Police Action Lawyers Group response to the Home Office's review of investigatory arrangements which follow police use of force and police driving incidents

Introduction

Police Action Lawyers Group

1. The Police Action Lawyers Group (PALG) is a national organisation comprising lawyers who represent members of the public who have been victims of police and other state misconduct throughout England and Wales. PALG was formed in 1991 and its members are concerned first and foremost with the principal objectives of those we represent: to ensure that the police are held accountable for their conduct through all available avenues, including the police complaints system, inquests, inquiries and other investigative regimes; judicial review; civil actions in tort and under the HRA and Equality Act; as well as via the criminal justice system where appropriate. Although, historically, our primary focus has been on police misconduct, PALG members also represent clients in respect of misconduct by other state authorities, particularly those with the power to detain and use force, including the prison service and immigration service.

2. Due to our large and varied membership, the collective experience of PALG is considerable. We include lawyers who act on behalf of victims of misconduct by police officers from virtually every force in England and Wales. All of our work as an organisation is voluntary and we receive no funding of any kind. The group is motivated by a desire to achieve the best possible outcome for our clients, many of whom have suffered the most serious abuse at the hands of the police.

Approach to these submissions

3. As outlined in the joint letter dated 1 November 2023, sent on behalf of PALG and a number of other organisations, the Terms of Reference indicate that this Review appears to amount to a wholesale appraisal of the framework for regulating, investigating, and prosecuting cases arising out of police use of force, police driving, and other cases where contact with police officers has resulted in death or serious injury. The current framework governing those matters is comprised of complex primary legislation, including the Police Reform Act 2002 and the Police Act 1996, the numerous pieces of associated secondary legislation, as well as a vast suite of statutory and non-statutory guidance. It is unreasonable and unrealistic to expect meaningful responses with submissions and evidence to be prepared in just over three weeks, especially on wide ranging issues without any specific proposals for legislative and policy change.

4. A lack of time and specificity has meant PALG is unable to provide examples from the wide range of cases of individuals and families who would be impacted by any changes. PALG is also concerned that it will mean that many organisations or individuals who would have wished to respond are unable to do so.

5. PALG also supports the response to this review submitted by INQUEST and the Inquest Lawyers' Group.

6. In light of the scope of the Review, we consider it necessary at the outset to address two broad issues: the origins of this Review and the relevant findings of the Casey Report; and the applicability of Article 2 of the European Convention on Human Rights ('ECHR') to the matters under consideration.

Origins of this Review

7. On 20 September 2023, the Crown Prosecution Service ('CPS') charged a firearms officer with murder in connection with the death of Chris Kaba. In protest at this decision, firearms officers from the Metropolitan Police Service ('MPS') handed in their tickets and refused to serve. In response to pressure from those officers and the Police Federation, on 24 September 2023 the former Home Secretary ordered this Review.[1] The MPS Commissioner wrote to the former Home Secretary with various proposals that amounted to wide-ranging and fundamental changes to the mechanisms of police accountability in England and Wales, including legislation to reverse two recent Supreme Court decisions.

8. It is notable that in respect of both cases cited in the Commissioner's letter of 24 September 2023 – two officers who fired shots during an incident in December 2018 and W80 – the misconduct processes are yet to conclude. It cannot therefore be said whether these are "*good officers*" being pursued "*through multiple legal processes over many years*" as the Commissioner's letter appears to imply. It is difficult to understand how these examples can provide any basis for such a wholescale review of the system for investigating and regulating police conduct. Nevertheless, the Review appears to adopt the Commissioner's proposals, as well as, considering wider questions about police accountability.

9. The Commissioner's proposals were quite explicitly directed at lowering the standards to which armed officers (and all officers who use force) are held to account and weakening the mechanisms for scrutiny of the use of force. That is particularly troubling against the background of the damning findings recently reached by Baroness Casey in her 'Independent review into the standards of behaviour and internal culture of the Metropolitan Police Service' ('the Casey Review') published in March 2023. We note in particular that Baroness Casey:

    a) encountered a "*deeply troubling toxic culture*"[2] within the MPS specialist firearms units, finding "*some of the worst cultures, behaviours and practices*"[3] and *"the acceptance of insidious attitudes including misogyny, racism and ableism in the Command"*.[4]

    b) recommended that the MPS should set "*new, higher vetting and behaviour standards in its specialist armed teams to identify any conduct issues and to keep out those drawn to these roles for the wrong reasons*".[5]

    c) recommended that the MPS should "*embed and enforce the highest policing ethical values and standards across all of its systems and management, from recruitment and vetting through to supervision and the misconduct process,*

