

NINTH POSITION STATEMENT
ON BEHALF OF THE CHIEF CONSTABLE, POLICE SCOTLAND
IN
THE SHEKU BAYOH INQUIRY

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Introduction

1. This is the ninth position statement submitted to the Inquiry on behalf of the Chief Constable. Previous position statements have been submitted on 31 March, 13 May, 7 and 24 October 2022, 20 January 2023, and 25 April 2023.
2. This position statement is made further to the Chair's request, sent via a letter emailed by the solicitor to the Inquiry on 16 December 2022 following correspondence from Police Scotland to the Inquiry on 11 October 2022 and the oral evidence of Inspector James Young to the Inquiry on 22 November 2022. In respect of the questions addressed in this statement, responses are now due from the Chief Constable by close of business on 31 May 2023.
3. Answers to this request are based on information available to the Chief Constable to date. The Inquiry may have other information from other sources which is not before the Chief Constable. Disclosure to Core Participants by the Inquiry Team is ongoing.
4. Further, as the Inquiry is aware, extensive inquiries with police officers and staff, some of whom are retired, are ongoing. The issues raised in this position statement request relate to the Chief Constable's compliance with duties in the Equality Act 2010 ('the Act') and in particular with the Public Sector Equality Duty ('PSED'), which will be explored more fully in the Race hearing that is scheduled for 7-31 May 2024.
5. The submissions set out in this position statement are therefore, of necessity, subject to the recovery of, or disclosure of, further evidence and evidence heard by the Inquiry.
6. As has been stated in previous position statements on behalf of the Chief Constable, as at 3 May 2015, Police Scotland was still in the transitional period following its creation on 1 April 2013. All the legacy force systems and procedures had to be assimilated into the new complex organisation. Reference

is made in particular to the eighth position statement dated 25 April 2023, paragraphs 5-7, which are adopted and repeated for the sake of brevity.

7. The statement that follows, addresses, insofar as possible, nine of the eleven questions posed to the Chief Constable in the Chair's request. As indicated above, the response in this statement represents only what can be said at this time. It will likely require amendment, correction or expansion as more information becomes available.
8. Questions 1, 4 to 8, and 10 seek clarification as to the factual position. The responses to Questions 2 and 3 are dependent on the facts set out in the responses to those questions. The questions are therefore not answered in numerical order but proceed in the order of Questions 1, 4 to 8, and 10 with the responses to Questions 2 and 3 provided together at the end of this position statement.

The Chief Constable responds to the question posed as follows:

Q1. The Inquiry seeks an overview, to establish a clear understanding of what data was being collected and in what forms it was available about race and/or ethnicity and the use of force in the years before and since Mr Bayoh's death.

9. Prior to November 2018, when a new Use of Force form ('UoF form')¹ was completed and launched live on SCoPE, there was no co-ordinated system in place for collation of data on race/ ethnicity together with the use of force by Police Scotland.
10. As a result of the National Officer Safety Training Review undertaken between December 2014 and March 2015, Inspector Young's Review and Evaluation Report² produced in April 2015 identified a lack of national procedures and

¹ PS11217

² PS11533

policies and a disparate approach across legacy forces in relation to use of force, including the completion and submission of use of force forms.³ This was notwithstanding the fact that from August 2014, the System to Co-ordinate Personnel and Establishment ('SCoPE') Use of Force Reporting/ Monitoring Form⁴ became available to all staff on SCoPE and Police Scotland was recording and collating the use of force data via SCoPE from that date⁵.

11. There were a number of different forms and systems in place for collection of data in relation to use of force and there was variable compliance with the requirement to complete those forms⁶. As a result, the data available in relation to use of force generally was incomplete and unreliable. For example, in relation to one instance of use of force, officers might make an entry in their notebooks, as well as complete a UoF form or make an entry in the custody record. If an officer was injured, an injury or "hurt on duty" form might be completed instead of a UoF form⁷. There would also have been some disparate data available on use of force as a result of investigation into complaints, Professional Standards matters, as well as FAI and PIRC investigations and responses to Freedom of Information requests.

12. In its inspection report on custody centres across Scotland report⁸, HM Inspectorate of Constabulary ('HMICS') noted that there were inconsistencies

³ See, for example, one of the actions in the Use of Force Monitoring Group ('UoFMG') Action Log for 16 February 2018 was for Chief Superintendent Richards to "*consider the disparity between North/East/West UoF Forms*".

⁴ **PS18345** D14280 RR 34 2 167 SCoPE Use of Force 2013 (PIT Misc).pdf. This form stated that it was required to be completed when the officer or prisoner was injured; after use of batons/ incapacitants (including drawing only); and after any physical use of force (except compliant handcuffing and '*come along hold*').

⁵ See Inspector Young's Briefing Paper of 3 July 2017 re: National Police Chiefs Council Guidance on Use of Force Recording and Publishing at [3.1].

⁶ The minutes of the first meeting of the UoFMG, (at that stage named the OST Monitoring Group), on 30 May 2016 noted that: "*Some incidents not being fed back to OST for analysis and **exposure to violence forms** being used instead of UoF forms. This exposure to violence form was apparently a D division form. There was also an **adverse incident form for custody division, which forms part of the accident form**". [Emphasis added]*

⁷ See, for example, one of the actions in the UoFMG Action Log for 03.05.17 was for Peter Blair to consider whether "use of force" and "hurt on duty" forms could be merged. A draft was to be circulated to members for comment and then to be sent to Assistant Chief Constable Higgins to be signed off. However, that action was subsequently closed after consideration was given to merging the forms but it was not progressed due to the work involved and time delays.

⁸ *HMICS Inspection of custody centres across Scotland* report, 19 February 2018

in how Police Scotland recorded use of force and that there were concerns about the quality of data that was available:⁹

*“43. Some staff told us they record any use of force in their notebook and by completing an electronic ‘Use of Force’ form on Scope (Police Scotland’s human resources ICT system). These forms are reviewed by the National Operational Safety Training Unit (NOSTU). However, other staff told us that some use of force, such as the use of spit hoods, would be recorded on the custody record only. This discrepancy may have arisen because the Use of Force SOP requires recording in notebooks and on Scope, while the custody policy requires recording on the custody record. **As a result, any data gathered on use of force by the NOSTU will be incomplete. This prevents the service from conducting an effective analysis of the use of force and to assess, for example, whether force is used disproportionately in some centres compared to others, or against detainees with particular characteristics.** Furthermore, unlike forces in England and Wales, Police Scotland does not publish its use of force data, which would allow for greater transparency and analysis by stakeholders.”*
[Emphasis added]

13. When Inspector Young took over national responsibility for OST¹⁰, it was identified that improvements were needed in order to improve the data that was being submitted on use of force. In particular, it was identified¹¹ that the UoF form on the SCoPE system was outdated and required to be modified and improved¹². There was also need to improve compliance with the requirement to submit UoF forms¹³.

⁹ HMICS *Inspection of custody centres across Scotland*, paragraph 43

¹⁰ Inspector Young took over the National OST Co-ordinator role (as a sergeant, as he then was) in September 2014 before being promoted to temporary inspector as Head of OST in October 2016. Subsequently, he took on responsibility for the Specially Trained Officer (‘STO’) Project (taser), performing both roles for a period of time. However, from March 2020, he had full-time responsibility for taser/ STO as the Operational Lead for that programme and he ceased to have any input in OST. (See paragraph 4 of Inspector Young’s Inquiry statement, **SBPI-00153**).

¹¹ In the national OST review carried out by Inspector Young and a subsequent review specifically in to the UoF Forms, which was actioned by the UoFMG on 3 May 2017 (*“PC D’Ambrosio and T/Ch Supt Gibson to review the process in regards to “use of force” forms to gain a more accurate picture of the situation”*). Upon completion of the review, it was noted in the UoFMG Action Log that a new UoF form was being created.

¹² See Inspector Young’s Briefing Paper of 3 July 2017 [3.6]. See also the Briefing Paper on Operational Safety Training produced by PC Callum Mac Taggart on 29 May 2019 for the UoFMG.

¹³ One of the actions on the UoFMG Action Log on 3 May 2017 was for PC D’Ambrosio to circulate a memo to all officers drawing their attention to the need to accurately record the “use of force” on the appropriate form.

