, supra*, paragraph 3.8.2. Also, *Police Service of Scotland (Conduct) Regulations 2014 SOP, supra*, Appendix 'E', page 55

Police Scotland Standard Operating Procedures

Policing purpose for checks

In May 2015, under Police Scotland's Data Protection SOP:³⁶⁵

... any search of police systems must be for a policing purpose. There must be a clear and legitimate reason for any search of any police system.

Similarly, in May 2015, Police Scotland's SOPs relating to its Police National Computer (PNC) and Criminal History System (CHS) systems stated that all checks carried out "must be for a policing purpose and can be verified".³⁶⁶

A "policing purpose" included the prevention or detection of crime; prevention of harm/risk of harm to an individual or property; discharging statutory functions; and where required for legal proceedings or establishing or defending legal rights.³⁶⁷

Recording searches

To enable officers to provide reasons for carrying out searches they were to "ensure that any fields requiring 'enquirer' or 'reasons' are properly completed".³⁶⁸

For both the PNC and CHS systems, when requests for checks were made the requesting officer required to provide their personal details to the operator conducting the check and operators were not to carry out checks without receiving that information.³⁶⁹ Officers and staff had to be in a position to justify obtaining details from the PNC and CHS systems in order to comply with an audit, if required.³⁷⁰ The relevant SOPs noted that:³⁷¹

In all circumstances details of checks should be recorded by the requesting officer either in a specific register, notebook or by reference to a recognised computer information system.

Unauthorised searches

It is noted within the Data Protection SOP that:³⁷²

Searching police systems for unauthorised reasons is a criminal offence and a significant breach of Police Scotland regulations.

³⁶⁵ *Police Scotland Data Protection Standard Operating Procedure*, version 1.00, paragraph 3.3.11 (PS11455)

³⁶⁶ *Police Scotland PNC Use and Management Standard Operating Procedure*, version 2.00, paragraph 5.19.1 (PS11453) and *Police Scotland Criminal History System (CHS) Use and Management Standard Operating Procedure*, version 1.01, paragraph 5.10.1 (PS11436)

³⁶⁷ *Data Protection SOP*, *supra*, paragraph 3.2

³⁶⁸ *Ibid*, paragraph 3.4.3

³⁶⁹ *PNC Use and Management SOP*, *supra*, paragraph 5.19.3 and *Criminal History System (CHS) Use and Management SOP*, *supra*, paragraph 5.10.1

³⁷⁰ *PNC Use and Management SOP*, *supra*, paragraph 5.19.4 and *Criminal History System (CHS) Use and Management SOP*, *supra*, paragraph 5.10.2

³⁷¹ *Ibid*.

³⁷² *Data Protection SOP*, *supra*, paragraph 3.3.3 (emphasis within original)

Any officer or member of staff suspected of breaching section 55 of the Data Protection Act 1998 could be suspended pending the outcome of an investigation and disciplinary or court hearing.³⁷³ Any action in breach of the 1998 Act or the Computer Misuse Act 1990 would be considered gross misconduct.³⁷⁴ Mishandling of data held within the PNC or CHS systems would be “vigorously investigated and may lead to either disciplinary proceedings or criminal charges”.³⁷⁵

Recording and dissemination of intelligence

In May 2015, when deciding to create an intelligence record the test to be applied was whether the grounds on which officers may record and disseminate intelligence material had been met. These “Standard Grounds” were established where:³⁷⁶

It is believed that the recording and dissemination of intelligence material is likely to be of value in:

- *The interests of National Security;*
- *The prevention or detection of crime and disorder;*
- *The maintenance of community safety;*
- *The assessment or collection of any tax or duty or of any imposition of a similar nature; or*
- *Otherwise serves a significant public interest.*

The recording and dissemination of intelligence material does not include “Confidential Material” (confidential personal information, confidential journalistic material or matters subject to legal privilege) unless, any proposed dissemination takes due account of any restrictions on its use or requirement for special handling imposed by the officer who authorised its collection; and

The recording and dissemination of intelligence material would be in compliance with the Data Protection Act 1998.