[1] https://www.bbc.co.uk/news/uk-66906193
[2] Casey Report, p.190
[3] Casey Report, p.13, 20
[4] Casey Report p.193
[5] Casey Report, p.20

making sure these are adhered to by all its officers and staff, and that those who breach the standards face the consequences the public would expect".[6]

d) noted that black Londoners are "*more likely to be stopped and searched, handcuffed, batoned and Tasered*" which, along with other examples of disproportionate treatment had led to "*generational mistrust of the police among Black Londoners*".[7]

10. The Commissioner himself has accepted the need for fundamental reform of the MPS to address the immense challenges identified by the Casey review and restore some semblance of trust and confidence in the MPS.

11. Against that background, it is remarkable that this wide-ranging nationwide Review comes about as a result of pressure from MPS firearms officers. The Home Secretary, in his letter of 16 November 2023, indeed accepts that the "*risk of reduced firearms resilience in police forces*" is the reason that this review has been brought. Those in the MPS firearms unit are the very officers identified as representing "*some of the worst cultures, behaviours and practices*" and being in need of "*higher…behaviour standards…to identify any conduct issues*". It should perhaps not be surprising that those officers reacted so strongly to a rare instance of one of their own facing accountability. But it is truly shocking that these officers' refusal to be held to account has been indulged to the extent that it has led to a review of the entire framework for police accountability for use of force.

12. Weakening the systems of accountability will have a particular impact on black, brown and other minority or 'suspect' communities, whose struggles against criminalisation and police brutality have for decades shaped the changing relationship in Britain between policing and public accountability. Baroness Casey's recognition of the disproportionate use of force against black Londoners and the 'generational mistrust' of those communities is just the latest in a long line of reports to have made such findings, which go as far back as the Scarman Inquiry into the Brixton disturbances of 1981 – which led to the end of the 'sus' law and the creation of the Police Complaints Authority – and the McPherson Inquiry concerning the killing of Stephen Lawrence, which led among other things to the creation of the Independent Police Complaints Commission in 2003, a requirement for the independent investigation of cases involving death and serious injury following police contact, and the public sector equality duty. These are changes which have greatly benefitted society as a whole.

<u>Article 2 ECHR</u>

13. Given that the Review does not identify any specific proposals, it is not possible with precision to identify the issues that arise under Article 2 ECHR. Nonetheless, we are concerned that the tenor of the Review indicates that such specific proposals, if and when they are provided, will undermine the important purposes of Article 2.

14. First, Article 2 requires that lethal force (including potentially lethal force) used by State agents must be no more than absolutely necessary and must be strictly proportionate in the circumstances. That reflects the important prerogative of limiting the use of such force by State agents in order to protect life. We are concerned that

[6] Casey Report, p.20
[7] Casey Report, p.17

measures to reduce or dilute the safeguards imposed on the State's use of force, including potentially lethal force, will undermine this core purpose of Article 2.

15. Second, Article 2 requires the State to have in place effective criminal-law provisions which will deter the taking of life (including by State agents) and will prevent and sanction breaches. Article 2 also requires an appropriate and effective legal and administrative framework to safeguard against arbitrary use of force and abuse of such force. The State's monopoly of the use of potentially lethal force is at stake when lethal and potentially lethal force is used by State agents. If the safeguards imposed on the State's use of lethal force (including potentially lethal force) are diluted, as appears under consideration in this generalised Review, that will call into question compliance with Article 2.

16. Third, a central purpose of Article 2 is to ensure the accountability of State agents for the use of lethal and potentially lethal force. This includes identifying and holding to account State agents who are responsible for deaths, including through criminal, disciplinary and other investigatory procedures. Securing accountability in these circumstances is instrumental in maintaining public confidence in the adherence of the State to the rule of law and conveying to the public that the State is not allowing unlawful acts to go unpunished. We are concerned that the general tenor of the Review, absent any specific proposals, is liable to fall foul of these important Article 2 requirements.