14. Inspector Young also identified that there was a need to collect and publish data on the use of force. This was particularly in relation to protected characteristics in order to promote transparency, scrutiny and allow for identification of disproportionate use of force as a matter of good practice. On 3 July 2017, Inspector Young prepared a briefing paper¹⁴ as to how Police Scotland recorded use of force and how Police Scotland could “*follow the principles of use of force data collection and publication as outlined in recent National Police Chief Councils NPCC guidance*”. In his briefing paper, Inspector Young recommended that UoF data should be published externally in line with the NPCC Guidance. The NPCC Guidance applied to police forces in England and Wales and to the Police Service of Northern Ireland but there was no NPCC requirement for Police Scotland to publish use of force data. However, Inspector Young recommended that the publishing of use of force data for Police Scotland would be beneficial and increase transparency.
15. The process to introduce data collection on ethnicity was prompted by Inspector Young’s awareness of the NPCC Guidance and also his consultation with other UK forces around the time of conducting his OST review and when producing the 3 July 2017 briefing paper.
16. The UoF forms in use in the years before and at the time of Mr Bayoh’s death did not provide for inclusion of information on the race and/or ethnicity or indeed on any of the protected characteristics¹⁵ in relation to a subject against whom force had been used. For example:

¹⁴ Inspector Young’s 3 July 2017 briefing paper was produced for Assistant Chief Constable Higgins, who was then Chair of the UoFMG. A subsequent briefing paper produced on 29 March 2019 for the UoFMG by Superintendent Phil Davison of the Criminal Justice Services Division (‘CJSD’) indicated that this paper “*was subsequently considered by the Use of Force Monitoring Group but it is unclear what progress has been made around any decisions to publish Police Scotland Use of Force data*”. The exact timeline relating to the progress of Inspector Young’s paper is, as at the date of this Position Statement, uncertain.

¹⁵ Although the age of the subject was recorded.

- a. The Fife Constabulary Baton/CS Report Form¹⁶ only required officers to record the name, date of birth, address, charge and crime/offence number(s) of the subject.
- b. After Police Scotland came into being, the five-page 2013 Use of Force Reporting/Monitoring SCoPE form¹⁷ did not include any fields requiring an officer to provide details in relation to any protected characteristics.

17. Inspector Young's 26 January 2016 EIA Summary of Results for the Use of Force SOP noted the following findings and actions arising from his assessment at that stage¹⁸:

"Part A: Summary of Analysis/ Decisions:

What the Assessment found and actions already taken:

Highlighted the need for a proportionate response to dealing with persons with mental health issues and the use of effective de-escalation techniques and the need for sharing practice and working together with partners.

All of the above will be incorporated into the new OST programme which supports this SOP

It has been identified that more guidance will require to be provided in relation to mental health/disability issues surrounding search/tactical communications/arrest. Full consultation was carried out with partners to provide appropriate guidance in respect of mental health and disability issues surrounding tactical communications/arrest/search. OST manual and guidance dicuments [sic] were sent to Police Scotland mental health training, safer communities E&D for review and guidance. This guidance which will be incorporated int the new OST manual

Further guidance was provided in relation to strip search of transgender persons

¹⁶ **PS18344 D14279** RR 34 2 166 Fife Use of Force Form 2012 (PIT Misc).pdf

¹⁷ **PS18345** D14280 RR 34 2 167 SCoPE Use of Force 2013 (PIT Misc).pdf. This form used by Police Scotland was based on a UoF form first created by Strathclyde Police in the early 2000s (see Inspector Young's Briefing Paper of 3 July 2017 re: National Police Chiefs Council Guidance on Use of Force Recording and Publishing [3.6]). The form stated that it was required to be completed when the officer or prisoner was injured; after use of batons/incapacitants (including drawing only); and after any physical use of force (except compliant handcuffing and 'come along hold').

¹⁸ **PS12083**

Further guidance was provided in relation to the safe restraint of pregnant women

further guidance was provided in relation to cultural issues surrounding search

Use of force monitoring did not cover protected characteristics”

Part B: Summary of Implementation/ Monitoring:

What else plan to do and how intend to check that done:

Work will be carried out with the Equality unit to ascertain if data around protected characteristics in relation to use of force can be obtained” [Emphasis added]

18. Following completion of his OST Review, Inspector Young undertook a substantial project to standardise and reform the OST programme. The UoF form development and data collection considerations were part of this extensive reform. A new National OST programme was introduced in January 2016 with the process of reform and improvement continuing in subsequent years.

19. In May 2016, the Use of Force Monitoring Group (‘UoFMG’) was created, reporting to the Head of People and Development¹⁹. The purpose of the UoFMG, as stated in the Terms of Reference, was to *“provide a means to monitor what extent and how effectively use of force is employed within Police Scotland and to monitor the overall direction and management of operational safety within Police Scotland”*²⁰. The stated Terms of Reference for the UoFMG were as follows:

- *“To review Police Scotland’s use of force in the light of use of force guidelines, statutory requirements and best practice.*
- *To recommend the establishment of working groups to investigate any aspect of use of force as appropriate.*
- *To study use of force reports and recommend remedial action where appropriate.*

¹⁹ Subsequently, the Terms of Reference were changed so that the UoFMG is now chaired by the Chief Superintendent of OSD and reports to the ACC Op Support. On 24 May 2023, it was agreed that the UoFMG would be chaired by the Chief Superintendent LTD.

²⁰ See the Terms of Reference for UoFMG (referred to in this document as the “OST Monitoring Group”)

- *To provide a forum to discuss in detail any issues arising from use of force, and to make recommendations to improve operational effectiveness.*
- *To receive reports of officer assaults, identifying trends and where appropriate recommend improvements in procedure/training.*
- *To ensure that the National OST Programme is being delivered effectively as per national guidelines.*
- *To monitor and highlight priorities for Operational Safety Training.*
- *To monitor the effectiveness of Operational Safety Training and make recommendations to improve same.*
- *To identify issues arising from operational safety equipment and thereafter report to the relevant group providing recommendations.”*

20. In 2018, the HMICS inspection report on custody centres across Scotland report recorded that²¹:

“44. Despite concerns about data quality, Police Scotland has nonetheless recently begun to analyse data on use of force which we welcome. Data is now being reported to a Use of Force Monitoring Group, chaired by an Assistant Chief Constable. This data relates to use of force across the service and not only in custody centres.... NOSTU is currently developing a new Use of Force form which it hopes will facilitate additional analysis, including by specific locations and protected characteristics. The introduction of this form will be supported by briefings to staff to encourage accurate recording.”

21. As part of the wider OST reform programme and in response to the identified need to update and improve the UoF form, Inspector Young worked to develop a new UoF form which would allow for better collation of use of force data, including in relation to protected characteristics. In creating the new UoF form, advice was sought from E&D advisors in Safer Communities (now known as Partnerships, Prevention and Community and Wellbeing (‘PPCW’))²²; input was

²¹ HMICS Inspection of custody centres across Scotland report, 19 February 2018, paragraph 44

²² See the email correspondence between Inspector Young and Safer Comms (PPCW) E&D Advisors between 12.09.16 and 3.11.16. In particular, on 7 October 2016, the E&D Advisor made the following comments: *“You may wish to consider whether the Use of Force form can be populated with data that the Police have already collected from the suspect/witness, given that someone upon whom force has been used is likely to have been taken into custody. The custody data includes age, ethnicity and gender (which are also question fields on the Use of Force form, so officers completing the latter could be directed to the former). Additionally, the custody data may also include information on religion/belief and disability, obtained through responses to welfare questions asked to fulfil Police custody’s duty of care.*

Our Chief Inspector Alastair Muir ... raises the question of Use of Force scenarios where there is no custody (drawing baton/spray to deter a hostile crowd...but no arrest). He says it would be helpful to know what the

provided from the UoFMG²³; technical and design assistance was provided by the SCoPE design team²⁴; and equality and human rights impact assessment were required²⁵ before the form was presented to the UoFMG for final approval.

22. This process of finalising the new form, took place along with the various other substantial reforms to the OST programme. The new UoF form (**PS11217**) was finalised and went live on SCoPE in November 2018.
23. The new UoF form captured information on protected characteristics of subjects, including race/ethnicity in accordance with the Police Scotland ethnicity categories using drop down boxes. These categories were provided by Equality and Diversity Advisors from Safer Communities (now known as PPCW).
24. The information from the UoF forms was available for review on SCoPE from November 2018. Excel spreadsheets collating the data were produced by the SCoPE team. The Analysis and Performance Unit ('APU') produced quarterly reports with charts and graphs analysing the data. The data (including in relation to ethnicity) was reviewed by the UoFMG in its meetings in order to identify and address any concerning trends, such as disproportionate use of

drivers and context are for this Use of Force form review. (Is it PIRC? Is It COPFS? Is it internal re: Stop Search?). We hope we are not overthinking this. We would welcome a phone call to discuss."

²³ One of the actions in the UoFMG Action Log for 03.05.17 was for PC D'Ambrosio and Temporary Chief Superintendent Gibson to review the process in regards to "use of force" forms to gain a more accurate picture of the situation. This review was completed and it was noted in the Action Log that a new UoF form was being created.

²⁴ On 16 February 2018, one of the actions in the UoFMG Action Log was for Inspector Young to "contact Scope Management Team regarding the progress of the new Use of Force Form and prepare instruction and recirculate guidance on the submission of current form". An update indicated that the form was "at testing phase with potential [to] go live in September [2018]".

