

Assistant Solicitor to the Inquiry

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Joanne Caffrey

[REDACTED]

By email only

Tuesday 12th July 2022

Dear Ms Caffrey

**SHEKU BAYOH PUBLIC INQUIRY
EXPERT REPORT ON TACTICAL OPTIONS AND USE OF FORCE**

I refer to our recent email correspondence and write to formally instruct you to prepare an expert report on tactical options and use of force.

Background

The Sheku Bayoh Public Inquiry was set up to examine the events surrounding the death of Sheku Bayoh, who died on the 3 May 2015, after being restrained by police officers in the street in Kirkcaldy. The Inquiry is chaired by the Right Honourable Lord Bracadale (Alastair Campbell).

The remit of the Inquiry is to establish the circumstances surrounding the death of Sheku Bayoh; to assess the post incident management process and subsequent investigation; and to establish the extent (if any) to which the events leading up to and following Sheku Bayoh's death, in particular the actions of the officers involved, were affected by his actual or perceived race. The full terms of reference for the Inquiry can be found on the Inquiry website [here](#).

There will be separate evidential hearings to examine the terms of reference, at which witnesses will be called to give evidence. We recently concluded the first of our hearings, which commenced on 10 May 2022. After the hearings are completed, the Chair to the Inquiry will consider all of the evidence and publish a report, laying out his findings, conclusions and recommendations.

The Inquiry is scheduled to sit during the month of November, where your report will form part of the evidence being considered by the Chair. You will be required to attend the hearing (date to be confirmed) in person to give oral evidence before the Chair. Your report will be disclosed to the legal representatives of Core Participants (individuals and organisations who have a significant interest in the Inquiry) before you give evidence. Your report will be made available to the public via the Inquiry website

after you have given evidence. When you give evidence, you will be examined by Counsel to the Inquiry. The legal representatives of Core Participants have no automatic right to ask questions but will be provided with an opportunity to make applications to explore further lines of questioning in addition to your examination by Counsel to the Inquiry.

Confidentiality

All documents and information provided to you by the Inquiry to undertake your report are confidential, in accordance with our Confidentiality Agreement. We can confirm that the Confidentiality Agreement has now been fully signed and returned to the Inquiry.

Evidence and productions

We attach as an Appendix to this letter a list of the materials to be made available to you to assist you in the preparation of your report. All of the materials will be shared securely via our sharing platform, Objective Connect. Please get in touch if you have any difficulty accessing the materials. In summary, they comprise the following:

Recordings and transcripts of evidence

Between 10 May and 24 June, the Inquiry heard oral evidence about the events of 3 May 2015. This included evidence from the officers who attended Hayfield Road, and from civilian eyewitnesses who witnessed part of the incident. All evidence was livestreamed via our YouTube channel, and transcribed. Both the video recordings of the evidence and the transcripts are available to you, for your consideration. We have listed in the Appendix the names of the officers and witnesses whose evidence we would like you to consider. Most, if not all, of the witnesses were asked to demonstrate actions or positions, and we would ask that you view the recordings of their evidence in addition to reading the transcripts. The recordings can be accessed via the Inquiry's YouTube page, and the transcripts of evidence can be accessed via the Inquiry's website as well as securely sent to you via Objective Connect. Links have been provided.

Inquiry statements

The witnesses called to give evidence all provided statements to the Inquiry in advance. The Inquiries Act 2005 provides that such statements have the status of evidence before the Inquiry (*contra* the position in a criminal trial or civil proof). The majority of witnesses provided their statements to a member of the Inquiry legal team, in the usual way. The officers involved in the restraint provided written answers to written questions asked by the Inquiry, in accordance with a procedure provided for in the Inquiry (Scotland) Rules 2007. These are referred to as Rule 8 requests/responses. All relevant Inquiry statements and Rule 8 requests/responses will be made available to you.

