JEAN CHARLES DE MENEZES (Deceased)

1. On 8 April 2009 I received representations from those acting on behalf of the family of Jean Charles de Menezes that, following the inquest into his death, the IPCC should review its decisions in relation to actual or potential disciplinary proceedings against officers involved in the circumstances surrounding the fatal shooting of Mr de Menezes at Stockwell underground station on 22 July 2005.

2. On 2 June 2009, following the conclusion of the CPS' review of its own decisions, the IPCC advised representatives of Mr de Menezes' family and the MPA and MPS that it would consider the family's representations and intended to determine whether it could and should review the decisions it had made with regard to potential disciplinary proceedings and, if appropriate, undertake such a review.

3. This document sets out my response to the family's representations.

4. I have carefully considered the advice I have received on this matter and considered the family's representations in the light of the evidence identified by the IPCC's own investigation and the subsequent legal proceedings.

5. I had originally intended to address the issue of whether the IPCC could and should reopen its decision first and take representations on this point before dealing, if appropriate, with the substantive issues. However, having considered the matter further and to avoid any misunderstanding or further delay, I have decided it is better to deal with both issues at the same time. I have decided that the IPCC does have the power to revisit its decisions in this matter and should do so. I have therefore reviewed those decisions and decided that the IPCC’s original decisions should stand.

6. This document is restricted to an assessment of whether any new evidence has emerged that would justify the bringing of disciplinary charges against any individual officer. It does not deal with the organisational failures that occurred on the day Mr de Menezes died and I acknowledge it cannot adequately address the distress and anger Mr de Menezes' family rightly feel. I repeat once again my sincere condolences to the family. I have previously made my views clear on the failings that led to Mr de Menezes' death; they are a matter of public record.
The IPCC's powers

7. I considered first whether the IPCC could or should review its decisions.

8. I considered whether the IPCC was *functus officio* in this matter and so unable to reopen its decision unless certain caveats apply. These caveats are whether the decision had been based on fraud, whether it was substantially in the public interest to do so or whether new evidence had emerged. I have noted that paragraph 23(6) of Schedule 3 of the PRA 2002 in effect requires the Commission to consider disciplinary matters if the Director of Public Prosecutions has notified it that the Director proposes to take no action on any of the matters referred to in its report. Following the conclusion of the inquest in December 2008, the Director reconsidered his decisions in this case and decided once again to take no action. The Director notified us of that decision on 30 April 2009. I considered that obliges the IPCC to reconsider its decisions on discipline.

9. In any case, the caveats referred to in paragraph 8 above do apply. Some new evidence did emerge at the inquest – for instance, about the whereabouts of C2 and C12 immediately before the events in the underground station – and this new evidence together with the controversy surrounding the inquest verdicts in my view make it plainly to be in the public interest that the discipline decisions are seen to be reviewed.

10. I am also mindful of the letter I wrote to the family's representatives on 11 May 2007 concerning the discipline decisions I took at that time in relation to the junior officers. I stated:

"I am satisfied that on the basis of the evidence I have available to me now or any development that might be reasonably foreseen, that there is no realistic prospect of successful disciplinary action being taken against any of the junior officers referred to above. However, I am strongly advised that if new evidence emerged, new disciplinary proceedings would not be prejudiced by discontinuing the existing proceedings now."

The letter will – and was intended to – have reassured the family's representatives that disciplinary proceeding could still occur if relevant new evidence emerged of a nature and in circumstances indicating that such disciplinary proceedings were justified and appropriate.

11. At the Health and Safety trial in late 2007, the jury found the Office of the Commissioner of the Metropolis "guilty" of the offence with which it was charged, but chose exceptionally (with the permission of the trial...
judge, Henriques J) to add a rider stating that in reaching their verdict they attached “no personal culpability to [then] Commander Dick”.

In his sentencing remarks on 1 November 2007 the trial judge said:

“The jury’s rider in relation to her was anticipated by me, and it accords with my view of the facts. She was in charge of and controlling an extremely difficult situation. She has now that rider to depend on and in my judgment, rightly so.”

In a letter to the MPA of 12 December 2007, following that Health and Safety trial, concerning the discipline decision I took at that time in relation to AC Dick I wrote:

“I cannot therefore foresee any circumstances in which new evidence might emerge which would cause any disciplinary tribunal to disregard the jury’s rider.”

I wrote in similar terms to the MPS concerning DCI Purser (Silver), (Trojan 84) and Chief Inspector Esposito (Trojan 80). These letters invite the question now about whether such new evidence has in fact emerged at the inquest or otherwise.