²⁵ The EQHRIA Use of Force SOP (**PS12854**) has a Mitigation Action plan entry for 17 November 2016 as follows: "Issue/ Risk: No formal process to capture data on use of force in relation to the protected characteristics of Age, Sex and Ethnicity.

Action Taken/ to be Taken: (completion date 17/11/16: PI Young) "Following consultation with Equality and Diversity at safer Communities, a new use of force form will be developed which will allow Police Scotland to capture this data to ensure that all training is developed and delivered appropriately."

force against persons with protected characteristics, or issues that would be relevant for training, health and safety, or policy.

25. However, no disproportionate use (compared with the census data at the time) was identified by the UoFMG (or from Inspector Young's reviews of the data). Where the data suggested that there may be cause for concern, this would be investigated by the OST compliance officer. For example, in April 2021 it was necessary to explore an unexpected significant increase of 600% for one ethnic group in one division in the space of one quarter. Following investigation, it was reported to the UoFMG in August 2021 that the increase was because of two incidents involving multiple nominals, which had skewed the percentage statistics.
26. In the event that any disproportionate use of force was identified then this would be escalated for consideration by the Senior Leadership Board and input would be sought from E&D advisors at PPCW.

Q4. In what way did the format of data prevent publication of the data collated from November 2018?

27. From November 2018, when the new UoF form went live on SCoPE, data was being collated that, theoretically, was available for publication externally. However, one of the updates in the UoFMG Action Log on 1 January 2019 noted that the SCoPE team had indicated that two to three months were required in order to be able to extract data for comparison²⁶ and the first full quarter of data available was for January 2019 to March 2019.
28. On 29 March 2019, the Criminal Justice Services Division ('CJSD') produced a briefing paper for the UoFMG highlighting an open HMICS Recommendation

²⁶ This update was provided in relation to the Action of 16 February 2018 for CS Richards to consider the disparity between North/East/West UoF Forms and the first full quarter of data available was for January 2019 to March 2019.

from the 2018 Inspection that Police Scotland should publish force-wide data on the use of force²⁷. Clarification had been sought from HMICS regarding ownership for delivery against this in recognition that CJSD did not have sole ownership of Police Scotland use of force data. HMICS confirmed that it was a wider Police Scotland issue and that the UoFMG would be a logical group for ownership and to ensure activity is undertaken towards addressing the recommendation. The paper therefore recommended the following:

“4.1 The HMICS Recommendation from the 2018 Custody Inspection is a Police Scotland National matter and requires to be owned and actioned by an appropriate governance group with influence on National Use of Force.

4.2 It is recommended that the National Use of Force Monitoring Group take the appropriate ownership of this matter to allow progression to a suitably agreed closure with HMICS. ”

29. In a subsequent Discussion Paper, produced for a Your Safety Matters (‘YSM’) Diamond Group meeting on 10 August 2021, it was confirmed that the external publication of use of force data was *“subsequently actioned by the UOFMG for completion by Operational Safety Training (OST)”*.

30. On 29 May 2019, the Operational Safety Training Co-Ordinator West (Operational Training Leadership, Training and Development), produced a Briefing Paper on Operational Safety Training in order to provide an overview of the recent changes to the Use of Force form and the impact on the data during the changeover period. In the paper, the following was explained:

²⁷ The HMICS *Inspection of custody centres across Scotland* report dated 19 February 2018 noted that *“unlike forces in England and Wales, Police Scotland does not publish its use of force data, which would allow for greater transparency and analysis by stakeholders”*. HMICS therefore recommended that Police Scotland should publish force-wide data on the use of force.

“3.1 Upon release of the new form there was a large amount of work done to promote the Use of Force form with the aim of raising awareness of the Use of Force form and increasing submission rates in areas that have lower submission rates.

3.2 This included communication on the Police Scotland Intranet and increased discussion on the form during Operational Safety Training (OST) Recertification’s.

3.3 This appears to have led to an increase in the amount of Use of Force forms submitted for example for Q4 there was an increase from 696 forms submitted in 2018 to 938 forms submitted in 2019.

4. Conclusion

4.1 Each form is reviewed by an OST Instructor and there has been no identifiable cause for concern. It would appear the increase in Use of Force submissions is down to the promotional work carried out when changing the form.”

31. At the UoFMG meeting on 15 August 2019, an action was raised for a proposal to be provided to the Executive to address the HMICS recommendations regarding the publishing of Police Scotland Use of Force data. The UoFMG updates on the Action and Decision Log in relation to this action up to 16 April 2021 record the following:

“Previous papers submitted in relation to this are currently being reviewed for relevance prior to submitting to ACC for consideration. Action to be closed till it has been established what data will be used.

4.5.20 - Graphics removed from the reporting document. The first publication will likely be at the end of May and a process for gathering the data on a regular basis being developed. Action to remain open until publication.

28.8.20 - Use of Force Performance Report circulated to group ahead of meeting on 31st Aug 2020 for review/comment. Demographics to be added to the report then passed through Information Assurance. Some additional comms to be added via Katie Winstanley before being presented to ACC for Executive sign off.

26.11.20 - Some concerns were raised around an apparent increase of use of force used against BAME communities in relation to the population demographic. Some research was carried out around this

which showed a that use of force appeared proportionate in relation to the current population demographic and reported back to ACC and awaiting further instruction

08.12.20 - Decision made to complete on going work with EQHRIA prior to publishing any data.

13.04.21 EQHRIA has been amended and is currently sitting with E&D for sign off"

32. The **EqHRIA Use of Force National Guidance** produced by Inspector Jennifer Steven on 13 May 2021, had to be carried out before publication of the use of force data, as was confirmed by Corporate Services Division, Governance, Audit & Assurance in email correspondence²⁸ with Inspector Jennifer Steven of that same date. Inspector Steven requested clarification as to the steps in the process once the mandatory consultation for the EqHRIA had passed so that she could provide the Executive with a timescale for the publication of Use of force data externally as Police Scotland would not want to publish the data until the National Guidance and EqHRIA were also published (PS18727). Corporate Services Division, Governance, Audit & Assurance set out the remaining steps required as follows:

"The Mandatory consultation period is due to end on 26/05/2021. When all relevant feedback has been received, any that requires your attention will be forwarded to yourself for consideration / action. Depending on the consultee feedback, amendments may be required to the guidance document however this will become more apparent when feedback is

After the Mandatory Consultation has been resolved then all that is left is for us to seek Executive Approval. ...

Once Executive Approval is obtained we will then be in a position to publish both the guidance and the EqHRIA to the guidance site with external publication to follow after the redactions process has been completed."

²⁸ See the email correspondence between Inspector Steven to Corporate Services Division, Governance, Audit & Assurance on 13 May 2021.

33. The EqHRIA Use of Force National Guidance has a Mitigation Action plan entry as follows:

“May 2021 – A Use of Force report to be published Quarterly externally on the Police Scotland website. This is in response to a HMICS recommendation and is in line with other UK Police Forces who publish similar reports.” Publication of the report per quarter with first report to be published in May 2021 (PS18727)

9.1 EqHRIA Author Log: PI Jennifer Steven

9.2 Quality Assurance Log

Comments from Quality Assurance (Samantha Anderson, Policy and Scrutiny Manager) on EqHRIA on 13.05.2021: “EqHRIA updated to reflect publication of Quarterly report into Use of Force figures each quarter. This publication will allow for transparency for members of the public. It should be noted that this EqHRIA is not assessing the report or the figures. Existing processes and procedures are in place for the monitoring of Use of Force and any subsequent findings from PSD, PIRC etc. This is not covered in the scope of this assessment which is against the Police Scotland guidance on Use of Force only. Should however, the publication of the quarterly report result in any changes being made to current processes, procedures or training the owning department has been advised to re-contact for further assessment of the EqHRIA to be carried out.”

9.3: Divisional Commander/ Head of Department Log: Supt Rob Hay 10.05.21”

34. It is understood that on 9 June 2021, ACC Williams presented a report, which had been prepared for him), highlighting the development of a statistical report in respect of Police Scotland Use of Force, and seeking , approval from the Senior Leadership Board (‘SLB’) for publication of the data. It was confirmed that publication of use of force data had been recommended by HMICS following a previous inspection.

“During discussion, there was support for the publication of data, however additional work was required in respect of the content of the report, including context and analysis information, and consideration of whether use of force data should be incorporated within other performance reporting. Although there was support in principle,

publication was not approved at this stage, with an action generated to further develop the report and consider the most appropriate method of publication, with oversight from Your Safety Matters.

DECISION: Recommendation not approved at this time.

