

## COPFS Post Incident Management Statement

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1 In relation to the Crown Precognition Narrative and Analysis of Evidence this material was prepared having regard to the constitution of the Crown Investigative team that included two highly experienced senior lawyers, namely Fiona Carnan and Alasdair MacLeod who had worked intensively on the case, as well as a dedicated Advocate Depute, Ashley Edwards KC, who was embedded in and who formed an essential part of the team from receipt of the second PIRC report. Accordingly Crown Counsel were fully engaged in the ongoing investigative process and had read significant investigative material that had been produced by the autumn of 2016 and thereafter and this meant that Crown Counsel could direct inquiries and obtain information and comment by way of consultation with expert witnesses that might assist in the decision making process.

This was the background to the preparation of the Precognition that was prepared at the request of the dedicated Advocate Depute to assist her in the decision making process. The intention was to draw all of the relevant investigative material together and to present it to Crown Counsel in an approved format and in a logical and comprehensible manner. In general the Narrative is intended to present a factual account of the incident and the Analysis will seek to provide a legal context as to whether a crime can be established and if so whether there is proof of the perpetrator.

In this case the Narrative and Analysis was substantially prepared by Ms Carnan and Mr MacLeod and this reflected the very detailed knowledge that they had of the evidence and also their skills and experience overall. Mr MacLeod had been brought to the team through Lindsey Miller and he had experience of preparing complex and lengthy cases and Ms Carnan was an established member of the Criminal Allegations Against the Police Division of COPFS (CAAPD) who was experienced in preparing CAAPD precognitions, particularly those involving allegations of use of force. There is a standard format for precognitions produced by CAAPD which have been in place for a number of years which include a number of additional elements including an account of officer's service history and previous complaint history including action taken.

As countersigner I consider that my role was to confirm that I was in agreement with the conclusions and recommendations made to Crown Counsel and the analysis and reasons for these.

2 I had limited involvement in the preparation of the Crown precognition supplementary report and it had been recognised by the dedicated Advocate Depute that in relation to potential culpability of Police Scotland that further input, specifically someone experienced in Health and Safety / corporate liability from COPFS Health and Safety Division was required. My recollection is that appropriate assistance and input was provided by a member of the division. I have no recollection of countersigning this supplementary report. A draft of the report had been shared with me and the dedicated Advocate Depute prior to input being provided by the Health and Safety Division. I was content with the analysis of the matters highlighted by Martin Graves and Michael Eddleston and understand that Lindsey Miller and the member of the Health and Safety Division were similarly content.

3 In relation to liaison with the Health and Safety Executive (HSE) they declined to become involved in the investigation and considered that the criteria according to their policy had not been met. However I do not consider that this decision prevented Crown Counsel from making a properly informed decision in relation to potential liability of Police Scotland in relation to corporate and

Health and Safety responsibility and dedicated Crown Counsel and reviewing Crown Counsel as well as the DCA were content that input and review of the report by the Crown Office Health and Safety Division was sufficient.

4 I do not recollect being involved in any discussion in relation to risk assessment of techniques for restraint. I do recollect that materials considered by the investigative team and by Crown Counsel included a policy document titled Striking the Balance and explanatory note prepared by HSE that set out relevant Health and Safety considerations for the police and the special considerations that they considered applied to emergency services including acknowledgement that in certain circumstances they will engage in activities that present a clear risk to safety. Other materials included the report prepared by Dame Elish Angiolini on restraint that reflected emerging thinking on the use and safety of restraint and recognised that restraint of itself carried inherent risks. It is the case that the training and application of restraint techniques were considered in the report prepared for Crown Counsel by Martin Graves.

5 The preparation of the Crown Precognition was informed by the incremental approach to the investigation that was approved by Crown Counsel and the Lord Advocate. The precognition was produced for the specific and limited purpose of enabling Crown Counsel to take a properly informed decision as to whether there was an evidential basis to take criminal proceedings in relation to any matter. [REDACTED]

[REDACTED] The analysis of evidence included reference to the deaths in custody of Roger Sylvester and Stuart Sandeman and the role of restraint in respect of these. It is also the case that the dedicated Advocate Depute consulted with a senior prosecutor in the CPS and drew on their expertise in relation to the investigation of restraint deaths and was also given sight of materials in relation to these that included analysis of circumstances and evidence.

