

SHEKU BAYOH PUBLIC INQUIRY

CLOSING SUBMISSIONS

On behalf of

SERGEANT SCOTT MAXWELL

PC DANIEL GIBSON

PC JAMES McDONOUGH

In respect of hearings in

May/June 2022

November/December 2022

May 2023

23 June 2023

PART ONE

EVENTS LEADING UP TO MR BAYOH'S ENCOUNTER WITH POLICE

Sheku Bayoh's Character:

[1] Sheku Bayoh was not a man who, in the ordinary course of events, would have come to the attention of the police. He was apparently a man of good character. He has been described as friendly, genuine, the kind of guy who would help you out. He was a man who loved his family and took care of his sons. He was in good stable employment. Unfortunately, in the hours and minutes preceding his encounter with the police on Hayfield Road on 3 May 2015, Sheku Bayoh was far from his usual self.

History of Drug Use:

[2] The evidence is clear that Mr Bayoh had taken controlled drugs overnight from 2-3 May 2015.¹ This was not the first time that Mr Bayoh had taken drugs. Although in the immediate aftermath of events, Mr Saeed sought to suggest that Mr Bayoh had no history of drug taking², the Chair should reject that evidence. He was known to use recreational/non-medicinal drugs including ecstasy and MDMA.³

[3] There were occasions when drugs had had an adverse effect on Mr Bayoh. Some 18 months before, he had taken a legal high in powder form and had a "bad experience".⁴

[4] Early in 2015, Mr Bayoh was at a party at a friend's house and had taken MDMA and ecstasy. His behaviour changed and he became paranoid. He started to

¹ PIRC-01445, Final Post Mortem Report, p12-13, Toxicology section

² Zahid Saeed, PIRC-00032, p2, para 5, "I had never...in the passing"

³ James Hume, PIRC-00231, p2, para 1, "As part of a night...powder form"; Martyn Dick, PIRC-00030, p3, para 5, "I knew Shek...MDMA on the weekend"; Kirsty MacLeod, PIRC-00054, p2, para 2, "I know he did...round at my house"; Zahid Saeed, SBPI-00071, p2, para 6, "Shek had taken...energy and love"

⁴ James Hume, PIRC-00231, p2, para 1, "I knew about 18...illegal high"

think people were talking about him, his race, his “colour” (as Zahid Saeed put it), when they were not. Mr Saeed thought Mr Bayoh was hallucinating.⁵

[5] A week prior to 3 May 2015, Mr Bayoh had taken (what appeared to be) MDMA. He said it didn’t taste right. This was confirmed by his friend, James Hume.⁶ After taking it, Mr Bayoh became uncomfortable, a bit paranoid and was overreacting to things.⁷ He became annoyed with a friend. This was unusual and out of character.⁸

Drug Use on 2-3 May 2015:

[6] Mr Bayoh and Zahid Saeed had planned to go to their friend Martyn Dick’s house to watch a boxing match. Before that they were at Mr Bayoh’s house drinking and listening to music. Both Mr Saeed and Mr Bayoh took drugs. Mr Bayoh took ecstasy and MDMA. At first all was well and Mr Bayoh’s reaction to the drugs was a positive one.⁹ Mr Saeed left the house for a time. When he returned around 01.30-02.00, Mr Saeed formed the view that Mr Bayoh was annoyed at him.

[7] The pair went to Martyn Dick’s house shortly after 04.00. Mr Dick has described them as both being in a good mood on arrival.¹⁰ Mr Bayoh was drinking. When the group sat down to watch the fight, it became apparent that Mr Bayoh was misinterpreting conversations, for example thinking the group were talking about him when in fact they were talking about a female friend. Mr Bayoh’s behaviour changed and the atmosphere became nervous. Mr Bayoh was “taking everything the wrong way”.¹¹ He was fidgeting, agitated and paranoid. He said “the MDMA was

⁵ Zahid Saeed, SBPI-00071, p3, para 7, “I am asked...sort of bad company”

⁶ James Hume, SBPI-00021, p6, para 26-28, “There was MDMA...was nasty”

⁷ James Hume, PIRC-00231, p2, para 5-6, “The last time I seen...nothing serious”

⁸ James Hume, PIRC-00232, p2, para 6, “I recall...out of character”

⁹ Zahid Saeed, SBPI-00071, p2, para 5-6, “We arrived...energy and love”; p4, para 9, “At around...negative at all”

¹⁰ Martyn Dick, PIRC-00030, p3, para 5, “They were both fine...good mood”

¹¹ Martyn Dick, PIRC-00030, p4, para 3-8, “I thought it was really...this was a good idea”

shit”.¹² Mr Saeed wondered whether Mr Bayoh had taken more drugs.¹³ He attempted to calm Mr Bayoh down and reason with him but got nowhere. They left, with Mr Saeed telling Mr Dick that “this has happened too often.”¹⁴ Mr Dick acknowledged that Mr Bayoh was not himself.¹⁵

[8] In so far as Mr Saeed, during his testimony¹⁶, sought to distance himself from the statement he gave to the Inquiry or to minimise the account he gave in it of what occurred that morning, the Chair should prefer the evidence in his statement.¹⁷ The statement was taken by experienced professionals employed by the Inquiry. Mr Saeed signed the declaration that it was the truth. His claim that he signed it “in a rush” is irrelevant to the issue of the truth of its contents. He did not suggest that any part of it contained words not uttered by him. He did not suggest that he had lied to the Inquiry team or given them wrong information. That Mr Bayoh had consumed drugs is beyond doubt given the toxicology results. That he was acting in an unusual, aggressive and disturbed way from the time he was in Martyn Dick’s house until his encounter with the police on Hayfield Road is confirmed by multiple witnesses.

[9] Mr Saeed felt that Mr Bayoh was experiencing a similar reaction as he had in January 2015 when he had taken ecstasy and MDMA, except that this time was worse.¹⁸

[10] Psychiatrist Dr Maurice Lipsedge gave evidence that with repeated usage of a stimulant-type drug, the brain can become sensitised (as opposed to habituated). While one may start with a relatively minor reaction, with repeated use the

¹² Kirsty MacLeod, PIRC-00052, p2, para 6 “Shek suddenly...similar to that”; PIRC-00053, p3, para 4, “I also heard him...was shit”

¹³ Zahid Saeed, SBPI-00071, p5, para 11, “My concern was...earlier in the night”

¹⁴ Martyn Dick, PIRC-00030, p5, para 1, “He gave...too often”

¹⁵ Martyn Dick, Transcript, 03/02/2023, p9, lines 4-5, “Obviously...parted company”

¹⁶ Zahid Saeed, Transcript 13/5/2022, p11, line 17 to end of evidence, “What is it you don’t know...”

¹⁷ SBPI-00071

¹⁸ Zahid Saeed, SBPI-00071, p5, para 12, “I felt at that time...January”; p7, para 17, “I am asked...was worse”

individual becomes vulnerable and more likely to have a more extreme reaction.¹⁹ Toxicologist Professor Michael Eddleston did not demur from that proposition, noting his experience was with those suffering acute exposure rather than those with a repeated exposure as treated by Dr Lipsedge.²⁰

[11] It is not known whether, on past occasions when Mr Bayoh had an adverse reaction after taking ecstasy and/or MDMA, those drugs had been adulterated with Alpha-PVP. But on 3 May 2015, it is more likely than not that the adverse reaction in Mr Bayoh was principally the result of Alpha-PVP rather than ecstasy and MDMA alone.²¹

[12] It cannot be known whether on 3 May 2015 Mr Bayoh deliberately ingested Alpha-PVP. It is possible that Alpha-PVP had been used to adulterate MDMA and that Mr Bayoh may have been unaware of the precise nature of the adulterant and its potential effects.²² Mr Saeed said that he did not feel right after taking the MDMA as a result of what it had been mixed with, and it was definitely not agreeing with Mr Bayoh. Mr Bayoh did not know he was taking a substance that would change his personality.²³

[13] The different responses to the drugs in Mr Saeed and Mr Bayoh was explained by Dr Kerry-Anne Shearer and Professor Michael Eddleston. Individuals can react differently to the same drug, and the severity of side effects or adverse reactions can vary regardless of dose.²⁴

¹⁹ Dr Maurice Lipsedge, Transcript 11/05/2023, p28, lines 6-13, "It's important...extreme reaction"

²⁰ Prof Michael Eddleston, Transcript 16/05/2023, p45, line 23, to p46, line 19, "Q. He explained...sounds fine"

²¹ Prof Michael Eddleston, Transcript 16/05/2023, p41, lines 21-24, "That alpha...rate of psychosis"; p65, lines 11-25, "Can I ask you a question or two...psychosis in particular"

²² James Hume, PIRC-00232, p2, para 1, "As far as...affects [sic] can be"; SBPI-00021, p8-9, para 39-43, "I hadn't heard of...bath salts or something else"

²³ Zahid Saeed, SBPI-00071, p6, para 14, "I told him...what it is"; p14, para 32, "It's just unfortunate...our personalities"

²⁴ Dr Shearer, SBPI-00304, p25(pdf), para 74, "I have been asked...as another person's response"; Transcript 10/05/2023, p25, line 24 to p26, line 15, "Again it varies...person-dependent as well"; Prof Eddleston, Transcript, 16/05/2023, p48, lines 3-6, "alpha-PVP I don't...variable by person"

Fight with Zahid Saeed:

[14] After leaving Martyn Dick's house, Zahid Saeed did not initially know where Mr Bayoh was but caught up with him some minutes later as Mr Bayoh arrived at the house at Arran Crescent.²⁵ Inside the house, Mr Bayoh was clearly paranoid, asking Mr Saeed if he was CID. It is noteworthy (in light of the evidence of Dr Lipsedge discussed in the submissions on Cause of Death at part 6 below) that Mr Bayoh's paranoia seemed to relate to suspicion of the police. Mr Saeed thought he was hallucinating. He was not angry, but he was being cold.²⁶ He gave Mr Saeed drugs to dispose of, at which point Mr Bayoh became physically different, sturdy and firm and his eyes "switched". He was clenching his fists and staring menacingly. Mr Saeed did not feel safe.²⁷

[15] The moment Mr Saeed turned his back to leave, Mr Bayoh "sucker punched" him on the head from behind. He charged towards Mr Saeed. He was not himself.²⁸ Mr Saeed started to run because Mr Bayoh was running towards him, chasing him with a wooden washing pole. In a neighbouring garden, Mr Bayoh pushed Mr Saeed to the ground and got on top of him, throwing multiple punches at his head. He looked angry, with bloodshot eyes. Mr Bayoh was clearly the aggressor.²⁹ There was no evidence of any reason why Mr Bayoh would have taken against his best friend, other than because he was so affected by drugs. As a result of the assault, Mr Saeed was injured to his head and face.³⁰

²⁵ Zahid Saeed, PIRC-00032, p3, para 7-8, "I presumed...towards his house"

²⁶ Zahid Saeed, SBPI-00071, p6, para 14, "he asked me...back to himself"; para 16, "Shek agreed...quite cold"

²⁷ Zahid Saeed, SBPI-00071, p7, para 16 "Once he gave me...safe at that point"; PIRC-00032, p4, para 3, "I then noticed him clenching...that's in the kitchen"

²⁸ Zahid Saeed, SBPI-00071, p8, para 18, "The minute I turned...wasn't himself at that point"

²⁹ Zahid Saeed, SBPI-00071, p8-9, para 19-21, "I am asked about...split personality moment"; Naomi Rhodes, Transcript 13/05/2022, p64, line 2 to p65, line 4, "When I was looking...Yes, yes" - adopting PIRC-00110, p2; Henry Pratt, PIRC-00088, p2, para 1, "Minutes later...made contact"; Andrew Rhodes, PIRC-00112, p2, para 4-7, "I could hear shouting...crouching down punching"

³⁰ Zahid Saeed, PIRC-0034, p3, para 1 "I had injuries...dizzy spells"; PIRC-01319, Forensic Medical Report Zahid Saeed, p4

[16] At 06.37 Mr Saeed twice tried to phone Martyn Dick and then texted him saying "I need your help" and "Shek has just attacked me". Mr Dick phoned him and Mr Saeed sounded panicked, shocked and was breathing heavily.³¹ Mr Dick came to meet Mr Saeed and, having decided that Mr Bayoh was back in his house (albeit they did not see him), they returned to Mr Dick's home.³² Mr Dick, his partner Kirsty MacLeod and Mr Sahid were all concerned for the safety of Mr Bayoh's partner, Collette Bell. Mr Saeed phoned to tell her what had happened and to warn her that Mr Bayoh may hurt her.³³ That they felt the need to do so indicates that they thought Mr Bayoh was behaving in an utterly unpredictable fashion.

[17] Unable to contact Mr Bayoh, Ms Bell returned home to Arran Crescent to find the house looking as if it had been burgled with items strewn and the cutlery drawer in the kitchen open.³⁴ A television was on the floor.³⁵ This must have been caused by Mr Bayoh after his fight with Saeed but before he went to Hayfield Road.

[18] Evidence of the fight with Mr Saeed and the surrounding events leads Dr Lipsedge to his retrospective diagnosis of psycho-stimulant induced psychosis.³⁶

Encounter with Neil Morgan:

[19] When Mr Morgan encountered Mr Bayoh in Arran Crescent, Mr Bayoh was armed with a large knife. Mr Bayoh, while not displaying aggression towards Mr Morgan, was clearly not himself, was evidently intoxicated and was tapping the knife against his leg. He was not prepared to go home with Mr Morgan or to take his advice that he could not walk around armed with a knife.³⁷

³¹ Martyn Dick, PIRC-00030, p5, para 3-4, "I had a couple...attack him again"

³² Zahid Saeed, SBPI-00071, p10, para 24-25, "When Martin...to his house"

³³ Collette Bell, PIRC-00027, p2-3, para 7, "Then he just said...got no answer"; Zahid Saeed, SBPI-00071, p10, para 25, "I was worried about Collette...drove home"

³⁴ Collette Bell, PIRC-00027, p3, para 2, "I was worried...TV was on the floor"

³⁵ Collette Bell, Transcript 09/02/2023, p11, lines 8-17, "There's coats...and look for him"

³⁶ COPFS-00130, p18; Dr Maurice Lipsedge, Transcript 11/05/2023, p30, line 18 to p32, line 24, "Q. You talk about this...Yes, yes. Exactly"

³⁷ Neil Morgan, Transcript 13/05/2022, p43, line 5 to p47, line 3, "Well, I asked him if...Cramond Gardens way"

[20] Dr Lipsedge (the only witness qualified to comment on the effects of psycho-stimulant intoxication and psychosis on an individual) noted the encounter with Mr Morgan and contrasted it with the very serious fight with Mr Saeed. His conclusion was that these events were illustrative of fluctuations in Mr Bayoh's degree of confusion, his misinterpretation of what was going on around him and how he understood other people's intentions. He noted there is variability in his mental state, his disorientation, and his paranoia from almost minute to minute, commenting, "That certainly happens in a drug induced state."³⁸

[21] What the encounter with Mr Morgan demonstrates is that following his assault of Mr Saeed, Mr Bayoh did not calm down. Rather he armed himself with a knife and proceeded from Arran Crescent towards Templehall Avenue with an unknown intention.

Mr Bayoh's witnessed behaviour in the vicinity of Hayfield Road:

[22] There are multiple witnesses who saw Mr Bayoh behaving erratically and who spoke to him being armed with a knife from the time he left Arran Crescent to just moments before PCs Alan Paton and Craig Walker came upon him at the bus stop in Hayfield Road.

[23] What follows is not exhaustive of all those who saw Mr Bayoh that morning prior to his encounter with police. The accounts all bear a striking similarity. None suggest that Mr Bayoh was calm, rational or behaving normally. It is clear that Mr Bayoh was psychotic, unpredictable, was displaying acutely disturbed behaviour, and that he was armed with a knife until just moments before police arrived on the scene.

[24] Alan Galloway saw Mr Bayoh in Arran Crescent wielding the knife and appearing to strike a car with it.³⁹

³⁸ Dr Lipsedge, Transcript 11/05/2023, p80, line 22 to p81, line 22, "the other thing I would emphasise...drug induced state"

³⁹ PIRC-00041, p2, para 1-3, "I got up...motor vehicle"

[25] Susan Pearson was a passenger in her husband's car when she saw Mr Bayoh on Templehall Avenue carrying the knife and tapping it against his leg.⁴⁰ She felt scared.⁴¹

[26] Robson Kolberg described Mr Bayoh, armed with a knife, stepping out towards his car, swinging his arm and striking the rear of the car with his fist or with the knife. The car accelerated away and Mr Bayoh jogged after them.⁴² Harry Kolberg corroborated his son's account of Mr Bayoh striking the car.⁴³ This was on Templehall Avenue/Hendry Road. Some minutes later, Mr Bayoh was "facing off" vans and cars on Hayfield Road, standing in front of them causing the cars to turn in the opposite direction.⁴⁴ The Kolbergs saw Mr Bayoh walking towards their car and other vehicles on Hayfield Road. They turned and left the scene to avoid him.⁴⁵

[27] Joyce Joyce saw Mr Bayoh crossing from Templehall Avenue onto Hendry Road.⁴⁶ He looked like he was "walking with a purpose, like he was on a mission...walking like a zombie, like he was focussed...to go where he was going."⁴⁷ As she passed him she saw he had a 10-inch kitchen knife in his hand.⁴⁸ She felt scared and worried for others.⁴⁹ She felt the need to lock the doors of her car.⁵⁰ She lost sight of him as Mr Bayoh turned left onto Hayfield Road.⁵¹

[28] Barbara Oliphant and Lisa Bell were travelling in the same car when they saw Mr Bayoh at the corner of Hendry Road and Hayfield Road. They both saw the

⁴⁰ PIRC-00068, p1, final para to p2, para 1, "About 0710...off his leg"

⁴¹ PIRC-00068, p2, para 7

⁴² PIRC-00015, p2, para 1, "about 30 metres from...jogging after us"

⁴³ Harry Kolberg, Transcript 13/05/2022, p77, lines 8-15, "He thumped...on the roof"

⁴⁴ Harry Kolberg, Transcript 13/05/2022, p83, lines 13-18, "Just as I turned...in front of them"; p84, lines 19-22, "All I could see...back the way"

⁴⁵ PIRC-01289

⁴⁶ PIRC-00065, p2, para 4

⁴⁷ PIRC-00065, p2, para 5

⁴⁸ PIRC-00065, p2 para 6

⁴⁹ PIRC-00065, p2, final para

⁵⁰ SBPI-00069, p3, para 7, "But I locked...he had seen me"

⁵¹ SBPI-00069, p3, para 7, "I went across...left along Hayfield Road"

knife. They described him as “power walking on a mission”⁵² and “walking briskly as if on a mission”.⁵³

[29] Diane Howie and Carol McCormick were together when they saw Mr Bayoh on the footpath that cuts diagonally up to Hendry Road from Hayfield Road. Both saw the knife. Howie said he was walking at quite a pace. McCormick said he was swinging the blade.⁵⁴

[30] Simon Rowe first saw Mr Bayoh carrying a knife in Templehall Avenue. He described him as walking “with a purpose”. A few minutes later, having called the police, Mr Rowe saw him again on Hayfield Road, between Hayfield Place and the bus stop. At that point, a police vehicle with blue lights flashing went past.⁵⁵

[31] Andrew O’Connor was on Hayfield Road, between Hayfield Place and Hendry Road, when he saw Mr Bayoh. O’Connor was driving at approximately 30mph. Mr Bayoh took a flying kick at his car as it passed.⁵⁶ He thought Mr Bayoh was on drugs and described him as looking aggressive.⁵⁷

[32] Former police officer David Grey was with Geoffrey Levy in a van on Hayfield Road when he saw Mr Bayoh. Mr Grey’s van can be seen in Robson Kolberg’s phone footage at 07.13.48.⁵⁸ Another driver had flagged them down to warn them.⁵⁹ Mr Grey described him as “eyes very wide open,...like a march,...on a mission”. He had a knife in his hand.⁶⁰ He thought he was on drink or drugs and

⁵² Barbara Oliphant, PIRC-00085, p1, final para to p2, para 1, “He was heading...12 inches long”

⁵³ Lisa Bell, PIRC-00102, p2, para 3, “My attention was...had a purpose”

⁵⁴ Diane Howie, PIRC-00111, p2, para 5, “I saw he was carrying...fast pace”; Carol McCormick, PIRC-00218, p2, para 1, “I saw a big...was swinging”

⁵⁵ PIRC-00010, p2, para 1-4

⁵⁶ PIRC-00063, p2, para 1-2, “I was travelling...swerve away from him”

⁵⁷ PIRC-00063, p2, para 7, “he just looked aggressive”; para 10, “he was definitely...drugs”

⁵⁸ SBPI-00047, video timeline

⁵⁹ David Grey, Transcript 13/05/2022, p109, lines 12-13, “That’s where the driver...with the knife ahead”

⁶⁰ David Grey, Transcript 13/05/2022, p102, lines 5-10, “What I did remember...a knife blade”

was “going to do something or take revenge...on someone further down the road.”⁶¹ He then heard sirens approaching.⁶²

[33] Linda Limbert saw Mr Bayoh in the middle of Hayfield Road and he was walking towards her car. He prevented her from turning into Hayfield Road. He had the knife in his right hand. His hands were in the air with the knife in his right as he approached her car.⁶³ She thought he was going to try and get into her car as his hand went towards the door. She was terrified. She described him as charging at her car, running fast, arms flailing, as she drove off.⁶⁴

[34] While the precise sequence of the various sightings is unclear, Linda Limbert’s car can be seen on the Gallagher’s CCTV footage encountering Mr Bayoh at the mini roundabout at the junction with Hendry Road. Shortly after, the controller can be heard dispatching PC Short and PC Tomlinson.⁶⁵

[35] Alan Pearson saw Mr Bayoh on Hayfield Road across from the community centre. He saw him jog across the road towards a taxi and try to kick it or strike it. Mr Bayoh then stood in the middle of the road facing Mr Pearson’s car. He had a large knife in his hand. Mr Pearson felt the need to flag down a passing car and tell them to turn back. After going up Hendry Road and stopping to phone the police, Mr Pearson made his way back towards Hayfield Road. He saw Mr Bayoh again. He was walking or standing near the bus stop just as the police van arrived.⁶⁶ At that point he did not see the knife.⁶⁷ This second sighting by Mr Pearson appears to be the last sighting of Mr Bayoh before the first police vehicle came upon him at the bus stop.