ACTION: Use of Force data report to be developed, including further analysis and contextual information, with consideration to take place in respect of the most appropriate mechanism for publication. Oversight to be provided by Your Safety Matters”

35. The Discussion Paper for the YSM Diamond Group meeting on 10 August 2021 was for the purpose of seeking approval of the use of force data externally and to update YSM members on the work undertaken to progress towards publication. As explained in the paper, the proposal to publish aligned “*to all of Police Scotland’s Strategic Outcomes by ensuring that relevant information is disseminated and decisions taken at the most appropriate level, which in turn improves the service delivery, addresses the needs of local communities, engages the public and partners to drive confidence in policing, supports our people and addresses the adaptability of the force*”. As to the work completed to date, the following summary of the steps taken and progress was provided:

“6.2 Work Completed

6.2.1 Initially the raw data, gathered from officers/staff completing the ‘UoF’ forms, is extracted by National SCOPE Management and provided to Analysis and Performance. This is now scheduled to be provided on a quarterly basis going forward to facilitate the report publication schedule.

6.2.2 This data will be processed by Planning Performance Officers to create both an internal performance document for the UOFMG and the external report in the agreed format following today’s discussion. Staff from the Statistical Unit have carried out quality assurance checks on the data gathering and report production processes, and will continue to monitor these on an ongoing basis.

6.2.3.. [The] Criminal Intelligence Analyst, completed a UoF Analysis Report on the data available for 2020/21. This included a report on the ethnicity data alongside the latest census figures on ethnicity. Staff from the Statistical Unit have reviewed these reports and, due to the comparatively small figures involved and the change in recording practices from 2018, at this time, they cannot identify any statistical patterns or trends in the dataset that require

further investigation. Moving forward this position will be monitored, and once a larger dataset is available, it may be possible to compare ethnicity data to 3/5 year averages to view any longer term trends and identify if any further analysis required.

6.2.4 An External Performance Benchmarking Short Life Working Group (SLWG) has been formed and has established a Benchmarking Practitioner Group (BPG). This BPG is chaired by Police Scotland and is currently working on identifying a small number of benchmarking metrics to be developed and reported in 2021/22. As UoF figures are widely published England and Wales, the BPG are currently working alongside OST to identify potential benchmarking opportunities in the UoF of data.

*6.2.5 Corporate Communications along with OST, has created a landing page for the Police Scotland internet, which will be accessible to the public and contain links to the UoF quarterly reports. A mock version of this page, and the text within, has been included in **Appendix One** for information, discussion and approval.*

*6.2.6 Planning Performance Officers have processed the data for Quarter 1 2021/22, and have produced two draft reports for discussion and feedback at this meeting. A wide variety of formats exists when researching data available from different forces in England and Wales and these have been used as the basis for the drafts. **Appendix Two** shows a standard reporting template with the data displayed in tables. **Appendix Three** uses infographics and pie charts to consolidate the same data into two pages.*

...

7.3 Equality, Diversity & Human Rights

The data set proposed for external publication contains figures on the ethnicity of subjects who have been included on UoF forms completed by officers/staff. This may be subject to external scrutiny, however, as detailed above the data will be monitored by Analysis and Performance staff and any exceptions raised with OST for further scrutiny.

7.4 Communications and Engagement

A wide ranging engagement strategy is ongoing, with internal stakeholders, consulted through Analysis and Performance and OST. Corporate Communications staff have been involved with the development of the proposed product. A further feedback process will be implemented following this meeting in order to steer the initial data publication towards an effective regular cycle which meets the needs of the departments and the Force Executive."

36. However, as explained above, there were a number of issues impacting the accuracy and reliability of the data. This led to a delay in the approval from the Executive (Senior Leadership Board) for publication of the data. Concerns were

expressed by members of the YSM Diamond Group at the meeting on 10 August 2021 and recorded in the Minutes. In summary the concerns were that the proposed publication presented for approval, was not fit for publication in terms of both its content and format. The publication resembled the quarterly SCoPE data and reports produced for consideration by the UoFMG but, in the absence of appropriate context, detailed analysis (including internal statistical comparison) and benchmarking, would lead to confusion and generate more questions than answers. Compliance in terms of completion of forms, standardisation of how the data was displayed, comparison with census data and national statistics and data quality issues were raised. Ultimately, publication would not fulfil the purpose of producing an accessible publication that would facilitate openness and transparency in order to ensure that *“relevant information is disseminated and decisions taken at the most appropriate level, which in turn improves the service delivery, addresses the needs of local communities, engages the public and partners to drive confidence in policing, supports our people and addresses the adaptability of the force”*²⁹.

37. As a result, the Force Executive did not approve publication of the use of force data until steps were taken to improve the quality of the data and make it more reliable. This was sought to be achieved by the following:

- a. Issuing of briefings, memos and reminders to raise awareness and remind officers as to the requirement to complete and submit UoF forms. For example:
 - i. One of the actions in the UoFMG Action Log for 03.05.17 was for PC D'Ambrosio to circulate a memo to all officers drawing their attention to the need to accurately record the "use of force" on the appropriate form. This was duly done.
 - ii. Another action for 08.02.19, was for Supt Chris Stones to action increased awareness regarding the submission of the UoF form and

²⁹ Discussion Paper for the YSM Diamond Group meeting on 10 August 2021

for David Kennedy of the SPF to assist. This action was marked as complete on 15.05.2019.

- iii. On 15.08.19, another action tasked David Kennedy of the SPF with raising the issue of lack of UoF submission with the local area committees. This action was marked as complete on 28.10.2019 with the issue being raised at the area committees and it was noted that it will continue to be done.
- iv. On 28.01.20, an action was raised for Superintendent Armstrong to circulate a briefing to local divisions regarding submission of UoF forms.
- v. On 2 August 2021, a memo was issued to all Divisional Commander/ Heads of Department re: accurate recording of UoF on SCoPE.

- b. Provision of training re: completion and submission of UoF forms³⁰.
- c. Other measures to ensure that UoF forms were completed. For example, on 2 August 2021, a memo to Divisional Commanders/ Heads of Department relating to Accurate Recording of Use of Force on SCoPE as follows:

“It has become evident that on some occasions when a Police Officer or member of Police Staff has used force during their tour of duty, the incident is being recorded on crime systems but not being recorded on a SCoPE Use of Force form. ... In an effort to improve compliance regarding the submission of these forms, Crime Report and Crime Files which detail that force has been used, will no longer be finalised by Crime Managers, unless there is a corresponding SCoPE reference number added other enquiry updates.”

- 38. Following the steps taken to improve the quality of the collection and collation of the data, it was published in September 2021. The process of improvement in terms of analysis of the data and publication of the data to make it more accessible and transparent for stakeholders and those with protected characteristics is a continuing one.

³⁰ For example, UoF form input was added to the Initial OST course at Tulliallan, and the initial PCSO course.

Q5. What prompted the inclusion of ethnicity in Use of Force Forms? Why was this not originally included?

39. As explained above, prior to 2018, the UoF forms used by legacy forces and subsequently by Police Scotland³¹ did not include ethnicity or any protected characteristics.
40. Inspector Young is unable to comment on why ethnicity was not included previously in the UoF forms by legacy forces. The legacy force procedure continued until the opportunity arose for all OST to be reviewed in the newly created service of Police Scotland. His review for Police Scotland commenced post-unification from 2014 to March 2015 and his report was produced in April 2015. At this stage it has not been possible to identify the answer as to why legacy forces did not include ethnicity in their UoF forms.
41. As explained above, when Inspector Young took over national responsibility for OST, his view was that all data on UoF should be collated, be available for internal use, and be published externally to promote transparency, scrutiny and allow for identification of disproportionate use of force as a matter of good practice. The process to introduce data collection on ethnicity was prompted by the above and also consultation with other UK forces and NPCC guidance.
42. Additionally, when Inspector Young undertook the UoF EqHRIA in 2016, he recognised the lack of UoF data in relation to protected characteristics, including race/ ethnicity as a significant risk, which prompted the creation of the new UoF form so that, moving forward, data could be captured, collated and reviewed in order to better inform subsequent EqHRIA.

³¹ The SCoPE form initially used by Police Scotland and that was available to officers on SCoPE from 2014 was based on the Strathclyde Police UoF form

43. As explained above, Inspector Young sought guidance from Police Scotland E&D advisors as to the inclusion of ethnicity in the UoF forms.

Q6. When exactly was ethnicity included on these forms?

44. As explained above, ethnicity was included in the UoF forms for the first time in November 2018, which is when the new UoF form went live on SCoPE.

Q7. To which “SCoPE” data sets was Inspector James Young referring, in his oral evidence to the Inquiry? What data sets were provided to Inspector Young for the purpose of drafting the Equality & Human Rights Impact Assessment for the Use of Force SOP?

45. As explained above, prior to November 2018, there was **no data available** for this version of the 2016 EqHRIA undertaken by Inspector Young in relation to the UoF SOP.

46. The dataset to which Inspector Young was referring in oral evidence was the data available to him on SCoPE from November 2018.