Previous statements

The majority of witnesses called to give oral evidence gave statements to Police Scotland (PS) and/or the Police Investigations and Review Commissioner (PIRC). Some police witnesses prepared operational statements. All witnesses were asked, during their oral evidence, whether their recollection would have been better at the time they gave their earlier statements and whether, in the event of any discrepancy between their Inquiry statement/evidence and their earlier statement(s), their earlier account should be preferred. Subject to some minor qualifications, all replied in the affirmative. That being so, their earlier statements have in effect been “adopted” into their evidence. As such, all relevant previous statements will be made available.

We will also make available the PS/PIRC statements of witnesses who did not provide statements to the Inquiry and were not called to give oral evidence, but whose statements may be of assistance to you.

Multimedia

The Inquiry recovered dash cam and mobile phone footage of Mr Bayoh shortly prior to the incident on Hayfield Road; CCTV footage of the incident and snapchat footage of brief moments during the restraint. In addition, we recovered recordings of 999 and 111 calls made by members of the public, and airwave transmissions between the attending officers and their control room.

All of this material was provided to Advanced Laser Imaging (ALI), who prepared an “evidence video timeline”, which combines all of the video footage and audio recordings against a real time clock (all timings are accurate to within 1 second). ALI also produced a spreadsheet, which includes timings of events, transcriptions of the airwaves and brief descriptions of what is seen in the video footage. The spreadsheet is an essential tool to understanding the evidence video timeline and the evidence of the witnesses and you will find it invaluable to have the spreadsheet to hand when reviewing the evidence. An A3 copy is attached.

In addition to the evidence video timeline and spreadsheet, ALI prepared a 3D model of the locus. As you view the evidence led, you will note that the attending officers were asked to mark their positions (and the positions of others) at various points during the incident on stills taken from the 3D model. A catalogue of these still images will be made available to you.

You may find it helpful to begin your consideration of the materials provided by watching the evidence of Mark Degiovanni from ALI – he prepared a helpful PowerPoint explaining how the evidence video timeline and 3D model were prepared.

If you would find it helpful to consult with Mr Degiovanni, please advise and we shall make the necessary arrangements.

Training and guidance

We shall make available to you the officer safety training materials that were used by Police Scotland in 2015 (principally, a manual and a PowerPoint), and relevant guidance including Standard Operating Procedures.

At our hearing in November, we intend to lead evidence from an officer safety trainer who will speak to the training provided by Police Scotland in 2015. In the meantime, we shall make available to you statements noted by the Inquiry team from officer safety trainers and a dog handler, as well as relevant statements noted by the PIRC.

The training and guidance provided will form part of the “benchmark” against which the actions of the officers will fall to be assessed (as discussed further below). We shall, in the future, invite your views on the *adequacy and sufficiency* of the training and guidance provided; for present purposes however we do not require you to comment on the standard of the training and guidance at this stage.

Miscellaneous

Police Scotland were required by the Chair to the Inquiry to produce a “position statement” setting out their position on a number of matters pertinent to your report, including risk assessment, the deployment of specialist resources, and the use of force. A copy will be provided to you. We shall also provide a copy of a note on law and practice relating to the use of force, prepared by the Inquiry team. This was shared with Core Participants some time ago; none have advised that they take issue with the terms of the note.

We have been provided with “sample” batons, handcuffs, incapacitant sprays and a vest by Police Scotland. If you would find it helpful to examine same, please advise.

Police Scotland provided our legal team with a helpful demonstration of techniques and the use of equipment (all as taught in 2015); if you would find a similar demonstration to be of assistance, please advise.

If you would find a locus inspection to be helpful, we can make the necessary arrangements.

In the event you require any further material or information in order to complete your report, please advise me as soon as possible.

Instructions

General

Please provide a copy of your full, up-to-date *curriculum vitae* and a note of your previous experience of giving evidence (how many times, forum, instructing party etc).

In preparing your report, you may find it helpful to have regard to the summary within Part 35 of the Civil Procedure Rules. Although the Rules are not in force in Scotland, they provide useful guidance on the role of an expert witness both north and south of the border. A copy will be provided.