The reference in my previous statement to other cases where black men and women had died during restraint by authorities, particularly the case of Sean Rigg, had highlighted the importance of carrying out a critical analysis of all the evidence and securing an independent view on the police evidence and of recognising signs of a person undergoing a mental health crises and responding appropriately. These considerations had informed the approach by the Crown team to the investigation of the actions of police towards Mr Bayoh, including the decision to precognosce all eye witnesses to the incident and the instruction of a suitably qualified independent expert on restraint techniques who was asked to consider all relevant circumstances. That expert considered whether the actions of police officers were reasonable and justifiable having regard to ethical and other appropriate considerations in all the circumstances including the apparent warning of a terrorist threat, and it is the case that Crown Counsel consulted with Mr Graves to further explore his opinion and reasoning. Issues of race and the reference to a possible terrorist attack were particularly relevant to the initial assessment and response to the incident on the part of the officers who were first on the scene and these aspects were addressed in the precognition so far as they were relevant to the issue of criminality.

It is the case however that significant further investigation by the Crown would have been likely to have taken place in preparation for a Fatal Accident Inquiry had a public inquiry not have been proceeded with and the investigations by the Crown during the precognition would likely have informed subsequent inquiry including in relation to the impact of race and considerations of implicit bias. Such inquiry would be likely to require precognition of police officers involved in the incident that could not be pursued while criminal proceedings were a possibility.

6 The perception of PC Short and other officers involved in the restraint of Mr Bayoh and how this may have influenced their actions and response was a matter that was considered by Martin Graves in assessing the reasonableness of their actions and was reflected in his report. I am confident that the

reasonableness of perception was a factor that was considered by the investigative team and by Crown Counsel so far as it was relevant to the issue of potential criminality but would also be relevant to considerations of unconscious or implicit bias.

7 During the investigation and in particular contact with Mr Anwar and Inquest I was aware of concerns that the reaction of police on 3 May 2015 had been influenced by racial stereotypes and in particular perceptions as to size, build and strength. Such considerations would be relevant to the consideration of criminality where they rendered the actions and response unreasonable and out with the range of actions that were available to officers. They would however be highly relevant to considerations of unconscious or implicit bias.

8 The reference by officers to potential terrorist connection in relation to the incident involving Mr Bayoh informed the focus of investigations by the Crown team. The reference was not accepted at face value and investigations were undertaken to establish in the first place whether any such warning had been issued and whether this was within the knowledge of the officers. The reference to such a threat was considered as part of the assessment of the overall reasonableness of actions of those involved by Martin Graves along with other relevant factors and was available to Crown Counsel during the decision making process. The basis for the belief on the part of officers was relevant to the issue of unconscious bias, particularly in relation to the passage in the statement of PC Good that refers to the Lee Rigby incident.

9 and 10 It is part of the format of CAAPD precognitions and standard practice to include all previous complaint history of subject officers. The intention is to provide context and background to an officers disciplinary record to assist Crown Counsel in assessing public interest considerations. It is not normal practice in my experience to include an officers profile in the analysis unless this is relevant to considerations of sufficiency of evidence.

11 and 12 My recollection is that both PC Paton and PC Walker made reference to the possibility of the incident being a terrorist attack while they were travelling to it. This was information that was available to Martin Graves and was reflected in his report in assessing the reasonableness of their initial actions as well as other factors that he considered relevant and that analysis was referred to in the precognition.

There was also reference in the precognition to Constables Walker, Paton and Good having concerns about a potential attack on the police and by PC Walker to the possibility that the incident was part of a plot to draw police to the location and to attack them.

The passage from Prof Eddleston's report obviously includes reference to the hypothesis that this might be a terrorist attack and is therefore broadly consistent with the position adopted by the officers.

13 The passage in the analysis headed Intelligence About a Terrorist Attack commencing at page 53 was included to set out the evidence that had been obtained by the Crown to establish whether there was a factual basis for the reference by some police officers of intelligence or communications warning of a possible terrorist attack. In the light of the criticisms expressed by Mr Anwar in relation to the reliability of accounts provided by police officers some weeks after the incident there was a focus by the Crown team on whether the reference by officers to such warnings could be independently established and this was consistent with the Crown approach to testing accounts provided by officers and subjecting them to scrutiny.

