

Response to the IPCC's consultation on the draft guidance on police post-incident management

1. This is a response to the IPCC's consultation on the *draft statutory guidance to the police service on achieving best evidence in death or serious injury matters*. This response is made on behalf of Doughty Street Chambers, INQUEST and the Police Action Lawyers Group (PALG). This document accompanies the consultation response form.
2. Doughty Street Chambers is a set of independent barristers' chambers, renowned for and committed to defending freedom and civil liberties, with a national and international profile across its wide range of practice in criminal law, civil law, administrative and public law, international law and human rights.
3. INQUEST is the only organisation in England and Wales that provides a free, specialist, comprehensive advice service on contentious deaths and their investigation to bereaved people, lawyers, other advice and support agencies, the media, parliamentarians and the wider public. INQUEST is an independent charity and it receives no funding from the state.
4. PALG is an organisation comprised of lawyers who represent claimants in civil litigation against the police throughout England and Wales. PALG members often represent family members in inquests involving the police.

Summary

5. We fully support the draft guidance. This response is focused on paragraphs 19 and 20 of the guidance, which prohibit conferring and require key policing witnesses to be separated from one another, with certain exceptions. We consider the guidance in those paragraphs is of great importance to ensure the integrity and effectiveness of the investigation, and to uphold public confidence. We consider that the guidance is necessary to comply with the procedural duty within article 2 of the European Convention on Human

Rights. We also support paragraphs 21 to 24, which require a detailed account to be given by key policing witnesses before they go off duty after the incident.

The separation of officers and prohibition on conferring

6. This part of the guidance will greatly improve the integrity and effectiveness of the investigation, and increase public confidence in it.
7. *R (on the application of Saunders) v Independent Police Complaints Commission* [2009] 1 All ER 379 set out in detail why enabling officers to discuss a death or serious injury incident undermines the ability of the investigation to establish the circumstances of the death (§13, 19-21 and 38). There is a great deal of evidence that shows there is a risk that officers will tailor their accounts, whether consciously or unconsciously, by reference to what they heard their colleagues say.
8. As we understand it, all relevant parties, including ACPO¹, accept that enabling officers to discuss an incident gives rise to a risk that the evidence will be contaminated.
9. Recommendation 13 of the IPCC report into the shooting of Jean-Charles de Menezes noted that officers should not write up their notes together, and that doing so makes those accounts less credible.
10. In evidence given to the inquiry into the fatal shooting of Azelle Rodney, the IPCC Commissioner, Deborah Glass, said that “*any circumstances giving rise to discussion or conferring, such as a debrief, risk undermining the integrity of those accounts*”².

¹ See, for example, paragraph 21 of ACPO’s skeleton argument for the Court of Appeal in *R (Duggan and Delezuch) v. ACPO* C1/2013/1759, 27 February 2014. Permission to appeal was granted by the Court of Appeal, and a substantive hearing is due to take place in October 2014. The IPCC is an interested party and has access to the relevant submissions and evidence.

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11. The external review of the IPCC's investigation into Sean Rigg's death recommended that in all cases of a death in police custody, arresting officers should be separated and instructed not to communicate with each other about the events until the IPCC has taken detailed statements from them³.
12. The IPCC's letter of 2 October 2012 responding to a letter before claim for judicial review relating to Mark Duggan's death accepted that conferring and collaboration is highly undesirable in this context; and accepted that the risks of contamination are particularly high, and the possibility of collusion has an impact on public confidence
13. One reason why it is likely that the current arrangements undermine public confidence is that police witnesses and civilian witnesses are "treated very differently" (see §19-21 of *Saunders*). As the draft guidance notes at §19, non-police witnesses are routinely warned not to discuss the incident in question. The same should apply to police witnesses.
14. Although the risk of officers consciously or unconsciously altering their accounts is a serious concern, that is not the only problem caused by conferring. Cross-examination of officers at a criminal trial or inquest may focus on the extent to which officers conferred. A truthful account may be doubted by a jury where the officers conferred extensively.
15. It is obvious that the measures set out in paragraph 20 (and also paragraphs 21-24) of the IPCC's draft guidance would reduce the risk of conferring and collusion and would increase public confidence. That is also demonstrated by the evidence from previous death in custody investigations. They show that the current ACPO/ College of Policing Guidance is inadequate⁴, fails to secure

³ Report of the independent external review of the IPCC investigation into the death of Sean Rigg, page 14.

