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**POLICE INVESTIGATIONS AND REVIEW COMMISSIONER
OPERATIONAL MODEL
RESPONSE TO ARTICLE 2 INVESTIGATIONS**

Police Investigations and Review Commissioner Operational Model – Response to Article 2 Investigations

This operational guidance document reflects the development of ECHR case law in respect of the implications of Article 2 along with the requirement for the Independent Investigation of those cases where Article 2 may be engaged. It also reflects the provisions of Chapter 7 of the ACPO Manual of Guidance on the Management, Command and Deployment of Armed Officers as adopted by the Police Service of Scotland (PSS).

The document is presented to allow clarity and understanding amongst Crown Office and Procurator Fiscal Service (COPFS), the Police Service Of Scotland and Police Investigation and Review Commissioner, in order to agree an operational response to matters where the PIRC may have an investigatory role.

The Operational Response Model seeks to capture the requirements of COPFS, the responsibility placed on the PSS and sets out the way in which PIRC will respond to such matters. The model relates to referrals made during office hours as well as establishing an out of hours referral process in relation to matters in which Article 2 may be engaged.

Where an incident actually or potentially engages Article 2 PSS require to make early contact with COPFS to seek instruction in relation to referral of the investigation to PIRC thereby providing the opportunity for the independent assessment process to begin at the earliest possible stage.

The Human Rights Act 1998 and obligations imposed under Article 2 apply equally to PSS, COPFS and PIRC. Where Article 2 is engaged, the police service have a duty to ensure that they conduct themselves in a manner that is consistent with the five procedural obligations that the courts have held to exist.

These are –

- **The investigation must be independent insofar as it should have no hierarchical or institutional connection to those implicated**
- **The investigation must be effective**
- The investigation must be reasonably prompt
- There must be a sufficient element of public scrutiny
- The next of kin must be involved to an appropriate extent

So far as this document is concerned it is the first two obligations that are relevant and which must be observed by the PSS and PIRC under direction of COPFS. In those cases where Article 2 may be engaged the PIRC will seek to deploy Investigators at the earliest opportunity to enable the conduct of an independent investigation.

The PSS have an obligation to preserve evidence so that it is available to support an effective investigation. At the same time PSS should not act in a manner that might compromise the independence of the investigation.

The courts have indicated that where there is a contravention of Article 2 that contravention cannot be rectified by later actions that are themselves compliant. What this means in individual cases will depend on the circumstances of that case.

COPFS and PIRC will rely upon the PSS to provide (at the earliest opportunity) such detail of the circumstances of the matter being referred as to enable appropriate assistance in accordance with the powers conferred by the Police Public Order and Criminal Justice (Scotland) Act 2006 as amended by the Police and Fire Reform (Scotland) Act 2012.

The following document is not exhaustive, it is a guide focussed principally upon those matters where the PIRC could be expected to have an investigatory role.

Article 2 Investigations - Operational Model

Assistance and Co-operation of police resources

The purpose of this section is to provide information regarding referrals where Article 2 may be engaged although it is important to note that the principles are equally as applicable in other referrals where it is necessary to ensure that an independent perspective is secured.

In most cases it is foreseen that co-operation of the police service will be obtained without difficulty.

The Regulations for Investigation require the Chief Constable and the Scottish Police Authority (SPA) to provide such facilities, assistance and co-operation as the PIRC may request for the purpose of, or in connection with, an investigation.

At the time of referral where it appears that Article 2 of Human Rights, ECHR is engaged the PIRC Investigator should be mindful of the following:-

- Convention of Human Rights (ECHR) appears to be engaged.
- That pursuant to Section 33A(1)(b)(ii) and Section 41B(1)(a)(i)&(ii) of the Police Public Order and Criminal Justice(Scotland) Act 2006 , where a serious incident involving the police has resulted in death and COPFS has determined that the matter will be subject to an independent investigation to be conducted by PIRC
- In the case where an incident involving the police has resulted in serious injury, the matter has been referred by the Chief Constable for the purpose of an independent investigation.
- Where it is appropriate the Chief Constable can be reminded that it is public authority for the purposes of the Human Rights Act 1998 under a duty under section 6(1) of the Human Rights Act 1998 not to act incompatibly with a person's Convention rights.

Upon receipt of a referral it may be necessary to require co-operation from police resources to carry out tasks that the PIRC feels are reasonable and appropriate. The PIRC Investigator will confer with the appointed police senior officer at the time of initial contact and deployment where it has been necessary to deploy. During those early discussions it may be necessary to secure the use of police resources to carry out tasks required by PIRC staff. These considerations are not exhaustive and are produced to assist PSS and PIRC staff, they are not meant to infer that the police will resist PIRC involvement.