⁶¹ David Grey, Transcript 13/05/2022, p103, lines 2-16, “Obviously when I see...someone further down the road”

⁶² David Grey, Transcript 13/05/2022, p106, lines 6-8, “We were going to...didn’t call the police, no”

⁶³ PIRC-00017, p2, para 1, “I observed...was terrified”; Linda Limbert, Transcript 17/05/2022, p58, lines 8-10, “in my mind...very frightened”

⁶⁴ Linda Limbert, Transcript 17/05/2022, p58, lines 13-15, “He was just...describe it anyway”

⁶⁵ SBPI-00047, 07:15:53; SBPI-00046, 07:16:22

⁶⁶ PIRC-00066, p2, para 1, “I looked along Hayfield...to turn back”; para 3, “I drove back down...seen the police van stop”; Alan Pearson, Transcript 17/05/2022, p10, line 8 to p11, line 1, “So I was driving...right-hand”; p11, lines 8-14, “There was another few...you know what I mean”

⁶⁷ PIRC-00067, p3, para 3, “I am certain...when the police arrived”

[36] The Chair should conclude that during this period (between leaving Arran Crescent and the moment before the first police officers came upon him), Mr Bayoh presented a significant and immediate risk to the safety of any person who encountered him.

PART TWO
CALLS FROM PUBLIC AND POLICE RESPONSE

The calls received by Police Scotland on the morning of 3 May 2015:

[37] From approximately 07.10 to 07.16, Police Scotland received six calls from the public regarding Mr Bayoh. Five were made to the '999' emergency number⁶⁸, one the '101' non-emergency number.⁶⁹

[38] A consistent description of Mr Bayoh was given. All the callers mentioned Mr Bayoh's perceived ethnicity.⁷⁰ He was always referred to as a "guy", a "man" or "male" not a youth.⁷¹ Alan Pearson thought Mr Bayoh was in his "late thirties".⁷² Several callers assessed Mr Bayoh as "6ft" tall and of "big" or "muscly" build.⁷³ His clothing was accurately described either in whole or in part.⁷⁴

[39] In five of the calls, Mr Bayoh was said to be carrying a knife or was believed to be. The knife was described as having a blade which was "big", "huge" or 9-inches in length.⁷⁵

[40] While Simon Rowe and Alan Pearson suggested that Mr Bayoh was simply walking along the road with the knife⁷⁶, Joyce Joyce said that he was "walking quite smart" towards Victoria Hospital.⁷⁷

⁶⁸ PIRC-01385, p1, "Recording Start Time", PS00002; PIRC-01388, p1, "Recording Start Time" PS00414; PIRC-01386, p1, "Recording Start Time", PS00005; PIRC-01383, p1, "Recording Start Time", PS00004; PIRC-01387, p1, "Recording Start Time", PS00006

⁶⁹ PIRC-01441, p1, "Recording Start Time", PS00001

⁷⁰ PIRC-01441, p2, row 2; PIRC-01385, p2, rows 2 and 17; PIRC-01388, p2, rows 2 and 24; PIRC-01386, p2, row 2; PIRC-01383, p2, row 16 and p3, rows 3 and 4; PIRC-01387, p2, rows 2, 8 and 16

⁷¹ PIRC-01441, p2, row 2; PIRC-01385, p2, row 2; PIRC-01388, p2, rows 2 and 24; PIRC-01386, p2, row 2; PIRC-01383, p2, row 2 and p3, rows 3 and 4; PIRC-01387, p2, rows 2, 8 and 16

⁷² PIRC-01383, p3, row 6

⁷³ PIRC-01385, p2, rows 2, 17, 19 and 21; PIRC-01383, p2, row 16, p3, rows 8 and 10

⁷⁴ PIRC-01385, p2, row 23; PIRC-01388, p2, row 24; PIRC-01386, p3, row 2; PIRC-01383, p3, row 3; PIRC-01387, p2, row 8

⁷⁵ PIRC-01441, p2, rows 2 and 4; PIRC-01385, p2, row 15; PIRC-01388, p2, rows 2 and 24; PIRC-01383, p2, rows 2, 19-23; PIRC-01387, p2, row 8

⁷⁶ PIRC-01441, p2, rows 2 and 6; PIRC-01383, p2, rows 2 and 8

⁷⁷ PIRC-01388, p2, rows 7 and 8, p3, rows 1-3

[41] Mr Pearson stated that he felt compelled to warn other drivers of Mr Bayoh's presence before he drove away.⁷⁸ Linda Limbert clearly sounded distressed during her call, at one point saying "Oh my God..."⁷⁹ She stated that Mr Bayoh had tried to stop her car while he was holding a knife.⁸⁰

[42] The calls made by Harry and Robson Kolberg indicated that Mr Bayoh had attacked and chased their car and attacked, or attempted to attack, those of other motorists.⁸¹ During the second of those calls, Harry Kolberg could not say what appeared to be wrong with Mr Bayoh.⁸²

[43] As a result of these calls, police would be looking for a tall, well-built adult male, armed with a knife with a large blade who had repeatedly approached, attempted to stop, attempted to attack, or attacked motorists in their vehicles. He was walking along public streets, constantly mobile and potentially heading towards a hospital. The fact that the calls were made within a short period and described a similar man, carrying a similar knife, in similar locations spoke to the veracity and reliability of the information.⁸³ That this incident was being reported on a Sunday morning was unusual. This was a time which was usually quiet for the police.⁸⁴ Violent disorder would not be expected.⁸⁵

⁷⁸ PIRC-01383, p3, row 20

⁷⁹ PIRC-01387, p2, row 6, PS00006

⁸⁰ PIRC-01387, p2, rows 14-16

⁸¹ PIRC-01385, p2, row 15 and PIRC-01386, p2, rows 2, 4, 8, 12 and 13

⁸² PIRC-01386, p2, row 4

⁸³ Alan Smith, Transcript 27/05/2022, p15, lines 5 to 13, "And when you...more credible"; 7/6/22, James McDonough, Transcript 07/06/2022, p24, lines 15 to 23, "I was able...actually happening"; Alan Paton, Transcript 21/06/2022, p25, lines 14 to 19, "And we have...hoax call"; Martin Graves, Transcript 25/11/2022, p171, lines 16 to 19, "When you...notice of it"; Joanne Caffrey, Transcript 30/11/2022, p80, lines 13 to 21, "And we have...truthfulness, yes"

⁸⁴ Steven Stewart, Transcript 19/05/2022, p50, lines 14 to 18, "I think it's...a better word"; Scott Masterton, Transcript 24/11/2022, p40, lines 3 to 7, "It was standard...of the week"

⁸⁵ Steven Stewart, Transcript 19/05/2022, p49, line 20 to p50, line 14, "Can I ask...Sunday morning"; Scott Maxwell, Transcript 07/06/2022, p132, lines 12 to 17, "I can go...chasing somebody"; Scott Masterton, Transcript 23/11/2022, p137, line 15 to p138, line 1, "Grade 1...recollection, no"; Joanne Caffrey, 30/11/2022, p81, lines 4 to 20, "Sunday mornings...unusualness"

[44] Given this information, Mr Bayoh clearly presented an immediate risk to the life to members of the public and any police officers responding to those calls.⁸⁶ However, while the calls provided an accurate description of Mr Bayoh, his actions and the knife he was carrying, they also gave a conflicting picture about whereabouts Mr Bayoh was.

[45] Mr Bayoh's presence on Templehall Avenue, Hayfield Road, Hendry Road and close to Gallagher's pub was correctly identified by members of the public.⁸⁷ However, Mrs Joyce and Mr Pearson stated (apparently wrongly) to the control room that Mr Bayoh was on Victoria Road.⁸⁸

[46] This conflicting picture is important because the controller in the Police Scotland Area Control Room ("ACR") at Bilston Glen, PC Scott Masterton, relayed the erroneous location to the members of Response Team 4 through the Kirkcaldy Group 1 channel. This resulted in officers having to search multiple loci.⁸⁹

The ACR response – Initial call handling:

[47] Although Simon Rowe and the Kolbergs appear to have called the police around the same time, it was the Kolbergs' first call that resulted in the creation of the first STORM incident log by the call handler.⁹⁰

[48] An essential part of the call handler's role in creating the STORM incident log is grading calls received from the public. That grading highlights to the ACR controller how urgent a response is needed.⁹¹ It is also the initial risk assessment.⁹² This initial 'triage' is instrumental in shaping the response to an incident.

⁸⁶ SBPI-00190, p9, para 20; Steven Stewart, Transcript 17/05/22, p140, lines 4 to 17, "If someone...public place"; Scott Maxwell, Transcript 07/06/2022 p131, line 23 to p132, line 25, "And I would like...Yes" and p134, lines 2 to 22, "And then there's...threat to life"; Joanne Caffrey, Transcript 30/11/2022,p78, line 18 to p80, line 12, "It would depend...I would, yes"

⁸⁷ PIRC-01441, p2, row 2; PIRC-01385, p2, rows 2, 4, 6, 13 and p3, rows 2-4; PIRC-01385, p2, row 2; PIRC-01383, p2, row 8; PIRC-01387, p2, rows 2, 6, 9-14, 17-18

⁸⁸ PIRC-01388, p2, rows 2-8,25 and p3, line 1; PIRC-01383, p2, rows 17-18

⁸⁹ SBPI-00047, p2, 07:17:44

⁹⁰ PS00231, p1

⁹¹ PS11007, p6, para 2.2.1, PS11009, p7, paras 8.1-8.2; Steven Stewart, Transcript 17/05/2022 p138, line 17 to p139, line 12 "Thank you...suited the individual"

[49] The first call made by the Kolbergs was graded as a Priority 2 call.⁹³ A Priority 2 call is a “Crime/Incident where there is a degree of urgency associated with police action”.⁹⁴ Unlike a Priority 1 call, it does not require an immediate response.⁹⁵

[50] Given the information provided by the Kolbergs, the call handler wrongly graded the call as a Priority 2 incident.⁹⁶ Had the call been properly graded as Priority 1, this would have resulted in a red flashing icon activating on the screens of the ACR controllers and supervisors simultaneously.⁹⁷ This would have alerted them to act on the call, potentially resulting in a quicker response and a response with oversight from the ACR Overview from the very outset.

[51] At or around the time the STORM incident log arising from the first of the Kolbergs’ calls is created, a further STORM incident log is also created for the call made by Mrs Joyce (“the Joyce STORM log”).⁹⁸ This time the call handler correctly graded it as Priority 1. The Joyce STORM log became the master log for the incident, with PC Masterton linking it to the log created after the Kolbergs’ first call.⁹⁹

[52] On receiving the Joyce STORM log, PC Masterton performed a “[v]ery, very basic” risk assessment.¹⁰⁰ However, his view was that the call had already been graded and the priority was to get police officers to the locus.¹⁰¹

[53] PC Masterton’s role as the controller was to assign divisional units to the call.¹⁰² He had information about which officers were on duty in Kirkcaldy, what

⁹² SPBI-00173, p2-3, paras 7, 9; SPBI-00194, p8, para 17; Steven Stewart, Transcript 17/05/2022, p134, line 8 to p136, line 18, “So the control room...to attend”; Steven Stewart, Transcript 23/11/2022, p128, line 16 to p130, line 3, “Right. For the call-takers...Yes”

⁹³ PS00231, p1

⁹⁴ PS11007, p7, para 2.2.8

⁹⁵ SBPI-00181, p98, para 10.1.16 “Priority 2...not required immediately”; Steven Stewart, Transcript 17/05/2022, p139, lines 7-8, “Grade 2...dispatch”, p141, lines 13-20, “The grade 2...resource free”; Scott Masterton, Transcript 23/11/2022, p127, lines 14-16, “a grade 2...quick order”

⁹⁶ SBPI-00181, p98, para 10.1.16 “My opinion is...carriageway; Steven Stewart, Transcript 17/05/2022, p142, line 13 to p143, line 7, “So if there’s a difference...A. Yes.”; Steven Stewart, Transcript 23/11/22, page 128, line 2 to line 8, “If they were dealing...certainly”

⁹⁷ Scott Masterton, Transcript 23/11/2022, p134, line 17 to p135, line 10, “It’s a while ago...the same time”.

⁹⁸ PS00232, p1

⁹⁹ Scott Masterton, Transcript 24/11/2022, p12, line 8 to p17 line 2, “Now, this is number 232...Yes”

¹⁰⁰ Scott Masterton, Transcript 23/11/2022, p140, lines 4-6, “Are you doing...grade 1 call”

¹⁰¹ Scott Masterton, Transcript 23/11/2022, p140, lines 4-6, “Are you doing...grade 1 call”

vehicles they were allocated to, and what jobs they were currently assigned to.¹⁰³ He did not, however, have knowledge of the experience, gender or skills of the officers assigned to Response Team 4 that day.¹⁰⁴ Thus, these factors did not form part of the limited risk assessment he undertook prior to allocating units to the call.

[54] As this was a Priority 1 call, PC Masterton's focus was having the units closest to the locus attend.¹⁰⁵ However, despite having control of assigning units to the incident¹⁰⁶, he (call-sign 'Con 1'¹⁰⁷) only assigned the team of PC Ashley Tomlinson and PC Nicole Short to attend.¹⁰⁸ This was despite three of the four 'two-man' teams on duty with Response Team 4 being available at that time, with the remaining team (PCs Paton and Walker) engaged in responding to a lower priority call.¹⁰⁹

[55] While PC Masterton accepted that he could have assigned all units in Response Team 4 to attend the incident, he did not believe this was necessary.¹¹⁰ That was based on his assumption that all of the officers on the Kirkcaldy Group 1 airwave talk group would have known from his initial description of the incident that it was a Priority 1 call¹¹¹, and that all available officers would respond to a call of that nature.¹¹²

[56] PC Masterton's explanation for his failure to assign all units from the outset is inadequate. Firstly, he did not initially transmit that the call was a Priority 1 call.¹¹³ Secondly, it assumes that all officers in Response Team 4 had their airwave radio on

¹⁰² SBPI-00067, p4, para 11-12; SBPI-00173, p3, para 11, "The Controller in...Controller's alone"; SBPI-00185, p8, para 19; Steven Stewart, Transcript 17/05/2022, p141, lines 14-19, "the controller...a resource"; Scott Masterton, Transcript 23/11/2022, p138, line 21 to p139, line 7, "I have a...to the job"

¹⁰³ SBPI-00067, p4, para 13

¹⁰⁴ SBPI-00067, p4, para 14; Scott Masterton, Transcript 23/11/2022, p141, lines 1-6, "No. I -- as I said...to the jobs"

¹⁰⁵ SBPI-00067, p4, para 14

¹⁰⁶ i.e. not specialist resources such as a dog unit or ARV

¹⁰⁷ Scott Masterton, Transcript 23/11/2022, p142, line 23 to p143, line 5, "Con 1, we...Yes"

¹⁰⁸ SBPI-00047, p1, 07:16:22 to 07:16:32

¹⁰⁹ 19/5/22, p29, line 23 to p30, line 13 "We were heading...Yes"

¹¹⁰ Scott Masterton, Transcript 23/11/2022, p145, lines 6-10, "Would it have...No"

¹¹¹ SBPI-00047, 07:16:32

¹¹² Scott Masterton, Transcript 23/11/2022, p145, line 11, to p146, line 11, "Was there a reason...yes"

¹¹³ SBPI-00047, p2, 07:16:32; Scott Masterton, Transcript 23/11/2022, p145, line 20 to p146, line 2, "Well, if we...that instance"

their person at that time and/or that they heard the call and that they had similar level of experience as himself. However, that was not the case.¹¹⁴

[57] Most importantly, however, it ignores that it was his duty to assign units to attend the incident. That his failure to task all units to attend fell below the expectations of his fellow officers can be seen by PC Tomlinson's immediate request for other officers to assist.¹¹⁵

[58] Even after this call, PC Masterton did not assign further units. Rather, he sent a further transmission stating that "another grade one" call had been received.¹¹⁶ It was only when APS Scott Maxwell transmitted that all available units were to attend and asking if an Armed Response Vehicle ("ARV") and dog unit were available¹¹⁷, that the other members of Response Team 4 began to respond.¹¹⁸

APS Maxwell's risk assessment and initial transmission:

[59] On hearing the initial descriptions of the incident transmitted by PC Masterton¹¹⁹, APS Maxwell performed a risk assessment. He assessed the call as corroborated, high risk and a threat to life. He did not want two officers to attend this incident without sufficient back up. Mr Bayoh needed to be traced and contained. One 'two-man' unit would be insufficient to do this. He regarded it normal practice for multiple officers to attend a call of this nature.¹²⁰

[60] APS Maxwell's request for all units to attend a Priority 1 call involving a knife was in line with other officers' experience of such calls.¹²¹ The correctness of his

¹¹⁴ SBPI-00045, p1, para 1

¹¹⁵ SBPI-00047, p2, 07:16:59

¹¹⁶ SBPI-00047, p2, 07:17:04

¹¹⁷ SBPI-00047, p2, 07:17:23

¹¹⁸ SBPI-00040, p1, para 1 "PS Maxwell...way to locus"; SBPI-00047, p2, 07:17:36, 07:17:44; SBPI-00063, p1, para 1 "PS Scott Maxwell...Gibson"

¹¹⁹ SBPI-00047, p1, 07:16:32, p2, 07:17:04

¹²⁰ SBPI-00044, p1 para 2 to p2, para 3 "In relation to...the officers attending", p4, para 8 "I think...fed back"; Scott Maxwell, Transcript 07/06/2022 p133, line 17 to p134, line 25, "Now in the first...Yes" and p153, line 10 to p156, line 5, "Can I ask you...show police presence"

¹²¹ SBPI-00063, p1, para 1 "All available...it presented"; Craig Walker, Transcript 19/05/2022, p58, lines 6-11, "And then can...ongoing disturbance"; Daniel Gibson, Transcript 01/06/2022, p106, lines 15 to

decision making was spoken to not only by the officers who attended the locus, but also his divisional supervisor and the duty Police Incident Officer (“PIO”) PI Stephen Kay¹²² and the ACR Duty Officer, PI Steven Stewart.¹²³

[61] APS Maxwell was also the first to mention, or seemingly consider, specialist resources in the form of an ARV and dog unit.¹²⁴ This formed part of his initial risk assessment. He had the knowledge of his officers, their skills sets and experience, and the potential loci. He wanted to be prepared for all eventualities, have additional tactical options available, and maximise officer safety.¹²⁵ These considerations were the way in which PC Tomlinson interpreted APS Maxwell’s transmission.¹²⁶

[62] PI Kay approved of APS Maxwell’s approach, and the suggestion that a dog unit should attend.¹²⁷ PI Stewart believed it was reasonable for him to seek such resources.¹²⁸ He thought it demonstrated that APS Maxwell was thinking about the incident in the correct way.¹²⁹ PC Walker, who had 10 years’ service as of 3 May 2015¹³⁰, expressed the view that APS Maxwell could not have done much else at that time.¹³¹

21, “Thank you...yes, it is” and p108 lines 6-18, “Can I ask...commitments”; Samantha Davidson, Transcript 10/06/2022, p123, lines 7 to p124, line 4 “And you....Yes, absolutely”; Alan Paton, Transcript 21/06/2022, p20, lines 5-17 “Was it of...everything and go”; Scott Masterton, Transcript 23/11/2022, p140, lines 13-17, “And at that time...hands on, yes”