47. The only information available to Inspector Young was from consultation with other UK forces and research that Inspector Young carried out including reviewing NPCC Guidance. This informed the EqHRIA that more needed to be done in respect of training of officers regarding protected characteristics and conflict management/de-escalation.

Q8. How does Police Scotland reconcile the availability of any datasets to Inspector Young, with the assertion in correspondence with the Inquiry that data was not collated on protected characteristics and the use of force prior to 2016?

48. As explained above, prior to November 2018, apart from any *ad hoc* or incidental data on UoF and protected characteristics, no data was captured or collated on the UoF form in use prior to that date.

49. The dataset to which Inspector Young was referring in oral evidence was the data available to him on SCoPE from November 2018.

50. Accordingly, the correspondence with Police Scotland referred to at paragraphs 1 and 2 of the background to this Position Statement request is correct.

Q10. Identify the Divisional Commanders or Heads of Department in May 2015 who had the responsibility of ensuring that equality impact assessments were carried out and that “all mitigating actions [we]re undertaken and practices amended and implemented as required in terms of the Police Scotland Equality Impact Assessment (Pilot) Standard Operating Procedure, version 1 (PS11547).

51. The purpose of the **Police Scotland Equality Impact Assessment (Pilot) Standard Operating Procedure, version 1** (‘the EIA Pilot SOP’) published on 30 August 2014 was to support Police Scotland and the Scottish Police Authority (‘SPA’) to meet the duties imposed upon them by the Act. It applied throughout the whole organisation and related to policies and procedures. The policies and procedures included ‘Policies, SOPS, Guidance Documents, Functions, Practices, Service Provisions, Events and Operations, HR documents and processes, Procurement, Contracts and Decisions financial and non financial.’³² The document applies to police officers as well as authority / police staff.

52. Section 8 of the EIA Pilot SOP is a summary of roles and responsibilities. 8.1 is headed ‘Owning Department’. It is stated in paragraph 8.1.1 that:

“The Divisional Commander / Head of Department will have ultimate responsibility for ensuring that and EIA is conducted. They or their designate will review each completed EIA, appending any comments on the EIA Form Management Log.”

53. Section 8.1.2 states that :

³² Paragraph 1.2 of the EIA Pilot SOP

“The Divisional Commander / Head of Department, or designate will ensure that all mitigating actions are undertaken and practices amended and implemented as required”

54. Section 8.1.3 states that they will also be responsible for ensuring that the EIA is revisited if there is a significant change to the policy and procedure.
55. Police Scotland is a complex structure with many divisions and numerous departments. In some cases departments are headed by civilian staff. An example of some of the departments include APU as discussed herein, technology, financial services, procurement, professional standards, legal services, communications, logistics, human resources, accounting, systems and people and development. In terms of policing there were 15 local command areas and 31 non territorial policing divisions with sub specialities within those divisions.
56. The scope of the question is such that Police Scotland would require to speak to at least 90 witnesses, some of whom are retired, to establish their general role and responsibility as at 2015. However, the fact that the SOP permits of designation means that it is not a matter of simply identifying the names of the 90 witnesses who were Divisional Commanders or Heads of Department as at May 2015. The designation also means that authority may have been delegated by the Divisional Commander or the Head of Department to another individual for a particular policy or policies. Given the number of potential policies and procedures, the task of answering the question as framed is unmanageable. It would not be efficient for the Inquiry to have material which is not relevant to the aims of the Inquiry or the Terms of Reference.
57. Resources have been applied in an effort to answer this question which has exposed the scale of the task. The Chief Constable will direct further resources once there has been clarification of what would be most helpful to the Inquiry.

Qs 2&3 combined: relevant legal provisions and principles

Q2. Bearing in mind the responses to the questions below³³, how does Police Scotland reconcile the availability and/or form of data collected about race and/or ethnicity with the Public Sector Equality Duty, as defined by Equality Act 2010 s.149 and the parallel common law duty of enquiry – sometimes referred to as the Tameside duty?³⁴

Q3. How does Police Scotland reconcile the following with the Public Sector Equality Duty, as set out in the Equality Act 2010 s.149?

(a) The absence of data on protected characteristics and the use of force in the years prior to Mr Bayoh's death in 2015.

(b) The absence of data on protected characteristics and the use of force in the years prior to Mr Bayoh's death in 2015.

(c) The absence of data on protected characteristics and the use of force in the years prior to Mr Bayoh's death in 2015

Introduction

58. The response to each of these questions is closely interrelated and there is duplication in what they seek. Question 2 refers to Question 3 (a) to (c) and seeks a response which is dependent on the answers to those questions (i.e. how the specific steps taken by Police Scotland regarding collation and publication of data relate to or can be reconciled with the PSED). Questions 2 and 3 are therefore addressed together and set out in the response to the specified directed questions in Question 3 (a) to (c) below.

59. Given that some legal context is raised in Question 2 under reference to the Act and what is referred to as the *Tameside* duty, the Chief Constable considers that it is necessary and useful first to set out more on the legal context and

³³ N.B. these are Qs3-6 of the request

³⁴ The footnote to Q2 in the request is as follows: *Secretary of State for Education and Science with Thameside Borough Council* [1997] App Cases 1014, per Lord Diplock at p 1065; see also in the context of disability: *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), Aitkens LJ at para [85] that: "... the public authority concerned will, in our view, have to have due regard to the need to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration."

background to the legislation, and to outline the nature of the PSED and the *Tameside* duty.

60. Whilst Question 2, as framed, relates to the Act and the PSED in particular, as well as the steps taken by Police Scotland to comply with the duties under section 149 of the Act, in the question, reference is made only to the case of *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) and to the *Tameside* duty, which is set out in the case of *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1977] AC 1014³⁵, at 1065B per Lord Diplock. It is the position of the Chief Constable that the consideration of the PSED will require a broader analysis of the relevant case law, the applicable statutory provisions in Scotland and the relevant guidance of public bodies. This will be the subject of comprehensive legal submissions following the hearing on race. In the meantime, some key points regarding the relevant legal provisions and principles are addressed in summary below for the purposes of this position statement.

The Equality Act

61. The Act brought together 116 separate pieces of legislation into one single Act and which came into force on 1 October 2010. The PSED in Chapter 1 of Part 11 of the Act came into force across Great Britain subsequently, on 5 April 2011³⁶, replacing the separate race³⁷, disability³⁸ and gender³⁹ equality duties contained in the Race Relations Act 1976, the Disability Discrimination Act 1995, and the Sex Discrimination Act 1975 respectively, harmonising those equality

³⁵ The case reference in the footnote to Question 2 of the Position Statement Request is incorrect

³⁶ The Equality Act 2010 (Commencement No 6) Order 2011 (SI 2011/1066)

³⁷ The race equality duty came out of the Macpherson Report and the findings of institutional racism in relation to the Metropolitan Police. The race equality duty, which was the first of the equality duties to come into force in 2002, changed the emphasis from rectifying cases of discrimination and harassment after they had occurred and it shifted the onus to promote equality positively from individuals to organisations.

³⁸ This was the second equality duty, which came into force in 2006.

³⁹ This third equality duty came into force in 2007.

duties into a single equality duty, as well as extending the equality duty so that it covers the eight relevant protected characteristics listed in s149(7)⁴⁰.

62. As explained by the Equality and Human Rights Commission ('EHRC') in the Foreword to its Public Sector Equality Duty Technical Guidance for Scotland⁴¹:

"The Equality Act 2010 (the Act) represents the culmination of years of debate about how to improve British equality law. It offers individuals stronger protection against discrimination. The Act also gives employers and businesses greater clarity about their responsibilities, and it sets a new expectation that public services must treat everyone with dignity and respect."

63. The PSED is a positive duty on public authorities and others carrying out public duties to advance equality. Its broad purpose is to ensure that public bodies or those carrying out public functions integrate considerations of the advancement of equality into their day-to-day business or functions and consider the needs of all individuals, i.e. in shaping policy, delivering services, and in relation to their own employees, and for these issues to be kept under review. Compliance with the general equality duty is a legal obligation, but it should also lead to better informed decision-making and policy development, as well as delivery of services that are more appropriate to the needs of the users and increased satisfaction with public services.

64. The PSED consists of two linked parts⁴²:

a. a **general equality duty**, which is imposed by s149(1) of the Act, and

⁴⁰ There are nine protected characteristics listed in section 4 of the Act: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. However, marriage and civil partnership is not one of the relevant protected characteristics included in the s149(7) list and only applies in relation to the first strand of the PSED (the prevention of discrimination and harassment) set out in section 149(1)(a).

⁴¹ <https://www.equalityhumanrights.com/en/publication-download/technical-guidance-public-sector-equality-duty-scotland>. The foreword for the English and Welsh Technical Guidance documents are in similar terms in the material aspects.