Section 1: The legal / regulatory framework on use of force and police driving

Use of force in misconduct proceedings

17. The legal test for use of force in self-defence by a police officer was recently considered by the Supreme Court in *R (Officer W80) v Director General of the Independent Office for Police Conduct & Ors* [2023] UKSC 24. The Court considered whether, within the context of misconduct proceedings, the civil or criminal (or some other) test should apply in circumstances where a police officer seeks to justify their use of force on the basis of self-defence. The Court held that the correct test was the civil law test.

18. Central to the Court's reasoning was the fact that public confidence in policing was best served by the civil test:

> *"The purpose of maintaining the public's confidence in the disciplinary process is also better served by the application of the civil law test. If the test is the criminal law test, then where, as here, it is accepted that the individual officer's belief was genuine and honest, there would be no scrutiny through the disciplinary process of the reasonableness of mistakes by police officers".*[8]

19. In that context, the Supreme Court cited the House of Lords decision in *R (Green) v Police Complaints Authority*:[9]

[8] *R (Officer W80) v Director General of the Independent Office for Police Conduct & Others* [2023] UKSC 24 §99

[9] [2004] UKHL 6; [2004] 1 WLR 725 (cited at *R (Officer W80) v Director General of the Independent Office for Police Conduct & Others* [2023] UKSC 24 §100)

> *"Public confidence in the police is a factor of great importance in the maintenance of law and order in the manner which we regard as appropriate in our polity. If citizens feel that improper behaviour on the part of police officers is left unchecked and they are not held accountable for it in a suitable manner, that confidence will be eroded."*

20. The position could not be clearer, and no further clarification is required. The position is also plainly correct: policing depends on public confidence, which requires robust scrutiny and accountability. Scrutiny and accountability can be difficult, challenging, and sometimes extremely so – and they should be. That is something faced by all those in whom society must place its trust and confidence – doctors, nurses, teachers, lawyers, etc. – police officers should be no different.

Use of force in criminal proceedings

21. Police officers are subject to the same law of self-defence as all citizens. That law is flexible enough to take into account the particular circumstances in which police officers may use force in the exercise of their duty, including when they are using firearms. Plainly there is no evidence of officers unfairly being convicted for lawful use of force. In the vanishingly few cases of officers facing prosecution, even fewer are found guilty. The fact that we have recently witnessed the incredibly rare occurrence of a police officer being charged by the CPS with murder certainly does not suggest that police officers should be held to any different standard.

22. We do not understand there to be any proposal to revise the law on self-defence as it applies to police officers in criminal proceedings. If there are, in fact, any such proposals they would represent a fundamental shift in the operation of the criminal law and would require full and proper consultation.

Standard of proof for unlawful killing in inquests and relevant inquiries

23. The standard of proof for an unlawful killing conclusion in an inquest has been recently considered by the Supreme Court. In *R (Maughan) v. HM Senior Coroner for Oxfordshire* [2020] UKSC 46, the Court held that the standard of proof for all conclusions at an inquest, including unlawful killing, is the balance of probabilities (the civil standard), not beyond reasonable doubt (the criminal standard).

24. This is a clear legal standard and plainly the appropriate one. Once again, it is a matter of public confidence. That was addressed by Lady Arden in *Maughan*, who stated:[10]

> "*Public confidence in the legal system will be diminished if the evidence at the inquest cannot lead to clear findings on a balance of probabilities. It would appear to the public as if the system has conspired to prevent the truth being available to them*".

25. It is notable that this statement, made in the context of addressing the suggestion that differing standards of proof in criminal and coronial proceedings would lead to confusion - a line pursued by the Commissioner in his letter to the former Home Secretary - was a suggestion rejected by the Supreme Court. We submit any such suggestion is advanced without any evidence.

[10] Lady Arden in *R (Maughan) v HM Senior Coroner for Oxfordshire* [2020] UKSC 46, at 93.

Police driving

26. There have been very recent changes to the legislation governing the standards for police driving following the consultation The Law, Guidance and Training Governing Police Pursuits - published on 22 May 2018. The Police, Crime, Sentencing and Courts Act 2022 amended the Road Traffic Act 1988 to provide that criminal courts will judge a police officer's standard of driving against a competent and careful constable with the same prescribed training (not against a member of the public without such training). This change was welcomed by the Police Federation.[11]

27. There has been insufficient time to assess the impact of this change in legislation. It is unclear what, if any, further changes are being contemplated to the standards against which police officers' driving is judged.