Suggested approach

I have, below, set out a number of questions, the answers to which might provide a structure to your report. Before you begin considering the evidence, however, it may assist you if I provide a very brief overview of the incident, and highlight what is, and is not, in dispute. It may also assist if I say a little more about the “benchmark” against which the officers’ actions will fall to be assessed by the Chair to the Inquiry.

Overview

As you might anticipate, the eyewitness evidence is, in places, inconsistent and at times contradictory.

Unless stated otherwise, the facts set out below are *not* contentious:

- 07:20:23 – PCs Walker and Paton arrive at locus. *PC Walker discharged PAVA spray; PC Paton discharged CS spray; the spray had no effect on Mr Bayoh but both officers were (temporarily) incapacitated*
- 07:20:39 – PCs Tomlinson and Short arrive at locus. *PC Tomlinson discharged CS spray; PC Short swung her baton but did not make contact with Mr Bayoh*
- 07:21:02 – PC Paton transmits, “officer’s injured, PC Short male...”
- 07:21:03 – CCTV footage appears to show a person falling to the ground
- *The Inquiry has heard evidence that Mr Bayoh struck PC Short on the back of her head, causing her to fall to the ground¹. The key dispute here is whether Mr Bayoh then stamped on her back, per the evidence of PCs Walker and Tomlinson. PC Short has no recollection of this; an eye witness, Kevin Nelson, says it did not happen. It will be for the Chair to determine whether or not Mr Bayoh stamped on PC Short’s back. We will invite you to consider two hypotheses of fact in your report: (i) that Mr Bayoh did stamp on her back; and (ii) that he did not stamp on her back*
- (precise time unknown) – PC Tomlinson strikes Mr Bayoh on the head with his baton, more than once. *PC Tomlinson’s evidence was that this was in response to Mr Bayoh stamping on PC Short (which is in line with hypothesis (i) above); in*

¹ Please note that Sgt Maxwell’s transmission at 7:26:52 – “on attendance this male’s attacked PC Short quite violently er as a result he was sprayed with CS and PAVA and batoned” is incorrect: there is no dispute that Mr Bayoh was sprayed with CS and PAVA *before* he struck PC Short.

relation to hypothesis (ii), proceed on the basis that this strike with a baton occurred in response to the blow to the head of PC Short only

- (precise time unknown) – PC Walker takes Mr Bayoh to the ground and the restraint begins. *PC Walker described shoulder charging Mr Bayoh; PC Tomlinson described the mechanism by which PC Walker took Mr Bayoh to the ground as a “bear hug”*
- 7:21:13 – it appears from the CCTV that Mr Bayoh was on the ground by this time
- 7:21:19 – PC Tomlinson’s emergency button is activated. *PC Tomlinson gave evidence that by the time he pressed his emergency button, Mr Bayoh was on the ground*
- 7:21:38 – PC Smith transmits, “male secure on the ground”
- 7:22:24 – PC Walker transmits, “male in cuffs still struggling”
- The first officer to restrain Mr Bayoh was PC Walker. He was quickly joined by PC Tomlinson, then PC Paton, then PC Smith, then Constables Gibson and McDonough, and finally Constable Good
- *The majority of police and civilian eyewitnesses gave evidence that Mr Bayoh was in the prone² position until the point that he was turned onto his side, at which time the officers noted he was unconscious and PC Smith sought an ambulance (07:25:17) (see below). PC Walker (supported to some extent by PC Paton) states that he was on his back throughout. Again, we will seek your views on two hypotheses of fact: (i) that Mr Bayoh was prone throughout the restraint, until he was turned onto his side; and (ii) that Mr Bayoh was on his back throughout the restraint until he was turned onto his side*
- 7:25:17 – PC Smith transmits, “this male now certainly appears to be unconscious, breathing, not responsive get an ambulance for him”. *By this time, handcuffs and leg restraints had been applied*
- 7:29:30 – Sgt Maxwell transmits, “this accused is now not breathing, CPR is commencing”
- 7:33:35 – ambulance arrives at locus

The hypothetical reasonable officer

The standard against which the officers’ actions and omissions will fall to be assessed by the Chair is that of an officer acting in accordance with the law, their training, Standard Operating Procedures, their ethical obligations, and any other guidance available to them. In the questions that follow, I shall refer to this hypothetical officer as the “reasonable officer”, by way of shorthand.