⁴² Page 4 of the 2017 Equality and Human Rights Commission *Measuring Up? Report 7*

- b. **specific duties**, which are imposed by secondary legislation made pursuant to s153 of the Act and which are intended to provide a framework in order to assist public authorities in the better performance of the general equality duty contained in s149(1) of the Act. In Scotland, the specific duties were created by secondary legislation in the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (SSI 2012/162) as amended ('the Regulations')⁴³, which came into force on 27 May 2012.

The General PSED

- 65. The PSED applies to all public authorities across Great Britain which are specified in Schedule 19 to the Act⁴⁴.
- 66. Pursuant to s149(1) of the Act, a public authority, in the exercise of its functions, must have **due regard** to the need to:
 - a. **Eliminate** unlawful discrimination, harassment, victimisation and any other conduct prohibited by or under the Act (s149(1)(a))⁴⁵;
 - b. **Advance** equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it (s149(1)(b))⁴⁶; and

⁴³ In England, the equivalent regulations were the Equality Act 2010 (Specific Duties) Regulations 2011, which came into force on 10 September 2011 and have now been replaced by the Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 (SI 2017/353). The Equality Act 2010 (Specific Duties) (Wales) Regulations 2011, which came into force on 6 April 2011, are the equivalent regulations in Wales. The full implementation of the PSED (incorporating the specific duties) was thus delayed in Scotland as compared to England and Wales.

⁴⁴ Section 150(1) provides that a "public authority is a person who is specified in Schedule 19". The chief constable of the Police Service of Scotland is listed in Schedule 19.

⁴⁵ Pursuant to s149(8) of the Act, a "reference to conduct that is prohibited by or under this Act includes a reference to (a) a breach of an equality clause or rule; (b) a breach of a non-discrimination rule". Chapter 2 of the Act deals with Prohibited Conduct and includes direct discrimination (s13), indirect discrimination (s19), harassment (s26), and victimisation (s27).

⁴⁶ Pursuant to s149(3), having due regard to the need to advance equality of opportunity refers to having due regard, in particular, to the need to "(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it; (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low".

- c. **Foster** good relations between different persons who share a relevant protected characteristic and persons who do not share it (s149(1)(c))⁴⁷.

67. These are often referred to as the three **‘equality needs’**.

68. Section 156 of the Act makes clear that a failure in respect of a performance of a duty imposed by or under Chapter 11 (including the PSED) does not confer a cause of action at private law. Instead, an alleged failure to comply with the PSED can be challenged as follows:

- a. It can be investigated and enforced by the Equality and Human Rights Commission (‘EHRC’) through a compliance notice⁴⁸, or
- b. It can be challenged by a person or a group of people with an interest in the matter or by the EHRC by way of a claim to the Court of Session for judicial review.⁴⁹

69. The EHRC is the statutory body established to help eliminate discrimination and reduce inequality. The EHRC has published a number of non-statutory guidance documents⁵⁰, including the Technical Guidance on the Public Sector Equality Duty documents for England, Scotland and Wales.

70. The guides are intended to help public authorities and are purely advisory in terms of legal status, as opposed to codes of practice which are normally binding and can carry sanctions for breach. However, as explained in [1.3] – [1.5] of the Technical Guidance for Scotland, although the guidance is not a statutory Code issued under s14 of the Equality Act 2006 and it is issued on the basis of its powers to provide information and advice under s13 of the Equality Act 2006, it may be used as evidence in legal proceedings⁵¹.

⁴⁷ This requires public authorities to have due regard, in particular, to the need to “(a) tackle prejudice, and (b) promote understanding” (s149(5)).

⁴⁸ See s30(1) of the Equality Act 2006..

⁴⁹ *J v Glasgow Housing Association Ltd* [2022] 8 WLUK 156

⁵⁰ <https://www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty-guidance>

⁵¹ *Kaur and Shah, R. (on the application of) v. London Borough of Ealing and Another* [2008] EWHC 2062 (Admin), para 22 per Moses LJ. See also *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), [2009] PTSR 1506 at [119-120].

The nature of the PSED and the meaning of 'Due Regard'

71. Lewis J in *R on the application of Buckley v Bath and North East Somerset Council* [2018] EWHC 1551 (Admin) at [113] neatly summarised the nature of the duty as follows:

*“the duty is a duty to have due regard to the specified matters, **not a duty to achieve a specific result**⁵². The duty is one of **substance, not form**, and the real issue is whether the relevant public authority has, in substance, had regard to the relevant matters, taking into account the nature of the decision and the public authority's reasoning. The absence of a reference to the public sector equality duty will not, of itself, necessarily mean that the decision-maker failed to have regard to the relevant matters although it is good practice to make reference to the duty, and evidentially useful in demonstrating discharge of the duty.”*
[emphasis added]

72. In *R (Bridges) v Chief Constable of South Wales Police* [2020] 1 WLR 5037⁵³, the Court of Appeal considered the legal principles relevant to the PSED, which had been set out by McCombe LJ in *R (Bracking) v SS for Work and Pensions (Equality and Human Rights Commission intervening)* [2014] Eq LR 60 at [26]. The Court of Appeal emphasised the following **six principles**⁵⁴, which were set out in McCombe LJ's summary and supported by earlier authorities⁵⁵:

*“(1) The PSED must be fulfilled before and at the time when a particular policy is being considered.
(2) The duty must be exercised in substance, with rigour, and with an open mind. It is not a question of ticking boxes.
(3) The duty is non-delegable.
(4) The **duty is a continuing one**.
(5) **If the relevant material is not available, there will be a duty to acquire it** and this will frequently mean that some further **consultation** with appropriate groups is required.*

⁵² See also *Hackney v Haque* LBC [2017] EWCA Civ 4 at [20]-[23]: there is no duty to procure a particular outcome

⁵³ This was a claim concerning the lawfulness of the use of automated facial-recognition (AFR) technology by the South Wales Police Force on A8, Data Protection Act, and PSED grounds. The CA concluded that the Divisional Court had been wrong to hold that the police complied with the PSED. The police did not take reasonable steps to make enquiries about whether the AFR software had bias on racial or sex grounds. However, there was no clear evidence that the AFR software was in fact biased on the grounds of race or sex.

⁵⁴ The Bracking 'principles' as opposed to 'requirements'. See *Sheakh v LB of Lambeth* [2022] EWCA Civ 457 [2022] PTSR 1315 paragraph 13 as referred to below

⁵⁵ At [175]

(6) Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then it is for the decision-maker to decide how much weight should be given to the various factors informing the decision. [emphasis added]

73. As the Court of Appeal pointed out, McCombe’s summary of the principles in *Bracking*, referred to a number of earlier important decisions, including *R (Brown) v SS for Work and Pensions (Equality and Human Rights Commission intervening)* [2009] PTSR 1506, and *R (Hurley) v SS for Business, Innovation and Skills* [2012] HRLR 13. It has been cited with approval since, including in *Hotak v Southwark LBC* [2016] AC 811 at [73] per Lord Neuberger PSC.

74. The Court of Appeal in *Bridges* went on to explain the following:

- a. The PSED is a duty of **process and not outcome** but public law is often concerned with process not the substance of the decision [176] – [180]:
“First, good processes are more likely to lead to better informed, and therefore better, decisions. Secondly, whatever the outcome, good processes help to make public authorities accountable to the public. We would add, in the particular context of the PSED, that the duty helps to reassure members of the public, whatever their race or sex, that their interests have been properly taken into account before policies are formulated or brought into effect.”
- b. What is required by the PSED **depends on the context**⁵⁶ and does not require the impossible. It **requires the taking of reasonable steps**⁵⁷ to make enquiries about what may not yet be known to a public authority about the potential impact of a proposed decision or policy on people with the relevant characteristics” [181].

⁵⁶ In *Hotak v Southwark London Borough Council* [2015] UKSC 30, Lord Neuberger explained at [74] that the extent of the “regard” must be what is appropriate in all the circumstances: “*in the light of the word “due” in section 149(1), I do not think it is possible to be more precise or prescriptive, given that the weight and extent of the duty are highly fact-sensitive and dependent on individual judgment*”. See also the more recent case of *Sheakh v LB of Lambeth* [2022] PTSR 1315 (re: a failed challenge in Court of Appeal by a disabled resident to a Low Traffic Neighbourhood)

⁵⁷ The principle of proportionality is important when considering whether there has been compliance with the PSED, both in relation to the general equality duty (see the Equality and Human Rights Commission Technical Guidance at [5.19], [5.23] and [5.34]), and in relation to the specific duties.

- c. The whole purpose of the positive duty (as opposed to the negative duties in the Act) “is to **ensure that a public authority does not inadvertently overlook information which it should take into account**” [182].
- d. The PSED does not differ according to whether something is a trial process or not. If anything, it could be said that, **before or during the course of a trial**, it is all the more important for a public authority to **acquire relevant information** in order to conform to the PSED and, in particular, to avoid indirect discrimination on racial or gender grounds [200].