¹²² SBPI-00036, p11, paras 60-61; 23/11/22, Stephen Kay, p25, lines 3 to 20 “Can I ask you...Yes”

¹²³ SPBI-00197, p13, para 17 “So, local...their sergeant”; Steven Stewart, Transcript 24/11/2022, p145, line 18 to p146, line 5, “I’m interested in...which is good”

¹²⁴ SBPI-00047, p2, 07.17.23

¹²⁵ SBPI-00044, p2, para 3 “I requested...was faced with”; Scott Maxwell, Transcript 07/06/2022, p135, line 1 to p136, line 20 “And in making...us in that”

¹²⁶ Ashley Tomlinson, Transcript 25/05/2022, p17, line 19 to p18, line 24 “In relation to...specialist resources”

¹²⁷ Stephen Kay, Transcript 23/11/2022, p25, line 3 to p26, line 7 “Can I ask you...to be honest”

¹²⁸ SBPI-00084, p23, para 45 “So that’s perfectly...make that call”; Steven Stewart, Transcript 17/05/2022, p145, lines 3-15 “So he is a...ARVs to an incident”

¹²⁹ Steven Stewart, Transcript 24/11/2022, p145, line 18 to p146, line 5 “I’m interested in...which is good”

¹³⁰ Craig Walker, Transcript 19/05/2022, p53, lines 15- 19 “Yes, well...Yes”

¹³¹ Craig Walker, Transcript 19/05/2022, p103, line 14- 21 “Did you...Sergeant Maxwell, yes”

[63] Martin Graves thought that “the control room” and “the controller” should have automatically considered sending an ARV and dog unit to the incident. Indeed, he thought it would be “unusual” if they were not considering such options.¹³²

The ACR response – the deployment of a dog unit:

[64] As at 3 May 2015, dog units were to be assigned to an incident by a controller or the Duty Inspector in the ACR based on a request from local officers, or of their own initiative.¹³³ In 2015, it was common for dog units to be called out to incidents involving knives.¹³⁴ Given that this incident would potentially involve the use of force to protect the lives of members of the public and police officers, the use of a dog unit would have been appropriate.¹³⁵

[65] Despite this, however, PC Masterton was not involved in allocating a dog unit to the incident.¹³⁶ While unsure, he erroneously believed that it was only ACR supervisors (e.g. sergeants or inspectors) that could assign dog units to an incident.¹³⁷

[66] Ultimately, it was PC Masterton’s colleagues in the ACR that assigned a dog unit to the incident.¹³⁸ The closest dog unit (call-sign SD18) was assigned, PC Gary Wood and Ember. They were at Fettes Police Office, Edinburgh.¹³⁹ The precise time PC Wood was dispatched is not necessarily clear.¹⁴⁰ The STORM log records that another dog unit (call-sign SD10) was dispatched at 07.18.18.¹⁴¹ That unit at some point stood down. The STORM log records PC Wood (SD18) was dispatched at

¹³² SBPI-00190, p4-5, para 10 “From memory...(call sign 411)”; Martin Graves, Transcript 25/11/2022, p169, line 20 to p170, line 19 “But you think...control staff”

¹³³ SBPI-00173, p3, para 11, “The Controller in...Police Dogs”; SBPI-00185, p9, para 24

¹³⁴ Gary Wood, Transcript 25/11/2022, p35, lines 8 to 16 “Can I ask you...It’s very effective”

¹³⁵ SBPI-00173, p4-5, paras 14-16; SBPI-00185, p9-10, paras 25-26

¹³⁶ SBPI-00067, p10, para 25 “I didn’t have...dog units”.

¹³⁷ Scott Masterton, Transcript 23/11/2022, p151, lines 5-11 “Dog handlers...rare resource”

¹³⁸ SBPI-00067, p10, para 24

¹³⁹ Gary Wood, Transcript 25/11/2022, p78, line 12-21 “They just shout...I had just started”

¹⁴⁰ Control transmissions about the dog unit are dealt with below

¹⁴¹ PS00232, p2, entry at 07:18:18

07.21.23¹⁴², by which time PCs Paton, Short, Tomlinson and Walker had made contact with Mr Bayoh and PCs Paton and Tomlinson had pressed their 'emergency buttons'.¹⁴³ The deployment of a dog unit by that stage had become academic, even without factoring in the 20 plus minutes it would have taken PC Woods to get to Kirkcaldy.¹⁴⁴

[67] Notwithstanding, the Chair should conclude that APS Maxwell's request for a dog unit to attend was not only reasonable, but appropriate given the risk Mr Bayoh presented, the need to manage that risk and to provide those officers he supervised with the potential for specialist support.

The ACR response – the deployment of an ARV:

[68] APS Maxwell's request for an ARV had to be assessed and, where appropriate, actioned by PI Stewart in his role as Initial Tactical Firearms Commander ("ITFC"). Only PI Stewart had the authority to declare a firearms incident and send an ARV.¹⁴⁵ He did not do so.

[69] At the time the request was made, PI Stewart was not at his post in the ACR Overview. He had not heard the initial transmissions regarding the incident.¹⁴⁶ When the call was brought to his attention, he went back to the ACR Overview to review it.¹⁴⁷

[70] PI Stewart's first transmission coincided with PCs Paton and Walker arriving at the locus.¹⁴⁸ Within 30 seconds of the start of that transmission, PC Paton had

¹⁴² PS00232, p2 "SD18 attending from Edinburgh 03/05/2015 07:21:23"; Gary Wood, Transcript 25/11/2022, p25, lines 2-15 "And then slightly...Yes"

¹⁴³ SBPI-00047, p3, 07.20.22 to 07.20.42

¹⁴⁴ 25/11/22, p101, line 10 to page 102, line 20 "To get there...approach to it, yes"

¹⁴⁵ SBPI-00173, p3, para 11, "However, only the...deploy ARVs"; SBPI-00185, p9, para 22

¹⁴⁶ SBPI-00084, p8, para 15 "My recollection...aware of it"; 17/5/22, Steven Stewart, p171, line 20 to p172, line 12 "I would like to...Yes"; Steven Stewart, Transcript 24/11/2022, p157, line 13 to p159, line 11, "Can I ask you...I don't know exactly"

¹⁴⁷ SBPI-00084, p8, para 15 "I ran upstairs...what was happening"; Steven Stewart, Transcript 17/05/2022, p171, lines 13- 22, "Where did you...talk group"

¹⁴⁸ SBPI-00047, p3, 07:20:13

pressed his 'emergency button'.¹⁴⁹ Approximately three minutes elapsed between APS Maxwell making his request for an ARV and PC Paton pressing his emergency button. Thus, by not being in the ACR Overview at the relevant time, PI Stewart lost around three minutes to begin his initial assessment about whether to deploy an ARV.

[71] Ms Caffrey and Mr Graves believed that APS Maxwell's request should have been an important factor in PI Stewart's decision-making process.¹⁵⁰ PI Stewart did not disagree with that suggestion¹⁵¹, but his consistent focus throughout his evidence was his need to have feedback from the locus before he could determine whether the deployment of an ARV was proportionate.¹⁵²

[72] This need for feedback applied throughout the divisional and ACR chain of command. PI Kay was the divisional PIO. He had divisional control that day, with APS Maxwell supervising Response Team 4 under PI Kay's command.¹⁵³ PI Stewart would only have taken command where he had declared the call a firearms incident.¹⁵⁴

¹⁴⁹ SBPI-0047, p3, 07:20:39

¹⁵⁰ Martin Graves, Transcript 25/11/2022, p176, line 12 to page 177, line 4, "And where a request has...make that decision"; 30/11/22, Joanne Caffrey, Transcript 30/11/22, p127, line 12 to p131, line 9, "Can I ask about...them the resource"

¹⁵¹ Steven Stewart, Transcript 24/11/2022, p112, line 16 to p113, line 1, "Would that have...be done first", p145, line 18 to p147, line 5, "I'm interested in...which is fine"

¹⁵² SBPI-0084, p16-17, paras 32, 34-36; SBPI-00197, p9, para 12 "There has to be...at that time", p23-24, paras 38-39, p28, para 44, p30, para 47 "The simple fact...including myself", p35, para 51 "Consideration would include...achieve this"; Steven Stewart, Transcript 17/5/2022, p181, line 7 to p182, line 22, "Did you get any...what I did", p209, line 10 to p210, line 21, "And according...stay safe"; Steven Stewart, Transcript 24/11/2022, p147, line 5 to p152, line 14, "but I have...armed response vehicle"

¹⁵³ SBPI-00036, p2-3, para 11-12; SBPI-00197, p37, para 54 "I'm asked...attended by response officers"; Stephen Stewart, Transcript 19/05/2022, p15, line 24 to p16, line 14 "Now, am I...Maxwell"; Scott Maxwell, Transcript 07/06/2022, p126, line 21 to p127, line 3, "And were you...that time"; Scott Maxwell, Transcript 8/6/22, p42, line 16 to p44, line 11, "Can you explain...Yes"; Stephen Kay, Transcript 23/11/2022, p7, line 8 to p8, line 5 "First of all...annual leave, etc", p14, line 17 to p15, line 11 "You have said...that was happening", p 26, lines 9 to 19 "Can I ask...or negotiators", p111, line 5 to p112, line 2 "Could you just explain...have any information"; Steven Stewart, Transcript 24/11/2022, p123, line 18 to p124, line 8 "So at any...firearms incident"; p124, line 16 to p126, line 11 "So insofar...course of action", p183, line 10 to p184, line 2 "Was there any...what to do"

¹⁵⁴ SBPI-00185, p9, para 23 "The update that...talk group"; SBPI-00197, p37, para 54 "I would only...declared a firearms incident"; Steven Stewart, Transcript 23/11/2022, p 112, lines 11-20 "So

[73] PC Masterton¹⁵⁵, APS Maxwell¹⁵⁶, PI Kay¹⁵⁷ and PI Stewart were all reliant on receiving feedback from the locus to assess the situation and thereafter issue further orders.¹⁵⁸ APS Maxwell was travelling to the locus. That he would do so was an expectation of PI Stewart.¹⁵⁹

[74] APS Maxwell knew his most experienced officers, PCs Paton and Walker, were the closest to the locus. He anticipated that, given their experience, they would feedback what they encountered.¹⁶⁰ That was a reasonable conclusion for him to draw.

[75] While responding to PC Masterton's initial transmissions about the incident, PC Paton was under the impression there were two different loci.¹⁶¹ It was only when PC Masterton transmitted the details of further calls from the public that PC Paton was able to deduce that Victoria Road was not likely to be the locus.¹⁶²

[76] This demonstrates that the initial part of the police response of necessity involved locating Mr Bayoh. When PCs Paton and Walker entered Hayfield Road, no police officer had yet seen Mr Bayoh. They came upon him immediately after turning into Hayfield Road. After Mr Bayoh was seen, the first transmission by any officer at the scene was PC Paton activating his 'emergency button'.

[77] On that basis, it is speculative to suggest that PI Stewart could have received information prior to 07.20/07.21 that morning which would have allowed him to make an alternative decision about the deployment of an ARV. Until officers 'had

you've got...firearms incident"; Steven Stewart, Transcript 24/11/2022, p 124, lines 3-8 "Yes, so that...firearms incident", p184, lines 2-10 "or if the officers...at that time"

¹⁵⁵ PC Masterton, Transcript 23/11/2022, p152, para 23 to p153, line 1 "Right. Who...local officers"

¹⁵⁶ SBPI-00044, p3, para 6 "They would attend...feedback", p4, para 8 "Information was...fed back"; Scott Maxwell, Transcript 07/06/2022, p 140, lines 5-13 "Officers have...particular time", p146, line 2 to page 149, line 12 "We have heard...everyone aware"

¹⁵⁷ SBPI-0036, p12, paras 66-67; Stephen Kay, Transcript 23/11/2022, p110, lines 13-18 "so I don't...all the information, p111, lines 12-19 "In what circumstances...if need be"

¹⁵⁸ Steven Stewart, Transcript 24/11/2022, p193, line 19 to p197, line 14 "Can I move on...Yes"

¹⁵⁹ Steven Stewart, Transcript 24/11/2022, p125, lines 8-16 "So they don't...wants to do", p196, line 8 to p197, line 5 "Part of the...go there"

¹⁶⁰ Scott Maxwell, Transcript 07/06/2022, p144, line 9 to p149, line 12 "I mean potentially...everyone aware"

¹⁶¹ SBPI-00047, p2, 07:17:44

¹⁶² SBPI-00047, p2, 07:17:04, 07:18:04, 07:18:27, 07:18:52, 07:19:35

eyes' on Mr Bayoh, his location and behaviour were, at best, 'known unknowns'.¹⁶³ Furthermore, given the speed at which the incident developed after PCs Paton and Walker arrived, the attendance of an ARV once Mr Bayoh had been found became a moot point.¹⁶⁴

[78] Notwithstanding, APS Maxwell's request for an ARV was demonstrative of a supervisor who was properly assessing the potential risks to his team and members of the public based on the limited information he had available from PC Masterton. The Chair should find accordingly.

The ACR response – Transmissions regarding the status of support unit:

[79] After he made the request for an ARV and a dog unit, APS Maxwell had to chase up a response. Only after that further transmission did PC Masterton respond "I believe a dog unit is on route".¹⁶⁵ His colleague Michelle Hutchinson (call-sign 'Con 2')¹⁶⁶ also responded with "Four one one [Maxwell's call-sign] be aware organising an ARV as well, standby."¹⁶⁷ Thereafter, PI Stewart transmitted "Inspector Stewart area control room to the set attending eh I'm monitoring this obviously from the ah eh an ARV perspective, eh if you get sightings of the male you need to make an initial assessment yourself em and feedback through straight away erm and I'll listen out on the channel."¹⁶⁸ These were the only transmissions made by ACR staff regarding the deployment of an ARV and a dog unit prior to contact being made with Mr Bayoh.

¹⁶³ SBPI-00197, p30, para 47 "The simple fact...any vulnerabilities"; Steven Stewart, Transcript 24/11/2022, p154, line 6 to p155, line 11 "Would it have...kept safe"

¹⁶⁴ Steven Stewart, Transcript 17/05/2022, p220, line 12 to p221, line 9 "And you talk...information back"; Steven Stewart, Transcript 24/11/2022, p170, line 18 to p171, line 20 "When you realised...maybe happening"; Martin Graves, Transcript 25/11/2022, p175, line 16 to p176, line 1 "So ultimately...not attending"

¹⁶⁵ SBPI-00047, p2, 07.19.17

¹⁶⁶ Steven Stewart, Transcript 17/5/2022, p170, lines 3-4 "Who was...Hutchinson"

¹⁶⁷ SBPI-00047, p2, 07.19.23

¹⁶⁸ SBPI-00047, p3, 07.20.13

[80] Several of the response officers correctly noted that those messages lacked the necessary clarity to be operationally useful.¹⁶⁹ They did not positively state that an ARV or dog unit was or was not attending; if they were attending, where they were coming from; what their ETA would be; and what the purpose of their attendance was. Thus, the response officers did not have clarity on whether support units were attending or not, and if they were, when they were likely to arrive. This limited their tactical flexibility¹⁷⁰ and left PC Short feeling inadequately supported.¹⁷¹

The ACR response – the ‘stay safe’ message:

[81] PI Stewart suggested that his transmission was a ‘stay safe’ message.¹⁷² His expectation was that it would be for the controller (PC Masterton) to issue such a message, failing which the supervising sergeant in the ACR, the divisional sergeant (APS Maxwell) or the divisional PIO (PI Kay).¹⁷³

[82] PI Stewart initially stated that there were pro forma ‘stay safe’ cards available for the ACR controllers on their desks as of 3 May 2015¹⁷⁴, however he later indicated that he was unsure if they were provided in 2015.¹⁷⁵

[83] When PC Masterton was asked about this, he initially indicated that he was only aware of ACR Inspectors issuing the ‘stay safe’ message¹⁷⁶, albeit he accepted in his parole evidence that he may have issued it “one or two times”.¹⁷⁷ He did not

¹⁶⁹ SBPI-00042, p3-4, paras 7-8; Craig Walker, Transcript 19/05/2022, p35, line 18 to p36, line 5 “Are you...Yes”; Nicole Short, Transcript 24/05/2022, p13, lines 7-23 “When you say...where we were”; Alan Smith, Transcript 27/05/2022, p19, line 12 to p24, line 8 “Could we look at...Yes”, p26, lines 8 to 20 “As his message...Yes”; Scott Maxwell, Transcript 07/06/2022, p137, line 23 to p139, line 19 “Can I...Without that support”

¹⁷⁰ Scott Maxwell, Transcript 07/06/2022, p139, line 16 to p140, line 16 “I didn’t believe...Yes”

¹⁷¹ SBPI-00041, p2, para 13 “but we didn’t...Unit”; Nicole Short, Transcript 24/05/2022, p13, lines 7 to 23 “When you say...where we were”

¹⁷² SBPI-00084, p10-11, paras 21 to 24; 17/5/22, Steven Stewart, p175, line 8 to p176, line 17 “Now, in your...to do so”

¹⁷³ SBPI-00084, p10, para 21 “For an incident...always there”; SBPI-00197, p20-21, para 33 “But, in terms...on the floor”, p43, para 43 “With this particular incident...en route”

¹⁷⁴ SBPI-00084, p10, para 21 “For an incident...on their desk”

¹⁷⁵ SBPI-00197, p21, para 35, “There were...subsequently”

¹⁷⁶ SBPI-00194, p5, para 12 “I’m asked...ever do it”

¹⁷⁷ 24/11/22, Scott Masterton, p54, lines 15- 21 “And you...two times”

recall being told that it was his responsibility to issue the message, being told to issue it, nor did he have any recollection of the pro forma card being available during the time he worked in the ACR.¹⁷⁸

[84] The only reference to 'stay safe' in the Police Scotland Command and Control SOP is in the context of firearms incidents.¹⁷⁹ Similarly, the Police Scotland Armed Policing Operations SOP only refers to 'stay safe' messaging with reference to the College of Policing ("COP") Stay Safe at Firearms Incident guidance.¹⁸⁰

[85] PI Stewart appeared to refer to the COP guidance when discussing the wording of a complete 'stay safe' message. He believed that this would take a "minute" to read out in full.¹⁸¹ Thus, the terms of his transmission were not the complete 'stay safe' message as detailed in the COP guidance or the pro forma.¹⁸²

[86] PI Stewart's delivery of an abbreviated form a 'stay safe' message therefore appears to be an adaption of a transmission which is expected in firearms incidents.¹⁸³ His stated purpose in issuing this message was to remind the response officers to make an initial assessment and feedback.¹⁸⁴

[87] PI Stewart accepted that APS Maxwell's transmission of "bearing mind officer safety"¹⁸⁵ served a similar purpose to his 'stay safe' transmission.¹⁸⁶ From PC Masterton's perspective, APS Maxwell's transmission amounted to a stay safe message in a similar way to PI Stewart's.¹⁸⁷

¹⁷⁸ SBPI-00194, p5-6, para 12; Scott Masterton, Transcript 24/11/2022, p54, lines 10-14 "We have...recall, no"

¹⁷⁹ PS11007, p27, para 8.3.7

¹⁸⁰ PS10985, p15, para 9.10.1

¹⁸¹ SBPI-00084, p10, para 22 "When you look at...minute to read out"

¹⁸² SBPI-00084, p10, para 22 "brief stay safe message"; SPBI-00197, p22, para 37 "the abbreviated...too long"; Steven Stewart, Transcript 24/11/2022, p 164, lines 5-6 "I acknowledge it wasn't...risk assessment"

¹⁸³ cf Scott Masterton, Transcript 24/11/2022, p55, lines 1 to 7 "And what for...if necessary"

¹⁸⁴ SBPI-00084, p10, para 22 "so the rationale...report back"; SBPI-00197, p22, para 37 "It's what I said...as well"

¹⁸⁵ SBPI-00047, p2, 07:17:23

¹⁸⁶ Steven Stewart, Transcript 24/11/2022, p191, line 19 to p193, line 18 "Mr Stewart...like this"

¹⁸⁷ Scott Masterton, Transcript 24/11/2022, p55, line 11 to p56, line 11 "And we see...No"

[88] Thus, the only supervisors to transmit an officer safety reminder were PI Stewart and APS Maxwell. Those messages were not required with respect to the applicable SOPs but represented a short form prompt to officers to keep their training in mind before engaging with Mr Bayoh. That was an appropriate step for APS Maxwell to take.

The ACR response – Should unarmed officers have attended without support?

[89] The need for feedback shows that response officers had to respond to the calls regarding Mr Bayoh. Most of the members of Response Team 4 had prior experience of responding to incidents in which knives were involved or as suspected as having been involved.¹⁸⁸ Sadly, knife incidents were (and are) an all too common part of policing in Scotland.¹⁸⁹ As of 3 May 2015, uniformed officers would be routinely sent to such calls.¹⁹⁰ In the context of this incident, both PC Masterton¹⁹¹ and PI Stewart¹⁹² expected unarmed response officers would attend such a call promptly given the potential threat to life presented by Mr Bayoh to the public.