Our law and practice note provides a synopsis of the applicable law. Read short, it amounts to this:

- an officer is entitled only to use force that is reasonable, proportionate and (the minimum) necessary
- the principle of “preclusion” dictates that less forceful options must have been attempted and failed, or have been considered and found to be inappropriate in the circumstances

² That is to say, on his front (as opposed to his back or side). You will note that the witnesses who gave evidence that Mr Bayoh was prone gave various descriptions of his precise position and the extent to which that position changed during the course of the restraint.

As mentioned above, the training materials used in 2015 will be made available to you, along with the guidance in place at that time.

Questions

I would be grateful if you could provide your opinion on the following issues (this list is not exhaustive; please offer a view on any other matters that are within your expertise and which you consider to be relevant):

1. Risk assessment:

(a) En route to the locus

- In light of the information known to the attending officers (airwave transmissions; terror threat level; day and time of call; proximity of locus to residential area, hospitals etc), what factors were relevant to the assessment of risk (i) to Mr Bayoh; (ii) to the attending officers; and (iii) to the public?
- What conclusion would a reasonable officer have reached as to the likely risk (i) to Mr Bayoh; (ii) to the attending officers; and (iii) to the public?
- Why?
- How would that risk assessment inform the available tactical options?

(b) First officers at locus: Constables Walker and Paton

- In light of the information known to Constables Walker and Paton (as above, together with Mr Bayoh's behaviour/demeanour at the locus, and the absence of a visible knife), what factors were relevant to the assessment of risk (i) to Mr Bayoh; (ii) to the attending officers; and (iii) to the public?
- What conclusion would a reasonable officer, arriving first at the scene, have reached as to the likely risk (i) to Mr Bayoh; (ii) to the attending officers; and (iii) to the public?
- Why?
- How would that risk assessment inform the available tactical options?

(c) Second officers at locus: Constables Tomlinson and Short

- In light of the information known to Constables Tomlinson and Short (as above, together with Mr Bayoh's behaviour/demeanour at the locus, and the absence of a visible knife), what factors were relevant to the assessment of risk (i) to Mr Bayoh; (ii) to the attending officers; and (iii) to the public?
- What conclusion would a reasonable officer, arriving second at the scene; have reached as to the likely risk (i) to Mr Bayoh; (ii) to the attending officers; and (iii) to the public?
- Why?
- How would that risk assessment inform the available tactical options?

2. Initial contact

(a) Constables Walker and Paton arrive at the locus

- Please categorise Mr Bayoh's offender behaviour³ at the time of the officers' arrival at the locus
- What impact would Mr Bayoh's behaviour have had on a reasonable officer's assessment of risk?
- What level of response⁴ was appropriate?
- What tactical options were open to a reasonable officer?
- Please identify all factors relevant and material to your assessment of the option(s) available
- What option(s) would a reasonable officer have chosen?
- Why?
- On balance of probabilities, had that option been selected, what difference might that choice have made?
- Please categorise⁵ and comment on the response(s) by Constables Walker and Paton at Hayfield Road. In particular, indicate to what extent, if any, their response(s) differed to that of a reasonable officer
- On Day 20, 21 June 2022, at page 91 to 94 inclusive, Constable Paton addressed in his evidence the possibility of an alternative course of action, namely parking in Gallagher's Pub car park, waiting for an Armed Response Unit, observing and monitoring Sheku Bayoh and providing feedback to the Area Control Room and airwaves transmissions to other officers on route. We invite your comments on this possible alternative course.

(b) Constables Tomlinson and Short

- Please categorise Mr Bayoh's offender behaviour at the time of the officers' arrival at the locus
- What impact would Mr Bayoh's behaviour have had on a reasonable officer's assessment of risk?
- What level of response was appropriate?
- In light of the apparent actions already taken by Constables Walker and Paton, what tactical options were open at that stage to a reasonable officer arriving at the scene?
- Please identify all factors relevant and material to your assessment of the option(s) available
- What option(s) would a reasonable officer have chosen?
- Why?
- On balance of probabilities, had that option been selected, what difference might that choice have made?