“REFRACT” was the generic term used when submitting all counter-terrorism intelligence.³⁷⁷ Where it was not clear if intelligence should be classified in this way, Local Intelligence Officers were “encouraged to contact Special Branch at the sanitisation³⁷⁸ stage should clarification be required”.³⁷⁹ The fundamental principle of the recording of any intelligence “must be that it is accurate”.³⁸⁰

³⁷³ *Ibid*, paragraph 3.4.2

³⁷⁴ *Police Scotland Information Security Standard Operating Procedure*, version 1.00, paragraph 9.2 (PS11494). As will breach of the Official Secrets Acts 1911 and 1989.

³⁷⁵ *PNC Use and Management SOP*, *supra*, paragraphs 10.5.3 – 10.5.4; *Criminal History System (CHS) Use and Management SOP*, *supra*, paragraph 3.2

³⁷⁶ *Police Scotland Scottish Intelligence Database, Rules, Conventions and Data Input Standards*, version 13.1, June 2014, paragraph 1.18 (PS11430)

³⁷⁷ *Ibid*, Appendix C, page 35

³⁷⁸ The removal of any material that implicitly or explicitly identifies the source of the intelligence (paragraph 1.32)

³⁷⁹ *Scottish Intelligence Database, Rules, Conventions and Data Input Standards*, *supra*, Appendix C, page 35

³⁸⁰ *Ibid*, paragraph 1.28

The Scottish Intelligence Database guidance in force in May 2015 did not identify what information was to be classified as “counter-terrorism” intelligence.³⁸¹ To date, no Police Scotland guidance has been identified as to what constituted “counter-terrorism” intelligence in May 2015.

Section E – Identification of body and post-mortem

(i) Identification of body

As noted above, in May 2015 following a death in custody, responsibility for securing evidence and taking appropriate action in an investigation remained with the police until PIRC took over the investigation.³⁸² This included the responsibility for “identification”.

In the investigation of a death, one of Police Scotland’s “overriding principles” was that the identification of the deceased was a “priority”, provided it did not compromise the investigation.³⁸³

In May 2015, Police Scotland’s Investigation of Death SOP stated that:³⁸⁴

It is routinely accepted that all investigated deaths require a minimum of one person to confirm a person's identity to a police officer, though in suspicious or criminal deaths it is necessary that this identification be by two persons.

Identification can also be assisted by medical and forensic means.

Where identification has not been possible prior to removal of the body, arrangements must be made to have the required person(s) attend the Mortuary for identification purposes.

Within P Division (Fife), following receipt of instructions from the Procurator Fiscal “the full circumstances of the death [were] to be presented, in person, to the pathologist and formal identification carried out”.³⁸⁵

In non-suspicious circumstances, it appears photos may be used to identify a deceased, although the position in May 2015 is unclear.³⁸⁶ In drugs or suspicious deaths, it is identified within a SOP published after 3 May 2015:³⁸⁷

*... the body can be identified to **two** Police Officers by **two** NOK, who knew the deceased in life and then those two officers must make themselves available to identify the body prior to the Post Mortem.*

³⁸¹ *Scottish Intelligence Database, Rules, Conventions and Data Input Standards, supra.*

³⁸² *Death or Serious Injury in Police Custody SOP, supra, paragraph 4.6*

³⁸³ *Investigation of Death SOP, version 1.02, supra, paragraph 2.3*

³⁸⁴ *Ibid, paragraphs 19.4.2 – 19.4.4*

³⁸⁵ *Ibid, Appendix C, page 39*

³⁸⁶ *The Police Scotland Investigation of Death Standard Operating Procedure, version 2.00 (PS11901) (which was not in force at the time of the incident as it was published after 3 May 2015) refers to the use of a bus pass, driving licence or passport in this regard at paragraph 25.9.*

³⁸⁷ *Investigation of Death SOP, version 2.00, ibid, paragraph 25.9 (emphasis within original)*

The version of Police Scotland's Investigation of Death SOP in force in May 2015 contains reference to a similar process of identification to that outlined above, but this only applied to five divisions of Police Scotland (not including P Division (Fife)).³⁸⁸

Family Liaison

In May 2015, FLOs played a "crucial" role in the identification process, with close liaison between the FLO, the SIO and the Procurator Fiscal in relation to viewing and identification of a body.³⁸⁹ It was noted, however, that:³⁹⁰

... the formal identification procedure and viewing of the body are separate processes. The formal identification will form an essential element of the post mortem process.