⁴ The current guidance is now contained in the College of Policing's *Authorised Professional Practice*. It states that officers should not be isolated from one another, other than for 'situation specific' reasons; and officers should not generally confer with others but they may

public confidence, and provides ample opportunity to officers to discuss the incident. For example:

15.1. Following the fatal shooting of Mark Duggan on 4 August 2011, the eleven CO19 officers directly involved conferred extensively about the incident. They spent about 8 ½ hours sitting together writing up their detailed accounts. They used a flip chart and discussed each segment of the operation in turn. Some officers said they conferred about everything up until officer V53 opened fire⁵. A great deal of time was spent during the criminal trials and the inquest on the extent to which officers conferred. It was suggested by counsel for the defendant and family respectively that they concocted their accounts. Widespread disturbances followed Mr Duggan's death. A number of reviews concluded that public anxiety about the police involvement in the incident and about the subsequent actions of the Commission and police, was an important contributory factor to the riots⁶. Securing public confidence in the integrity of the investigation is often of great importance.

15.2. On 5 July 2002, Malcolm Cash died shortly after being restrained by a number of police officers. This case demonstrates how police officers may consciously try to cover their tracks. In *R (Cash) v. HM Coroner for Northamptonshire* [2007] 4 All ER 903 the High Court recorded that one of the police officers involved said shortly afterwards that he:

“wanted “to grab everybody that was in at the start ‘cos we're going to have to make sure that we fucking scribble this up properly”. It would have been for the jury to determine whether this showed ... an attempt by the police to cover their tracks by ensuring that they each gave a consistent account of the incident, ...” or some other purpose such as that he wanted to do the job properly. §16

do if “in a particular case a need to confer on [issues other than what was in their mind when force was used] does arise...”.

⁵ This is a summary of the evidence at the inquest, a transcript of which is available on the Mark Duggan inquest website. There is also a summary of this in the witness statements of Marcia Willis Stewart for the *Duggan and Delezuch* judicial review.

⁶ Riots Communities and Victims Panel final report, pages 16 and 19; *Home Affairs Committee Policing Large Scale Disorder: Lessons from the disturbances of August 2011, Sixteenth Report of Session 2010–12*, §16; and “*Reading the Riots*” report by the London School of Economics and Guardian Newspaper, page 5.

- 15.3. Following the death of Sean Rigg on 21 August 2008 the four key officers sat in a room together for extended periods, at times without any, or sufficient, independent oversight⁷. This raised serious concerns. The review considered that the police officers could and should have been kept separate.
- 15.4. The following evidence comes from lawyers who represented families in investigations following deaths in police custody. Those lawyers emailed Adam Straw for the purposes of this consultation. Part of the evidence was submitted by the Claimant in the *Delezuch* judicial review claim⁸. If more information is required, please let us know.
- 15.5. Faisal Al Ani died on 31 July 2005 after being restrained by the police. Officers wrote their accounts 24 hrs after the death by which time they had conferred and spent 5 hours together in the station bar with other police witnesses and the Federation Representative. They only wrote their accounts after the post-mortem had been conducted, the family and PCSOs interviewed, medical records obtained and CCTV viewed. The family were concerned that there had been improper collusion.
- 15.6. Paul Davis died on 28 September 2006 after police used force on him to try to remove drugs from his mouth. The officers involved sat together to write up their statements. Several officers gave different evidence in their statements as to a crucial fact in the inquest (the time the incident began) compared with the evidence they eventually gave at the inquest after further disclosure of evidence relevant to that crucial fact had been given. This suggested to the family that the officers had concocted what they said in their statements.

⁷ Report of the independent external review of the IPCC investigation into the death of Sean Rigg, pages 30-31.