Whether the framework is sufficient to maintain public confidence in policing, particularly for communities and families impacted by police use of force

28. The MPS Commissioner has himself said: "*I recognise the scale of the damage to public trust that has taken place and the significant work we still have to do in order to restore it*".[12]

29. The existing framework (the legislative and policy structure) may well be capable of maintaining public confidence, but only if the individuals and bodies who are supposed to discharge the functions within that framework have the will and the ability to do so and are committed to a system of policing underpinned by robust mechanisms of accountability. Regrettably, that does not seem to be the case. The present Review serves as an example: a decision by the CPS, following an investigation by the IOPC, to do nothing more than hold an officer to account against the framework has been met with: a protest by firearms officers; an outcry by the Police Federation; a call by the country's most senior officer for an overhaul of the framework; public criticism of the charging decision by the then Home Secretary; and has culminated in a wholesale nationwide review of the system of police accountability. However robust the framework, it cannot succeed if those on whom it depends (and who in fact depend on it) are so resistant to accountability that they are determined to see it fail.

30. Of course, the mistrust and lack of confidence is most keenly felt by black and other ethnic minority communities. By the Home Office's own statistics on police use of force in England and Wales (based on officer reporting), there were 608,164 incidents of use of force in the year ending March 2022, up by 8% on the previous year.[13] Of the 608,164 incidents of use of force, 22% involved people perceived as Black, Asian or mixed, though together these groups comprise only 7.2% of the population in England and Wales.[14] In 2017, the Angiolini report found that use of restraint was more prevalent in cases of Black, Asian and minority ethnic individuals who died in police custody than in deaths of white people.[15]

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[11] https://www.polfed.org/news/latest-news/2022/police-drivers-will-be-impacted-by-new-legislation/

[12] Vikram Dodd, *'Mark Rowley aims to reform the Met on the scale of Robert Mark in the 1970s'* *The Guardian* (6 April 2023)

[13] Home Office, *Police use of force statistics, England and Wales: April 2021 to March 2022* (15 December 2022)

[14] Population of England and Wales: Ethnicity facts and figures (last updated 4 April 2023)

[15] Rt. Hon. Dame Elish Angiolini DBE QC, 'Report of the Independent Review of Deaths and Serious Incidents in Police Custody' (2017), paragraph 1.36.

31. It is well established, and entirely unsurprising, that this disproportionate and discriminatory use of force by police against people from Black and minority ethnic backgrounds is linked directly to lower levels of confidence in police by these communities.[16] Plainly, much more needs to be done.

32. The framework does not set out a basis for effectively investigating whether an officer's perception of risk, and so a decision to use force in response, was distorted by prejudice, for example, on grounds of race. The outdated and weak IOPC guidelines on discrimination, combined with a lack of tenacity on the part of those investigating, means that investigations into use of force fail to grapple with the question of discrimination, and as a result disciplinary, civil and criminal findings in respect of police discrimination are rare. There is no effective guidance on investigating potential discrimination where a member of the public is killed by police lethal force. The framework's failure to properly scrutinise the officers' perceptions and prejudices, means full accountability is never achieved.

33. Since 1990 in England and Wales, 1,877 people have died in police custody or otherwise following contact with the police. Of those, 80 were shot dead by police officers, yet only four police officers have ever faced murder and/or manslaughter charges in respect of those fatal shootings and none have been convicted.

34. Indeed, from those 1,877 deaths, only twelve murder and/or manslaughter charges have been brought against an on-duty police officer. The only police officer ever to have been found guilty of a homicide offence for the death of a member of the public is Benjamin Monk, who was convicted of manslaughter after he killed former footballer Dalian Atkinson by Tasering him for six times longer than is standard and then kicking him in the head at least twice with so much force it left an imprint of shoe laces on Dalian's forehead and blood on Monk's boots.

35. Whilst there are rare instances in which use of lethal force may be necessary, a conviction rate of 1 in 1,877 fatal incidents (not all, of course, involving direct use of force) exposes the failure of the existing framework to achieve accountability. In 2017, Dame Angiolini reported that there was "*a very strong perception* [among those bereaved by deaths in police custody] *that the police sit above the law, and that a different set of rules apply to them*".[17] Of course, that differential treatment is exactly what the Commissioner's letter requests.