The family were to be asked by the FLO, following consultation with the SIO, who they wished to formally identify the body.³⁹¹ Where a formal visual identification was "not appropriate", this was not to impact on a family's wish to view the remains for bereavement purposes.³⁹²

Major incidents

In May 2015, a Senior Identification Manager (SIM) could be appointed in response to major incidents³⁹³ and would be responsible for matters including identification procedures.³⁹⁴ It does not appear that the incident involving Sheku Bayoh would meet the definition of a major incident in this context.³⁹⁵

(ii) Post-mortem

In May 2015, in most cases of "un-natural" death within P Division (Fife), including all deaths in custody, the deceased would be conveyed to Edinburgh City Mortuary for examination.³⁹⁶ In such circumstances, "appropriate transport arrangements" were to be made by the police at the locus of a death in the community³⁹⁷ and bodies in police possession would be transported under the supervision of a police officer.³⁹⁸ Following a "natural" death, undertakers were to be used to transport the bodies using "suitable receptacles and vehicles" and wearing protective clothing.³⁹⁹

³⁸⁸ *Investigation of Death SOP*, version 1.02, *supra*, Appendix G, page 56. "Prior to Post Mortem examination, the body must be identified to both Pathologists directly by two persons who have known the deceased in life or by two Police Officers to whom identification has already been made by the two persons who knew the deceased."

³⁸⁹ *Family Liaison SOP*, *supra*, paragraphs 10.9.1 and 10.9.2

³⁹⁰ *Ibid*, paragraph 10.9.3

³⁹¹ *Ibid*, paragraph 10.9.9

³⁹² *Ibid*, paragraph 10.9.7

³⁹³ *Police Scotland Major Incidents – Initial Response, Roles and Structures Standard Operating Procedure*, version 2.00, paragraph 17.2 (PS11006)

³⁹⁴ *Crime Investigation SOP*, *supra*, paragraph 13.2

³⁹⁵ *Major Incidents – Initial Response, Roles and Structures SOP*, *supra*, paragraph 1.2

³⁹⁶ *Investigation of Death SOP*, version 1.02, *supra*, Appendix C, page 40

³⁹⁷ *Ibid*.

³⁹⁸ *Ibid*, page 39

³⁹⁹ *Ibid*.

Where there had been a death following police contact, the SIO was to advise the PIRC at a “very early stage” of the post-mortem arrangements.⁴⁰⁰ The PIRC would be responsible for deciding who would attend the post-mortem and a decision could be taken that the police would not be present.⁴⁰¹

Family Liaison

In May 2015, the FLO was to liaise closely with the SIO and Procurator Fiscal about arrangements for the post-mortem, in addition to viewing of the body, the identification process and release of the body for burial or cremation.⁴⁰²

Sensitive communication with the family was essential where, for example, an explanation was required as to why a post-mortem was required (“particularly where cultural or religious beliefs are contrary to the process taking place”);⁴⁰³ where the Procurator Fiscal or Pathologist deemed an invasive technique necessary during the post-mortem (such as the removal of body parts);⁴⁰⁴ or to prepare the family for viewing the body by providing information as to its condition.⁴⁰⁵ With regard to the body’s condition, it might also be necessary for the FLO to liaise with the Pathologist or mortuary staff to ensure that the body was in a “presentable state” before a viewing took place.⁴⁰⁶

Family requests concerning the nature of the viewing, contact with the body or performing cultural rites were to be met, wherever possible.⁴⁰⁷ Where not possible, a full explanation was to be provided to the family.⁴⁰⁸

Retention of organs and release of body

At the conclusion of the post-mortem, the FLO was to establish which tissues, organs and/or samples had been retained for further pathological examination and the reasons for their retention.⁴⁰⁹ The retention of such tissues, organs and/or samples, and the reasons for same, were to be set out in a letter from the Procurator Fiscal and were to be provided by the FLO to the family.⁴¹⁰

The Procurator Fiscal was responsible for authorising the release of the body of the victim to the family.⁴¹¹ The FLO was to liaise closely with the SIO and Procurator Fiscal to ensure that the family were kept informed about this process.