12. I have therefore concluded that the IPCC can – and indeed in these circumstances should – review its discipline decisions.

13. I have considered one further factor. I recognise that the officers might argue that to bring discipline proceedings against them now would be an abuse of process or would otherwise be inherently unfair. I considered whether this was a matter for the IPCC to address or whether this was a matter for any disciplinary tribunal. I decided this would be a matter for the IPCC to consider – but only once we had come to a view about what discipline charges if any should be brought against which officer. An abuse of process argument must be specific to the circumstances of a particular case. As in this case I have decided, following a review, not to change my original decision, the abuse of process issue does not arise.

14. There is extensive material relating to this matter much of which dates back to 2005. I have carefully considered what I believe to be the relevant material.

Context

15. I turn now to the substance of the family’s representations that I should change my decisions. The context is important.
16. First, as I have said on a number of occasions, the death of Jean Charles de Menezes was a truly shocking event. An entirely innocent man, on his way to work, was shot and killed by armed police while he sat on a tube train. We know there was nothing in his actions which justified his fate. He had no opportunity to defend himself or protest his innocence. The Health and Safety trial and inquest both confirmed the conclusions of our investigation that this happened because of mistakes that could and should have been avoided.

17. Second, before judging in 2009 the conduct and performance of the individuals involved in July 2005, it is important to remember the events of that time. On the 7 July 2005, four bombs had exploded on the London transport network and fifty two innocent people had lost their lives. On 21 July, there were a further four attacks which thankfully failed. On 22 July the police were involved in an urgent operation to track down the attackers from the previous day before they might make another, successful attack.

18. In its response to the inquest verdict questionnaire, the jury agreed by a majority verdict that they could not say whether the attacks of that July and the pressure that placed on the MPS contributed to Mr de Menezes' death. The inquest jury therefore, on the balance of probabilities, could not determine whether that pressure was or was not a factor. So it seems to me unlikely that a disciplinary tribunal, where the onus was for the prosecution to prove, on the balance of probabilities, the guilt of any officer, not for the officer to prove their innocence, would conclude that such pressure could not be a factor.

19. Third, the Health and Safety trial, the Coroner's Rule 43 report, the IPCC's recommendations, Her Majesty's Inspectorate of Constabulary, the Metropolitan Police Authority and the MPS itself have all recognised the organisational failings that lead to Mr de Menezes' death. Major efforts have been made to rectify these. It is necessary to take these organisational failings into account when judging the individual culpability of the officers involved.

20. Fourth, the decisions in the case have already been subject to exhaustive scrutiny. The salient events are:

19 Jan 2006 IPCC report concluded and submitted to the CPS.

17 Jul 2006 CPS announced its decision to prosecute the Office of the Commissioner of the Metropolis under the Health and Safety at Work Act 1974.

13 Dec 2006 The High Court upholds the Coroner's decision to hold the inquest after the trial.
22 Jan 2007 Application to have health and safety charges dismissed rejected by High Court.

11 May 2007 IPCC withdraws disciplinary notices from 10 frontline officers.

1 Nov 2007 Health and Safety jury return a guilty verdict with a rider that [then] Commander Cressida Dick bore "no personal culpability", this rider being endorsed by the trial judge.

21 Dec 2007 IPCC withdraws disciplinary notices from remaining four senior officers.

22 Sep 2008 Inquest opens.

1 Dec 2008 Coroner rules unlawful killing verdict cannot be left to jury.

3 Dec 2008 Coroner's ruling upheld following judicial review

12 Dec 2008 Inquest concludes with Open Verdict

13 Feb 2009 Initial review by CPS concluded. Original decision confirmed.

8 April 2009 Further review by CPS concluded. Original decision confirmed.

21. To date, every independent judicial, prosecuting and disciplinary authority who has considered the conduct of the officers involved has concluded individual criminal or disciplinary charges are not merited.

22. Within this context I have considered the family's representations that new evidence emerged at the inquest in a number of respects which would justify the bringing of disciplinary charges against specific officers and all of which I have considered. The principal among them are dealt with below.