[90] The position taken by PC Masterton and PI Stewart was challenged by the opinion of Ms Caffrey. She expressed the view that PC Masterton should not have deployed unarmed officers to the incident without instructing them only to observe

¹⁸⁸ SBPI-0042, p6, para 16; SBPI-00044, p 5, para 14; SBPI-0045, p4, para 12; SBPI-00063, p4, para 12; SBPI-00081, p2, para 19; 24/5/22, p22, lines 9-13 “And how...Two, yes”; Kayleigh Good, Transcript 31/05/2022, p125, line 20 to p126, line 21 “As a probationer...the knife”

¹⁸⁹ SBPI-00040, p4, para 14; SBPI-0042, p6, para 16; SBPI-00043, p 6, para 17; SBPI-00044, p 5; SBPI-00063, p4, para 12; SBPI-00081, p2, para 19; SBPI-00194, p4, para 9 “First of all...not unusual”, p6, para 13; SBPI-000197, p4-5, para 7; Steven Stewart, Transcript 17/05/2022, p180, line 11 to p181, line 6 “Are calls about...night shift”; Scott Masterton, Transcript 23/11/2022, p128, lines 9-15 “How many...two a week”

¹⁹⁰ SBPI-00194, p6, para 14; SBPI-00197, p4, para 7 “An incident involving...become a firearms incident”, p5, para 9 “I’m asked...calls routinely”; Scott Masterton, Transcript 24/11/2022, p48, lines 7 to 10 “So for you...Yes”

¹⁹¹ Scott Masterton, Transcript 23/11/2022, p140, lines 6-11 “Member of the...action and attendance”

¹⁹² SBPI-00197, p6-7, para 10 “So the incident is happening...the circumstances at that time”, p15, para 21, p27, para 43 “The reality is...go in some capacity”; Steven Stewart, Transcript 24/11/2022, p 109, line 13 to p111, line 9 “If you had...that incident”, p154, line 6 to p155, line 11 “Would it have...kept safe”

Mr Bayoh, and that PI Stewart should not have deployed unarmed officers to the incident without a clear tactical plan.¹⁹³

[91] On this issue, the Chair should prefer the evidence of PI Stewart and PC Masterton. Ms Caffrey was not trained as an ACR controller, a duty officer in the ACR or an IFTC, nor had she ever performed any of these roles.¹⁹⁴ On that basis, her evidence regarding these issues does not assist the Chair as she lacked the appropriate skills so as to provide expert comment.¹⁹⁵ Ms Caffrey has previously provided opinion evidence regarding matters outwith her competence, resulting in her being the subject of criticism and therefore the Chair should be cautious about her evidence.¹⁹⁶

[92] Her opinion purports to be underpinned by the terms of the Police Scotland Armed Police Operations Standard Operating Procedure (“SOP”) 2014¹⁹⁷ and the Police Scotland Critical Incident Management SOP 2014.¹⁹⁸ Neither of these SOPs applied as the incident had not been declared either a critical incident or a firearms incident prior to officers engaging with Mr Bayoh.

[93] Her understanding of the command structure that applied on 3 May 2015 (and which is discussed above) was also wrong.¹⁹⁹

[94] Ms Caffrey’s suggestion that unarmed officers should not have attended the incident until a plan was in place and/or should have been instructed only to observe Mr Bayoh ignores the fact that his precise whereabouts were unknown when Response Team 4 were deployed.

¹⁹³ SPBI-00181, p 74, para 9.5.10 “Regardless of...only observe”, p81, para 9.8.8 “In my...response considerations”; Joanne Caffrey, Transcript 30/11/2022, p164, line 8 to p154, line 21 to p156, line 17 “I would like to...to reverse”

¹⁹⁴ SPBI-00181, p 77, para 9.6.1, p 337 (no record of being trained as controller, ACR duty officer or ITFC); Joanne Caffrey, Transcript 30/11/2022, p119, lines 8-12 “I mean...outside the control room”, p125, lines 9-16 “But where...never been that role”

¹⁹⁵ *Kennedy v Cordia LLP* 2016 SC (UKSC) 59, [44] to [50]

¹⁹⁶ *Gemmell v The Scottish Ministers* 2022 Rep LR 78, [25]

¹⁹⁷ SPBI-00181, p42, para 9.1.1.2

¹⁹⁸ SPBI-00181, p42, para 9.1.1.6

¹⁹⁹ SBPI-00181, p71, para 9.5 to p78, para 9.6.6, p89, para 9.11.1

[95] Her suggestion was not a tactic PC Masterton, who as of 3 May 2015 had been a police officer for 28 years and a controller for 18 months²⁰⁰, had ever used himself, nor could he recollect it being used by others.²⁰¹ Indeed, he could not conceive of a situation which would merit such an instruction.²⁰²

[96] PI Stewart similarly disagreed with the suggestion that non-engagement was an option. Rather, he believed that engagement may have allowed for negotiation and the potential for de-escalation.²⁰³

[97] Ms Caffrey's suggestion fails to take account of what PI Stewart called the "collapsing timeframe"²⁰⁴ that impacts the management of rapidly developing incidents such as this. Local response officers were best placed to respond quickly as they were the closest available resource.²⁰⁵ It would have taken at least 20 minutes for support units to arrive.²⁰⁶ Given Mr Bayoh's unverified location and the threat he posed to members of the public, the suggestion that the police wait 20 minutes for a dog unit before engaging is not a credible one. As PI Stewart put it "waiting wasn't an option on that morning because someone was reported to be carrying a knife in a public place at 7 o'clock in the morning and we were just unsure what was going to happen".²⁰⁷

[98] As an alternative to instructing officers to approach but not engage Mr Bayoh, Ms Caffrey suggested that a Rendezvous Point ("RVP") should have been put in

²⁰⁰ SBPI-00067, p1, para 2

²⁰¹ SBPI-00194, p7-8, para 16; 24/11/22, Scott Masterton, p50, lines 2-15 "So you had...with a gun"

²⁰² Scott Masterton, Transcript 24/11/2022, p45, line 9 to p46, line 10 "I cannot really...decision themselves"

²⁰³ SBPI-00197, p27, para 43 "I notice in the...that as well"; Steven Stewart, Transcript 24/11/2022, p177, lines 4 to 15 "I do think...to do so", p181, line 16 to p182, line 18 "And then we...of engagement"

²⁰⁴ e.g. SBPI-00084, p17, para 34

²⁰⁵ SBPI-00084, p17, para 34, p19-20, paras 37-38, p23, para 43 "The reality with...what's happening"; SBPI-00197, p6-7, para 10 "I think time...that time"; Steven Stewart, Transcript 17/05/2022, p222, lines 11 to 21 "It was one...this incident"; Steven Stewart, Transcript 24/11/2022, p109, line 13 to p111 to line 14 "If you had...the situation"

²⁰⁶ SBPI-00084, p19, para 37 "The nearest ARV...25 minutes to get there"; SBPI-00197, p6, para 10 "It would not...with the subject", p8, para 12 "Specialist resources...time frame", p20, para 32 "I considered it...getting there", p26, para 41 "The time for...was located", p27, para 43 "With specialist...some capacity",

²⁰⁷ Steven Stewart, Transcript 17/05/2022, p178, line 20 to p179, line 1

place.²⁰⁸ In her parole evidence, she provided an example of using an RVP in practice. However, in that example the suspect was known to be inside a property with a fixed address.²⁰⁹ That is in marked contrast to the situation on 3 May 2015. Mr Bayoh's exact location was unknown until PCs Paton and Walker had arrived at Hayfield Road. It is inconceivable that an RVP could have been set up as officers could not have had a known fixed point at which to rally.

[99] Furthermore, PC Masterton had no experience of an RVP being used except for incidents involving guns or emergency incidents at Edinburgh Airport where a series of emergency services needed to rally at a single point.²¹⁰

[100] PI Stewart did not agree that use of an RVP was a viable option. It was a "slow time sort of decision".²¹¹ He believed the risk to public safety was too great. He stressed the need for Mr Bayoh to be located so that the public could be protected, and feedback be given. Its use would have also delayed potential engagement and de-escalation.²¹² He thought that Ms Caffrey's opinion "flies in the face of everything that I've been taught in terms of keeping people safe, and also the duty to act. What would members of the public think if I had officer at an RVP for 10 minutes and someone was harmed or injured? For me, at the time, the risks were too great."²¹³

[101] While it is accepted that Mr Graves was also not a trained ITFC²¹⁴, he was a trained firearms officer and firearms officer trainer.²¹⁵ He had also acted as a sergeant supervisor in a control room.²¹⁶ Therefore, unlike Ms Caffrey, he had the necessary expertise to proffer an opinion on how an ACR controller and supervisor would manage a developing incident with a knife.

²⁰⁸ SBPI-00181, p66, para 6.5, p59, para 9.1.59 (and associated subparagraphs), p69, para 9.3.5, p78, para 9.6.6, p90, para 9.11.2, p90, 9.12.2, p97, para 10.1.13, p142, para 13.8.1.2; Joanne Caffrey, Transcript 30/11/2022, p136, line 9 to p138, line 9 "So the first...Yes"

²⁰⁹ Joanne Caffrey, Transcript 30/11/2022, p24, line 13 to p27, line 16 "but can I...their own"

²¹⁰ Scott Masterton, Transcript 24/11/2022, p51, line 12 to p52, line 11 "Had you had...RV point, yes"

²¹¹ Steven Stewart, Transcript 24/11/2022, p172, lines 6 to 7 "so a rendezvous...of decision"

²¹² SBPI-00197, p29-31, para 47

²¹³ SBPI-00197, p31, para 48

²¹⁴ SBPI-00190, p3, para 6

²¹⁵ SBPI-00190 p3, para 6

²¹⁶ SBPI-00190, p3-4, paras 7-8

[102] Mr Graves opined that that having response officers attend but simply observe Mr Bayoh from an RVP would be “a difficult decision to make”.²¹⁷ He agreed with PC Masterton and PI Stewart that indicating to officers not to approach or engage Mr Bayoh from an RVP would have been the “wrong decision to make based on the risk to members of the public”.²¹⁸

[103] In his parole evidence, Mr Graves accepted that if the incident had been declared a firearms incident, he would have expected an RVP to be set up.²¹⁹ However, he did not think it was a requirement given that the decision had already been made to deploy officers to the scene. In his view, the sensible deployment option was to have the members of Response Team 4 arrive as they did, rather than all turning up to one place.²²⁰

[104] That RVPs are a feature of firearms incidents is spoken to by the Police Scotland Command and Control SOP in place as at 3 May 2015.²²¹ The only reference to RVPs in that SOP is within the section headed “8.3 Firearms Incident: Initial Actions”.²²² Ms Caffrey did not consider this SOP in the production of her report.²²³ The Police Scotland Contact, Command & Control (C3) Division Nation Guidance from 28 June 2021 that is referenced in her report does refer to RVPs, but again only in the context of firearms incidents.²²⁴ That SOP was not in force on 3 May 2015.

[105] The Police Scotland Armed Policing Operations SOP in force on 3 May 2015²²⁵ was considered by Ms Caffrey²²⁶ and it does discuss the use of RVPs. Again,

²¹⁷ SBPI-00190, p18, para 42

²¹⁸ SBPI-00190, p18, para 42

²¹⁹ Martin Graves, Transcript 25/11/2022, p196, lines 5-10 “Certainly if...they arrived”

²²⁰ Martin Graves, Transcript 25/11/2022, p196, line 18 to p197, line 3 “I don’t think...to one place”

²²¹ PS11007, p22, para 8.3.6

²²² PS11007, p20

²²³ SBPI-00181, p33, para 6.5

²²⁴ SBPI-00181, p33, para 6.5, footnote 12 (hyperlinked document – p14, heading ‘9 Firearms Incidents’, p15-16 Subheading ‘Role and Responsibilities’ and related table, ‘Overview’ row)

²²⁵ PS10985

²²⁶ SBPI-00181, p42, para 9.1.1.2

however, it does so in the context of firearms incidents. It also makes clear that it is for the ITFC to declare an RVP, not officers at the scene.²²⁷

[106] PC Paton gave evidence that the set-up of an RVP in Gallagher's car park may have assisted in the incident ending differently.²²⁸ However, that evidence was given in the context of a firearms incident having been declared and an ARV being dispatched from Glenrothes, some 10 minutes away.²²⁹

[107] PC Paton also highlighted the risks that setting up an RVP presented. It would have required officers to keep eyes on Mr Bayoh for 10 minutes. While this would have been manageable if Mr Bayoh was stationary²³⁰, if he walked off, he could have entered the housing estate or industrial estate that branched off Hayfield Road and Poplar Crescent. There were insufficient officers to contain him. In his view, Mr Bayoh could have picked up the knife again and that could have led to "chaos" or "death".²³¹

[108] PC Paton's evidence also needs to be read in light of his earlier comments that there was a need for early intervention, without which Mr Bayoh presented real danger to the public²³², and that neither he nor PC Walker confirmed via airwave that they had spotted Mr Bayoh, his location, or what he was doing when they arrived at the locus. It was that additional information that was required for APS Maxwell, PI Kay or PI Stewart to issue further instructions.

[109] Thus, Ms Caffrey's suggestion that an RVP should have been put in place prior to response officers arriving on the scene should be disregarded. It was not a viable tactical option for the reasons outlined above.

[110] Finally, in his 3rd Position Statement, the Chief Constable states that the deployment of a PSU in the case of a developing threat or risk of a violent deranged

²²⁷ PS10985, p15, 9.10.2

²²⁸ Alan Paton, Transcript 21/06/2022, p90, lines 3-14 "What resources...here today"

²²⁹ Alan Paton, Transcript 21/06/2022, p91, line 13, to p92, line 3 "And you have...eyes on him"

²³⁰ Alan Paton, Transcript 21/06/2022, p91, line 13, to p92, lines 2 to 3 "Well, if...eyes on him"

²³¹ Alan Paton, Transcript 21/06/2022, p91, line 13, to p92, line 3 to p93, line 14 "If he walked off...(nods)"

²³² Alan Paton, Transcript 21/06/2022, p20, line 21 to p21, line 12 "was it of...using it then"

person could have been authorised by the Duty Officer at Service Overview, Inspector, or PIO.²³³ In her report, Ms Caffrey states that this would be PI Stewart, acting PI Kay and APS Maxwell.²³⁴ She is wrong. Not only was APS Maxwell not trained in command and control or public order, he was not fulfilling any of the roles mentioned by the Chief Constable. Any criticism of APS Maxwell implicit in Ms Caffrey's comment is without foundation and unwarranted. Moreover, PI Kay ruled out sending PSU officers as the situation was still developing and the unit is designed to manage public disorder, of which there were no reports.²³⁵

Conclusion:

[111] The Chair should conclude that APS Maxwell acted appropriately as well as in accordance with his training and ordinary police practice, when he deployed all units. Similarly when he asked for specialist resources and chased up in the absence of a response.

[112] Although it was not mandated by any SOP, he delivered a 'stay safe' message to remind his officers to remember their training for such incidents where officers are at risk. He was entitled to consider that would be sufficient to ensure that the officers first on the scene would carry out a proper risk assessment and consider all options.

[113] The Chair should reject the evidence of Joanne Caffrey suggesting that unarmed officers should not have been deployed, or not deployed without express instructions to observe only or without a tactical plan. She is not properly qualified to proffer such an opinion and it is entirely at odds with the normal response of Police Scotland to a knife incident.

[114] In so far as it was suggested by Ms Caffrey that a supervisor should have designated an RVP, the Chair should reject that as unrealistic given the lack of

²³³ SBPI-00185, p12, para 36

²³⁴ SBPI-00181, p66, para 9.2.4.7

²³⁵ Stephen Kay, Transcript 23/11/2022, p55, lines 2-10 "The reason...was available"

knowledge to pinpoint Mr Bayoh's whereabouts, the dynamic nature of his reported movements, and the terms of the applicable SOPs. In addition, the Chair should reject the suggestion that APS Maxwell could or should have deployed a PSU. He was not authorised to do so.

[115] The Chair should conclude that the actions of APS Maxwell were an appropriate, justified and proportionate response to the reported incident.

PART THREE

INITIAL POLICE CONTACT: WHAT DID APS MAXWELL, PC GIBSON AND PC McDONOUGH KNOW?

[116] While members of Response Team 4 were aware of an incident concerning a male armed with a knife at 07.16.32, until they arrived at the locus, they were reliant on the information transmitted over the 'Kirkcaldy 1' airwaves talk group.

[117] Harry Kolberg's initial call had been about a man chasing cars. PC Masterton's first transmission was interpreted by APS Maxwell as meaning that the man was chasing a person rather than cars.²³⁶ That was a reasonable interpretation based on the hesitant manner of PC Masterton's delivery.²³⁷ PC Walker interpreted the transmission in the same way.²³⁸

[118] The transmission heard by PC James McDonough was about a call concerning a large male in possession of a knife.²³⁹ He thought the locus was Templehall Avenue. PC Daniel Gibson, who had not heard the transmission, understood from what was told by PC Nicole Short that there was a man on Hendry Road with a knife.²⁴⁰

[119] PC Masterton's second transmission confirmed that the incident was a Priority 1 call relating to a male armed with a "large knife", which he described as having a "nine-inch blade".²⁴¹ He followed this up with transmissions concerning two further sightings of Mr Bayoh.²⁴²

[120] As previously stated, this series of similar calls in a short timeframe served to confirm the genuineness of the reports in the minds of a number of the officers.

²³⁶ SBPI-00044, p1, para 1 "The initial...chasing someone"; Scott Maxwell, Transcript 07/06/2022, p132, line 3 to p134, line 22 "And so...threat to life"

²³⁷ SBPI-0046, 07:16:32

²³⁸ Craig Walker, Transcript 19/05/2022, p69, lines 3-15 "And in that...ongoing disturbance"

²³⁹ SBPI-00063, Answer 1, para 1 "a large...a knife"

²⁴⁰ SBPI-00045, Answer 1, para 1 "I saw...heard the call"

²⁴¹ SBPI-0047, p2, 07:17:04

²⁴² SBPI-0047, p2, 07:18:27 "That's a further...Gallagher's pub", p3, 07:19:58

[121] After PC Paton corrected the information surrounding the erroneous Victoria Road locus, he transmitted that he and PC Walker were on Hayfield Road “heading in the direction of the [Victoria] hospital.”²⁴³ It is important to stress that, at this point, no officer has yet transmitted that they had spotted Mr Bayoh. The last transmission regarding Mr Bayoh’s whereabouts stated that he was walking in the direction of the hospital.²⁴⁴ This suggests that he was moving eastwards *away* from the junction of Hayfield Road and Hendry Road.

[122] Thirty-six seconds after PC Paton transmitted that he was on Hayfield Road, he pressed the ‘emergency button’ on his airwaves radio.²⁴⁵ The button is designed to open a ‘hot mic’ facility on the officer’s terminal. This should have allowed Paton to transmit uninterrupted over the ‘Kirkcaldy 1’ talk group for 10 seconds.²⁴⁶

[123] On the button being pressed, other officers on the same airwaves talk group would hear an audible tone, their radio would vibrate, the screen on their airwaves radios would turn red and they would receive an “emergency” status message to their radio.²⁴⁷ ACR controllers on the talk group hear an audible alarm in their headset and receive a message on their Integrated Command Control System (“ICCS”) screen notifying them that a button has been pressed.²⁴⁸

[124] Controllers in the ACR can override the ‘hot mic’ function.²⁴⁹ Pressing the button does not ‘cut off’ the controller. Thus, controllers must effectively exercise their judgement in deciding whether to continue an existing transmission or commence a new transmission once an ‘emergency button’ has been pressed.²⁵⁰ There have been instances where a controller has inadvertently shut off a ‘hot mic’

²⁴³ SBPI-00047, p3, 07:20:06

²⁴⁴ SBPI-00047, p3, 07:19:54

²⁴⁵ SBPI-00047, p3, 07:20:42

²⁴⁶ SBPI-00-83, p11, para 25 “Handheld devices...control room”; Colin Gill, Transcript 17/05/2022, p110, line 12 to p111, line 16, “You explained...is restored”

²⁴⁷ Colin Gill, Transcript 17/05/2022, p109, line 21 to p110, line 8 “You have...activation ongoing”

²⁴⁸ SBPI-00196, p3, para 7; Scott Masterton, Transcript 24/11/2022, p 72, line 16, to p73 line 1 “And when...an alarm”, p73, lines 11 to 17. “Right. When...Yes”

²⁴⁹ Colin Gill, Transcript 17/05/2022, p110, line 22 to p111, line 8 “You explained...is okay”

²⁵⁰ SBPI-00196, p3, para 6

period by transmitting in an attempt to clarify if the officer who has pressed their button is ok.²⁵¹

[125] In the instant case, the majority of PC Paton's 'hot mic' period was lost due to PC Masterton continuing to transmit a description of Mr Bayoh at the request of PC Smith.²⁵² Thus, any information PC Paton provided during that period was lost. It was this that led PI Kay to ask PC Masterton to stop transmitting.²⁵³

[126] PC Masterton stated that had he been aware of PC Paton pressing his 'emergency button', he would have ceased transmitting.²⁵⁴ He was unaware that only the controller could override the 'hot mic'.²⁵⁵ PC Masterton explained that he may not have been aware of the button being pressed because he was not looking at his ICCS screen at the time or because he was concentrating on some other aspect of the job.²⁵⁶ The Chair will need to consider whether that explanation is a reasonable one. It does highlight, however, a potential deficiency with the airwaves 'hot mic' system which allows an opportunity for valuable information to be lost to other officers attending or en route.