Religious and cultural sensitivities

⁴⁰⁰ *Death or Serious Injury in Police Custody SOP, supra, paragraph 7.1*

⁴⁰¹ *Ibid, paragraph 7.2*

⁴⁰² *In Partnership, Managing Family Liaison, Joint Protocol between ACPOS and COPFS, supra, paragraph 6*

⁴⁰³ *Family Liaison SOP, supra, paragraph 10.10.1*

⁴⁰⁴ *Ibid, paragraph 10.9.5*

⁴⁰⁵ *Ibid, paragraphs 10.9.10 and 10.9.11. “Where viewing takes place after the post mortem the FLO should, in advance, explain to the family the necessity and consequences of the procedure.”*

⁴⁰⁶ *Ibid, paragraph 10.9.11*

⁴⁰⁷ *Ibid, paragraph 10.9.14*

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *Ibid, paragraph 10.11.1*

⁴¹⁰ *Ibid, paragraphs 10.11.2 and 10.11.3*

⁴¹¹ *Ibid, paragraph 10.11.4. Also, Investigation of Death SOP, version 1.02, supra, paragraph 5.4.*

In May 2015, Police Scotland's Investigation of Death SOP noted that:⁴¹²

When death occurs in specific religions and cultures, family members may seek a quick resolution to enquiries and the release of the body. Reference should be made to the Police Scotland Diversity Booklet – A Practical Guide to ensure a professional approach is adopted in these circumstances.

Within this Diversity Booklet, with reference to "African / African Caribbean" culture, it was noted that "customs relating to death vary according to religious beliefs and traditions".⁴¹³ The guidance provided for sudden deaths involving persons of Muslim faith is as follows:⁴¹⁴

Be aware of the potential conflict that could arise from a sudden death and the sensitivities around the requirement for a post mortem. It may be prudent to involve an elder or the local Imam (Spiritual Leader) at an early stage to explain the circumstances and necessity for the procedure;

Muslims are always buried as they believe in the resurrection of the body after death. Burial should take place as soon as possible after death with a strong emphasis on it being done the same day. Delay in burial can cause families more grief;

Interference with the corpse is deeply resented and this includes post mortem. Muslim families will do their utmost to avoid a post mortem. If aware of this, medical staff can usually ensure that medical records have enough information to avoid the need for a post mortem;

Rules concerning separation of the sexes apply to the corpse therefore Officers of the same gender as the deceased should be used to deal with the body.

The Inquiry has not identified any specific Police Scotland guidance regarding the handling of bodies of deceased persons of Muslim faith.

(iii) Repatriation

In May 2015, Police Scotland's Investigation of Death SOP noted that:⁴¹⁵

In the event of a suspicious death where the victim was a foreign national, the relevant consulate should be contacted and advised of the fact of death and that a police investigation into those circumstances is ongoing.

The Inquiry has not identified any guidance as to whether PIRC were responsible for making such contact in cases where there had been a death in custody in May 2015. Similarly, no guidance has been identified in relation to the repatriation of bodies of persons who died in Scotland at that time.

⁴¹² Investigation of Death SOP, version 1.02, *supra*, paragraph 20.4

⁴¹³ Police Scotland Diversity Booklet – A Practical Guide, *supra*, page 82

⁴¹⁴ *Ibid*, pages 36 – 37

⁴¹⁵ Investigation of Death SOP, version 1.02, *supra*, paragraph 22.1

Section F – Communication and liaison

(i) Communication with the media

Police Scotland Standard Operating Procedures

Media Standard Operating Procedure

From the material that the Inquiry has ingathered, it does not appear that Police Scotland had a dedicated SOP in place on 3 May 2015 covering media engagement. Police Scotland’s first Media SOP was published on 5 November 2015.⁴¹⁶

Joint Protocol between COPFS, Police Scotland and PIRC

The Media SOP makes reference to a joint protocol between COPFS, Police Scotland and the PIRC in relation to the media.⁴¹⁷ This joint protocol was in force in May 2015 and aimed to distinguish between the roles of the three organisations in providing information at different stages of criminal proceedings and to clarify what information could be shared with, and reported by, the media in the course of those proceedings.⁴¹⁸