New evidence heard at the inquest

23. The family's representatives suggest that it became clear at the inquest that there were three firearms cars present at the TA Centre at the time Mr de Menezes emerged from his flat and so he could have been safely stopped before he reached any public transport. I do not think this is directly relevant. Whether or not a firearms team was present it
is clear that a decision had been made (at least by default) that not everyone leaving the building would be stopped. This may have been because of the difficulty in identifying which flat those leaving by the communal door had come from. No sufficiently positive identification had been made of Mr de Menezes at this stage. Furthermore, the surveillance team were not aware the firearms team had arrived and so could not utilise them as a resource to have any individual stopped. I accept Mr de Menezes should have been stopped. I do not accept the presence or absence of firearms officers at the TA Centre was a factor in this decision or lack of decision.

24. The family’s representatives suggest it became clear at the inquest that firearms officers had arrived at Stockwell underground station in time to stop Mr de Menezes entering the station. I accept this is the case – but this does not change the position. It was not possible for these officers to intervene at that point because those in the control room did not know where they were and they themselves did not know who or where the suspect was. This was a result of the communication failures that were a central part of our report.

25. The family’s representatives suggest evidence emerged at the inquest for the first time that D/Su MacBrayne had failed to pass on the torn "wedding" photographs that were obtained from the rucksack left behind after the failed attacks on 21 July and which provided a good likeness of Osman. D/Su MacBrayne was not issued with a 'Reg 9' or disciplinary advisory notice and so the considerations of whether disciplinary decisions can be reviewed are not relevant in his case. With hindsight and with ample time to consider the matter, D/Su MacBrayne might have done things differently; however, at the time he did not believe the photographs were of sufficient value to take forward and nor is it clear that even if he had, the technology then available would have allowed the images to be used and disseminated sufficiently quickly. A decision, action or inaction that later turns out to be mistaken does not in itself amount to misconduct; it would have to be unreasonable or negligent to be so. I do not think D/Su MacBrayne's use of the photographs was unreasonable or negligent even if it is now accepted that it would have been better done differently.

26. The family’s representatives submit that new evidence given by civilian witnesses at the inquest now justifies the bringing of disciplinary charges. In my view, evidence from the passengers given to us and heard at the inquest was contradictory and must have reflected the very confusing and traumatic nature of the events that were experienced by all involved. For instance, one witness told the IPCC shots were fired into the ceiling – her statement (Wrobel) was read to the jury on 4 November 2008. No such shots were fired. Mr Livock
described Mr de Menezes reaching his hand towards the waist-band of his trousers, a movement which, at the very least, in those circumstances would have concerned the officers. Just as C2 and C12 incorrectly describe Mr de Menezes as wearing a bulky jacket, Mr Whitby incorrectly states 'Ivor' was wearing a padded jacket. Contrary to the jury’s conclusion, a number of witnesses state they did not see Mr de Menezes stand up in the carriage. Overall, the civilian witnesses paint a picture of confusing and terrifying events happening very quickly. They do not support a case for disciplinary action against the officers.

C2 and C12 - using excessive force and abuse of authority

27. The family’s representatives submit that C2 and C12 should be charged with the disciplinary offences of using excessive force and abuse of authority. They argue that the inquest jury’s failure to return a 'lawful killing' verdict amounts to a rejection of C2 and C12's evidence. This is not the case – an open verdict means the jury decided that the necessary elements of a 'lawful killing' were not established, not that the contrary was established. The Coroner specifically advised the jury that they should not return an Open Verdict "as a mark of disapproval or to make any sort of statement". The family’s representatives believe that these officers would rely on self-defence to justify their actions and submit this required them to carry out an assessment of the risk posed to them by Mr de Menezes. The family’s representatives accept in their submission that the only opportunity these officers had to carry out such an assessment was "the 5 -10 seconds they were in the carriage itself before the shots were fired". I do not think this is a realistic expectation. The family’s representatives suggest D/Su Swain's evidence supported the view that C2 and C12's use of lethal force was entirely unjustified. I understand this refers to D/Su Swain’s evidence about examples from other countries when suspected suicide bombers, who appeared to be completely restrained, were nevertheless shot. I do not accept this is relevant; Mr de Menezes was not restrained in the way D/Su Swain describes.