Article 2 Investigations - Operational Model

Providing the direction that officers should not confer prior to recording their first account

The issue surrounding officers being allowed to confer following an incident and in particular a firearms incident, has been a contentious one. However the judgement **R (Saunders and Tucker) v the IPCC and others, HC [2008]** where the families of two men shot dead by the police challenged the IPCC for their failure to ensure that the police officers involved in the killings were prevented from collaborating in the preparation of their accounts of the shootings.

The decision of the Administrative Court indicated that the force, as a public authority, may not be acting in a manner compliant with Article 2 of the ECHR if it permits the principal officers to confer before individually making their initial note of the matter. The court said, "if the circumstances of either of these cases were in due course to be considered by the Court it might very well find that a breach of Article 2 had occurred ...It seems to me necessarily to follow from the decision in Ramsahai that the Court would be very chary of a general practice under which officers who are key witnesses in an Article 2 investigation are expressly permitted to collaborate in the production of their statements".

The Court accepted the IPCC position that they had been waiting for guidance to be published by the Association of Chief Police Officers (ACPO) but sent a clear message that the relevant guidance should be finalised. That guidance has been published and is now contained in paragraphs 7.94 and 7.95 of Chapter 7 of the ACPO Manual of Guidance on the Management, Command and Deployment of Armed Officers and provides some clarity.

Paragraph 7.94:

As a matter of general practice officers should not confer with others before making their accounts (whether initial or subsequent accounts). The important issue is to individually record what their honestly held belief of the situation was at the time force was used. There should therefore be no need for an officer to confer with others about what was in their mind at the time force was used. If, however, in a particular case a need to confer on other issues does arise then, in order to ensure transparency and maintain public confidence, where some discussion has taken place, officers must document the fact that conferring has taken place, highlighting:

- Time, date and place where conferring took place.
- The issues discussed
- With whom
- The reasons for such discussion

Paragraph 7.95:

There is a positive obligation on officers involved to ensure that all activity relating to the recording of accounts is transparent and capable of withstanding scrutiny.

Nevertheless, the management of this will still require careful handling and directions provided to the police service should reflect PIRC independence and responsibility to ensure accountability but also acknowledge and consider the welfare of principle officers. Again cooperation will hopefully be secured by mutual agreement. However there may be cases where confusion still exists and PIRC staff need to be aware of this. The information outlined below will aid understanding and provide the necessary information to enable direction to be given should that cooperation not be forthcoming. How that direction should be given will be a matter for the individual but it must be clear and appropriately recorded.

PIRC considerations in the initial stages of a referral involving the police use of firearms should therefore reflect the provisions of Chapter 7. It should be made clear to the Post Incident Manager/ Referring Officer that it is the expectation of PIRC that Chapter 7 will be complied with and it should

be ascertained whether or not that is the case. If that is not the case the Senior Officer making the referral and / or the Senior officer present at the Post Incident Management Procedure should be reminded of paragraphs 7.94 and 7.95. to ensure compliance.

If the police do not comply they should be asked to record the reasons for that and provide that record to the senior PIRC member of staff attending the scene. They should be informed that failure to comply may result in subsequent criticism and be a potential breach of Article 2. It will also be appropriate to be clear that this is for the purposes of obtaining best evidence and demonstrating independence and accountability and is not an assumption of guilt.

Article 2 Investigations - Operational Model

PIRC Investigators Guidance Note

Referrals involving the police use of firearms

The purpose of this note is to advise Senior investigators and Deputy Senior Investigators of the developments arising from **R (Saunders and Tucker) v the IPCC and others, HC [2008]** judgement regarding conferring and the response to that by ACPO and agreed by ACPOS in relation to the wording of Chapter 7 of the new ACPO Manual of Guidance on the Management, Command and Deployment of Armed Officers. This advice note will assist PIRC in providing a clear and consistent response to the police service when a referral involving the police use of a firearm is made.

The judgement indicated that Principal Officers being allowed to confer prior to a first account being provided may be in breach of the requirements of Article 2, ECHR.