In the investigation of deaths, initial enquiries arising from the circumstances of a death were to be directed to Police Scotland.⁴¹⁹ Once a case had been reported to the Procurator Fiscal, further media enquiries were to be directed to COPFS.⁴²⁰ The protocol notes that “whenever possible, nearest relatives of the deceased will always be informed and any other relevant agencies consulted, before information is provided to the media”.⁴²¹

Initial media enquiries about investigations of deaths in police custody were to be directed to the PIRC.⁴²² The name of the deceased was only to be released by the PIRC after the point of contact in the family had been informed that the information was to be made public.⁴²³

Media briefings could be considered by COPFS, in consultation with Police Scotland and PIRC, for high profile investigations, including PIRC-conducted investigations in respect of deaths in police custody.⁴²⁴

Other Standard Operating Procedures

The version of Police Scotland’s Death or Serious Injury in Policy Custody SOP that was in force in May 2015, in acknowledging that deaths following police contact attracted “considerable media interest”, identified that:⁴²⁵

⁴¹⁶ *Police Scotland Media Standard Operating Procedure*, version 1 (PS11913)

⁴¹⁷ *Ibid*, paragraph 3.8

⁴¹⁸ *Working with the Media*, COPFS, Police Scotland and PIRC Joint Protocol (PS18478), page 6

⁴¹⁹ *Ibid*, page 8

⁴²⁰ *Ibid*.

⁴²¹ *Ibid*.

⁴²² *Ibid*.

⁴²³ *Ibid*, pages 8 – 9

⁴²⁴ *Ibid*, page 9

⁴²⁵ *Police Scotland Death or Serious Injury in Policy Custody SOP*, supra, paragraph 5.11

It is important to stress that within an independent PIRC investigation the media and investigative strategies are for the PIRC Senior Investigator to determine and progress in conjunction with the Procurator Fiscal and senior police commanders. Consideration should be given to the formation of a Gold Group in order to manage the community impact and support the investigation.

The importance of a media strategy was identified in different contexts, from inclusion within Community Impact Assessments to ensure that sensitive material was not released⁴²⁶ to the response to critical incidents.⁴²⁷ For the latter, Police Scotland's press office was to be made aware of any incident that could be treated as a critical incident "in the early stages" by the Gold Commander who would then prepare a briefing note for the press office if an incident was generating publicity.⁴²⁸ A strategy to deal with ongoing media issues ("considered by all appropriate agencies") would be produced to ensure that no material sensitive to community tension was released.⁴²⁹ No press release was to be made "without prior notification to the family / victim where appropriate".⁴³⁰ This would often be linked to the "reassurance messages" prepared by Police Scotland's Diversity Unit.

Lord Advocate's Guidelines

The Lord Advocate issued guidelines covering the relationship between police and the media in 1983, following the enactment of the Contempt of Court Act 1981.⁴³¹ Despite the passage of time, these guidelines remained in force in May 2015.⁴³²

Police Scotland's Media SOP, which was published in November 2015, required all officers and staff of Police Scotland to adhere to the Lord Advocate's Guidelines "in all circumstances", unless authorised by Police Scotland's Head of News and COPFS.⁴³³

The guidelines included guidance to police officers for providing statements to the media in different circumstances, from instances where a crime had been discovered and someone had been arrested to those where an incident had simply been the subject of a police investigation.⁴³⁴

College of Policing Guidance

The College of Policing published guidance in relation to relationships with the media in 2013.⁴³⁵ Whilst College of Policing guidance relates to policing in England and Wales, this guidance document was referred to within Police Scotland's Media SOP when it was published in November 2015.⁴³⁶

⁴²⁶ *Community Impact Assessment SOP, supra*, paragraph 12.1

⁴²⁷ *Critical Incident Management SOP, supra*, paragraph 9

⁴²⁸ *Ibid*, paragraphs 9.1 and 9.2

⁴²⁹ *Ibid*, paragraph 9.2

⁴³⁰ *Ibid*, paragraph 9.3

⁴³¹ *Amended Guidelines Issued by the Lord Advocate (1983) Police and the Media* (COPFS-05747)

⁴³² Up-to-date Lord Advocate guidelines in this regard can be found on COPFS's [website](#).