⁸ *R (Delezuch) v. Chief Constable of Leicestershire Constabulary* CO/12228/2012

- 15.7. Habib Ullah died on 3 July 2008 after being restrained by the police. The five key officers prepared their statements while sitting all together. The earlier drafts of the statements were later disclosed and demonstrated that significant sections of the officers' initial accounts had been edited out.
- 15.8. James Herbert died in the custody of the Avon and Somerset Police on 10 June 2010. The officers involved had an opportunity to confer afterwards. The IPCC conducted a further investigation focusing on that issue and officers were served with notices alleging that the conferring was gross misconduct.
- 15.9. Darren Neville died on 5 May 2013 after being restrained by police. Officers have been served with gross misconduct notices regarding inappropriate conferring.
16. The Duggan case also demonstrates why paragraphs 21 to 24 of the IPCC's draft guidance are important. The initial accounts provided by the officers were largely pointless because nearly all of them omitted any important information. Officers claimed they did not realise they should have mentioned factors as important as that they claimed to have seen Mr Duggan had a gun and/or was making threatening movements just before he was shot. Some officers thought that only the officer who used force had to say why it was justified. Only wholly uncontroversial facts were set out in most initial accounts.
17. The current ACPO/ College of Policing Guidance permits officers to confer about any matter other than what was in their mind at the time of the shooting if there is 'a need to confer'⁹. This is insufficient to prevent any risk of conferring. It leaves the judgment to officers. In the Mark Duggan case some officers thought they could confer if they needed to, to ensure they got the best evidence by having their memories jogged by their colleagues' accounts. Paragraph 20.2 of the draft guidance is more appropriate, because it appears to

⁹ See footnote 6, above

restrict the circumstances in which an officer can confer to where there is a need to avert a real and immediate risk¹⁰.

18. The requirement in the ACPO/ College of Policing Guidance to keep a record about conferring does not remove the risk that evidence will be contaminated. It will often not be possible to determine whether an officer's evidence was altered, from the brief record that is made. The availability of disciplinary proceedings does not prevent the need for the safeguards mentioned above. Firstly, because of the absence of proper monitoring, there is not an adequate means of bringing about disciplinary proceedings if officers act wrongly. Secondly, illegitimate conferring will not always amount to misconduct.

Article 2 of the European Convention on Human Rights

19. We consider that the guidance in paragraph 20-24 is necessary to satisfy the procedural duty under article 2 of the European Convention on Human Rights. That is for the following reasons.

Legal background

20. When a person dies or is seriously injured during or after contact with the police, articles 2 and/or 3 of the European Convention on Human Rights requires the State to carry out an effective, independent investigation into the death ("the article 2 and/or 3 procedural duty"). The following analysis is based on article 2, but an equivalent duty will arise under article 3. In *Ramsahai v The Netherlands* [2008] 46 EHRR 43 the Grand Chamber stated:

The authorities must take the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye-witness testimony... **Any deficiency** in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required measure of effectiveness. [emphasis added §321].

21. In *Ramsahai* a principal basis for the finding of a violation of the procedural duty (at §332) was that the two firearms officers who witnessed a police shooting were not kept separated and not questioned for nearly 3 days:

¹⁰ We suggest it would help if the wording of that paragraph is altered to make clear that police witnesses may only confer if it is necessary to avert a real and immediate risk to life.

What is more, Officers Brons and Bultstra were not kept separated after the incident and were not questioned until nearly three days later (see [94] and [107] above). Although, as already noted, there is no evidence that they colluded with each other or with their colleagues on the Amsterdam/Amstelland police force, **the mere fact that appropriate steps were not taken to reduce the risk of such collusion amounts to a significant shortcoming in the adequacy of the investigation.** [emphasis added, §330]

