

OFFICIAL SENSITIVE

IOPCIndependent Office
for Police Conduct
Swyddfa Annibynnol
Ymddygiad yr Heddlu

Our reference: 2015/058597

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1 May 2018

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Dear DCI Taverner

Re: IOPC independent investigation into the death of Mr Jermaine Baker**Introduction****Chronology**

1. The Independent Police Complaints Commission (IPCC) conducted an independent investigation into the circumstances of Mr Jermaine Baker's death, culminating in the final report dated 23 November 2016 prepared by Operations Manager Catherine Hall and Operations Team Leader Liz Parsons in compliance with paragraph 19 of Schedule 3 of the Police Reform Act 2002 ("the PRA"). The investigator's opinions regarding "conduct" in that report were that:
 - a. W80 had a case to answer for gross misconduct for using excessive force when fatally shooting Mr Baker.
 - b. Former DCI Neil Williams had a case to answer for misconduct for breaching his duties and responsibilities by inadequately setting out the full intelligence picture in the FA2 (the Application for Authority for the Deployment of Armed Officers authorisation).
2. The final report was submitted to IPCC Commissioner Cindy Butts (in compliance with paragraph 23(1) (b) of Schedule 3 of the PRA) and Ms Butts made a determination to refer it to Director of Public Prosecutions (DPP). She also sent a copy of the final report to the Metropolitan Police Service (MPS) as the Appropriate Authority (AA) for it to determine whether any persons to whose conduct the investigation related had a case to answer in respect of misconduct/gross misconduct and what actions will be taken in respect of the matters in the report (in compliance with paragraphs 23(2) (a) and paragraphs 23(6) of Schedule 3 of the PRA).

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3. The DPP made a decision not to charge any police officers with any offences on 14 June 2017. That decision was challenged by Mr Baker's family who exercised the Victims' Right of Review (VRR).
4. The AA provided its memorandum setting out its determinations that neither W80 nor DCI Williams had a case to answer for misconduct or gross misconduct on 5 September 2017 (in compliance with paragraph 23(7) of Schedule 3).
5. On 8 January 2018 the IPCC became the Independent Office for Police Conduct (IOPC) and I was appointed as the Director General's delegate in this matter and have:
 - a. Read the final report of the investigation.
 - b. Read the AA's memorandum under paragraph 23(7) of the Schedule 3 to the PRA.
 - c. Made arrangements so that I am assured the final report accurately summarised the relevant evidence from the investigation.
6. On 19 March 2018 the DPP issued its decision regarding the VRR which was that no charges would be brought against any officer in relation to this matter.
7. By letter dated 19 March 2018 I recommended that officer W80 had a case to answer for gross misconduct for using excessive force due to his conduct in shooting Jermaine Baker and that disciplinary proceedings for gross misconduct should be brought against him for the reasons set out in that letter. As DCI Williams had retired and the former officer regulations did not apply to him, I made no determinations in respect of him.
8. By an undated letter received 19 April 2018, you as AA decided not to accept my recommendations in relation to W80. It now falls to me to decide whether to direct you to put into effect my recommendations.

Direction of Misconduct Proceedings

9. Paragraph 27(3) of Schedule 3 to the PRA allows the IOPC to recommend to an AA, *inter alia*, that a person serving with the police has a case to answer for gross misconduct or misconduct or has no case to answer and that disciplinary proceedings in the form specified in the recommendation are brought against that person; or that disciplinary proceedings brought against that person are modified so as to deal with such aspects of the conduct as may be specified in the recommendation.
10. If, after the IOPC has made such a recommendation, the AA rejects it, the IOPC may, pursuant to paragraph 27(4) of Schedule 3 to the PRA, direct the AA to give effect to the recommendation.
11. The IOPC has a discretion, therefore, whether to direct the AA to give effect to its recommendation(s). The question whether to exercise that discretion must be determined separate to the determination that there is a case to answer for

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gross misconduct or misconduct. Whether to exercise the discretion to make such a direction is a question which involves consideration of a number of factors including, but not limited to, an assessment of where the public interest lies.

12. I have decided to direct you to put into effect my recommendations that disciplinary proceedings for gross misconduct should be brought against officer W80 for the reasons set out in this letter.

Factual summary and Legal tests

13. I have set out my summary of the factual background in my letter dated 19 March 2018; the legal tests to be applied in relation to case to answer, determining whether use of force may be excessive or not and assessment of severity of potential conduct, all of which remain relevant for my determination whether to direct that the AA gives effect to my recommendations.