75. The Court of Appeal acknowledged that there was no evidence that the AFR technology did have any bias on racial or gender grounds but that was “*to put the cart before the horse*”. It was held at [191] that the police service did not know “*the racial or gender profiles of the total number of people who were captured by the AFR technology but whose data was then almost immediately deleted. In order to check the racial or gender bias in the technology, that information would have to be known*”. It was, however, noted that the police service had “*never sought to satisfy themselves, either directly or by way of independent verification*” that the software program did not have an unacceptable bias on grounds of race or sex [199].

76. In the later case of *Sheakh v LB of Lambeth* [2022] EWCA Civ 457 [2022] PTSR 1315, the Court of Appeal reviewed the recent case law. At paragraph 10, the following 5 important points are made.

“10. First, section 149 does not require a substantive result (see the judgment of Dyson LJ in *Baker v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141; [2009] PTSR 809 (at para 31)). Second, it does not prescribe a particular procedure. It does not, for example, mandate the production of an equality impact assessment at any particular moment in a process of decision-making, or indeed at all (see *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin); [2009] PTSR 1506, para 89). Third, like other public law duties, it implies a duty of reasonable enquiry (see *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014). Fourth, it requires a decision-

maker to understand the obvious equality impacts of a decision before adopting a policy (see the judgment of Pill LJ, with which the other members of this court agreed, in R (Bailey) v Brent London Borough Council [2011] EWCA Civ 1586; [2012] Eq LR 168, paras 79, 81 and 82). And fifth, courts should not engage in an unduly legalistic investigation of the way in which a local authority has assessed the impact of a decision on the equality needs (see the judgment of Davis LJ in Bailey, with which Richards LJ agreed, at para 102)."

77. *Bracking* was also discussed in so far as relevant to the issues under consideration and the eight principles were said not to be significantly in dispute. Importantly the relevance of *Tameside* was addressed as follows:

*"12.....As was submitted in R (National Association of Health Stores) v Department of Health [2005] EWCA Civ 154 at [26] Innovation and Skills [2012] EWHC 201 (Admin) , and accepted by Elias LJ at para 90,] ... **the combination of the principles in [Tameside] and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision", and "[if] the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required ... [see the judgment of Aikens LJ in Brown , at para 85]"**. [Emphasis added]*

13. Both sides in this appeal referred to "the Bracking requirements". In our view it is better to refer to these propositions as "principles" rather than "requirements"—as did the Divisional Court (Singh LJ and Swift J) in its recent decision in R (Good Law Project Ltd and Runnymede Trust) v Prime Minister and Secretary of State for Health and Social Care [2022] EWHC 298 (Admin) (at para 106) . It is also important to remember that these glosses are no substitute for the language of the statute."

78. Detailed reference was also made in paragraphs 14 to 17 to other recent cases. The whole paragraph is relevant but these particular sections are extracted here for ease of reference.

"14. In R (End Violence against Women Coalition) v Director of Public Prosecutions [2021] EWCA Civ 350; [2021] 1 WLR 5829 ", Lord Burnett of Maldon CJ (at para 85) observed that the way in which section 149 applies "will be different in each case depending on what function is being exercised", and that the relevant judgments, including that in Bracking , "must not be read as if they were statutes". And he pointed out that in Powell v Dacorum Borough Council [2019] EWCA Civ 23; [2019] HLR 21 McCombe LJ himself had said that

the previous decisions about section 149 must be taken in their contexts. A similar statement had been made by Briggs LJ, as he then was, in Haque v Hackney London Borough Council [2017] EWCA Civ 4; [2017] PTSR 769 (at para 41) . The Lord Chief Justice went on to say (in para 86):

*“86. Section 149 ... requires a public authority to give the equality needs which are listed ... **the regard which is due in the particular context. It does not dictate a particular result. It does not require an elaborate structure of secondary decision-making every time a public authority makes any decision which might engage the listed equality needs, however remotely. The court is not concerned with formulaic box-ticking, but with the question whether, in substance, the public authority has complied with section 149.** A public authority can comply with section 149 even if the decision-maker does not refer to section 149 (see, for example, *Hotak v Southwark London Borough Council [2016] AC 811*).” [Emphasis added]*

...

*16. In the same vein, in R (Hollow) v Surrey County Council [2019] EWHC 618 (Admin); [2019] PTSR 1871 , where the challenge was to a decision in the county council's annual budget to reduce its spending on education and special educational needs, the Divisional Court (Sharp LJ and McGowan J) emphasised that **“what constitutes ‘due regard’ ... will depend on the circumstances, particularly, the stage that the decision-making process has reached”. And “the nature of the duty to have ‘due regard’ is shaped by the function being exercised, and not the other way round ...”** (para 80 of the judgment). In that case the authority had proposed to produce an equality impact assessment if and when a specific cut was identified. The court held (at para 81) that, **“having regard to the stage that the decision-making process had reached, that was indeed sufficient compliance with the [public sector equality duty] on the facts”.** [Emphasis added]*

The Scottish Specific Duties

79. The Scottish Regulations came into force on 27 May 2012, significantly later than in England, where the equivalent regulations came into force on 10 September 2011. Thus, Scottish authorities were only required to produce their first set of equality outcomes, mainstreaming report and employment information by 30 April 2013 whereas in England that requirement had to be met a year earlier, from 6 April 2012.

80. The specific duties in Scotland apply to public authorities (including Police Scotland) that are listed in the Schedule of the Regulations.
81. The specific duties contained in the Regulations are intended to further the s149(1) general equality duty by helping or enabling the public bodies to perform the general equality duty and to address the three equality needs. Before the Act, separate equality duties existed in relation to sex, race and disability and each general equality duty had parallel specific duties, which did vary slightly, but were generally the same. The specific duties are now consistent across all of these protected characteristics.
82. The specific duties contained in the Regulations are as follows:
- a. Regulation 3: The duty to report on **mainstreaming** the equality duty (produce a mainstreaming report every two years setting out how a listed authority has made the PSED integral to the exercise of its functions).
 - b. Regulation 4: The duty to publish **equality outcomes** every four years, which are based on relevant evidence and involvement with those who share a protected characteristic.
 - c. Regulation 5: The duty to **assess and review new or revised policies and practices**. It is important to note that (unlike the specific duties applicable in England) this duty includes enhanced obligations relating to equality impact assessments (EIAs), which should now be assessed against the three needs of the PSED (regulation 5(1)), and the **requirement to publish the results of any assessment** (regulation 5(4)).
 - d. Regulations 6-8: **Publication of employment monitoring information**, in addition to the annual publication of a listed authority's gender pay gap figure and the publication of an equal pay statement every four years.
 - e. Regulation 9: Where appropriate, the **introduction of equality considerations** into procurement documents.
 - f. Regulation 10: publish in a manner that makes the **information accessible to the public**.

83. Unlike the general s149 PSED equality duty, which is enforceable by means of both judicial review and a compliance notice issued by the EHRC, enforcement of the specific duties is only by means of a compliance notice issued by the EHRC⁵⁸. This distinction is important particularly given the wide variation between the specific duties in England and Scotland and the fact that the specific duties are more onerous in Scotland.
84. However, since the specific duties are designed to flesh out the PSED, a failure to carry out an effective EIA would be a relevant factor in determining whether a public authority had due regard to their equality duties: compliance with the specific duties could be used as evidence of compliance (or not) with the general equality duty.
85. The full implementation of the PSED in Scotland as compared to England (and Wales) was delayed, with listed authorities in Scotland only being required to produce their first set of equality outcomes, mainstreaming report and employment information by **30 April 2013**, a year after English authorities.
86. The specific duties in Scotland are more onerous and prescriptive than the English specific duties, particularly in relation to the requirement to conduct and publish EIAs, which is not a requirement in England.
87. However, the need to publish relevant, proportionate information showing compliance with the general Equality Duty, and to set equality objectives is essentially the same as it is for England.

⁵⁸ Unlike the General PSED, the EHRC can issue a compliance notice where it thinks that a listed authority has not complied with its specific duties without the need to conduct an assessment. Further, if the Commission thinks that a person to whom the notice has been given has failed to comply with a requirement of the notice, it may apply to the Sheriff Court for an order requiring the person to comply.

The Tameside Duty

88. The *Tameside* duty is set out in the case of *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1977] AC 1014, [1976] 3 All ER 665, at 1065B per Lord Diplock as follows:

“The question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?”

89. In essence, the *Tameside* duty is a well-known principle requiring decision-makers to carry out sufficient inquiry or to take reasonable steps to inform themselves in order to make an informed decision.