22. The European Court does not prescribe one specific form of investigation for the fulfillment of the article 2 duty. But *Ramsahai* makes clear that the Court will find unlawful specific approaches by the authorities to the investigation, such as a failure to keep officers separated before providing their accounts. In particular, it will do so where appropriate steps were not taken to reduce the risk of collusion.
23. This means that in the case of a fatal shooting by police officers the state may be held to have violated article 2 if adequate steps were not taken to prevent the key police officers from conferring before producing their accounts: *Saunders* §38 and §40.
24. One purpose of the article 2 investigation is to secure public confidence: *R (Amin) v. Secretary of State for the Home Department* [2004] 1 AC 653, §31. This is particularly important in a police shooting investigation where: “What is at stake here is nothing less than public confidence in the State's monopoly on the use of force.” *Ramsahai* at §326. Thus, in *Ozcan & Others v. Turkey*, 18893/05, 20th April 2010, para 67, the arrangements for questioning a soldier who fatally shot a member of the public were unlawful, in part because they were “conducive to leading ... the public in general – to form the opinion that members of the security forces operate in a vacuum in which they are not accountable to the judicial authorities for their actions.” §76.
25. The body carrying out the investigation must be independent from the earliest possible stage. “This means not only a lack of hierarchical or institutional connection but also a practical independence”: *Ramsahai* at §325. In *Ramsahai* a delay of only 15 ½ hours in the independent body becoming involved in the investigation was alone sufficient to violate article 2: §341.

ACPO is not sufficiently independent to take responsibility for deciding what investigative steps should be carried out: *SP v Secretary of State for Justice* [2009] EWHC 13 (Admin), §80 and 81; and *R (JL) v Secretary of State for the Home Department* [2009] 1 AC 588 at 75 and 78.

26. It is for the independent body to decide what investigative steps will be taken:
- “Once the independent investigation has been established with the powers and resources it needs, it is very much up to the investigator to decide how to proceed in order to achieve the objectives for which it was set up.” *JL*, at §76 and §83.

Analysis

27. The article 2 procedural duty requires the State to take appropriate steps to reduce the risk of collusion between officers involved in a fatal incident before they complete their accounts (*Ramsahai* §330, and *Saunders* at §38 and 40).
28. That is for two reasons. Firstly, the opportunity for officers to confer increases the risk that their evidence will be contaminated. This is a deficiency which undermines the ability of the investigation to establish the circumstances of the case, and so is liable to fall foul of the required measure of effectiveness (*Ramsahai* §321). Secondly, it will undermine public confidence. Maintaining public confidence is of great importance in any investigation of a death in police custody (*Ramsahai*, and *Ozcan*). That is demonstrated most acutely by the circumstances of Mr Duggan’s death.
29. For the reasons given in the section above, the current ACPO/College of Policing guidance involves a risk that evidence will be contaminated, and fails to secure public confidence. Of particular concern is the aspect of the current guidance that prevents, in most circumstances, officers from being separated. In *Ramsahai*, as referred to above, the fact that the officers were not kept separated after the incident and were not questioned until nearly three days later, was a significant shortcoming.

30. The judicial review claim involving *Duggan and Delezuch*¹¹ indicates that ACPO do not dispute that the current guidance involves a risk of evidence being contaminated. The reason ACPO do not want to change it is that it is impractical to do so¹². They say that officers will need to confer for specific operational reasons. But the particular operational reasons ACPO rely on are very restricted. For example, they say there may be a need to discuss a police shooting if there is a chase, or when first aid is given. In nearly all of the case examples set out above when officers did confer, there appears to have been no operational reason for them to be together. If necessary, these highly limited circumstances in which there is a genuine operational need to confer, can be incorporated into the IPCC's guidance, for example at §20.2.
31. More importantly, the independent body that is given responsibility for deciding what are the appropriate steps that must be taken within the article 2 investigation should be the IPCC. The IPCC has decided that further steps should be taken to prevent conferring. In particular, it wants principal officers to be kept separated before giving their accounts. We are strongly of the view that the IPCC is the correct body to issue such guidance, rather than ACPO.

Conclusion

32. The guidance set out in paragraphs 19-24 of the IPCC's draft guidance will reduce the risk of contamination of evidence and increase the overall effectiveness of the investigation. There is no good reason not to introduce that guidance. In fact, it is our view that it is necessary to do so in order to comply with articles 2 and 3 of the Convention.

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¹¹ Footnote 3, above

¹² Paragraph 20 of ACPO's skeleton argument for the Court of Appeal in *R (Duggan and Delezuch) v. ACPO* C1/2013/1759, 27 February 2014