⁴³³ *Media SOP, supra*, paragraph 3.4

⁴³⁴ 1983 Guidelines, paragraph 7

⁴³⁵ [Guidance on Relationships with the Media](#), College of Policing, May 2013. Up-to-date guidance from the College of Policing may be found on its [website](#).

⁴³⁶ *Media SOP, supra*

Regulations pertaining to Police Scotland

As noted above, the Police Service of Scotland (Conduct) Regulations 2014 include a Standard of Professional Behaviour relating to confidentiality, with information only to be disclosed by officers “in the proper course of their duties”.⁴³⁷ The guidance associated with the 2014 Regulations confirms that officers are not to provide information to third parties who are not entitled to it, including by way of unauthorised disclosure to the media.⁴³⁸

Attempting to pervert the course of justice

The nature of the offence of attempting to pervert the course of justice has been defined (subsequent to the incident involving Sheku Bayoh) as follows:⁴³⁹

...the essence of the charge is the interference with what would otherwise be expected to have come to pass in the ordinary and uninterrupted course of justice in the particular case.

The offence covers a wide range of conduct,⁴⁴⁰ including giving false information to the police to avoid detection and prosecution;⁴⁴¹ intimidating or attempting to intimidate witnesses;⁴⁴² knowingly bringing false criminal charges against an individual;⁴⁴³ and, in the case of police or officers of the court, fabricating evidence.⁴⁴⁴ The offence must be committed intentionally.⁴⁴⁵ Charges of perverting the course of justice are not restricted to interference with the course of criminal investigations and proceedings, but include interference with the course of civil and other proceedings.⁴⁴⁶

Impeding police officers

It is an offence for a person to resist, obstruct or hinder constables and members of police staff whilst they are acting in that capacity.⁴⁴⁷

Official Secrets Act 1989

The Official Secrets Act 1989 provides (and provided in May 2015) that:⁴⁴⁸

⁴³⁷ The Police Service of Scotland (Conduct) Regulations 2014, Schedule 1

⁴³⁸ *Police Service of Scotland (Conduct) Regulations 2014 Guidance, supra*, paragraph 3.8.3. Also, *Police Service of Scotland (Conduct) Regulations 2014 SOP, supra*, Appendix ‘E’, page 50

⁴³⁹ *Hanley v HMA* [2018] HCJAC 29, at 12

⁴⁴⁰ *HM Advocate v Harris (No. 2)* 2010 SCCR 931, per Lord Justice-General Hamilton, at 28: it has long been “authoritatively recognised that attempting to pervert (or to defeat) the ends of justice was a crime according to the common law of Scotland and that the commission of the crime might take various forms”.

⁴⁴¹ *Dean v Stewart*, 1980 SLT 85

⁴⁴² *Kenny v HM Advocate* 1951 SLT 363; *Darroch v HM Advocate* 1980 SLT 33

⁴⁴³ *McFarlane v Jessop* 1988 SLT 596

⁴⁴⁴ *Templeton v McLeod* 1986 SLT 149

⁴⁴⁵ *HM Advocate v Mannion* 1961 JC 79. This is in contrast to the offence of contempt of court, where there is strict liability (Contempt of Court Act, section 1).

⁴⁴⁶ *McGregor v D* 1977 SLT 182 (relating to a children’s hearing)

⁴⁴⁷ Police and Fire Reform (Scotland) Act 2012, section 90

⁴⁴⁸ Official Secrets Act 1989, section 4

(1) *A person who is or has been a Crown servant or government contractor is guilty of an offence if without lawful authority he discloses any information, document or other article to which this section applies and which is or has been in his possession by virtue of his position as such.*

(2) *This section applies to any information, document or other article—*

(a) *the disclosure of which—*

(i) *results in the commission of an offence; or*

(ii) *facilitates an escape from legal custody or the doing of any other act prejudicial to the safekeeping of persons in legal custody; or*

(iii) *impedes the prevention or detection of offences or the apprehension or prosecution of suspected offenders; or*

(b) *which is such that its unauthorised disclosure would be likely to have any of those effects.*