Following the judgement ACPO have considered the implications and as a result an amendment has been incorporated into latest version of the ACPO Manual of Guidance on the Management, Command and Deployment of Armed Officers at Chapter 7 paragraphs 7.94 and 7.95 as follows:-

Paragraph 7.94

As a matter of general practice officers should not confer with others before making their accounts (whether initial or subsequent accounts). The important issue is to individually record what their honestly held belief of the situation was at the time force was used. There should therefore be no need for an officer to confer with others about what was in their mind at the time force was used. If, however, in a particular case a need to confer on other issues does used arise, then, in order to ensure transparency and maintain public confidence, where some discussion has taken place, officers must document the fact this has taken place, highlighting:

- Time, date and place where conferring took place
- The issues discussed
- With whom
- The reasons for such discussion

Paragraph 7.95

Activity relating to the recording of accounts is transparent and capable of withstanding scrutiny.

Chapter 7 of the ACPO Manual of Guidance on the Management, Command and Deployment of Armed Officers also relates to the preservation and securing of evidence and states the following:

Paragraph 7.88

The responsibility for securing evidence and taking appropriate action in an Article 2 investigation remains with the Police Service until such times as the independent investigative authority has taken over the investigation.

Paragraph 7.89

The responsibility of the police service being investigated is to facilitate that investigation through, for example:

- Identification and preservation of scenes and exhibits
- Identification of immediately available witnesses
- Securing of physical evidence
- The availability of experienced family or witness liaison officers

We should be mindful that this relates to securing and preserving evidence and not the conduct of investigation. Therefore upon receipt of a referral involving the police use of firearms the PIRC member of staff receiving the initial referral and/or attending the scene should:

- make clear to the police our expectation that the provisions of Chapter 7 are being complied with and ascertain whether or not the force are doing so.
- If the police indicate that they do not intend to comply with the new guidance or are not sure what they will do, make clear that they are aware of the Regulations for Investigation as provided by Section 41D subsection (f) of the Police Public Order and Criminal Justice(Scotland) Act 2006 , requires the chief constable, the Scottish Police Authority to provide such facilities, assistance and co-operation as the PIRC may request for the purpose of, or in connection with, an investigation.

The reminder of this requirement should be given to the Senior Officer present as representative of the Chief Constable.

All conversations relating to expectations must be appropriately recorded.

If the force are not complying with the provisions of Chapter 7 regarding the issue of conferring and continue not to do so the senior officer present will be asked to record the reason for that and provide the PIRC member of staff with a copy of that record. If the force indicate that they will not comply with the provisions of Chapter 7 it should be pointed out that the consequences of that will expose the risk of challenge as to the compliance with Article 2, will be the subject of comment in the PIRC report and should create an expectation that officers will be questioned later as to why the Chapter 7 guidance was not complied with, for example at a Fatal Accident Inquiry.

Additional advice for staff

If the indications are that the guidance is not going to be complied with we should explain to officers that, in relation to the use of lethal force they should record their honestly held belief why they used the force and we should make it clear that conferring is not necessary when recording their own belief. We must be clear that we are not seeking for officers to be separated and we understand that they are entitled to legal advice.

Each case will have to be dealt with on its own merits, the underlying principle will be to ensure that our investigation is as effective as it possibly can be.

If Investigators are confronted with an unwillingness to comply the relevant senior PIRC representative should be consulted.

It should be pointed out that the adoption of this procedure is to obtain best evidence, to preserve the principles of accountability and independence and should not be seen as attributing guilt at an early stage. We should be mindful that this change in position is relatively new to the police service and in doing so we recognise the uniquely difficult and dangerous job performed by firearms officers. The PIRC is clear that its investigators do not treat officers as suspects unless there is evidence that an offence has been committed. We recognise that firearms officers are lawfully carrying weapons and we do not treat them as suspects in a crime unless there is evidence to do so. However, when the state takes a life, we believe that there must be a rigorous investigation and the families and public are entitled to the fullest possible explanation of what occurred and why.

If it is necessary to provide a reminder to the Chief Officer to comply with Chapter 7 of the ACPO Manual of Guidance on the Management, Command and Deployment of Armed Officers the following is a suggested form of words :

“You do not appear to have complied with the provisions of Chapter 7 of the ACPO Manual of Guidance on the Management, Command and Deployment of Armed Officers and have indicated that it is not your intention not to do so. I am therefore reminding you of your

requirement in accordance with the Regulations for Investigation , that the Chief Constable is required to provide such facilities, assistance and co-operation as the PIRC may request for the purpose of, or in connection with, an investigation..

“I require that you issue an instruction to the principle officers in relation to conferring. I must point out to you that you have a duty to ensure that all such steps as are appropriate for the purposes of obtaining and preserving evidence relating to this matter should be taken. If you do not comply with the provisions of Chapter 7 you should record your reasons for not doing so along with the reasons for that and provide me with a written record of that decision and rationale.”