Section 2: Investigations and post-incident processes

<u>The system of examining DSIs following police contact</u>

36. It is difficult to engage with the query as to *"whether the requirements for police referrals of DSIs and other matters to the IOPC are appropriate"* without any indication as to whether or what specific changes are envisaged. However, where consequences are this severe, it cannot be controversial that the events are thoroughly investigated. Referral to the IOPC assists in satisfying the State's investigative obligations under Articles 2 and/or 3 of the ECHR. Further, any lack of investigation, or investigation by the relevant force without referral to the IOPC, would

[16] Home Affairs Committee, *Policing Priorities* (10 November 2023), paragraphs 69 & 90.
[17] Rt. Hon. Dame Elish Angiolini DBE QC, 'Report of the Independent Review of Deaths and Serious Incidents in Police Custody' (2017), paragraph 13.2.

be damaging for public confidence and would likely leave subjects and family members without appropriate recourse to a sufficient investigation.

37. The Terms of Reference also pose the question of *"whether the system of examining DSIs following police contact is working effectively for the police and the public"*. Similarly, absent clarity on what is envisaged and/or proposed, it has not been possible to properly engage with this point, but we set out some key observations about the current system below.

38. Where there is death or serious injury in police custody or following police contact, it is imperative that the circumstances are examined to identify potential misconduct, criminal conduct, and/or opportunities for individual and/or organisational learning, and that the appropriate steps are taken to address the conclusions reached. Further, the circumstances of deaths in custody are often complex and involve other state agencies and social issues. As such, the IOPC, CPS, and Coroner's Courts all have vital and unique roles to play in these investigations. In our view, duplication between those processes is minimal. Those systems work together for this purpose, each making use of the evidence and information gathered by the other. The most obvious example of this is that the IOPC carries out an initial investigation, gathering witness and documentary evidence, which is then used in criminal, disciplinary and/or coronial proceedings.

39. PALG is concerned by the clear suggestion within these terms of reference that the investigatory system should be judged against whether it works *"for the police*". The purpose of the investigatory framework for DSIs is to ensure that agents of the State are acting within their powers and fulfilling their responsibilities, and that they are held to account where they do not. It is not to serve the interests of police officers and must not be compromised for that purpose. As we have said above, scrutiny and accountability can be challenging and difficult for those subject to them, but that does not mean they should be circumvented.

40. As to whether the system is working for the public, there are areas in which the current system could improve. The timescales for response to this review are not sufficient for us to make comprehensive representations on this point, but some areas in which PALG submits improvements could be made are as follows:

    a) PALG continues to be concerned by opportunities for police officers to confer with one another following a DSI incident;

    b) In some cases, officers have been designated as witnesses alone in DSI investigations, where there was an indication that they may have committed a criminal offence or behaved in a manner justifying disciplinary proceedings, impacting the quality of the evidence gathered;

    c) Investigations could be enhanced and earlier evidence obtained if a greater proportion of officers were interviewed rather than just providing statements;

    d) Investigations are hindered where officers do not cooperate with investigations, e.g. refusing to answer questions in interviews;

    e) We would encourage the IOPC to seek early investigative advice from the CPS to ensure that the appropriate evidence is obtained at an early stage.

f) The points made on delay below (see paragraph 57).

41. While there may be some scope for this system to work more effectively, as we have set out above any changes to the framework are meaningless without a commitment to accountability from all those involved in making it work.

The thresholds for launching a misconduct or criminal investigation

42. The current threshold for launching a misconduct or criminal investigation is appropriate and should not be changed. Under the PRA 2002, a misconduct or criminal investigation into a police officer's actions can be launched "…*where there is an indication (whether from the circumstances or otherwise) that a person serving with the police may have (a) committed a criminal offence or (b) behaved in a manner which would justify disciplinary proceedings"* (emphasis added).[18] *"[D]isciplinary proceedings"* are limited to "*misconduct* proceedings" under the Police (Conduct) Regulations 2020 ("Conduct Regulations"), with "*misconduct*" defined as *"a breach of the Standards of Professional Behaviour…so serious as to justify disciplinary action*", i.e. a written warning.[19]