A “Crown servant” in this context includes police officers and other police staff.⁴⁴⁹ It is a defence for a person to prove that “he did not know, and had no reasonable cause to believe, that the information, document or article in question was information or a document or article” to which the above section applies.⁴⁵⁰

(ii) Liaison with PIRC

Memorandum of Understanding between Police Scotland, the PIRC and Scottish Police Authority

A memorandum of understanding (MOU) between Police Scotland, the PIRC and SPA in place in May 2015 outlined a “framework for collaborative working” and annexed various protocols agreed between the three organisations.⁴⁵¹ The protocols covered several areas, including the provision of information to the PIRC and agreed procedures where police officers and staff were to be interviewed by the PIRC.

Initial operational response

The protocols confirm that, in circumstances where COPFS had directed PIRC to investigate allegations of a criminal nature or deaths in custody or following police contact, Police Scotland staff would assist and support the PIRC investigation under instruction of the designated PIRC senior investigator.⁴⁵² A flow chart set out the “initial operational response” of Police Scotland, COPFS and PIRC to deaths following police contact.⁴⁵³ This identified that the police were to continue to preserve a scene and

⁴⁴⁹ 1989 Act, section 12(e)

⁴⁵⁰ 1989 Act, section 4(5)

⁴⁵¹ *Memorandum of Understanding between The Police Investigations and Review Commissioner, The Police Service of Scotland and The Scottish Police Authority*, 2013, *supra*

⁴⁵² *Ibid*, *General Protocol*, paragraph 8

⁴⁵³ *Ibid*, *General Protocol*, Appendix A “Initial Operational Response”

available evidence whilst initiating an investigative response to the incident until such time that COPFS had provided direction to PIRC.

In investigations of allegations of a criminal nature and following deaths in custody PIRC's Duty Senior Investigator (DSI) would ascertain information from COPFS, before confirming same with Police Scotland's SIO.⁴⁵⁴ The DSI would require that the police undertake certain actions pending the deployment of PIRC staff, would note the information received from COPFS and Police Scotland in writing and would thereafter deploy to the scene as soon as is reasonably practicable. Upon arrival at the scene, a formal minuted meeting would be held with Police Scotland's senior investigators to clarify who had primacy of the scene and to identify roles and responsibilities.⁴⁵⁵ The SIO would undertake to perform the actions requested by the DSI.⁴⁵⁶

Handling of shared scenes

The police were to be responsible for initial crime scene management.⁴⁵⁷ Where scenes were of interest to both Police Scotland and the PIRC, in matters that were directed by COPFS, the directing Procurator Fiscal would determine whether Police Scotland would retain primary control of the scene or if control would be passed to PIRC.⁴⁵⁸ This was in contrast to investigations that were not directed by COPFS, where such matters would be discussed and agreed between Police Scotland and PIRC's respective senior investigators.⁴⁵⁹ Meetings between Police Scotland and PIRC, and, where relevant, any handover meetings between their respective FLOs, were to be minuted.⁴⁶⁰ A forensic strategy would be documented at a meeting convened "as soon as possible" between the DSI, SIO and, where appropriate, the directing Procurator Fiscal in order to ensure that the necessary collection and preservation of evidence took place.⁴⁶¹

Interview procedures

Police officers required by PIRC to provide a witness statement would be informed whether they were subject to a complaint, prior to providing a statement.⁴⁶² Police officers who were suspects in any PIRC investigation would normally, subject to COPFS instructions, be asked to present themselves voluntarily for interview under caution, with arrangements made for same by Police Scotland's Professional Standards Department.⁴⁶³

Police Scotland, the PIRC and the SPA entered into a new MOU in 2020,⁴⁶⁴ which contains updated information in relation to the intended cooperation between the three