[127] Following PI Kay's message, PC Paton transmitted "Officer injured, PC Short, male".²⁵⁷ APS Maxwell immediately sought to confirm the locus²⁵⁸, with PC Smith responding that blue lights were spotted "adjacent to Gallagher's".²⁵⁹ This is the first confirmation via airwaves transmission of Mr Bayoh's location. That confirmation was given around a minute after PC Paton and Walker's police van came to a halt on Hayfield Road.²⁶⁰

²⁵¹ Colin Gill, Transcript 17/05/2022, p111, lines 5-8 "sometimes that...is okay"

²⁵² SBPI-00047, p3, 07:20:35, 07:20:39

²⁵³ SBPI-00047, p4, 07:20:56; 23/11/22, p46, line 5 to p47, line 19 "Can I go back...better update"

²⁵⁴ Scott Masterton, Transcript 24/11/2022, p 72, lines 2-3 "If I became...wasn't aware"

²⁵⁵ Scott Masterton, Transcript 24/11/2022, p 72, lines 11-15 "Yes, we have....No"

²⁵⁶ Scott Masterton, Transcript 24/11/2022, p 73, lines 8-10 "It would...the job"

²⁵⁷ SBPI-0047, p4, 07:21:02

²⁵⁸ SBPI-0047, p4, 07:21:13

²⁵⁹ SBPI-0047, p4, 07:21:17

²⁶⁰ SBPI-00047, p3, 07:20:23, p4, 07:21:17

[128] Four seconds after PC Smith's transmission, PC Tomlinson activated his 'emergency button'.²⁶¹ There was some confusion among the officers about which of their colleagues had pressed their 'emergency button' and when. APS Maxwell was only aware of PC Paton activating his emergency button.²⁶² By contrast, PC McDonough was only aware of PC Tomlinson activating his 'emergency button'.²⁶³ PC Gibson knew that PC Paton had activated his 'emergency button' and that another officer had pressed their 'emergency button', albeit he was unsure if it was PC Tomlinson or another officer.²⁶⁴

[129] That these officers were unsure which of their colleagues had pressed the 'emergency button', and when, is understandable given that they were activated within 37 seconds of each other²⁶⁵ and while other transmissions were also incoming.²⁶⁶ APS Maxwell and PC Gibson were also concentrating on driving²⁶⁷, with APS Maxwell issuing further transmissions at the same time.²⁶⁸

[130] Based on the Kirkcaldy 1 transmissions, APS Maxwell, PC Gibson and PC McDonough were aware of the following prior to arriving at the locus:

- a. That the subject was in possession of a large knife;
- b. That the locus was adjacent to Gallagher's pub;
- c. That PCs Paton, Walker, Short, Tomlinson, Good and Smith were already at the locus;
- d. That at least one of their colleagues had activated their 'emergency button'; and

²⁶¹ SBPI-00047, p4, 07:21:21

²⁶² Scott Maxwell, Transcript 07/06/2022, p164, lines 7-11 "And you know...one activated", p165, lines 18-22 "Which one...No"

²⁶³ James McDonough, Transcript 07/06/2022, p23, lines 13-16 "And then...remember seeing", p24, line 24 to p25, line 1 "The fact that...aware of one"

²⁶⁴ SBPI-00045, p2, para 6 "Before I...emergency button"; Daniel Gibson, Transcript 01/06/2022, p110, lines 6 -18 "Also probably...emergency activation"

²⁶⁵ SBPI-00047, p3, 07:20:42, p4, 07:21:19

²⁶⁶ SBPI-00047, p3, 07:20:39, p4, 07:20:50, 07:20:56, 07:21:02, 07:21:09, 07:21:13, 07:21:17

²⁶⁷ Daniel Gibson, Transcript 01/06/2022, p112, lines 5-6, "No, it didn't...get there", p125, lines 11-12 "Well, to...police car"; Scott Maxwell, Transcript 07/06/2022, p164, lines 3-4 "You're driving...Yes", p168, line 21 to p169, line 16 "And then at...progress safely"

²⁶⁸ SBPI-00047, p4, 07:21:13, p4, 07:21:48

e. That PC Short had been injured.²⁶⁹

Risk assessment:

[131] PC Gibson noted that PC Paton activating his emergency button caused him to become more alert about the seriousness of the situation developing at the locus. This was because PCs Paton and Walker were “two of [the] biggest guys on [the] shift” and PC Paton “certainly knew how to look after himself.”²⁷⁰

[132] On the way to the incident, PC McDonough stated to PC Gibson “[w]e may have a problem here.” His explanation for this comment was that he had seen that PC Tomlinson had activated his ‘emergency button’ and a series of calls had come in about a male armed with a knife.²⁷¹ Given the situation that was developing over the airwaves channel that morning, this was an entirely understandable comment to make.

[133] Both PC Gibson and PC McDonough had limited experience of attending knife calls before 3 May 2015.²⁷² On the way to the locus PC McDonough had been thinking about whether Mr Bayoh was still in possession of the knife. This caused him to understandably feel “anxious”.²⁷³

[134] That he was thinking of that risk speaks to the unpredictable nature of such incidents. PC McDonough provided an example of an incident where it was only once the knife was recovered from the subject that they then ‘kicked off’. It then took

²⁶⁹ SBPI-0044, p2, para 3-4, p4, para 8, p5, para 12; SBPI-00045, p1, para 1, p2, para 6; SBPI-00063, p1, para 1, p2, para 6

²⁷⁰ Daniel Gibson, Transcript 01/06/2022, p110, line 24 to p112, line 16 “What as it...Yes”

²⁷¹ 7/6/22, James McDonough, p22, line 17 to p23, line 6 “Do you...like that”

²⁷² SBPI-00045, p4, para 12 “At that time...attended afterwards”; SBPI-00063, p4, para 12 “Due to me...a knife”; Daniel Gibson, Transcript 01/06/2022, p112, line 24 to p120, line 14 “And during that year...No”; James McDonough, Transcript 07/06/2022, p9, line 2 to p13, line 2 “And can I...it didn’t involve a knife”

²⁷³ SBPI-00063, p3, para 8 “I was thinking...using it”; 7/6/22, p24, line 6 to p23, line 23 “Can I ask you...Yes, yes”

at least four officers to restrain the male and get them to the ground.²⁷⁴ APS Maxwell described a knife incident where one of his officers was stabbed in front of him.²⁷⁵

[135] Thus, as with all the officers, the situation that PCs Gibson and McDonough were facing that day carried a significant degree of risk.

[136] Standing the nature of the call and the transmission that PC Short has been injured, PC McDonough was concerned that PC Short may have been stabbed.²⁷⁶ APS Maxwell shared that concern.²⁷⁷ That was a legitimate and reasonable concern to have and to factor into their assessment of the situation. They would have been entitled to proceed on the basis that on arrival at the locus they may need to meet 'Level 5 – Assaultive Resistance' or 'Level 6 – Serious/Aggravated Assaultive Resistance'.²⁷⁸ In turn, this would entitle them to be prepared to use force up to either 'Level 4 – Defensive Tactics' or 'Level 5 – Deadly or Lethal Force'.²⁷⁹ This would include the use of empty hand strikes, batons, incapacitant sprays and “more robust defensive handcuffing techniques.”²⁸⁰

[137] In response to this knowledge, PC Gibson elected not carry out a risk assessment. He was focused on driving there and he wanted to assess the situation as he found it on arrival.²⁸¹ That, too, was a reasonable approach given the limited amount of information he had and his proximity to the locus.

[138] PC McDonough, who was not driving, carried out an initial risk assessment based on the information received over the radio. He considered the use of his force-

²⁷⁴ James McDonough, Transcript 07/06/2022, p116, line 23 to p119, line 6 “The first is...At least four”

²⁷⁵ SBPI-00044, p5, para 14 “Subsequently...front of me”

²⁷⁶ SBPI-00063, p2, para 6 “Before I...injured”; James McDonough, Transcript 07/06/2022, p18, line 23 to p19, line 5 “So at that...at that point”

²⁷⁷ SBPI-00044, p5, para 12 “On hearing...serious injured”

²⁷⁸ PS10933, p8, paras 4.6.5-4.6.6; SBPI-00181, p155, para 14.8.6-14.8.7, p165, para 15.2.1; SBPI-00190, p42-43, para 86; Martin Graves, Transcript 28/11/2022, p61, line 3 to p62, line 9 “Then moving on...officers concerned”; 1/12/22, Joanne Caffrey, p28, line 23 to p30, line 19 “So moving on...Yes”

²⁷⁹ COPFS-00024, p39, para 8k; PS10933, p9, paras 4.7.5-4.7.6; SBPI-00181, p155, para 14.8.6-14.8.7, p166, para 15.3.1; SBPI-00190, p43, paras 87 to 88; 28/11/22, Martin Graves, p62, line 11 to p66, line 12 “Then looking...their mind”; 1/12/22, Joanne Caffrey, p30, line 20 to p31, line 23 “Thank you...Definitely, yes”

²⁸⁰ PS10933, p9, paras 4.7.5-4.7.6

²⁸¹ SBPI-00045, p2, para 3; Daniel Gibson, Transcript 01/06/2022, p121, lines 9-24 “And you say...risk assessment”

issued PPE and put on slash proof gloves which had been given to him by his tutor constable. These gloves were non-standard issue PPE that PC McDonough believed could assist where he encountered a male armed with knife. He also released the strap on his baton holder for quick and easier access to his baton, and thought about the need to maintain his distance and use tactical cover as he could be facing a subject armed with a knife.²⁸² These steps were in line with the level of force he would be authorised to use were he to meet either 'Level 4' or 'Level 5' resistance at the locus. PC McDonough's assessment and actions en route were reasonable.

[139] Standing his role as the shift sergeant, APS Maxwell's initial risk assessment was focused on ensuring that there were sufficient resources to respond to the threat posed. This led to the "all units" transmission and request for support units discussed above.²⁸³

[140] APS Maxwell was aware the then UK terror threat level was assessed as 'Severe'.²⁸⁴ As a result, when assessing the risk posed by the incident using the NDM, he considered the possibility that it was terror related together with other factors. However, through that assessment process, he discounted that the incident was terror related given the lack of credible evidence to that effect.²⁸⁵ Terrorism did not thereafter play a part in his decision making that day.²⁸⁶ Standing the then current threat level and his supervisory role, this was a prudent course for APS Maxwell to follow. PC Gibson also discounted that terrorism was a motive for the incident prior to his arrival.²⁸⁷

[141] The assessments of Maxwell, Gibson and McDonough and their actions en route were reasonable in light of limited information available to them.

²⁸² SBPI-00063, p2, para 3; 7/6/22, James McDonough, p16, line 20 to "Can we have..."

²⁸³ SBPI-00044, p4, para 8; 7/6/22, Scott Maxwell, p158 line 23 to p159, line 8 "So if your...play there"

²⁸⁴ SBPI-00044, p3, para 5 "For the avoidance...United Kingdom"

²⁸⁵ SBPI-00044, p3, para 5 "However...available"; 7/6/22, p157, line 15 to p158, line 15 "I would like...threat", p160, line 25 to p162, line 6 "And then it...yes, yes"; 8/6/22, p114, line 8 to p116, line 3 "So just...head, yes"

²⁸⁶ Scott Maxwell, Transcript 08/06/2022, p116, lines 4-7 "And did...No"

²⁸⁷ Daniel Gibson, Transcript 01/06/2022, p129, line 13 to p130, line 20 "Now, in paragraph 6...Definitely not"

Final airwaves transmissions:

[142] As seen above, as a result of Paton's transmission, Maxwell, Gibson and McDonough knew that PC Short had been injured. They did not know the nature of the injury.

[143] After PC Smith transmitted the locus (adjacent to Gallagher's), shouting could be heard over PC Tomlinson's hot mic.²⁸⁸

[144] PC Smith then transmitted that an officer had been punched to the back of the head. He did not specify whether that was PC Short or another officer. He then stated "male secure on the ground."²⁸⁹

[145] Ten seconds later, APS Maxwell was still "thirty seconds out".²⁹⁰

²⁸⁸ SBPI-00047, p4, 07:21:21

²⁸⁹ SBPI-00047, p5, 07:21:38

²⁹⁰ SBPI-00047, p5, 07:21:48

PART FOUR
THE CONTROL PHASE AND THE RESTRAINT

[146] It was noted in Part Two that the supervisors, including APS Maxwell, were dependent for the purposes of issuing instructions or further assessing risk on information being fed back by those officers first on the scene. Part Three has addressed the fact that limited information was available to those officers (PCs Gibson and McDonough, and APS Maxwell) who were arriving last to the locus.

[147] By the time these three officers arrived, other members of Response Team 4 had located Mr Bayoh, physically engaged with him, PC Short had been assaulted, Mr Bayoh had been brought to the ground and efforts were ongoing to restrain him including attempting to apply handcuffs. Any opportunity to assess Mr Bayoh prior to attempting to bring him under physical control had been and gone. By the time Gibson, McDonough and Maxwell arrive, the opportunity for containment or de-escalation was past (having said that, it must be remembered that de-escalation was not part of officers' training in 2015²⁹¹). The attempted restraint was ongoing, putting both Mr Bayoh and the officers involved at risk until he was under full control.

PCs Gibson and McDonough - Risk Assessment and decision:

[148] The last transmissions that were made before PCs Gibson and McDonough arrived at the locus were from PC Smith, "Control Bravo one officer's been punched to the back of the head no obvious injuries, male secure on the ground" and APS Maxwell, "Thirty seconds out four one one."²⁹² PCs Gibson and McDonough's marked police vehicle is first seen on the Gallaghers CCTV footage on Hendry Road at 07.21.46.²⁹³ Contrary to what is noted in the description on SBPI-00047, they turn

²⁹¹ James Young, Transcript 22/11/2022, p53, lines 1-20, "really the only tactical...discussed back then"

²⁹² SBPI-00047, 07:21:38; 07:21:48

²⁹³ SBPI-00046, 07:21:46

right (not left) into Hayfield Road. They come to a stop at 07.21.54. At this time there is no supervisor or superior officer present.

[149] Gibson and McDonough are clear that at the point of their arrival a significant struggle was ongoing between Mr Bayoh and a number of officers from Response Team 4.

[150] Both the Officer Safety Training Instructor Manual and the Student Manual state that “Restraint is attained when the arms and legs are under control”.²⁹⁴ By this definition, at the time of PCs Gibson and McDonough’s arrival, restraint had not been achieved. Martin Graves stated that someone is “classed as restrained because they’d been placed in handcuffs and they’ve also been placed in limb restraints.”²⁹⁵ Gibson and McDonough arrive when the “control phase” is ongoing.²⁹⁶ The Chair is urged to use these definitions rather than describe the whole of the physical interaction with Mr Bayoh on the ground as “restraint”.

[151] Contrary to the transmission at 07.21.38 by PC Smith the male was not “secure on the ground”.

[152] PC Gibson saw a struggle involving, he thought, two officers. He did not discount other officers being there, he just did not notice them.²⁹⁷ He noted batons and spray canisters on the ground indicating to him that there had been a struggle.²⁹⁸ He noted that PC Walker did not have control of Mr Bayoh and he assessed that this presented a risk to Mr Bayoh and to PC Walker.²⁹⁹ That was an appropriate assessment of risk in the circumstances. It was of note to PC Gibson that PC Walker,

²⁹⁴ PS12330, Module 6, Section 3, p168, right hand column, para 1; PS01938, Module 4, Section 2, p119, left hand column, para 2

²⁹⁵ Martin Graves, Transcript 28/11/2022, p87, lines 7-10, “so the person...limb restraints”

²⁹⁶ Martin Graves, Transcript 28/11/2022, p67, lines 14-23, “Yes, people quite...position of restraint”

²⁹⁷ Daniel Gibson, Transcript 01/06/23, p135, line 5 to p136, line 3, “So the first thing...Not at that stage”; PIRC-00258, p4, para 6-7, “I saw there were officers...I didn’t notice them”

²⁹⁸ SBPI-00045, p2, Answer 6, para 2; Daniel Gibson, Transcript 01/06/22, p135, lines 10-13, “I recall there...over to the officers”

²⁹⁹ SBPI-00045, p2, Answer 6, para 3

who was a well-built officer was struggling to control Mr Bayoh.³⁰⁰ He saw Mr Bayoh kicking out his legs and concluded (properly) that Mr Bayoh was actively resisting his colleagues.³⁰¹

[153] PC McDonough described seeing Mr Bayoh on the ground with four officers dealing with him and that Mr Bayoh looked like he was struggling and attempting to evade detention.³⁰² Mr Bayoh was using his legs to kick out and was lifting the officers up.³⁰³ PC McDonough also saw PC Short bent over at one side of a police van. She appeared to be injured and PC Good was approaching her.³⁰⁴ Thus he saw first-hand support for the earlier airwaves transmission "Officer injured, PC Short, male". He did not believe Mr Bayoh had handcuffs on him at that point. He did not think officers had their bodyweight on Mr Bayoh, rather the force being used was the officers' arms trying to keep Mr Bayoh's legs down and get a handcuff on him.³⁰⁵ Even though there were four officers dealing with Mr Bayoh, they looked to be struggling due to his muscular and aggressive manner and PC McDonough decided to assist.³⁰⁶

[154] Martin Graves stated that using up to six officers to try to restrain someone on the ground is a safe methodology.³⁰⁷ Thus the situation as witnessed by Gibson and McDonough on arrival was not such as should make them think that assisting the attempted restraint would be unsafe or unorthodox. Mr Graves also noted that an

³⁰⁰ SBPI-00045, p2, Answer 6, para 3; PIRC-00258, p4 "PC Walker...at that point"; SBPI-00045, p3, para 11 "What I said...out to me", p6, para 24 "Before I got...still moving"; 1/6/22, Daniel Gibson, p142, line 23 to p144, line 10 "Can you tell...Yeah"

³⁰¹ SBPI-00045, p2, Answer 6, para 4

³⁰² PIRC-00273, p4, para 2-5, "I observed...attempting to escape"

³⁰³ SBPI-00063, p3, Answer 10, para 2; James McDonough, Transcript 07/06/22, p35, lines 21-24, "I remember him just...back onto his feet"; p39, lines 16-23, "Yes. So I could see...tilted at this point"; p40, lines 9-14, "It's just sort of...up just repeatedly"

³⁰⁴ PIRC-00273, p3-4, "I looked down...going to assist her"; SBPI-00063, p4, para 11 "I saw PC Nicole...towards her"; James McDonough, Transcript 07/06/2022, p41, line 5 to p42, line 5 "Now, in your...Yes, yes"

³⁰⁵ PIRC-000273 p4; SBPI-00063, p7, para 26 "Mr Bayoh...his body"; James McDonough, Transcript 07/06/2022, p39, line 4 to p41, line 2 "So again...there was", p57, lines 14-23 "What did...Yes"

³⁰⁶ PIRC-00273, p4, para 7

³⁰⁷ Martin Graves, Transcript 28/11/2022, p68, lines 10-17, "We look at using...yes"

attempted restraint involving up to six officers can “look quite over the top”.³⁰⁸ The Chair should therefore apply a degree of caution to the descriptions of the attempted restraint by civilian witnesses.

[155] Although there are slight differences in what PC Gibson and PC McDonough each described seeing on their arrival, any differences should not be considered significant. Officers’ adrenaline would be up, they are having to appraise the scene in an instant in order to decide how to act, the events were unusual and happening quickly, and generally witnesses’ powers of observation and/or recollection can vary.