The apparent anxiety in relation to a potential attack was a consideration of the investigative team and the overall state of mind of officers on their initial attendance was a factor that was considered along with other factors by the team and by Martin Graves and indeed by Prof Eddleston in considering the choice of action by officers.

14 I consider that the critical factor in officers attending an incident where there the potential that a knife is being carried is the degree of risk that this

presents according to the circumstances and that the potential motivation of the person who may be carrying it is of limited importance as compared with other risk factors. In assessing whether the threshold for criminality had been established the analysis of evidence suggests that a mistaken belief as to circumstances does not of itself provide evidence of criminal intent. The approach of the Crown team, informed by the expert evidence provided by Martin Graves, was to consider whether the actions taken by the officers in the light of all of the relevant circumstances fell out with the range of options open to a reasonable officer. I consider that the investigative team gave consideration as to whether the state of mind of officers on their initial attendance prevented proper consideration being given to alternative approaches to the situation including whether Mr Bayoh was suffering a mental health episode but it was not the case that the team themselves accepted that there was a risk of a terror attack and that the police were entitled to act in a certain way.

The consideration of whether officers should have considered the possibility of a terror related incident is one that involves whether implicit bias contributed to the perception and would require exploration of their reasoning and the extent to which race was a factor. Analysis of past behaviours by officers could form part of this assessment.

15 The purpose of the reference to the stay safe memo by ACC Ruaraidh Nicholson at page 54 of the analysis was to include it as one of the potential sources of information referred to in my answer to question 13 where the focus was to establish whether there was a factual basis for the information concerning a warning referred to by some officers. Its inclusion was not intended to convey any acceptance by the Crown team that there was any relation or connection between the incident and Islamic extremist groups.

16 The summaries of the PIRC investigations into allegations of racism at pages 123 and 124 of the narrative set out the results of the enquiries made by PIRC

in relation to this aspect of the investigation and were included to make Crown Counsel aware of what had been established so that this could be considered as part of their decision as to whether the commission of a crime could be proved. [REDACTED]

[REDACTED] the issue of potential racial motivation would require analysis if proceedings had been recommended against any officer for their actions on that date. Attitudes of individual officers to issues of race and racism would likely be matters to be explored once the issue of criminality had been determined.

17 I consider that the circumstances of the death of Mr Bayoh and his race were factors that meant that a proper investigation into the incident would have to consider the impact of race and the effect this had on the way the incident and its aftermath was handled. From an early stage the Lord Advocate was clear that considerations of race would have to be a focus of the investigation. It is the case however in my view that specific issues raised by Mr Anwar, by the Bayoh family and by Inquest were of great assistance in identifying areas for inquiry such as unwarranted interrogation of police systems, previous investigations into race by Fife Constabulary and the importance of not accepting accounts provided by police officers uncritically.

18 The exchanges in the email thread with Ms Erin Campbell on 7 December 2016 appear to set out some preliminary thinking in relation to the areas that would require to be addressed when instructing an expert on restraint techniques to provide opinion evidence on the actions of police officers involved in the restraint of Mr Bayoh. The email thread is a good example of how emerging thinking was shared throughout the investigative team and dedicated Crown Counsel for input and comment.

The passage from Erin Campbell referred to makes reference to a concern that Mr Bayoh may have perceived himself as being under attack, and whether police were entitled in those circumstances to deploy their incapacitant sprays and draw batons. These were concerns that I consider informed the ultimate



approach for such expert opinion from Martin Graves, and were related to the critical question as to whether officers acted precipitately and failed to recognise signs that Mr Bayoh was suffering from a mental health episode. These considerations informed his report and subsequent consultation by dedicated Crown Counsel [REDACTED]

19 I am asked about [REDACTED]

[REDACTED] the report in the Sun newspaper of 1 November 2015 containing comments attributed to him. It is the case that the Lord Advocate (Mulholland) was very displeased with the apparent breach of confidentiality by Dr Karch and considered that this impacted upon his reliability and the extent to which he could be relied on. Dedicated Crown Counsel were aware of the criticism [REDACTED]

[REDACTED]. The precognition makes reference to the basis of the opinion of Dr Karch being at odds with all of the other experts who expressed an opinion on the cause and mechanism of death and the role that restraint and struggling played.