43. The use of the words "*appears*", "*an indication*" and "*may*" indicate that the threshold for launching an investigation is a relatively low one.[20] The IOPC's "*Statutory Guidance on the Police Complaints System*" (2020) ("the IOPC Statutory Guidance") provides that "*Indication*" is taken to have its "*plain English definition*" and investigators should consider whether the circumstances and evidence available "*show or reasonably imply*" that the threshold is met.[21]

44. However, the various guidance also makes clear that whilst the threshold is low, "*not all conduct…will meet this threshold*"[22] and *"If what is alleged…is undermined by contemporaneous real objective evidence…, or is inherently unlikely, there is unlikely to be an indication"*.[23] The guidance repeatedly emphasises that the distinction is one between:

a) *"serious breaches … that would damage public confidence in policing and have the potential to bring the reputation of the police force concerned or the service as a whole into disrepute such that a formal sanction would be appropriate if the allegation or matter were found proven"* (§4.34) (emphasis added); and

b) *"low level breaches and infringements of the Code of Ethics– i.e. wrongdoing, actions or behaviours which contravene those standards but are not serious enough to justify disciplinary proceedings"* (§4.54).[24]

[18] Section 12(2) PRA 2002, and PRA 2002, Schedule 3, para 21A(1)(2B). See also (*R (Reynolds) v Chief Constable of Sussex* [2008] EWHC 1240 (Admin) per Collins J at para 20 re when a DSI matter may become a "*conduct matter*".
[19] Section 29(1) PRA 2002 read with Regulation 2(1) of the Police (Conduct) Regulations 2020. See also the Standards of Professional Behaviour at Schedule 2 of the Conduct Regulations.
[20] see *R (Yavuz) v Chief Constable of the West Yorkshire Police* [2016] EWHC 2054 (Admin), [2017] PTSR 228 per Sweeney J at para 142; see further *R (Rhodes) v Police and Crime Commissioner for Lincolnshire* [2013] EWHC 1009 (Admin) per Stuart-Smith J at paras 9(i) and 23(i).
[21] IOPC Statutory Guidance on Police Complaints System (2020), §10.7.
[22] Home Office Statutory Guidance: Conduct, Efficiency and Effectiveness (2020), §4.15.
[23] IOPC Statutory Guidance on Police Complaints System (2020), §10.8.
[24] Home Office Statutory Guidance: Conduct, Efficiency and Effectiveness (2020), §4.34 and 4.54.

45. Home Office Guidance further explains that disciplinary proceedings should *only* be used where there is a case to answer for a breach of the Standards justifying a written warning (§4.33), which should be used only where "…*the gravity or seriousness of the matter…warrants a formal sanction*" (§4.36). Similarly, the criteria for the recording of conduct matters in PRA 2002 Sch 3 para 11(2), include where the conduct "*appears to have resulted in the death of any person or in serious injury to any person"* or has *"adversely affected*" a member of the public.

46. In the circumstances, it is clear that the threshold for launching either a criminal or misconduct investigation under the current framework is the correct one. Were the threshold to be changed, for example to be made closer to the case to answer threshold, this would mean that even in circumstances where there was evidence that a police officer may have committed a *criminal* offence, for example assault, or potential misconduct so serious as to "*damage public confidence in policing*" or bring the police "*into disrepute*", this would stand un-investigated.

47. The inevitable consequence of such a change would be to undermine public faith in policing. As the Home Office and College of Policing guidance themselves emphasise, *"the most important purpose of imposing disciplinary sanctions is to maintain public confidence in, and the reputation of, the policing profession as a whole"*[25] and there is an *"overriding public interest that police officers and those exercising police powers are subject to scrutiny and held to account for alleged wrongdoing"*.[26] Increasing the threshold for investigations, including by arbitrarily introducing a distinction between those acting 'in the line of duty' would stand completely at odds with the purpose of the police complaints system and fundamental constitutional protections.

48. Any such change would also mean lesser protection for police officers themselves. PRA 2002 Schedule 3, para 19A(4) provides that a recordable conduct matter relating to the conduct of a member of a police force must be carried out in accordance with special procedures set out in regulations 16-22 of the Police (Complaints and Misconduct) Regulations 2020. These special procedures include conducting a 'severity assessment' in consultation with the police force in question, and providing the officer with a formal notification, to include explanation of their rights in the process. Crucially, they provide that the officers be interviewed under caution – whereas outside of the Special Procedures mechanisms officers would be expected to cooperate fully with any investigation without this protection.