[156] Kevin Nelson confirmed that Mr Bayoh was actively resisting at this time. He thought the officers were attempting to restrain Mr Bayoh to prevent anyone else being hurt given what Mr Bayoh had done to PC Short. He continued to struggle even as efforts were made to put on leg restraints.³⁰⁹

[157] Further, the evidence that Mr Bayoh was still resisting and struggling on Gibson and McDonough’s arrival is corroborated by the contemporaneous airwaves transmissions. At 07:22:24 PC Walker transmits, “Update male in cuffs still struggling.”³¹⁰

[158] In these circumstances, the Chair should conclude that, based on what they saw on arrival, PC Gibson and PC McDonough were justified in taking the decision to try to assist those officers who were attempting to gain control over Mr Bayoh in order to restrain him. Given what they knew prior to arrival from airwaves transmissions combined with what they saw on arrival, there can be no question that they had reasonable grounds to detain/arrest Mr Bayoh. At the very least, Mr Bayoh

³⁰⁸ Martin Graves, Transcript 28/11/2022, p68, lines 11-13, “It may look...on the floor”

³⁰⁹ PIRC-00019, p3, para 7, “I also remember a male voice...kicking his legs”; COPFS-00055, p3, para 4, “The two officers were trying...trying to lift his head up”; para 5, Another officer...as he was kicking out”; SBPI-00014, p8, para 13; Kevin Nelson, Transcript 31/05/23, p81, lines17-19, “Q So Mr Bayoh was resisting...happening at that time, yeah”; SBPI-00045, p7, para 26 “I don’t...say anything”; SBPI-00063, p4, para 26 “I cannot recall...his body”; Kevin Nelson, Transcript 07/06/2022, p69, line 17 to p70, line 21 “And you...I described”

³¹⁰ SBPI-00047, 07:22:24

was clearly seen by them to be obstructing or hindering police in the execution of their duty.³¹¹ This would entitle them to use reasonable force to arrest him.³¹²

[159] At the point PCs Gibson and McDonough got involved, Mr Bayoh was undoubtedly displaying active resistance. In terms of the Use of Force SOP in place at the time, officers would be entitled to use force at level 3 (Control Skills). Control skills expressly include the use of leg restraints.³¹³ It is notable that (as described in Part 3) the information available to Gibson and McDonough en route would have alerted them to the possibility of a higher level of resistance entitling a higher level of response. Thus, it is clear that both officers conducted a fresh risk assessment on arrival and adapted their response accordingly.

Application of leg restraints:

[160] The proper method of application of the leg restraints is to have the subject in a prone position, and to apply the straps just above the knees and at the ankles. PC Gibson's description³¹⁴ and demonstration³¹⁵ to the Inquiry of the manner in which he sought to control Mr Bayoh's legs was indistinguishable from the trained technique.³¹⁶ PC McDonough's account confirms that the straps were applied in the correct position.³¹⁷ There is no evidence before the Inquiry to suggest that the fast straps were not applied in accordance with the trained technique.³¹⁸ While the Use of Force SOP³¹⁹ envisages that before leg restraints are applied, the subject will be handcuffed to the rear, this is not prescriptive (as seen by the use of the word

³¹¹ Police and Fire Reform (Scotland) Act 2012, section 90

³¹² Police and Fire Reform (Scotland) Act 2012, section 20, and the common law

³¹³ PS10933, para 4.6.5 (Level 4 - Active Resistance), para 4.7.4 (Level 3 – Control Skills), para 4.4 (Confrontational Continuum graph)

³¹⁴ SBPI-00045, p4, Answer 16; Daniel Gibson, Transcript 01/06/2023, p137, line 23 to p138, line 10, "So I dropped...by another officer"

³¹⁵ 01/06/2022 at approx 1408 hours (Transcript p139 on)

³¹⁶ PS10938, OST Student Training Manual, Module 4, Section 2, p119; see also Martin Graves, Transcript 28/11/2022, p70, lines 2-15, "Initially they would attempt...lifting you up"

³¹⁷ SBPI-00063, p4, Answer 14

³¹⁸ PS10938, Module 4, Section 2, p118, left hand column

³¹⁹ PS10933, para 20.5

'should' – "The Subject *should* be handcuffed to the rear..." and there is no SOP or other training rule which precludes the application of leg restraints in circumstances where a subject is unable to be cuffed to the rear. Mr Graves noted without criticism that there are times when officers cannot get handcuffs to the rear because of the level of resistance and therefore the cuffs will be to the front.³²⁰

[161] In so far as it may be suggested that the evidence of Christopher Fenton (a mental health worker trained in restraint in a clinical context) indicates that the attempts to restrain Mr Bayoh were inappropriate, his evidence, properly construed, would not provide a sufficient foundation. Mr Fenton described up to six officers apparently lying on top of Mr Bayoh while prone. As noted above, this description is not inconsistent with a proportionate and safe attempt at restraint and with the proper technique for the application of leg restraints. He was not able to describe specific actions of the officers³²¹ nor was it suggested by him that anything about the attempted restraint was excessive.³²² His car (black Honda Civic) appears on the Gallaghers CCTV footage at 07:22:41. It enters Hayfield Road at 07:22:48 – this is the point at which he first sees the restraint.³²³ By 07:21:54, his car can be seen manoeuvring around the "fish van". By 07:22:58 his car can be seen passing PC Smith's van. Mr Fenton confirmed that he had to navigate around various police vehicles.³²⁴ The reality is Mr Fenton had passed through the whole scene in less than 10 seconds, with his opportunity to observe the restraint being significantly shorter than that. He initially described it as a glance, "although probably an extended glance"³²⁵ but subsequently stated that he was "watching this scene for only a couple

³²⁰ Martin Graves, Transcript 28/11/2022, p88, lines 3-14, "So we get to that stage...often be to the front"

³²¹ COPFS-00048, p2, para 1, "I can't really...past the police cars"

³²² PIRC-00251, p3, para 1, "I think I maybe saw...as being overly excessive"; COPFS-00048, p3 para 2, "Against my background...caused me concern"

³²³ PIRC-00251, p2, para 7, "When I first turned...grey t-shirt"

³²⁴ PIRC-00251, p3, para 1, "I was still...manoeuvre past"; COPFS-00048, p2, para 1, "I can't really...police cars"

³²⁵ PIRC-00251, p3, para 1, "I only glanced...extended glance"

of seconds”.³²⁶ His transit through the scene occurs after PC McDonough has started to remove the leg restraints from his pocket³²⁷ but appears to be before the restraints have been successfully applied.³²⁸

[162] It is not possible to know at what time the leg restraints were finally secured but it appears to have been achieved relatively quickly.

[163] Once the leg restraints were on, the Chair will need to consider what position Mr Bayoh was in. There are differences in the accounts.

[164] PC Gibson states that he remained over the legs because they were still moving, albeit Mr Bayoh was not kicking out as much.³²⁹ He was applying less weight at that time.³³⁰ As soon as PC Smith noticed that Mr Bayoh was unresponsive and said “Get off him”, PC Gibson removed himself altogether from contact with Mr Bayoh.³³¹ It is unclear what period of time had passed between securing the straps and PC Smith saying “Get off him”. PC Gibson’s recollection is that it was at that point Mr Bayoh was moved onto his side. PC Gibson’s evidence on this is at odds with the other officers.

[165] PC McDonough stated that once the leg restraints were on, Mr Bayoh was placed on his side and it was apparent Mr Bayoh was still moving.³³² PC Tomlinson also testified that once the straps were applied, Mr Bayoh was moved onto his side.³³³ PC Good said that he was rolled onto his side.³³⁴ Once the straps were applied, PC Smith stood up and looked at his injured hand. He heard PC Walker say that the male needed to be moved onto his side and officers moved him onto his

³²⁶ SBPI-00011, p3, para 6, “I saw this...of seconds”

³²⁷ SBPI-00047, 07:22:10-07:22:20, per SNAPCHAT footage

³²⁸ SBPI-00047, 07:23:13, DS Davidson, “we’re gonna need...at the moment”; Samantha Davidson, Transcript 10/06/2022, p131, lines 13-15, “I could hear them...starting to do that”

³²⁹ PIRC-00258, p5, para 3, “I still stayed...fast straps”

³³⁰ SBPI-00045, p6, Answer 22

³³¹ PIRC-00258, p6, para 3; SBPI-00045, p6, Answer 22

³³² James McDonough, Transcript 07/06/2022, p55, lines 6-13, “Yes, absolutely...against the straps”

³³³ Ashely Tomlinson, Transcript 20/05/2022, p43, lines 2-13, “but I’ve got to a side...pocket of the opposite side”

³³⁴ Kayleigh Good, Transcript 31/05/2022, p161, lines 22-24, “I think one of...left-hand side, I think”

side.³³⁵ Very shortly after APS Maxwell arrived (which was before Mr Bayoh became unresponsive), Mr Bayoh was put onto his left-hand side, or was already lying on his left-hand side.³³⁶ No officer speaks to PC Gibson remaining over Mr Bayoh's legs.

[166] The Chair is invited to conclude that PC Gibson's recollection is not accurate and to prefer the evidence of the other officers, and to find that once the fast straps were applied, Mr Bayoh was moved onto his left side.

[167] The training is that a subject should be moved onto his side or into a seated position once the fast straps are secured.³³⁷

[168] The Chair should conclude that the application of leg restraints was performed in accordance with the training. He should also conclude that the application of leg restraints was justified and proportionate in terms of the Use of Force SOP.

APS Maxwell:

[169] On 3 May 2015, APS Maxwell was acting in a temporary role. At that time, he had seven years' service. While he was the senior officer in Response Team 4 because he was acting temporarily as a sergeant, he had significantly less service than PC Walker (10 years), PC Paton (14 years) and PC Smith. As well as having ten years' service, PC Smith was a qualified Officer Safety Trainer. In that role, he taught the practical aspects of the SPELS first aid course, specifically primary survey, CPR, secondary survey and placing a casualty in the recovery position. He had also

³³⁵ PIRC-00278, p8, para 8, "PC Walker said...moved him onto his side"

³³⁶ PIRC-00267, p3, para 4, "All officers...recovery position"; PIRC-00266, p5, para 1, "I got out...was facing me"; in his evidence Scott Maxwell initially suggested Mr Bayoh was already on his side (Transcript 07/06/2022, p183, lines 19-20, "He was on...onto his left-hand side" but later he clarified that he was being moved, p187, lines 6-18, "Not that I can recall...he was unconscious"

³³⁷ PS10938, Module 4, Section 2, p120, left hand column, bullet point 2, "The subject should...on their side"

attended a 3-day First Aid Course.³³⁸ He was a trained firearms officer and had been trained in public order.³³⁹

APS Maxwell's arrival:

[170] Command: Prior to APS Maxwell's arrival, there was no supervising officer at the locus. PI Kay suggested he did not have command of the incident unless he expressly took control. Not only did he seek to suggest that APS Maxwell (a lower ranked officer) would have command, but later he suggested that the ACR would be in command because it would be deemed a firearms incident, even though it was never declared as such.³⁴⁰ It would be a reasonable inference that PI Kay's evidence was designed to avoid being seen to have any responsibility for command of the incident. The Chair should prefer the evidence of PI Steven Stewart that if a call comes into an inspector's divisional area, they have command of the incident.³⁴¹

[171] Unless and until it became a firearms incident, PI Stephen Kay (as the on-duty Police Incident Officer ('PIO') and divisional inspector) was in charge, with subordinate responsibility falling to APS Maxwell.³⁴² PI Kay could have intervened at any time with what APS Maxwell was doing, but in PI Kay's view, he was doing things correctly.³⁴³ As noted in Part Two above, until either of the supervisors was on scene, they were reliant on feedback from the officers already at the locus. Officers attending an incident retain autonomy and discretion (within the bounds of their training and any applicable SOPs) to decide how to deal with what faces them. PCs Walker and Paton were the most experienced on the shift.

³³⁸ PIRC-00278, p2, para 1-3, 5

³³⁹ Alan Smith, Transcript 27/05/2022, p9, line 5 to p10, line 16, "Yes. I was a firearms...the role I was employed in"

³⁴⁰ Stephen Kay, Transcript 23/11/2022, p102, lines 9-15, "Q. Could you just...would take control"; p103, lines 13-22, "Q. So you've got an inspector...firearms incident"

³⁴¹ Steven Stewart, Transcript 24/11/2022, p116, lines 1-10, "Yes, I mean if you're...incidents like this"

³⁴² Steven Stewart, Transcript 24/11/2022, p104, lines 11-16, "Yes, so that would...firearms incident"

³⁴³ Stephen Kay, Transcript 23/11/2022, p102, lines 4-8, "PC Maxwell is not...goes to the ACR"

[172] Once APS Maxwell arrived at Hayfield Road, he was initially in charge of the incident on the ground (albeit still subject to direction from PI Kay).³⁴⁴ That PI Kay was performing a supervisory role can be seen from his response to the update provided by DS Samantha Davidson when he instructs officers to keep full control and use all restraints necessary.³⁴⁵ On PI Kay's arrival, he had full responsibility and was no longer reliant on feedback.³⁴⁶

[173] APS Maxwell was the last officer from Response Team 4 to arrive at the scene. His car pulled up in Hayfield Road at 07:22:29. He contacted the ACR within 30 seconds, but the controller did not respond.³⁴⁷

[174] On arrival APS Maxwell observed an ongoing attempted restraint with Mr Bayoh still actively resisting but with officers gaining control.³⁴⁸ Within a short time (estimates given were up to a minute), Mr Bayoh was under control with handcuffs and leg restraints applied.³⁴⁹ At that point he was in restraint. He noted that Mr Bayoh had no visible injuries at that time.³⁵⁰

[175] DS Davidson arrived around 30 seconds after APS Maxwell.³⁵¹ She had no concerns about the manner in which officers were seeking to control Mr Bayoh at that time (it appears leg restraints were in the process of being applied as officers were at Mr Bayoh's feet).³⁵²

[176] Once Mr Bayoh was under control, APS Maxwell assessed the risk to Mr Bayoh and the officers at that point to be low.³⁵³ As noted above, Mr Bayoh was placed on his side. Having briefly asked officers what happened and if everything

³⁴⁴ Samantha Davidson, Transcript 10/06/2022, p154, lines 8-10, "PS Scott...of his officers"

³⁴⁵ SBPI-00047, Davidson 07:23:13, Kay 07:23:49

³⁴⁶ Stephen Kay, Transcript 23/11/2022, p59, lines 14-20, "It's role-by-role...specialised department"

³⁴⁷ SBPI-00047, 07:22:50

³⁴⁸ PIRC-00266, p6, para 4, "From what I seen...had full control"; PIRC-00267, p2, "On arrival at locus...trying to restrain him"; SBPI-00044, p4, Answer 10, para 2

³⁴⁹ PIRC-00267, p3, para 2, "About a minute...applied"

³⁵⁰ PIRC-00267, p3, para 4, "I witnessed...at this time"

³⁵¹ ABPI-00046, 07:23:10 (car stops)

³⁵² Samantha Davidson, Transcript 10/06/2022, p132, lines 12-14, "I had no...concerns"

³⁵³ SBPI-00044, p4, Answer 10, para 2

was ok³⁵⁴, Maxwell left PC Alan Smith to monitor Mr Bayoh and he went to check on PC Short's welfare. He had checked with his officers that Mr Bayoh was conscious and breathing.³⁵⁵ APS Maxwell stated that he was confident in PC Smith's abilities to control the situation in terms of restraint and after-care for Mr Bayoh.

[177] Joanne Caffrey relies in her report on the Independent Advisory Panel on Deaths in Custody: Common Principles of Safer Restraint.³⁵⁶ She states that where a person is taken to the ground, core principles exist. These include an officer assuming the role of "controller" to co-ordinate the manual handling of the detainee, and an officer (possibly the same one) assuming the role of "safety officer" to monitor the welfare of the detainee.³⁵⁷ Caffrey opines that "a controlled restraint was required, with a controller function and safety officer function as soon as possible from the beginning."³⁵⁸ She appears to criticise APS Maxwell for failing to take such a role.³⁵⁹ It would be wrong so to do. Ms Caffrey's criticism relies on the application of the Independent Advisory Panel principles. She had no information to suggest that those principles had been adopted by Police Scotland as at 3 May 2015. Nor did she identify any equivalent principles in any applicable Police Scotland SOP.

[178] As PI James Young explained, at that time Police Scotland had not incorporated these principles into officer training. He confirmed that officers were not, at that time, trained that in a restraint involving three or more that one person should be in control. Police Scotland has subsequently incorporated a "safety officer" into restraint procedures.³⁶⁰ The criticism of APS Maxwell by Ms Caffrey was without proper foundation and was unwarranted on the facts, and the Chair should make such a finding.

³⁵⁴ SBPI-00044, p6, Answer 18, para 2

³⁵⁵ Scott Maxwell, Transcript 07/06/2022, p188, line 8 to p190, line 5, "I had PC Smith who was...what's happened here"

³⁵⁶ SBPI-00181, p318, App.G

³⁵⁷ SBPI-00181, p181, para 17.1.19, 17.1.19.4, 17.1.19.5

³⁵⁸ SBPI-00181, p233, para 18.9.1

³⁵⁹ ABPI-00181, p230, para 18.3.2

³⁶⁰ James Young, Transcript 22/11/2022, p140, line 16 to p142, line 9, "Inspector Young, could I ask...That's correct sir, yes"

[179] Given their respective levels of service, the undoubted experience and skill set of PC Smith, and that his expertise was evident to APS Maxwell by the actions PC Smith was taking³⁶¹, the Chair should conclude that APS Maxwell's assessment of risk and his decision to leave PC Smith to monitor Mr Bayoh were reasonable.

³⁶¹ PIRC-00266, p6, para 8-9, "When I saw PC Alan Smith...by his actions"

PART FIVE
AFTER THE RESTRAINT

PC Smith's monitoring of Mr Bayoh:

[180] Once Mr Bayoh had been restrained (as previously defined), PC Smith took his attention away from him for "30 seconds to a minute" to check a minor injury to his hand and ascertain who else was at the locus at that time. He remained in the vicinity of Mr Bayoh. At this stage Mr Bayoh was moved onto his left-hand side, in a manner akin to the recovery position. PC Smith could hear him moaning. Mr Bayoh was no longer resisting. Other officers were around him with hands on him to ensure he remain restrained and in position. No weight was being placed on him. PC Smith had no concerns for Mr Bayoh at that time.³⁶²

[181] After PC Smith had assessed the situation and his injury, he returned his attention to Mr Bayoh. He considered the possibility that Mr Bayoh suffered from excited delirium at that time and discounted it. Although he was aware of CS spray being used, he was not aware that Mr Bayoh had been struck with a baton. As he then went to examine Mr Bayoh, he noticed that he was unconscious. He and PC Paton tried to rouse Mr Bayoh verbally, without effect. PC Smith then put his knuckles on the bone at the top of his Mr Bayoh's chest (a recognised first aid technique), again without effect. On realising Mr Bayoh was unconscious, PC Smith immediately called for an ambulance.³⁶³ The ambulance was called for at 07.25.17.³⁶⁴

[182] When PC Smith realised Mr Bayoh was unconscious, he confirmed Mr Bayoh was still breathing by putting his face towards Mr Bayoh's mouth. He heard and felt breath and he could see Mr Bayoh's chest moving in a manner consistent with

³⁶² PIRC-00278, p 8-9 "Once the...control"; SBPI-00039, p10, para 68; SBPI-00042, p12-13, para 44 "I recall...his arrest"; SBPI-00063, p7, para 26 "I cannot...Called for"; Alan Smith, Transcript 27/5/2022, p134, line 25 to p137, line 17, "And so this...think so"

³⁶³ PIRC-00278, p 9 "At that stage...was requested"; SBPI-00042, p12-13, para 42 "I then began...immediately"; Alan Smith, Transcript 27/5/2022, p139, lines 2-13 "Yeah, that's...that was", p145, line 15 to p148, line 7 "Leaving your...Yes, it is"

³⁶⁴ SBPI-00047, p7

normal breathing. He thereafter continued to closely monitor Mr Bayoh's breathing. He did so while positioned close to Mr Bayoh's head. He was looking for changes in the pattern of Mr Bayoh's breathing. He did this by monitoring the movement of Mr Bayoh's chest.³⁶⁵

[183] Senior counsel to the Inquiry asked Ms Caffrey whether a reasonable officer would step back for 30 seconds to a minute from a restrained subject who was unresponsive but not breathing to check a superficial wound to their hand and consider whether the subject was suffering from excited delirium. Ms Caffrey said they would not.³⁶⁶

[184] Senior counsel to the Inquiry put a similar scenario to Mr Graves, albeit on this occasion she asked if the reasonable officer would "simply step back from the subject and leave them lying on the ground" without reference to any limitation of time or detail as to the purpose for which the officer stepped back. She further suggested that the 'reasonable officer' in question would "not carry out any further monitoring". Unsurprisingly, Mr Graves stated that the reasonable officer would continue to monitor such a subject until medical assistance arrived or another officer takes over.³⁶⁷

[185] These scenarios clearly referred to the actions of PC Smith. However, the factual premise underlying them did not accurately reflect the evidence before the Inquiry and summarised above and in Part Four. The questions asked were unfair to PC Smith and to the expert witnesses. No criticism of PC Smith should be drawn from Ms Caffrey's and Mr Grave's responses. Mr Bayoh was not left unattended. PC Smith did not step away when he was aware Mr Bayoh was unresponsive.