90. In the more recent case of *R (Plantagenet Alliance Ltd) v Secretary of State for Justice & Ors* [2014] EWHC 1662 (Admin), Hallett LJ (as she then was in the role of the Vice-President of the Queen’s Bench Division), Ouseley J, and Haddon-Cave J considered the duty to carry out sufficient inquiry/ *Tameside* duty at [99] – [100]. In the Judgment of the Court, the following six principles that could be gleaned from the authorities since *Tameside* were summarised as follows at [100]:

- “1. The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.*
- 2. Subject to a Wednesbury challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken ([R\(Khatun\) v Newham LBC \[2005\] QB 37](#) at paragraph [35], per Laws LJ).*
- 3. The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (per Neill LJ in [R \(Bayani\) v. Kensington and Chelsea Royal LBC \(1990\) 22 HLR 406](#)).*
- 4. The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient (per Schiemann J in [R \(Costello\) v Nottingham City Council \(1989\) 21 HLR 301](#) ; cited with approval by Laws LJ in *R(Khatun) v Newham LBC (supra)* at paragraph [35]).*
- 5. The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require*

him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion (per Laws LJ in (R (London Borough of Southwark) v Secretary of State for Education (supra) at page 323D).

6. *The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it (R (Venables) v Secretary of State for the Home Department [1998] AC 407 at 466G)."*

91. Subsequently, in *Balajigari v Secretary of State for Home Department* (2019) EWCA Civ 673⁵⁹, the CA repeated and endorsed at [70] the above summary of the general principles relevant to the *Tameside* duty set out in *Plantagenet Alliance Ltd*.

92. The following recent cases are also of relevance in relation to the *Tameside* duty:

- a. *R (Pharmaceutical Services Negotiating Committee v Secretary of State for Health* [2018] EWCA Civ1925: It is for the decision maker to decide upon the manner and intensity of inquiry to be undertaken. A failure can only be challenged on irrationality grounds.
- b. *R (FDA) v Minister for the Cabinet Office* [2018] EWHC 2746 (Admin): The *Tameside* duty does not give rise to a duty to consult unless it would be irrational not to obtain consultees views.

Guidance

93. The following guidance has been provided by the EHRC in relation to **relevant equality evidence**:

- a. As the Evidence guidance for Scotland⁶⁰ explains: "*relevant evidence is internal and external information relating to equality groups and*

⁵⁹ In *Balajigari*, the CA held at [72] - [76] that it was not necessary in that case to impose a separate *Tameside* duty in addition to the requirements of procedural fairness and that it was not irrational for the SS to have proceeded in the way that it did (i.e. without making specific enquiries of HMRC).

communities which provides insight into the area or issue under consideration".

- b. Where there is insufficient evidence to establish if action is required to tackle inequality or further the aims of the PSED, then listed authorities should consider taking extra steps to gather relevant information⁶¹.
- c. Both the Technical Guidance and the Evidence guidance recognise that the raw data initially may not be very useful or (or even missing) and suggests ways to deal with gaps in evidence. As explained in the Technical Guidance [5.22] – [5.25]:

“5.22 The requirement to have sufficient evidence does not imply that a body subject to the duty needs, in every instance, to have hard statistical data. A relevant body can also use more qualitative sources such as service user feedback. Where a body subject to the duty does not have sufficient information in-house it can also use external sources, for example information available from the Commission; local or national representative groups etc.

5.23 It is not acceptable for a relevant body to say that it cannot meet the duty because it does not have evidence about a relevant issue. If a body subject to the duty does not have sufficient evidence to have due regard it will need to obtain this. Possible ways it can do this are by:

- *collecting new sources of data itself, **if it has time and it is proportionate to do this***
- *involving people with certain protected characteristics, or*
- *using external sources of information. This is likely to be particularly helpful for those protected characteristics where the collection of information is sensitive and numbers low, for example gender reassignment*

5.24 It may take some time for good quality information to be collected. A body subject to the duty will need to decide where there are gaps in its evidence base and how to address them.

5.25 *A body subject to the duty should not delay considering issues which come to light through existing sources; for example, staff knowledge, court or tribunal cases, customer feedback or involvement of equality groups and national data.*⁶² [emphasis added]

94. The Scottish Government has also developed an Equality Data and Evidence website, which makes information on equality more easily available and provides guidance on gathering equality data⁶³. The Scottish Government recognised that national and local policy makers must have access to a wide-ranging and robust equality evidence base in order to develop inclusive policies and to measure the impact of policies on equality groups. However, the Scottish Government also recognised that there are barriers and challenges to collecting, analysing and reporting intersectional equality data and, despite improvements in recent years, there remain significant gaps in Scotland's equality evidence base. As a result, the Equality Data Improvement programme was established in April 2021⁶⁴.

Q3. How does Police Scotland reconcile the following with the Public Sector Equality Duty, as set out in the Equality Act 2010 s.149?

(a) The absence of data on protected characteristics and the use of force in the years prior to Mr Bayoh's death in 2015.

95. As explained above, no data on protected characteristics was collated prior to Mr Bayoh's death and before November 2018 when the new UoF form went live on SCoPE. At this stage it is not possible to address the reasons for this as regards the legacy forces up to 1 April 2013. The legacy force procedure continued until the opportunity arose for all OST to be reviewed in the new service, Police Scotland. That review commenced in 2014 and was completed

in March 2015, with the report being published, shortly before Mr Bayoh's death in April 2015.

96. As a result of the OST review, reform was taking place beginning with the introduction of a new National OST programme in January 2016. The collection of data was part of a larger equality programme and steps taken by Police Scotland to advance equality, which is ongoing.

97. At the time of Inspector Young's national OST review in 2014/2015, what was identified was a need to address the issue of use of force in terms of policy, training, and service delivery. This is what Inspector Young set out to do in his OST reform and the launch of the new national OST programme in January 2016.

98. The absence of hard statistical data regarding the use of force by Police Scotland (and the legacy forces prior to 1 April 2013) and specifically by reference to the relevant protected characteristics was identified as an issue that needed to be addressed by Police Scotland. Having identified that there was a need to have data regarding use of force and protected characteristics, the process of identifying how this could be done was initiated.

99. However, in the absence of hard statistical data, in order to address the wider need for OST reform, in the interim, changes still had to be made to policy, training and ultimately service delivery with the aim of advancing equality on the basis of the evidence that was available at that time. Thus, other evidence and information were considered and taken into account, including the NPCC Guidance and practices of other UK forces (following Inspector Young's consultation with those forces as explained in Inspector Young's briefing paper of 3 July 2017).

100. In the absence of internal data, this was the proper approach for a public body to take. It is appropriate to arrange to collect new data. The collection of new

data was actioned but, as it was recognised that it may take time for good quality information to be collected, it was appropriate to proceed with the reform, which it was acknowledged was needed.

101. The EHRC and indeed the Scottish Government recognise that the process of acquiring relevant evidence is not easy or straightforward and, as noted above, they have both developed and published guidance in order to assist public authorities in relation to evidence gathering and on data collection and publication. It is important to bear in mind that the PSED is a continuing duty, which requires reasonable steps to be taken to comply with the PSED by having due regard to the three equality needs or aims. As set out above, Police Scotland put in place steps to remedy the lack of evidence that had been identified.

102. It is also important to bear in mind that evidence gathering is aimed at enabling public authorities to comply with the PSED and is not an end itself. Ultimately, the aim is to have due regard to the equality needs and to take reasonable steps to make real or substantive improvements to equality/advance equality.

(b) The fact that data was not collated in a format capable of being published externally until 2021.

103. At the time the data was being collected from 2018, it was anticipated that, given the time invested in having it in the SCOPE record, it would be in a format capable of being published. However, once the data was collected and collated, it was seen that it was unreliable and that it would not fulfil one of the key purposes of its collection. In those circumstances, the proper approach was to instruct better collection and collation of the data in a reliable, understandable format in order that it could be interrogated to establish any issues with use of force which included use of force against those with protected characteristics.

This was in fulfilment of the PSED and in line with the EHRC Technical guidance at [5.25] referred to above.

(c) Why were there no Operational Safety Use of Force Reports published prior to Q1 of 2021/2022

104. As explained above, the data was unreliable and had not been collated in a manner which was fit for purpose. There was insufficient evidence. Extra steps were taken to remedy that which is the proper and reasonable approach for a public body to take gather reliable and relevant information.

Conclusion

105. These answers have been submitted in response to specified directed questions about one aspect of the availability, collation and publication of certain data. These matters should be seen in due course in the context of all the actions taken by Police Scotland in furtherance of the PSED. This will be covered in detail by the submission of documentary evidence, reports and oral evidence in subsequent hearings.

106. It is important to note that the PSED is not a free-standing duty. It applies to the way in which a public authority exercises its functions. Those functions derive from other laws. The PSED “informs” the way public authorities perform their decision making but does not override it (see *McMahon v Watford Borough Council* (2020) EWCA Civ 497 at paragraphs 48 and 67).

Submitted on behalf of the Chief Constable, Police Scotland,

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31 May 2023