The AA's response to recommendations

14. You have determined not to accept my recommendations on the basis that, in summary, you do not consider that I have properly assessed the reasonableness of W80's belief, taking into account the short time frame within which he had to make the decision to use force rather than analysing the transcripts of audio recordings from the time. In your view there is nothing to indicate that W80 heard the words "put your hands up" nor grounds to say that he should have appreciated that this is what Mr Baker was doing. You further consider that the speed with which W80 made the decision to use force is "neither here nor there" in assessing reasonableness of belief.
15. The IOPC investigator's findings in her final report were not, in my view, decisively based on "a careful textual analysis of everything that was said" before W80 made his own assessment to fire his weapon. They are certainly not based on being able to prove that W80 heard an officer say "put your hands up" (as opposed to "put your hands on the dashboard") so that W80 must have appreciated that Mr Baker was responding to that discrete, clear instruction. As for the timings issue, the fact that the shot was discharged so quickly after the interception began and instructions were being shouted to Mr Baker to "put his hands on the dashboard" and/or "to put his hands up" and/or to "show his hands" is self-evidently relevant to the issue of whether the force used was necessary, reasonable or proportionate. The points made by the AA are of course relevant ones for W80 to make in the context of his defence to a disciplinary charge of gross misconduct but they do not of themselves carry such weight that a reasonable disciplinary tribunal would be bound to conclude that there is no case to answer for gross misconduct.
16. I refer to the rationale previously provided in my recommendations letter, on the basis of which I remain of the view that a reasonable disciplinary tribunal could find that W80 has a case to answer for gross misconduct.

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Discretion to direct and consideration of the public interest

17. As set out above, notwithstanding that I consider a reasonable disciplinary tribunal could find that W80 has a case to answer for gross misconduct, I separately must consider whether it is appropriate to direct that you give effect to my recommendations.
18. You have not put forward any representations regarding the balance of the public interest, however, I am of course aware of concerns expressed by the previous Commissioner for the Metropolitan Police Service, Sir Bernard Hogan Howe, regarding the negative impact of investigations into the use of force by firearms officers, as for example reported here:
<https://www.theguardian.com/uk-news/2017/feb/14/bernard-hogan-howe-armed-police-deserve-more-public-trust>
19. Set against this, however, there are very strong public interest arguments for proceedings to take place, based on the severity of the alleged conduct. In this case there was a loss of life as a result of the conduct for which there is a case to answer. The degree of harm is relevant to the severity of any sanctions that would be imposed¹ and there is strong public interest in officers facing disciplinary proceedings where dismissal may be justified. Although I have accepted that excessive force was used because of a genuine, albeit unreasonable, belief, the severity of the result is such that I believe public confidence in policing would be severely undermined if despite there being a case to answer there were no proceedings to determine whether the officer should be disciplined.
20. This case involves the use of lethal force against an individual of mixed race. The perceived way in which individuals from a BAME background are treated by the police is a sensitive issue of great concern to the public and, more particularly, the BAME community. The IPCC's public confidence survey, last carried out in 2016, showed that there were clearly lower levels of confidence in the police complaints system among people from BAME communities. Though their confidence has risen in many areas, it remains significantly lower than the general population across a range of issues: readiness to complain and trust in fair handling, perception that there may be negative consequences of complaining, willingness to take complaints directly to the police, and knowledge and understanding of the IPCC and its independence.
21. This is high profile case which has attracted significant attention both nationally and internationally. Where there is objective evidence of harm to the reputation of the police service within a particular section of the public that is also a matter that can be taken into account by a disciplinary panel in determining seriousness.² There is a very strong public interest in ensuring that any decisions regarding the accountability of those involved are as transparent as possible and proceeding to a disciplinary hearing in order to preserve public confidence in the regulation of the police.

¹ College of Policing Guidance on outcomes in police misconduct proceedings p21

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22. In my view, any failure to determine what (if any) breaches have been committed by the officer would strike at the very purpose of the police misconduct regime, in that it would circumvent the need to uphold high standards in policing and would damage public confidence in the reputation of the police service, and the balance of public interest is in favour of proceeding to a disciplinary hearing.

Determinations

23. I have determined that:

- a. W80 has a case to answer for gross misconduct for using excessive force due to his conduct in shooting Jermaine Baker and I direct the AA to put into effect my recommendation that disciplinary proceedings for gross misconduct should be brought against officer W80.

Next steps

24. Please keep me advised of the steps taken to give effect to my directions in order to satisfy your duties under paragraph 27(9), Schedule 3 of the Police Reform Act 2002. It is the AA's responsibility to put witnesses on notice of attendance at hearings.
25. I would also welcome being consulted on the drafting of the Regulation 21 notices before these are served. I will also wish to satisfy myself that I do not need to make any directions to modify the disciplinary proceedings or the conduct specified in the notice. The IOPC lead investigator or a member of their team will be happy to assist with briefing Counsel, including attending any conferences with Counsel prior to the hearing.
26. We will consider whether we wish to attend the hearings to make representations or as an observer after we have spoken to Counsel. I should be grateful if you would consult with the IOPC regarding potential hearing dates in order that we are able to inform you of the availability of our staff members, and also counsel if instructed. Please also confirm the composition of the Panel when known.
27. I understand that W80 will have completed 30 years' service and be eligible to retire on 11 September 2019. I would urge you to ensure that the disciplinary hearing is held in advance of this date and also ask that you inform me immediately should W80 give notice of intention to resign or retire.
28. It is my intention to issue a brief press update regarding my decision. We will be in contact with you shortly regarding the timing of this and will also share a draft of our intended release in advance.
29. It also remains my intention to disclose the correspondence between us relating to our determinations to the family of Mr Baker, subject to the harm