³ Chapter 4.6 of the Officer Safety Training Manual (PS 10933) and module 1, section 8 of the OST manual (PS11538(a)); 1 compliance; 2 verbal resistance and/or gestures; 3 passive resistance; 4 active resistance; 5 assaultive resistance; 6 serious/aggravated assaultive resistance

⁴ Chapter 4.7 of the Officer Safety Training Manual (PS 10933) and module 1, section 8 of the OST manual (PS11538(a)); 1 officer presence; 2 tactical communications; 3 control skills; 4 defensive tactics; 5 deadly or lethal force

⁵ See footnote 4

- Please categorise and comment on the response(s) by Constables Tomlinson and Short at Hayfield Road. In particular, indicate to what extent, if any, their response(s) differed to that of a reasonable officer

3. Assault of Nicole Short

Hypothesis 1: punch to back of head (no stamp)

- Please categorise Mr Bayoh's offender behaviour at the time of the assault
- What impact would Mr Bayoh's behaviour have had on a reasonable officer's assessment of risk?
- What level of response was appropriate?
- What tactical options were open to a reasonable officer?
- Please identify all factors relevant and material to your assessment of the option(s) available
- What option(s) would a reasonable officer have chosen?
- Why?
- On balance of probabilities, had that option been selected, what difference might that choice have made?
- Please categorise and comment on the response by Constable Tomlinson. In particular, indicate to what extent, if any, his response differed to that of a reasonable officer

Hypothesis 2: punch to back of head, followed by stamp(s), as demonstrated by Constables Walker and Tomlinson in their evidence

- Please categorise Mr Bayoh's offender behaviour at the time of the assault
- What impact would Mr Bayoh's behaviour have had on a reasonable officer's assessment of risk?
- What level of response was appropriate?
- What tactical options were open to a reasonable officer?
- Please identify all factors relevant and material to your assessment of the option(s) available
- What option(s) would a reasonable officer have chosen?
- Why?
- On balance of probabilities, had that option been selected, what difference might that choice have made?
- Please categorise and comment on the response by Constable Tomlinson. In particular, indicate to what extent, if any, his response differed to that of a reasonable officer

4. Restraint - taking Mr Bayoh to the ground

- Please categorise Mr Bayoh's offender behaviour at the time he was taken to the ground
- What impact would Mr Bayoh's behaviour have had on a reasonable officer's assessment of risk?

- What level of response was appropriate?
- What tactical options were open to a reasonable officer ?
- Please identify all factors relevant and material to your assessment of the option(s) available
- What option(s) would a reasonable officer have chosen?
- Why?
- On balance of probabilities, had that option been selected, what difference might that choice have made?
- Please categorise and comment on the response by Constable Walker. In particular, indicate to what extent, if any, his response differed to that of a reasonable officer
- Please comment on the manner in which Constable Walker took Mr Bayoh to the ground (i) on the hypothesis that he “shoulder charged” Mr Bayoh to the ground and (ii) on the hypothesis that he took Mr Bayoh to the ground in a “bear hug”

5. Restraint: position of Sheku Bayoh; duration; number of officers involved; use (and position) of force and bodyweight applied to Sheku Bayoh

Hypothesis 1: prone restraint

- Please categorise Mr Bayoh’s offender behaviour during the restraint
- What impact would Mr Bayoh’s behaviour have had on a reasonable officer’s assessment of risk?
- What level of response was appropriate?
- What tactical options were open to the officers involved in the restraint (i) initially, and (ii) as the restraint progressed?
- Please identify all factors relevant and material to your assessment of the option(s) available
- What option(s) would a reasonable officer have chosen?
- Why?
- On balance of probabilities, what difference might the choice of that tactical option(s) have made?
- Please categorise and comment on the response by the officers. In particular, indicate to what extent, if any, their response differed to that of a reasonable officer or officers

Hypothesis 2: supine restraint

- Please categorise Mr Bayoh’s offender behaviour during the restraint
- What impact would Mr Bayoh’s behaviour have had on a reasonable officer’s assessment of risk?
- What level of response was appropriate?
- What tactical options were open to the officers involved in the restraint (i) initially, and (ii) as the restraint progressed?
- Please identify all factors relevant and material to your assessment of the option(s) available
- What option(s) would a reasonable officer have chosen?