⁴⁵⁴ *Ibid*, *Call out procedures for serious incidents*, paragraphs 7 and 8

⁴⁵⁵ *Ibid*, paragraphs 8, 9 and 11

⁴⁵⁶ *Ibid*, paragraph 10

⁴⁵⁷ *Ibid*, *Procedures for Handling Shared Scenes*, paragraph 2

⁴⁵⁸ *Ibid*, paragraph 3

⁴⁵⁹ *Ibid*, paragraph 4

⁴⁶⁰ *Ibid*, paragraph 5

⁴⁶¹ *Ibid*, paragraphs 7 – 11

⁴⁶² *Ibid*, *Interview, Detention and Arrest Procedures*, paragraph 2

⁴⁶³ *Ibid*, paragraph 7

⁴⁶⁴ *Memorandum of Understanding between The Police Investigations and Review Commissioner, Police Scotland and The Scottish Police Authority*, 2020, *supra*

organisations (including around investigation processes;⁴⁶⁵ scene management;⁴⁶⁶ family liaison;⁴⁶⁷ and communication with the media⁴⁶⁸).

Section G – Issues of race and equality

(i) Reporting obligations and procedures

Regulations pertaining to Police Scotland

As noted above, there are various Standards of Professional Behaviour with which constables require to comply, as set out within The Police Service of Scotland (Conduct) Regulations 2014.⁴⁶⁹ There is, for example, a Standard of Professional Behaviour relating to equality and diversity.⁴⁷⁰

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

There is a further Standard of Professional Behaviour relating to authority, respect and courtesy.⁴⁷¹

Constables act with self-control and tolerance, treating members of the public and colleagues with respect and courtesy.

The guidance associated with the 2014 Regulations identifies that, in complying with this second Standard of Professional Behaviour:⁴⁷²

Police officers use appropriate language and behaviour in their dealings with their colleagues and the public. They do not use any language or behave in a way that is offensive or is likely to cause offence.

As noted above, any failure to comply with these (or other) Standards of Professional Behaviour will, in turn, require other constables to report, challenge or take action against the behaviour in question.⁴⁷³

In this regard, the guidance associated with the 2014 Regulations identifies that officers are expected to take appropriate action if they come across the conduct of a colleague which has fallen below the Standards of Professional Behaviour and that “they never ignore such conduct”.⁴⁷⁴

⁴⁶⁵ *Ibid*, section 10

⁴⁶⁶ *Ibid*, section 16

⁴⁶⁷ *Ibid*.

⁴⁶⁸ *Ibid*, section 17

⁴⁶⁹ The Police Service of Scotland (Conduct) Regulations 2014, Schedule 1

⁴⁷⁰ 2014 Regulations, Schedule 1

⁴⁷¹ *Ibid*

⁴⁷² *Police Service of Scotland (Conduct) Regulations 2014 Guidance, supra*, paragraph 3.3.7. Also, *Police Service of Scotland (Conduct) Regulations 2014 SOP, supra*, Appendix ‘E’, page 52

⁴⁷³ 2014 Regulations, Schedule 1. See above at footnote 111.

⁴⁷⁴ *Police Service of Scotland (Conduct) Regulations 2014 Guidance, supra*, paragraph 3.11.2. Also, *Police Service of Scotland (Conduct) Regulations 2014 SOP, supra*, Appendix ‘E’, page 57

Similar Standards of Professional Behaviour are in place for senior officers.⁴⁷⁵

Reporting procedures

In May 2015, Police officers who did not feel that they could challenge a colleague directly about conduct that had fallen below the Standards of Professional Behaviour were to report their concerns, “preferably to a line manager”.⁴⁷⁶ If officers did not feel able to approach a line manager with their concerns, “they may report the matter to the Professional Standards Department or through a confidential reporting mechanism, or to the Police Authority”.⁴⁷⁷ Whilst it was acknowledged that immediate action might be difficult, police managers were “expected to challenge or take action as soon as possible”.⁴⁷⁸ It would not always be necessary to report a police officer’s conduct if the matter had been dealt with “appropriately” by a manager.⁴⁷⁹

No guidance has been identified by the Inquiry which assists managers in handling such reports or concerns.

⁴⁷⁵ The Police Service of Scotland (Senior Officers) (Conduct) Regulations 2013, Schedule 1

⁴⁷⁶ *Police Service of Scotland (Conduct) Regulations 2014 SOP, supra*, Appendix E, p. 57

⁴⁷⁷ *Ibid.* It is unclear what a “confidential reporting mechanism” would encompass.

⁴⁷⁸ *Ibid.*

⁴⁷⁹ *Ibid.*