28. The family’s representatives submit that in a number of matters the jury did not accept the officers’ accounts and that in other matters, the officers’ accounts were contradicted by compelling forensic or other evidence. They argue that the fact that the officers were allowed to confer before making their initial statements (as was allowed at the time) damaged the credibility of those statements. I accept all of this – but it is not the complete picture. As I have described in paragraph 26 above, the accounts of some civilian witnesses were also not accepted or were plainly wrong. It is not suggested that the civilian witnesses who were mistaken in their evidence were deliberately untruthful.
29. I do not believe that any disciplinary panel would come to a different conclusion to the bodies that have already considered these issues: in view of the extreme confusion and stress of this time it cannot reasonably be concluded that the mistakes that definitely were made were deliberate or negligent. It seems to me that criticisms of what happened in those few seconds or what could subsequently be remembered about that period more than three years after the event – no matter how desperately important those few seconds were – are not realistic, or in any event cannot safely be relied upon as a sufficiently secure foundation for potential disciplinary proceedings against individual officers.

30. In my view, the central question regarding C2 and C12’s evidence is the same today as it has always been: what was their honestly held belief at the time they shot Mr de Menezes? I draw attention to the events immediately after the shooting which throw light on their belief at the time: such was their stress that they had to pat each other down to check for injury; there was nothing in their or other officers' demeanour to suggest they thought they had made a dreadful mistake; CCTV shows their colleagues running down the escalator immediately after the shooting while passengers escaped in the opposite direction – nothing in these pictures suggest there was any doubt amongst any of the officers about the peril they believed they faced.

C2 and C12 – honesty and integrity

31. The family’s representatives submit that C2 and C12’s assertion that C12 shouted "armed police" and that they believed at the time Mr de Menezes was wearing a bulky jacket were deliberate lies to mislead the investigation and were contradicted by other police and civilian witnesses and not believed by the jury.

32. The family’s representatives recognise that the officers may have suffered from perceptual distortion but argue that it is "perhaps unlikely" that both officers would have the same perceptual distortion in relation to the jacket. It seems to me that this is an argument that the family’s representatives do not advance strongly. In any case, as noted in paragraph 26 above, Mr Whitby makes the same mistake about 'Ivor' which perhaps makes it less unlikely that the officers could have made the same mistake.

33. A number of police and civilian witnesses agree there was shouting on the platform before Mr de Menezes was shot. 'Ivor', 'Lawrence' and 'Ken' state this included the word 'police'. C7 said he gave a warning as he came down the escalator before Mr de Menezes was shot. C5 and 'Ralph' state they gave a warning after Mr de Menezes had been shot. R. Livock heard the shouting outside the carriage but did not
hear anything addressed to Mr de Menezes. R. Wilson was sure the word ‘police’ was not used. W. Merrill heard loud shouting but had no recollection of whether anything was said to Mr de Menezes. A. Dunwoodie also heard shouting on the platform but states it was not directed at people in the carriage or Mr de Menezes. R. Preston heard an instruction to “down, get down, down” before Mr de Menezes was shot. He believed this was directed at Mr de Menezes but it appears he may have been confused with ‘Ivor’. Mr Whitby also heard shouts directed to ‘Ivor’ to “get down, get out”. On the basis of the confused and on occasion plainly incorrect evidence of a number of witnesses, I do not believe any disciplinary tribunal would single out that of C2 and C12 for being deliberately so.

DAC McDowell

34. The family’s representatives submit that DAC [then Commander] McDowell failed to carry out his duties as Gold Commander for the operation effectively. McDowell was Gold Commander for the investigation into the attacks on 21 July 2005. The Coroners Rule 43 Report highlights the lack of clarity about the role of the Gold Commander:

“As in most major operations, the Gold/Silver/Bronze command structure model was used. However, in this case, it was unclear precisely to what extent the Gold Commander was required to supervise the operation after setting his strategy. There was also an argument in the Inquest as to the freedom of the Silver commander to refine or adjust the Gold strategy. The ACPO Manual on Police Use of Firearms (at Ch. 4, para. 3.6) lists a series of duties for the Gold Commander, including a duty to keep the strategy under review and a duty to document any changes. The MPS might usefully review the command structure and the Manual, and consider whether there can be further clarification of the continuing role played by the Gold Commander after setting his strategy”