20 The passage in the analysis of evidence at pages 13 and 14 of the Crown analysis of evidence refers to the opinion of Prof Eddleston and seeks to raise the question as to whether a different outcome might have ensued had police who attended the incident with Mr Bayoh initially adopted a more empathetic approach on the basis that Mr Bayoh was suffering from an episode connected with ingestion of drugs. I consider that Crown Counsel were aware that this was a matter that required to be factored into the decision making process and the question was addressed and analysed by Martin Graves in his report and his reasoning could be tested at consultation. I consider that the opinion of Martin Graves and indeed the opinion of any expert on restraint is not conclusive or determinative of whether a particular approach by police is justified but rather is obtained for the purposes of assisting the decision making process. I consider that this is reflected in the fact that consultations by

Crown Counsel were undertaken with Mr Graves at key points in the decision making process which was focused at this time on whether criminality could be established. Accordingly I do not consider that it is correct to say that there was deferral to the opinion of Mr Graves in the sense that his opinion was accepted uncritically but he was selected as an expert on the basis of his independence and wide experience of restraint approaches from a police and public safety perspective.

21 The materials provided to experts throughout the investigation was informed by a view expressed by the Lord Advocate (Mulholland) that there should be a consistent approach regarding the material that was provided. As I recollect the letter of instruction to Prof Eddleston asked for expert opinion from him in relation to the effect that the drugs detected in Mr Bayoh's system might have on his behaviour, mood and cognitive ability. Prof Eddleston in addressing this indicated views and opinion on the related issue of the actions of the police and whether the officers should have recognised signs that Mr Bayoh's behaviour may have been drug related. In view of Prof Eddleston's expertise on the physical signs that such drugs may produce and the fact that the police assessment of risk was an important consideration and in recognition that his observations were intended to be of assistance, his views were not ignored but were addressed in assessing the initial response of officers attending the incident.

22 The actions of officers involved in the incident following their return to Kirkcaldy Police Office are set out in the narrative at page 51 onwards and refers to the fact that the officers were not separated and that a number of them including PCs Walker, Good, Tomlinson and McDonagh stated that they had discussed the incident and what had happened and there is also reference to knowledge of the incident on the part of other officers at the station that may have come from those directly involved. The statement of PC Paton also refers to officers talking about the incident in the canteen.

That passage in the narrative also discusses the application of Post Incident Management procedures and how the process that relates to firearms

incidents was also being applied to other serious incidents and how a staged process to obtain information from those involved is set out including the desirability of separating officers to facilitate this and prevent conferring.

The apparent discussion of the incident following the incident was a factor in the approach of the Crown Investigative team to test the account of officers throughout the process and to be alert to the possibility that accounts may have been affected by information provided by other sources.

23 I am asked about a passage at page 53 of the analysis of evidence that referred to the fact that police officers had made reference to being aware that they believed Mr Bayoh had sustained a rib fracture during resuscitation attempts by them but had not made mention of this in an earlier statement made before the fracture had been discovered by pathologists. This discrepancy merited further inquiry in relation to whether there was any evidence that suggested that an officer had become aware by improper provision of information of the existence of the fracture and had added information to their statement as a consequence of this. Law Officers were aware of the concern and the matter was factored into the Crown investigation, including obtaining expert evidence in relation to the cause and mechanism of the fracture and whether it was consistent with resuscitation efforts. The results of these investigations were fully considered by Crown Counsel and there was no basis to take the matter further at that stage but may have been a focus of further investigation with the officers concerned had a Fatal Accident Inquiry been proceeded with.

24 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[Redacted text block]

25 The inclusion in the Crown narrative to the allegation of assault made by Mr Zahid Saeed was to summarise the available evidence in respect of an allegation of criminality against police officers that was made during the course of the PIRC investigation and formed part of their investigation and was related to the conduct of officers in the aftermath of the incident involving Mr Bayoh.

26 [Redacted text block]

[Redacted text block] With the benefit of hindsight and in the light of the fact that no Fatal Accident Inquiry was instructed I consider that there was scope for the Crown to explain in greater detail the consequences of the incremental approach adopted to the Bayoh family and that wider considerations of race in relation to the incident and its aftermath could still be explored and determined.

27 I believe the facts stated in this witness statement are true. I understand that the statement may form part of the evidence before the Inquiry and be published on the Inquiry's website.

Signature of Witness. [Redacted signature]

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