49. The current threshold therefore plays a vital role in protecting the integrity of any investigation into potential criminality or serious misconduct by police officers with a view to any subsequent proceedings, and in guaranteeing officers crucial protections.

<u>The thresholds for directing disciplinary proceedings or referring a matter to the Crown Prosecution Service</u>

50. The current thresholds for directing disciplinary proceedings or referring a matter to the CPS are similarly appropriate and should not be changed. Under the PRA, at the completion of an investigation the investigator must set out their opinion as to whether, based on the available evidence, on the balance of probabilities,[27] an officer has a

[25] College of Policing 'Guidance on outcomes in police misconduct proceedings' (2022), §4.4.
[26] Home Office Statutory Guidance: Conduct, Efficiency and Effectiveness (2020), §8.81.
[27] *R(City of London Police)* v IOPC [2018] EWHC 2997 Admin

"*case to answer in respect of misconduct or gross misconduct*".[28] The IOPC must also consider whether there is an indication, on the basis of the evidence, that an officer may have committed a criminal offence.[29] If, on receipt of the final investigation report, the Decision Maker considers that there remains an indication, then they must decide whether it is appropriate to refer the matter to the CPS.

51. The Courts have consistently made clear that:

    a) "*it is not the function of the investigator to decide whether criminal or disciplinary proceedings should be brought. His function is to produce a report which provides an accurate summary of the evidence and states his opinion (which must obviously be reasoned) whether there is a case of misconduct or gross misconduct to answer"*;[30]

    b) "*A 'case to answer' in that context means a case to answer before a criminal court and/or a disciplinary tribunal. It is, one might think, obvious that if the investigators' task is to report their opinion as to whether there is such a case to answer before another tribunal, it is not their function also to purport to decide the very question or questions that are raised by such a case*";[31] and

    c) "*…if there is a case to answer on one legitimate construction of the facts, the investigator has to recommend that there is a case to answer*".[32]

52. This is echoed in the statutory guidance. Under the PRA 2002, the IOPC must seek the views of the Appropriate Authority on these matters, and, as above, there are safeguards in place to ensure that officers' interests are adequately protected, including the Special Procedures mechanisms themselves and consideration of whether disciplinary proceedings are justified in all the circumstances.[33] The IOPC Statutory Guidance makes clear if the evidence indicates that an offence may have been committed, then the IOPC and/or the Appropriate Authority should seek advice from the CPS at the earliest opportunity.[34] This is to ensure that the CPS is involved from the preliminary stages of a case to advise the IOPC on its steps forward and protect the integrity of any criminal investigation, ensuring swifter justice for both victims of crime and accused officers.

53. In this way "*The Investigator's report is only one step in the process of determining whether criminal or disciplinary proceedings should be brought against an officer"*.[35]

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[28] Section 23(5A)(a)(i) Schedule 3 Police Reform Act 2002, read with Regulation 27(3) Police (Complaints and Misconduct) Regulations 2020 and IOPC Statutory Guidance on Police Complaints System (2020), paras 14.12 and 17.54-17.58

[29] Section 21A(1)-(3) Schedule 3 Police Reform Act 2002

[30] *R (IPCC) v IPCC* [2016] EWHC 2993 (Admin), at 14. See also para 19: "*it is not the role of an investigator to reach final conclusions as to whether misconduct has been committed, or to resolve conflicting evidence, but only to express an opinion whether or not there is a case to answer*" and *R (Chief Constable of West Yorkshire Police) v Independent Police Complaints Commission* [2014] EWCA Civ 1367, at 52.

[31] *R (Chief Constable of West Yorkshire Police) v Independent Police Complaints Commission* [2014] EWCA Civ 1367, at 50.

[32] *R (IPCC) v IPCC* [2016] EWHC 2993 (Admin), at 21.

[33] See e.g. Home Office Statutory Guidance §8.88-8.90.