35. Central to any assessment of McDowell’s role must be the lack of clarity about the role of the Gold Commander to which the Rule 43 report points. I think it is likely that this uncertainty was exacerbated by the introduction of AC Dick as DSO who at that time was of similar rank to McDowell. In my view, the evidence heard at the inquest strengthens, not diminishes, the weight that should be given to the pressure McDowell was under. DAC McDowell had responsibility for the entire operation to arrest those responsible for the attacks on 21 July. He lists the priorities he had identified at a meeting he chaired at about 18:15 on the evening of 21 July 2005. These included fully exploiting the scenes from that day’s attacks, seeking witnesses,
setting up an operations room, ensuring firearms, technical and surveillance support was available, reinforcing the intelligence unit which was in danger of being swamped, making arrangements for the custody of anybody arrested and briefing the relevant people. He had about two hours sleep between 02:00 and 04:00 when he returned to New Scotland Yard. DAC McDowell set a clear strategy for the operation at Scotia Road at about 04:55 on 22 July. He remained engaged until he had briefed AC Dick shortly after 07:00 when he states he returned to his office to deal with other pressing issues. There were then about two and a half hours until Mr de Menezes left his flat. He states there were six addresses of interest to the police by 09:30 that morning; two of which were the subject of a covert operation. There were organisational failings during this time but I think a disciplinary tribunal would take into account DAC McDowell’s overall responsibilities for the investigation into the 21 July attacks and would not be likely to conclude that the failings that occurred after he set his strategy were due to negligence on his part.

AC Dick

36. The family’s representatives list a number of failings they allege were made by AC Dick. AC Dick is the only person in this incident on whom a jury has come to a definite, unambiguous conclusion about their conduct. In the Health and Safety trial the jury exceptionally added a rider to their verdict that [then] Commander Dick had no "personal culpability" for Mr de Menezes’ death. This was not merely a statement she was ‘not guilty’ of any offence but an affirmative statement she was ‘innocent’. Henriques J noted “She now has that rider to rely on and in my judgement, rightly so”. I said on 12 December 2007 that "I cannot therefore foresee any circumstances in which new evidence might emerge which would cause any disciplinary tribunal to disregard the jury’s rider". I do not think there was any significant, material evidence presented at the inquest which would cause any disciplinary tribunal to disregard or to override the jury’s rider – endorsed by the trial judge - and find her guilty of any disciplinary offence.

DCI Purser - briefing

37. The family’s representatives submit that DCI Purser's briefing of the firearms team was unbalanced and he did not have sufficient control of events on the ground. I do not believe the inquest provided any material new evidence on this matter. It could be argued in hindsight that DCI Purser's briefing was unbalanced. However, 52 people had been killed in a terrorist attack just over two weeks before; there had been four failed attacks the day before; the operation that day was concerned with addresses known to be associated with those suspected of having carried out the previous day's attacks. As the
family’s representatives accept, DCI Purser did repeat the standard warning regarding the use of force – and this was in any case, something the officers would have been very familiar with. As the family’s representatives accept, DCI Purser was correct in pointing out that any device could have been concealed and detonated by a timer or remotely even if this was not common. I do not think DCI Purser could be held individually responsible for the lack of clarity about identification thresholds.

**DCI Purser and CI Esposito – Operational roles**

38. The family’s representatives are critical of both DCI Purser’s and CI Esposito’s performance once the operation was in progress. They cite a number of omissions by both officers and inaccuracies in the information that Esposito in particular provided to other officers. In my original letter of 21 December 2007, I stated that I believed the roles of Dick, Purser and Esposito were inextricably linked. In the case of all three officers, any judgements about their performance that are now made, four years after the event, must be tempered by the pressure, uncertainty and fast-moving nature of events at the time. For example, the family’s representatives criticise Esposito because they assert he “unjustifiably delayed in assessing the request from Ivor to carry out the stop of Mr de Menezes in the entrance hall of the station, and as a result did not advise DAC Dick to accept his request”. I do not think this is a reasonable criticism. The delay was not more than the time it took Mr de Menezes to walk from the bus to the station and given what was believed then about the position of the firearms teams, the threat Mr de Menezes posed and the relative capabilities of the firearms and surveillance teams, I do not believe this decision opens DI Esposito to a disciplinary charge. I do not see how any disciplinary tribunal could accept the Health and Safety trial jury’s rider “that no personal culpability” attached to [then] Commander Dick but conclude that such culpability did attach to Purser and Esposito.

'James'

39. The family’s representatives submit that James, the officer in charge of the Grey surveillance team, was negligent in not making clear to the command team the degree of doubt that existed about the identity of the suspect. The family’s representatives are correct to say that the degree of doubt that existed was not communicated clearly – and that explains mistakes that were made in other parts of the operation. However, I do not think James can be held personally responsible for those communication failures which were the result of both technical shortcomings, the speed and stress of the circumstances concerned, and the lack of an unambiguous communications process.
D/Su MacBrayne

40. I deal with D/Su MacBrayne in paragraph 25 above.

Nick Hardwick
Chair
IPCC

Friday 2 October 2009