- Why?
- On balance of probabilities, what difference might the choice of that tactical option(s) have made?
- Please categorise and comment on the response by the officers. In particular, indicate to what extent, if any, their response differed to that of a reasonable officer or officers

6. *Restraint: general*

We invite your comments on:

- The length of the restraint
- The number of officers involved in the restraint at different stages of the restraint
- The force applied to Mr Bayoh as he lay on the ground, insofar as you are able
- PC Paton's use of a baton during the restraint
- By reference to the enhanced Snapchat footage and stills from same; the evidence (which is in dispute) that Constable Walker (who weighed 25 stones) lay across Mr Bayoh's back
- The evidence (from a number of witnesses) that the restraint bore resemblance to a "collapsed rugby scrum"
- Whether a reasonable officer would have monitored or arranged to have monitored, Mr Bayoh's breathing during the restraint
- The significance of environmental factors (weather, temperature, Mr Bayoh's state of dress)

7. *Miscellaneous*

Insofar as not already explored within the answers to preceding questions, please comment on the following:

- Waiting and observing;
- De-escalation: please describe de-escalation techniques and explain what they are designed to achieve and the possible outcomes when such techniques are employed;
- Acute Behavioural Disturbance/Excited Delirium/mental health crisis⁶: please offer a view as to how these matters were defined/taught to officers in 2015; a view as to how these may have been recognised by officers in the field; and whether any of the evidence indicated that Mr Bayoh displayed any signs or symptoms of ABD/ED/mental health crisis (drug induced or otherwise). If so: whether a reasonable officer would have had in mind the possibility of ABD/ED/mental health crisis; at what point in time would this possibility have crossed his mind; and what action would he have taken;
- Positional asphyxia⁷: describe what a reasonable officer would have known of this risk in 2015; describe the steps a reasonable officer would have taken to mitigate

⁶ See Chapter 5 and 21.3 of the Use of Force SOP (PS10933); pages 23-25 of the OST PowerPoint (PS17208); and Module 1, section 11 of the OST manual (PS11538(a))

⁷ See Chapter 21 of the Use of Force SOP (PS10933); pages 26 and 27 of the OST PowerPoint (PS17208); and Module 1, section 11 of the OST manual (PS11538(a))

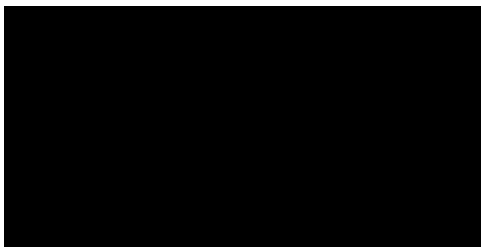
the risk of positional asphyxiation (i) if Mr Bayoh were restrained in the prone position and (ii) if he were restrained in the supine position; and

- In what circumstances (if any) do you consider it would be appropriate for an officer to strike a suspect with a vehicle on arrival at a scene? Please refer to the evidence of PC Walker on Day 6, 19 May 2022 page 39, line 22; pages 64 line 23 to page 66 line 8. Please categorise and comment on this proposed response by an officer. In particular, indicate to what extent, if any, this response would differ to that of a reasonable officer or officers.

I would be grateful if you could prepare your report in draft by the end of September. Counsel to the Inquiry would like to consult with you on the terms of your draft report in early October. In the meantime, please provide any update regarding your fee estimate (if applicable) once you have had an opportunity to review our instructions and the enclosed productions and papers. The Inquiry will be responsible for paying your fees in relation to your report and the presentation of your evidence - this includes attending the hearing to give evidence.

I would be grateful if you could acknowledge safe receipt of these instructions.

Yours sincerely

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Assistant Solicitor