[34] IOPC Statutory Guidance on the Police Complaints System, §13.74. See also: Memorandum of Understanding on the working arrangements between the Special Crime Division of the Crown Prosecution Service and the Independent Police Complaints Commission, 1 March 2011

[35] *R (IPCC) v IPCC* [2016] EWHC 2993 (Admin), at 16.

The courts, including the Court of Appeal, have considered and clarified the relevant test relatively recently, and the test it is entirely workable and appropriate. As acknowledged by the Home Office's own guidance, there is an *"overriding public interest"* in police officers being subject to scrutiny, and that "*public confidence in the system of policing and ensuring high and visible levels of accountability are crucial."*.[36]

54. It is clear that the thresholds for the IOPC to direct disciplinary proceedings, or make a referral to the CPS are the correct ones. Those thresholds are mindful that the primary responsibility of the IOPC, and the police complaints system, is to investigate potential misconduct and maintain public confidence in policing. As above, increasing these thresholds, including by arbitrarily introducing a distinction between those acting 'in the line of duty', would stand completely at odds with the purpose of the police complaints system and fundamental constitutional protections.

Section 3: Timeliness of investigations and legal processes

55. As has been identified in the terms of reference, there are a number of investigations and legal processes that may follow a police use of force or driving incident, including but not limited to:
    a) A criminal investigation, possibly followed by criminal proceedings;
    b) A disciplinary investigation either internally by a force Professional Standards Department or independently by the IOPC, possibly followed by misconduct proceedings;
    c) Coronial investigations; and
    d) Any 'satellite' legal processes arising from the above, including judicial review proceedings.

56. Given the differing purposes of these investigations, it would be an oversimplification to refer to these as a 'system' that can be easily streamlined. There are a number of facts that can impact the timeliness of investigations and legal processes, and in many cases bereaved families and other victims of police misconduct represented by PALG members would welcome a quicker resolution to the resulting legal processes.

57. While in the time available it is not possible to gather detailed evidence on the point, it is noted that in many circumstances, the delays are caused by officers seeking to frustrate progress. For example, in the example used by the Commissioner in his letter to the then Home Secretary - of W80 waiting eight years to find out whether he will face disciplinary proceedings - there is a noted failure to mention that W80 himself spent more than four years trying to avoid the gross misconduct hearing by pursuing an application for judicial review to the Supreme Court which he ultimately lost.

Section 4: Post-incident communications and learning

58. Many clients represented by PALG members face very frequent difficulties in obtaining sufficient information in relation to the progression of their cases through the criminal and police misconduct systems. With sufficient time to do so, PALG members would be able to provide numerous examples of cases in which the obligations outlined in the Police Reform Act 2002 have proven inadequate in ensuring sufficient updates on progress of investigations. A failure to allow bereaved families and victims of police misconduct to properly participate in investigations as a result potentially breaches their rights under Article 2/3 of the ECHR.

[36] Home Office Statutory Guidance §8.81

59. The existing structure appears to be more than sufficient to protect the identities of relevant police officers. Officers are not usually named publicly in the course of investigations by the IOPC except for in exceptional circumstances, with naming only taking place once the officer in question is the subject of public proceedings (either in the misconduct or criminal context)[37]. Furthermore, it remains open for any police officer charged with a criminal offence to make an application for anonymity in any such proceedings.

60. Again, PALG would be able to provide an evidence-based response to any specific proposals for changes to the existing framework were sufficient time available to do so.

Conclusion

61. We repeat, that the MPS Commissioner has himself recognised "*the scale of the damage to public trust that has taken place and the significant work we still have to do in order to restore it*".[38] In light of the findings of the Casey review, a full scale review of this nature which does not provide specificity or allow time to respond, arising out of the circumstances it has, will not do anything to assist with rebuilding public confidence.

62. If the Home Office formulates any specific proposals, it should consult with PALG (and others) about those proposals before they are finalised. The absence of specific proposals at this point means that the current process does not amount to sufficient consultation.

Police Action Lawyers Group
17 November 2023

[37] See IOPC 'Policy on the naming of police officers and police staff subject to IOPC investigation, appeal or criminal proceedings' assessment https://www.policeconduct.gov.uk/sites/default/files/documents/naming-of-police-officers-and-police-staff-IOPC.pdf

[38] Vikram Dodd, *'Mark Rowley aims to reform the Met on the scale of Robert Mark in the 1970s'* *The Guardian* (6 April 2023)