[186] It was after Mr Bayoh became unconscious that PC Tomlinson told PC Smith that he had struck Mr Bayoh on the head with a baton. PC Smith immediately

³⁶⁵ PIRC-000278, p9 "I checked his...normal breathing", p10 "I was fully not moving"; SBPI-00042, p13-14, paras 44-45; Alan Smith, Transcript 27/5/2022, p140, line 16 to p142, line 12 "So you have...Yes", p147, line 22 to p148, line 25 "And would...three minutes"

³⁶⁶ Joanne Caffrey, Transcript 1/12/2022, p90, line 5 to p91, line 8 "Would a...over that"

³⁶⁷ Martin Graves, Transcript 28/11/2022, p111, line 21 to p115, line 14, "Yes, so...Thank you"

examined Mr Bayoh's head for the presence of any serious injury, both visually and with his hands. He did not find any evidence of such an injury. He did not pass any update as APS Maxwell was standing close to him.³⁶⁸ APS Maxwell confirmed that PC Tomlinson had intimated that he had struck Mr Bayoh to the head and Maxwell promptly advised the ACR that Mr Bayoh had been struck on the head with a baton, having ensured that an ambulance had been summoned.³⁶⁹ Prior to that, on his arrival, APS Maxwell had asked his team what had happened.³⁷⁰ No-one at that stage mentioned that Mr Bayoh had been struck with a baton to the head. APS Maxwell stated that, had he been made aware, he would be getting an ambulance straight away.³⁷¹ In the event, at the point APS Maxwell was told of the baton strike, an ambulance had already been called.

[187] As soon as PC Smith thought Mr Bayoh had stopped breathing, he turned Mr Bayoh on to his back and checked by placing his ear over his mouth and looking down the line of his chest. DS Davidson, who had been standing nearby, also noticed that Mr Bayoh was in distress checked for a pulse. She could not find one. She asked PC Smith to check for one and he got the same result. PC Walker then commenced CPR with the assistance of PCs Paton and Smith. APS Maxwell immediately sought to expedite the ambulance.³⁷²

[188] PC Smith's oversight of Mr Bayoh followed the SPELS guidance.³⁷³ As soon as Mr Bayoh became unconscious, an ambulance was requested. APS Maxwell promptly updated the ACR as he learned more about what had happened and he

³⁶⁸ PIRC-00278, p9-10 "At that point...standing there"; SBPI-00042, p13, para 43; Alan Smith, Transcript 27/5/2022, p139, line 24 to p140, line 15 "Can we...his head"

³⁶⁹ SBPI-0047, p8, 07:26:41, 07:26:52

³⁷⁰ Scott Maxwell, Transcript 07/06/2022, p188, line 23 to p190, line 21, "Q. Who did you communicate...Not at that time, no"

³⁷¹ Scott Maxwell, Transcript 07/06/2022, p192, lines12-22, "If I had known...get that seen to"

³⁷² PIRC-00278, p10 "at which point...chest compressions"; SBPI-00038, p7, para 18 "He was...chest compressions"; SBPI-00042, p13-14, paras 44-45; SBPI-00044, p11-12, para 43 and para 44 "PC Smith...be performed"; SBPI-00047, p11, 07:29:30; Alan Smith, Transcript 27/5/2022, p142, line 13 to p145, line 14 "And then...to me", p149, line 1 to p153, line 24 "oh, three...I don't know; Scott Maxwell, Transcript 08/06/2022, p28, line 12 to p30, line 19 "Can I...Yes"; Samantha Davidson, Transcript 10/6/2022, p153, line 24 to p157, line 15 "I'm slightly...PC Craig Walker"

³⁷³ PS12313, p4,5,7,8,9

chased up the ambulance a number of times. It is not clear why the attending paramedics did not know of the possible head injury until arrival. Maxwell had passed all the necessary information to the ACR.

[189] As noted above, as of 3 May 2015, Police Scotland officers were not taught about the “safety officer” role. PC Smith cannot be held to a procedure or standard that he was not taught and that was not a part of the SOPs. In so far as the comments of Ms Caffrey and Mr Graves regarding PC Smith’s actions amount to criticisms on that the basis that he did not act in accordance³⁷⁴ with a “safety officer” procedure³⁷⁴, they are unwarranted.

[190] Ms Caffrey, who is not medically qualified, suggests that CPR should have commenced as soon as “abnormal” breathing was identified.³⁷⁵ Dr Nathaniel Cary would not have expected rescue breaths to be given to someone who was unconscious but breathing.³⁷⁶ He highlighted that it would be difficult for a lay person to identify if someone was not breathing adequately.³⁷⁷ Dr Gillian Pickering, a consultant in Accident & Emergency medicine, suggested that CPR started at the correct time as it was started as soon as PC Smith and DS Davidson thought Mr Bayoh had no cardiac output.³⁷⁸

[191] There is no evidence of Mr Bayoh breathing abnormally until the point PC Smith recognised that he had ceased breathing. PC Smith had been closely monitoring Mr Bayoh from the moment he became unconscious. Standing his lack of medical training, PC Smith intervened appropriately as soon as he thought Mr Bayoh’s breathing pattern had changed. The Chair should find that PC Smith’s

³⁷⁴ SBPI-00181, p205, paras 18.1.10, p233, 18.8.2 and 18.9.1, SBPI-00190, p57, para 113; 28/11/22, p92, line 20 to p94, line 10 “And we’ve...by 2015”, p98, line 3 to p99, line 9 “So you’ve...training, yes”, p103, line 3 to p104, line 5 “Moving on...of positioning”; Joanne Caffrey, Transcript 1/12/2022, p96, line 7 to p98, line 4 “And does that...from 2006”

³⁷⁵ SBPI-00181, p270-271, para 23.2.4; Joanne Caffrey, Transcript 1/12/2022, p84, line 5 to p85, line 1 “And when...in 2015”, p88, lines 3 to 9 “And if...Yes”

³⁷⁶ Dr Nathaniel Cary, Transcript 24/5/2023, p71, line 17 to p72, line 4 “So in...be relevant”

³⁷⁷ Dr Nathaniel Cary, Transcript 24/5/2023, p72, lines 5-24 “In terms of...Exactly”

³⁷⁸ Dr Gillian Pickering, Transcript 01/06/2022, p50, lines 17-22 “So what...to do”

monitoring of Mr Bayoh, and the actions he took, were appropriate and in line with officers' training.

When should an ambulance have been called? Maxwell's role:

[192] Maxwell, Gibson and McDonough were not at the locus to witness Mr Bayoh's initial interactions with the attending officers. The best opportunity to assess whether Mr Bayoh was intoxicated with drugs, or suffering from a mental health crisis, or was displaying ABD (or Excited Delirium) was during the first part of the incident, before he was brought to the ground by PC Walker.

[193] In so far as it is suggested that an ambulance ought to have been called before officers began to attempt to restrain Mr Bayoh, APS Maxwell, PC Gibson and PC McDonough cannot be criticised since they only arrived after Mr Bayoh was on the ground with other officers attempting to gain control. At the point APS Maxwell arrives, his officers appear to be gaining compliance quickly over Mr Bayoh and there were no obvious signs of Excited Delirium (which was, at that time, the subject of the officers' training).

[194] Ms Caffrey insisted that an ambulance should have been called to assist Mr Bayoh sooner than it was. In her opinion, when APS Maxwell called for an ambulance for PC Short, he should also have called one for Mr Bayoh.³⁷⁹ That is an unfair criticism. APS Maxwell did not have any realistic opportunity to assess whether Mr Bayoh might be suffering from "excited delirium" or was displaying ABD in the 90 seconds or so between calling the ambulance for PC Short and the point Mr Bayoh became unresponsive and an ambulance was called. Nor did Maxwell at that point know about the head injury.

[195] Once Mr Bayoh was under control, PC Smith (who had witnessed Mr Bayoh's actions over a far longer period) did consider the possibility of excited delirium. As

³⁷⁹ SBPI-00181, p 205, para 18.1.9, p212, para 18.1.25, p231, para 18.5.7, p18.5.8.5 para 232, p233, paras 18.7.1 and 18.9.1, p243 para 20.2.2.3 and 20.2.2.4, p244, para 20.2.2.7, p245, para 20.2.2.10 and 20.2.3, p246, para 20.2.4, p270, para 23.2.2 and 23.3.3

has been stated, it was very shortly after this that Mr Bayoh was found to be unconscious. At that point an ambulance was called. It was then repeatedly chased.

[196] The Care and Welfare of Persons in Police Custody SOP provides that subjects are in custody from the moment they are “apprehended”.³⁸⁰ Any requirement for immediate or urgent medical attention takes priority over custody. This includes where a subject has suffered a head injury, is unconscious or is suffering from a medical condition that requires immediate medical attention. In such circumstances, the subject should be assessed at a hospital or by paramedics before being taken to a custody suite.³⁸¹ At the moment Mr Bayoh was seen to be unconscious, emergency medical attention was sought. As soon as APS Maxwell was told of the possible head injury, he chased up the ambulance.

Communication failures between the ACR and the Scottish Ambulance Service:

[197] PC Masterton confirmed that the information passed to the Scottish Ambulance Service (“SAS”) came from the ACR. The ACR had a direct line to the SAS Control Room. He was not involved in contacting the SAS in relation to the incident, it was done by his colleagues in the East Overview.³⁸²

[198] An ambulance was initially called for PC Short. That message was relayed to the SAS. However, the information received by the assigned ambulance from SAS control not only sent them to the incorrect locus, Victoria Road, but also described PC Short as a male police officer.³⁸³ While the ambulance was en route, the locus had to be corrected twice before Hayfield Road was correctly specified.³⁸⁴ While on this occasion the specification of an incorrect locus did not delay the arrival of

³⁸⁰ PS11014, p13, para 5.1.1

³⁸¹ PS11014, p13-14, paras 5.3.1-5.3.2

³⁸² Scott Masterton, Transcript 24/11/2022, p23, line 20 to p25, line 20 “Ambulance contacted...the log”, p56, lines 12 to 18 “Can we...didn’t, no”

³⁸³ PIRC-01068, p3 “Received call 07:24...FACIAL INJ”; David Taylor, Transcript 22/6/2022, p69, line 15 to p74, line 11 “Can you...correct, yes”

³⁸⁴ PIRC-01068, p3 “UPDATE MESSAGE...ROAD KIRCKALDY”; David Taylor, Transcript 22/6/2022, p75, line 6 to p76, line 6 “En route...that point”

paramedics because of where it was situated as these updates were received, had it been closer to the actual locus then a delay could have been caused.³⁸⁵

[199] Over the course of the incident, APS Marshall provided updates about the condition of Mr Bayoh. It appears his transmission that Mr Bayoh has been struck on the head with a baton and had been sprayed with CS and PAVA was not passed on by the ACR to the SAS³⁸⁶, whereas his transmission that CPR had commenced was.³⁸⁷

[200] PC Masterton acknowledged receipt of APS Maxwell's transmission about the baton strike and use of CS and PAVA, but noted that it was for the controller in East Overview who initially asked an ambulance to attend to update SAS with information contained in APS Maxwell's transmission.³⁸⁸ David Taylor, one of the paramedics who attended, confirmed that this information was not passed to him and that this information would have been useful to him.³⁸⁹ APS Maxwell rightly expected that his transmission would have been relayed to the attending paramedics.³⁹⁰ That it was not was a failure of information management within the ACR.

[201] APS Maxwell chased up the ambulance for PC Short once³⁹¹ and for Mr Bayoh three times.³⁹² While PC Masterton may be correct to say that the SAS will likely be irritated by constant requests for updates³⁹³, ETAs for the ambulance were only provided after APS Maxwell's third chaser for the ambulance for Mr Bayoh.³⁹⁴ These ETAs were given six minutes after an ambulance had been requested for Mr Bayoh because he was unconscious. In the circumstances, it was reasonable for the officer in

³⁸⁵ David Taylor, Transcript 22/6/2022, p79, lines 8-23, line 6 "So I...done, yes"

³⁸⁶ SBPI-00047, p8, 07:26:52

³⁸⁷ PIRC-01068, p3, Final Observations "TOLD BY...CARDIAC ARREST"; SBPI-00047, p11, 07:29:30

³⁸⁸ Scott Masterton, Transcript 24/11/2022, p58, line 12 to p60, line 11 "Now, there...no"

³⁸⁹ David Taylor, Transcript 22/6/2022, p106, line 17 to p108, line 24 "Things like...that information"

³⁹⁰ SBPI-00044, p13, para 50

³⁹¹ SBPI-00047, p7, 07:24:28

³⁹² SBPI-0047, p8, 07:26:41, p11, 07:29:30, p12, 07:31:22

³⁹³ Scott Masterton, Transcript 24/11/2022, p63, line 5 to p60, line 11 to p65, line 20 "Do you...as possible"

³⁹⁴ SBPI-00047, p12, 07:31:57, 07:32:25

attendance at the locus to have expected an ETA to be provided far sooner than that given that they recognised they were facing a medical emergency from that point.

The provision and effectiveness of CPR:

[202] Handcuffs and leg restraints were not removed from Mr Bayoh until he reached hospital.³⁹⁵ Ms Caffrey suggested that they should have been removed when Mr Bayoh became unconscious³⁹⁶, or where they had not been removed by that stage, before CPR commenced.³⁹⁷ Mr Graves thought they should have been removed when he stopped breathing³⁹⁸, albeit he was more prepared to recognise the risk that Mr Bayoh could have been feigning unconsciousness than Ms Caffrey.³⁹⁹

[203] The officers who performed CPR and APS Maxwell did not believe that the presence of handcuffs or leg restraints in anyway affected their ability to perform CPR.⁴⁰⁰ Mr Taylor shared that view.⁴⁰¹ Although Dr Pickering thought they may have affected the ability to effectively perform CPR⁴⁰², the CPR provided by officers at the locus appears to have been effective given that Mr Taylor was able to detect a pulse when Mr Bayoh was attached to a defibrillator in the ambulance, meaning his heart was beating at that time.⁴⁰³ A pulse was also found by Dr Picking when Mr Bayoh

³⁹⁵ Alan Smith, Transcript 27/5/2022, p166, line 12 to p167, line 2 “Did you...or not”; Gillian Pickering, Transcript 1/6/2022, p23, lines 8-11 “What happened...said yes”

³⁹⁶ SBPI-00181, p181, para 17.1.19.9, p210, para 18.1.21; Joanne Caffrey, 1/12/22, p99, lines 2-13 “And what...Yes”

³⁹⁷ SBPI-00181, p236, para 18.9.7; Joanne Caffrey, 1/12/22, p101, lines 1-7 “And after...restraints removed”

³⁹⁸ Martin Graves, Transcript 28/11/2022, p115, line 15 to p116, line 4 “Can I ask...that stage”

³⁹⁹ Martin Graves, Transcript 28/11/2022, p105, line 6 to p106, line 5 “What you...that point”

⁴⁰⁰ Scott Maxwell, Transcript 8/6/2022, p36, line 5 to p37, line 9 “Where were...CPR done”; Alan Paton, Transcript 21/6/22, p63, lines 19 to 23 “No, because...negligible”, p65, lines 8 to 22 “Well, I...the CPR”

⁴⁰¹ David Taylor, Transcript 22/6/2022, p95, lines 9 to 13 “We have...The CPR”

⁴⁰² SBPI-00028, p10, para 49; Gillian Pickering, Transcript 1/6/2022, p26, line 9 to p28, line 2 “Doctor, we have...Yes”, p82, line 5 to p83, line 6 “Earlier in...to restart”

⁴⁰³ SBPI-00017, p9, para 44, David Taylor, Transcript 22/6/2022, p96, line 18 to p97, line 22 “Can we...was beating”

first arrived at hospital.⁴⁰⁴ That the CPR was effective was spoken to anecdotally by Dr Cary.⁴⁰⁵

[204] Officers had a legitimate concern that Mr Bayoh may have feigned unconsciousness.⁴⁰⁶ While they had a duty to ensure his safety, they also had a duty to ensure that they and their colleagues were kept safe and to prevent the potential need for a further restraint measures to be undertaken.

[205] It is recognised the use of handcuffs and leg restraints can in certain circumstances amount to degrading treatment in terms of Article 3 and in extreme circumstances Article 8 of ECHR. This is not such a situation. The handcuffs and leg restraints were appropriately applied to effect a lawful arrest and to protect officers from harm. The failure to remove them was not aimed at degrading or humiliating Mr Bayoh. So while removal of the handcuffs and leg restraints during CPR may have been best practice, the Chair should find that the fact they remained in place had no discernible impact on the significant efforts taken by officers to preserve Mr Bayoh's life at the locus; that it was not unreasonable for the officers to keep them in place and that Mr Bayoh's ECHR rights were not breached.

Provision of a blanket

[206] Ms Caffrey suggested that the 'reasonable officer' would have provided Mr Bayoh with a blanket (or equivalent covering) while he was lying on the ground.⁴⁰⁷ However, both APS Maxwell⁴⁰⁸ and Mr Graves⁴⁰⁹ thought that such a covering would have got on the way of the officers while they were performing CPR. Further,

⁴⁰⁴ PIRC-00118, p2 "I had checked...a pulse"

⁴⁰⁵ Nathaniel Cray, Transcript 22/6/2022, p134, line 13 to p135, line 10 "Just to be...really helps"

⁴⁰⁶ PIRC-00274, p10 "At that point...was breathing"; Alan Smith, Transcript 27/5/2022, p 154, lines 7 to 42 "Was there...of restraint"; Scott Maxwell, Transcript 8/6/22, p19, line 21 to p20, line 21 "Did you...you're in control"; Alan Paton, Transcript 21/6/22, p63, lines 23 to 25 "and it is...or whatever", p64, line 11 to p65, line 24 "And you...you know"

⁴⁰⁷ SBPI-00181, p252, para 20.9.1; Joanne Caffrey, Transcript 1/12/2022, p99, line 14 to p100, line 23 "What would...can use?"

⁴⁰⁸ Scott Maxwell, Transcript 8/6/22, p20, line 22 to p21, line 3 "And did...at that time"

⁴⁰⁹ Martin Graves, Transcript 28/11/2022, p116, line 18 to p117, line 8 "When we...treatment mode"

no evidence was led from any medical witness that giving Mr Bayoh a blanket would have had any material impact on his condition.

[207] The evidence of APS Maxwell and Mr Graves should be preferred regarding this issue. APS Maxwell and Mr Graves were right to state that a blanket could have been provided if Mr Bayoh had been lying on the ground for a period without the need for CPR. However, that window of time in the instant case was small.⁴¹⁰ It was not long after the ‘control phase’ of the restraint was over that Mr Bayoh fell unconscious. From the point, PC Smith needed to carefully observe the movements of Mr Bayoh’s chest. The sourcing and addition of a blanket would potentially have hindered that process. Moreover, once CPR was required, it would have needed to have been removed in any event. The Chair should find that this issue was *de minimis* and no criticism should be made of any officers with respect to a failure to provide Mr Bayoh with a blanket.

⁴¹⁰ SBPI-00190, p58, para 115 “In terms of...administering CPR”; Scott Maxwell, Transcript 8/6/22, p21, line 4 to p22, line 6 “There was...of seconds”

PART SIX

CAUSE OF DEATH

Law & Practice

[208] The Inquiry Team's Cause of Death Law and Practice Note⁴¹¹ accurately summarises the three tests for factual causation which may apply in damages actions arising from negligence: the 'but for', 'material contribution' and 'material increase in risk' tests.

[209] On considering the evidence, the Chair should conclude that no single factor led to Mr Bayoh's death. Rather, he is invited to conclude that the cause of Mr Bayoh's death is multifactorial. The reasons for that are discussed in detail below.

[210] As no single factor led to Mr Bayoh's death, it would be inappropriate to apply the 'but for' test.⁴¹²

[211] Similarly, the Chair should not apply the 'material increase in risk' test.⁴¹³ The application of this rule is exceptional. In *Sienkiewicz v Grief (UK) Ltd*⁴¹⁴, the Supreme Court reiterated that the test only applies in circumstances where it is scientifically impossible to establish the cause of a pursuer's injury.⁴¹⁵ Here, that issue does not arise given the clear identification of the factors which led to Mr Bayoh's death.

[212] The Chair is invited to apply the 'material contribution' test.⁴¹⁶ In applying that test, the Chair should conclude that those factors listed in Part 1a of the proposed cause of death set out below 'materially contributed' to Mr Bayoh's death.⁴¹⁷ These factors cannot be said to be *de minimis*.

⁴¹¹ SBPI-00301

⁴¹² SBPI-00301, p2, para 1-3, *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32, [37]-[40]

⁴¹³ SBPI-00301, page 3, para 5 to p6, para 1

⁴¹⁴ *Sienkiewicz v Grief (UK) Ltd*

⁴¹⁵ *Sienkiewicz v Grief (UK) Ltd*, [142], [161], [207] – [208]

⁴¹⁶ *Bonnington Castings Ltd v Wardlaw* 1956 SC (HL) 26, 31 – 32, SBPI-00301, p1, para 2 to p2, para 4

⁴¹⁷ Para [215] below

Cause of Death:

[213] The List of Issues relating to the Cause of Death hearing lists a number of matters that may have played a role in the chain of events leading to Mr Bayoh's death.⁴¹⁸ Based on the evidence before the Inquiry, the Chair is invited to conclude the following had no bearing: exposure to incapacitant sprays, heart disease, seasonal rhinitis, sleep apnoea.

[214] The opinion of each of the experts who appeared before the Inquiry is that the Cause of Death should be in a narrative form. The Chair is invited to adopt that approach.

[215] For the reasons set out below, the Chair should conclude that the cause of death is best stated as⁴¹⁹:

1a Sudden death in a man intoxicated by MDMA (ecstasy) and alpha-PVP, drug-induced psychosis, in association with struggling against attempted restraint

2 Sickle cell trait

[216] Should the Chair conclude that there was a degree of positional or mechanical asphyxia arising from the conduct of police officers (in particular PC Craig Walker compressing Mr Bayoh's chest) and that this amounted to a material contribution to death, the cause of death should be stated as:

1a Sudden death in a man intoxicated by MDMA (ecstasy) and alpha-PVP, drug-induced psychosis, in association with struggling and attempted restraint

2 Sickle cell trait

This is the cause of death proposed by Dr Cary and agreed upon by Dr Shearer, with the addition of drug-induced psychosis and 'attempted'. The forensic pathologists could not diagnose drug-induced psychosis, but the existence of it and its contribution to the circumstances of the death was spoken to in clear terms by Dr

⁴¹⁸ SBPI-00302

⁴¹⁹ The underlining is intended to highlight the language that differs from the COD proposed by expert witnesses

Lipsedge, within whose expertise diagnosis lies. “Attempted’ is inserted because of the definition of ‘restraint’ which the Chair is urged to adopt.

Reasons: “Sudden death”

[217] There is nothing found at post-mortem to account for Mr Bayoh’s death. The conclusion drawn by the majority of the pathologists is that Mr Bayoh has suffered a sudden fatal cardiac arrhythmia.

[218] The Chair should discount any adverse impact of chronic drug use (whether stimulants or steroids). The evidence of Dr Karch that there was chronic damage to the heart as a consequence of long-term steroid and stimulant abuse should be rejected.⁴²⁰ The heart and samples taken from it have been examined by numerous experienced pathologists and no-one apart from Dr Karch noted any damage to the heart or changes to the heart tissue or structure (such as enlargement). In particular, the heart was examined by a specialist cardiac pathologist, Professor Mary Sheppard, who noted that the heart was “morphologically normal” and that “While the drugs may have an effect on the heart, there is no evidence pathologically of damage to the heart due to drugs”.⁴²¹

Reasons: “Intoxicated by MDMA and alpha-PVP, drug induced psychosis”⁴²²

[219] There are two relevant aspects which the Chair should consider in relation to drug intoxication. The first is the acute effect of the drugs on Mr Bayoh’s heart – including whether it can be excluded that the fatal cardiac arrhythmia was triggered by the drugs alone. The second is in relation to the effect of the drugs on Mr Bayoh’s mental state and his behaviour.

[220] In relation to the first aspect – the acute effect of the drugs on Mr Bayoh’s heart – the Chair should conclude that both stimulants rendered Mr Bayoh more

⁴²⁰ PIRC-02526(a), p1-2; SBPI-00319, p9, para 33-45

⁴²¹ COPFS-00027, p5, para 3; p6, para 3

⁴²² Mr Bayoh had historically and recently also taken steroids. While these may have rendered him more vulnerable to arrhythmia, it is not suggested that they made a material contribution to his death

vulnerable to cardiac arrest. As to whether the drugs alone triggered a fatal arrhythmia, while this cannot be excluded, on balance of probabilities it is not the more likely direct cause of death. It is more likely than not that the drug intoxication rendered Mr Bayoh more susceptible to irregular heart rhythms (including tachycardia) which, when combined with activity such as struggle/restraint, materially increased the risk of cardiac arrest.⁴²³

[221] In relation to the second aspect – the effect of the drugs on Mr Bayoh’s mental state and behaviour – the Chair should accept the evidence of Dr Lipsedge and Professor Eddleston and conclude that Mr Bayoh was suffering from psycho-stimulant intoxication and psychosis.

[222] Psycho-stimulant intoxication resulted in Mr Bayoh suffering a psychotic episode from the time he left Martyn Dick’s house until he lapsed into unconsciousness in Hayfield Road. It is important to recognise the psycho-stimulant psychosis as different from and as developing out of psycho-stimulant intoxication. Intoxication, as noted above, rendered Mr Bayoh vulnerable to cardiac arrhythmia. It further rendered him much more vulnerable to developing psychosis.⁴²⁴ While psycho-stimulant intoxication may cause behavioural changes⁴²⁵, the evidence did not suggest that the intoxication was the sole cause of his behaviour. It is the development of psychosis that properly and fully explains his acutely disturbed behaviour as witnessed by Zaeed Sahid, the members of the public who called the police, those who witnessed Mr Bayoh in and around Hayfield Road before his encounter with the police, and the police officers themselves.⁴²⁶

[223] Concern has been expressed by a number of expert witnesses that the term Excited Delirium should not be used as a cause of death. The Independent Review

⁴²³ SBPI-00317, p19, para 79, “There is relatively little...cardiac arrests”; Prof Eddleston, Transcript, 16/05/2023, p64, lines 1-8, “I mean we have...not clear why”; p82, line 15 to p83, line 10, “There’s also...taking the drugs”

⁴²⁴ Prof Eddleston, Transcript 16/05/2023, p41, lines 21-24, “that alpha-PVP...rate of psychosis”

⁴²⁵ COPFS-00130, p18, para 1, “The rapid changes...intoxication”; and para 3, “The adverse...other exposure”

⁴²⁶ Dr Lipsedge, Transcript 11/05/2023, p32, lines 14-24, “Q. You’ve talked about...Yes. Exactly”; COPFS-00130, p18, para 4, “Psycho-stimulant psychosis evolves...extremely violent behaviour”

of Deaths and Serious Incidents in Police Custody recommended “Excited Delirium should never be used as a term that, by itself, can be identified as the cause of death.” This recommendation has been adopted in England and Wales by the Forensic Science Regulator and the Royal College of Pathologists.⁴²⁷ Insofar as it is unclear that this approach has been formally adopted in Scotland, the Chair should make a similar recommendation.

[224] In relation to the term Acute Behavioural Disturbance, the preponderance of opinion evidence is that this term should be used, not as a medical diagnosis, but as a descriptor of how an individual is presenting and that they should be treated as an acute medical emergency. Maxwell, Gibson and McDonough agree. Dr Lipsedge went further than other witnesses, proposing the idea of a SAPID (severely agitated person in distress) which would be apt to encompass not only the individual who is psychotic (for whatever reason), poses a risk and needs urgent medical intervention, but also the person who is publicly distressed, for example a lady who has been bereaved.⁴²⁸ The Chair should reject that wider approach. There is no evidence that its adoption would assist in the safe resolution of incidents where police officers are called to attend on a person behaving in a bizarre and potentially dangerous manner. There is no evidence that it would enhance the ability of police officers to distinguish between those who require urgent medical intervention and those who do not. Dr Lipsedge himself recognised that this approach would still necessitate the exercise of some judgment to distinguish between those requiring an emergency service response and medical intervention and those who do not.⁴²⁹ He noted that this is difficult to teach to police and ambulance staff, as recognised by the Royal College of Psychiatrists.⁴³⁰

⁴²⁷ WIT-00025, p3, para 1.1.4, p4, para 5.1.1

⁴²⁸ SBPI-00298, p20, para 40; p21, para 44-45

⁴²⁹ SBPI-00298, p21, para 43-44, “In a community...come into it”

⁴³⁰ SBPI-00298, p35, para 79, “The college addresses...at physiological risk”

[225] Drug-induced psychosis, in contrast to Excited Delirium or ABD, is a medical diagnosis. It is therefore proper, in appropriate cases, to include it as a contributing factor in the cause of death. Mr Bayoh's is an appropriate case.

[226] Extreme paranoia and an aggressive reaction are well-recognised patterns of behaviour with synthetic cathinones.⁴³¹ The psychosis meant that Mr Bayoh was incapable of rationalising the situation and incapable of stopping struggling.⁴³²

[227] Dr Lipsedge postulated that black men who are not mentally unwell may struggle in order to escape the police because they feel the outcome for them is going to be very bad.⁴³³ The Chair should reject any suggestion that Mr Bayoh fell into this category. Dr Lipsedge's remark was predicated on the scenario of a black man who has been "inappropriately apprehended".⁴³⁴ No doubt it is within judicial knowledge that there is statistical evidence to suggest that black men are disproportionately subject to the exercise of police powers such as "Stop and Search" (albeit Dr Lipsedge commented that it was in the United States that the hypothesis he was presenting was well documented⁴³⁵). However, this is not a case in which one could conclude that Mr Bayoh was inappropriately apprehended. He was reported as being in possession of a large knife, as if he was on a mission, he had been chasing and striking out at cars. Those reports necessitated the attendance of officers. When Mr Bayoh punched PC Short to the ground, there can be no serious dispute that officers were entitled (if not actually required) to apprehend and physically restrain him.⁴³⁶ He was not "inappropriately apprehended".

⁴³¹ SBPI-00298, p9, para 16, "It is very important...pattern of behaviour"

⁴³² Dr Cary, SBPI-00268, p16, para 70, "My understanding...be reasoned with"; Prof Eddleston, Transcript, 16/05/2023, p113, lines 3-8, "Because he is not understanding...could die from it"

⁴³³ Dr Lipsedge, Transcript 11/05/2023, p86, lines 9-15, "But I do want to...death struggle"

⁴³⁴ Dr Lipsedge, Transcript 11/05/2023, p86, line 11

⁴³⁵ Dr Lipsedge, Transcript 11/05/2023, p82, lines 11-21, "So the struggle...experience of racism"

⁴³⁶ Martin Graves, Transcript 28/11/2022, p61, line 18 to p63, line 5, "I think you've got to be...potential death"; COPFS-00024, p22, para b, "In this incident...handcuffs", and p30, para r, "totally justifiable...possession of a knife"; Joanne Caffrey, Transcript 01/12/2022, p30, line 23 to p31, line 5, "you've got all the options...safe detention of the subject"

[228] Psychosis (and associated intoxication) is the more probable explanation for the degree of resistance Mr Bayoh displayed.⁴³⁷

Reasons: “in association with struggle against attempted restraint”

[229] Professor Lucas proposed “struggle against restraint”.⁴³⁸ Dr Nathaniel Cary proposed “struggle and restraint”.⁴³⁹ Dr Shearer agreed with Dr Cary’s proposal, but she was not asked about her view of Prof Lucas’ phrasing.

[230] No expert was asked to consider the definition of restraint used by Police Scotland, namely that restraint is only attained when hands and legs are under control.⁴⁴⁰ Indeed, at no point during the evidence was a consistent definition of “restraint” established and used.

[231] Maxwell, Gibson and McDonough take no position on what findings the Chair should make about what occurred during the period prior to their arrival on the scene when Mr Bayoh was interacting with the other officers. After their arrival, they explained to the Chair what they saw of the ongoing attempted restraint.⁴⁴¹

[232] The key issue for the Chair to determine in deciding how to express the “struggle/restraint” aspect of cause of death is whether or not the Chair is satisfied that PC Craig Walker was in fact lying with his full body weight on Mr Bayoh’s torso for such a period as to cause a degree of mechanical (or, as some put it, positional) asphyxia that contributed in a material way to hypoxia. Should the Chair conclude that PC Walker did do that, the Chair should describe that part of the cause of death as “in association with struggle and attempted restraint”.

[233] However, the evidence of the expert witnesses on pathology would not, of itself, permit that conclusion.

⁴³⁷ Dr Lipsedge, Transcript, 11/05/2023, p15, line 18 to p16, line 6, “This might be...lack of cooperation”; see also Dr Cary, SBPI-00268, p15, para 68, “I don’t think...driven by drugs”

⁴³⁸ SBPI-00314, p10, para 36, “I would not actually...phenomenon”

⁴³⁹ COPFS-00196, p6, para 5

⁴⁴⁰ See Part Four, para [150]

⁴⁴¹ See Part Four

[234] The pathological findings relied upon to establish a degree of asphyxia are the petechial haemorrhages. Dr Cary's view is that these "may indicate a degree of asphyxia" and that this most likely originated from compression of the trunk in a face down position.⁴⁴²

[235] Dr Cary elaborated on this in his parole evidence. He described seeing petechial haemorrhages in "crush asphyxia-type deaths" because the chest is squeezed so hard.⁴⁴³ However in his inquiry statement, Dr Cary had distinguished Mr Bayoh's case from a "classic asphyxia" which includes crushing, noting that "it's something a bit more subtle. It's basically breathing not keeping pace with the requirements because of the amount of exercise going on."⁴⁴⁴ Thus Dr Cary's position on the significance of the haemorrhages was inconsistent.

[236] Other relevant experts were of the opinion that petechial haemorrhages, while consistent with a degree of asphyxia, are also consistent with a period of resuscitation involving CPR.⁴⁴⁵

[237] The pathological evidence does not of itself permit the conclusion that there was a degree of positional or mechanical asphyxia caused by the actions of the officers, in particular PC Walker.

[238] There have been a number of questions asked by senior counsel to the inquiry about whether Mr Bayoh was in respiratory arrest first followed by cardiac arrest, and what, if any, significance that may have in determining cause of death, in particular in relation to possible asphyxia. Given the evidence (discussed immediately below) that Mr Bayoh's own exertions and consequent development of acidosis caused/contributed to hypoxia, any finding that respiratory arrest came first would not of itself assist the Chair in determining whether some aspect of the control phase or the restraint itself gave rise to a degree of asphyxia. In any event,

⁴⁴² COPFS-00196, p6, para 5, "In terms of possible...there was no evidence."

⁴⁴³ Dr Cary, Transcript, 24/05/2023, p44, lines 4-9, "But you may...squeezed so hard"

⁴⁴⁴ SBPI-00268, p34, para 138, "It's not classic...going on"

⁴⁴⁵ Dr Shearer, Transcript 09/05/2023, p56, line 10 to p57, line 12, "In our forensic...them as well"; PIRC-01445, p17, para 1, "Post mortem examination...degree of asphyxia"; Prof Crane, COPFS-00134, p6, para 2, "These petechial...cardio-pulmonary resuscitation"

the factual evidence is not sufficiently clear to allow a finding that respiratory arrest came first. As Dr Cary explained, it is very difficult to know what the first event was and the signs can be confusing.⁴⁴⁶ While Mr Bayoh was identified as having a heart rhythm when he arrived at hospital, it cannot be known whether he had a rhythm all along, or whether the continued efforts at CPR by the police officers had restored a faint pulse.

[239] The Chair should not conclude that the hypoxia suffered by Mr Bayoh was as a result of positional/mechanical asphyxia caused by PC Walker (or other officers). He should conclude, on balance, that the hypoxia was the result of Mr Bayoh's over-exertion in the struggle against the attempts to restrain him. As noted above, the Chair is invited to conclude that the reason for Mr Bayoh's relentless struggle was intoxication and psychosis, rather than as a result of specific actions of the police officers (beyond the mere fact they were attempting to restrain him).

[240] A consensus emerged in the evidence that it is most likely that, as a result of over-exertion and a struggle until exhaustion, Mr Bayoh developed acidosis, triggering ultimately a fatal cardiac arrhythmia.

[241] Prof Crane opined that "If the deceased was acting in a violent or aggressive manner or was resisting being restrained then the restraint process will be associated with increase in heart rate and blood pressure, sweating, possible elevation in body temperature and eventual exhaustion...A general increase in muscular activity may result in elevation of blood lactate acidosis."⁴⁴⁷ He continued "It must be understood however that it is not the 'restraint' per se which may predispose to the cardiac arrest but its association with the effects of the stimulant drugs along with aggressive and/or violent behaviour, excitability and physical/emotional stress."⁴⁴⁸

[242] In his report, Dr Cary described Mr Bayoh as displaying "remarkable strength and stamina" and that where the 'restraint' and struggling continued it was very

⁴⁴⁶ Dr Cary, Transcript 24/05/2023, p68, line 14 to p69, line 5, "Yes, or it may be cardiac...fingertips"

⁴⁴⁷ COPFS-00134, p5, final para

⁴⁴⁸ COPFS-00134, p6, para 1

likely to lead to significant metabolic disturbances and the development of acidosis.⁴⁴⁹ In his inquiry statement and in evidence, Dr Cary described the effects of “isometric exercise”, namely that it consumes a lot of energy and can cause lactic acidosis. He was envisaging not seeing much, if any movement, because the person is being held down.⁴⁵⁰ It was explained to him by senior counsel to the inquiry that there was eye-witness evidence of Mr Bayoh doing a press-up movement and lifting up himself, PC Walker and other officers and he was asked if that movement would put Mr Bayoh at risk of hypoxia. Dr Cary agreed stating, “Yes it does. I think the other thing is that is a huge amount of effort...that is an enormous effort to lift, just not one person but lifting more than one.”⁴⁵¹

[243] Dr Shearer agreed with Dr Cary and explained this process of acidosis in both her inquiry statement⁴⁵² and in her evidence.⁴⁵³

[244] Finally, Professor Eddleston, in discussing Mr Bayoh’s prognosis at the point the physical attempts at restraint started, also placed the emphasis on the person violently fighting back against ‘restraint’ being the thing that places them at risk of hypoxia.⁴⁵⁴

[245] Absent a degree of positional or mechanical asphyxia arising from an action or actions of the police officers, the Chair should conclude that the control phase and restraint itself did not make a material contribution to the death but rather it was the struggle against the attempted restraint that contributed. This should be reflected in the cause of death as “in association with struggle against attempted restraint”.

⁴⁴⁹ COPFS-00196, p6, para 1, “the deceased displayed...metabolic acidosis”

⁴⁵⁰ SBPI-00268, para 138, “The exercise...acidosis”; Dr Cary, Transcript 24/05/2023, p41, line 16 to p42, line 1, “Yes so I mean...physically held down”

⁴⁵¹ Dr Cary, Transcript, 24/05/2023, p112, lines 20-25, “Yes it does...manoeuvre”

⁴⁵² SBPI-00304, p44, para 133, “In the consultation...acid being produced”; and para 142-143

⁴⁵³ Dr Shearer, Transcript 10/05/2023, p56, line 19 to p57, line 13, “So during these types...as well”

⁴⁵⁴ Prof Eddleston, Transcript 16/05/2023, p112, lines 11-16, “We know that...fibrillation occurring”

Leg restraints:

[246] APS Maxwell was not physically involved in the control phase or the restraint itself. The only involvement of PC Gibson and PC McDonough was an attempt to control Mr Bayoh's legs by application of the fast-straps.⁴⁵⁵

[247] Where possible, the Chair should make findings in relation to each individual officer's actions. He should expressly conclude that the actions of PCs Gibson and McDonough (assisted by PC Good and PC Smith) in the application of the fast straps did not make a material contribution to the death of Mr Bayoh.

[248] Prof Crane opined that the application of leg restraints would not have contributed to or caused asphyxia.⁴⁵⁶

[249] In his statement Dr Cary suggested that leg restraints are potentially dangerous for someone with lactic acidosis.⁴⁵⁷ However, during his parole evidence he was advised by senior counsel to the inquiry that the leg restraints were not removed until after Mr Bayoh had collapsed and was at the hospital. On that basis Dr Cary confirmed that the application of leg restraints would not contribute to the risk of hypoxia.⁴⁵⁸

Reasons: Sickle cell trait:

[250] There appears to be a consensus among the experts that the fact that Mr Bayoh had sickle cell trait played a role, albeit a less prominent one than other factors, in his death. Professor Lucas (who, in contrast to Dr Cary and Dr Shearer, is an expert in sickle cell pathology) ultimately maintained that sickle cell trait made a material contribution to the death.⁴⁵⁹ In his opinion, the fact that Mr Bayoh had sickle cell trait accelerated his death.⁴⁶⁰ He concluded that sickle cell trait it should be

⁴⁵⁵ See Part Four above

⁴⁵⁶ COPFS-00134, p7, para 1, "The application...movements"

⁴⁵⁷ SBPI-00268, p27, para 117, "Leg restraints are...blood stream"

⁴⁵⁸ Dr Cary, Transcript, 24/05/2023, p120, line 11 to p121, line 4, "The principal risk...not directly"

⁴⁵⁹ SBPI-00314, p10, para 38, "I am asked...a small amount"

⁴⁶⁰ Prof Lucas, Transcript 23/05/23, p105, lines 11-14, "yes, and I...happened anyway"

included in part 2 of the cause of death. Dr Shearer agreed with that proposed revision.⁴⁶¹ The Chair should make a finding accordingly.

Shelagh M McCall KC
David Adams, Advocate
23 June 2023

⁴⁶¹ Dr Shearer, Transcript 10/05/2023, p69, lines 7-10, "You wouldn't...Yes"