



**Independent Review of Complaints Handling,
Investigations and Misconduct Issues in Relation to
Policing**

Preliminary Report

June 2019

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Foreword

In June 2018 Michael Matheson MSP, the then Cabinet Secretary for Justice, and the Lord Advocate, James Wolffe QC, invited me to conduct an independent review on complaints against the police in Scotland. The Review commenced in September 2018. Six years have passed since the creation of radical, new policing structures for Scotland. This is an appropriate juncture to review the effectiveness of the new systems for dealing with complaints against the police in Scotland, how well such complaints are investigated and the processes reviewed. This review also provides a significant opportunity to contribute to work on matters of profound public interest in a key area of human rights.

My mandate from the Ministers is to make recommendations that will help to strengthen public confidence in policing in Scotland. This first report makes recommendations that are preliminary. It will be followed next year by a wide-ranging report seeking to ensure that the future legislation, regulations, guidance and practice are fit for purpose. It will also examine in detail the structures of the individual organisations charged with dealing with complaints against the police. Despite the very different responsibilities and natural tensions between the four separate organisations involved in the process, it is crucial that relationships are professional, respectful, and focused on continuous improvement of policing in Scotland and securing the rights of those they serve.

In 2017 I was asked by the then Home Secretary to carry out a review of deaths in police custody in England and Wales. In my report of that Review¹ I observed that we ask a lot of those who police us in the 21st century. The need to interact and sometimes intervene in the lives and freedom of members of the public is a daily occurrence for the police. Such duties involve the power to arrest or intervene where criminal conduct is suspected or where the welfare or life of that individual or others is at serious risk, as well as in many other emergency settings. The powers that flow from those duties are immense in their potential impact on citizens and are regulated

¹ <https://www.gov.uk/government/publications/deaths-and-serious-incidents-in-police-custody>

by a complex framework of laws and regulations to prevent abuse or negligence in the exercise of those powers.

How those powers are exercised is also governed by the competence and integrity of the individual police officer as well as the wider police force within which he or she serves. In addition to law, training and guidance on how officers should approach encounters that may lead to detention, the community relies on the professionalism, wisdom, ethics and courage of police officers to approach incidents which may result in harm to the officers or others. These are often situations from which most in the community would wish to remove themselves immediately for their own personal safety. Where death or serious injury occurs for those detained by the police and, in other cases, where it is alleged the detention is unlawful, human rights considerations come into play and the state is obliged to carry out effective, timeous and independent investigations into those allegations. In those that result in death, the investigation must also be held in public and allow effective participation in the process by the next of kin of the deceased.

There is however a much wider set of complaints against the police which may involve other types of allegations of criminality. Serious complaints should also be the subject of independent investigation and consideration by a prosecution service independent of the police, others should be drawn to the attention of the prosecutor as soon as possible to allow the prosecutor to determine who should carry out the investigation. Further, members of the public who interact with the police may have complaints about the conduct or efficiency of officers or the quality of service they have received from the police service as an organisation. These matters represent the vast bulk of complaints and are principally directed at the quality of the service provided including rudeness, delay or ineffectiveness. These complaints are identified for a process which aims to be user friendly and capable of as swift and proportionate a response as possible by the police organisation itself, subject to independent supervision, audit and checks.

It can be seen therefore that the notion of a complaint against the police covers a very wide range of events, behaviours and conduct that can be very distinct from

each other in character. There may also be occasions however where a combination of different categories of complaint can arise from any given situation. Similarly, the character of the complaint is not always apparent to those first to receive the intimation and further information needs to be sought or investigation undertaken before decisions are made about the route the complaint should take.

This variation in the nature of, and appropriate response to complaints, presents significant challenges for the police and appropriate agencies charged with supervising or investigating such matters; more so for any member of the public wishing to make a complaint. Any understanding of the operation of the different types of complaint and the complex routes for response flowing from the complaint has been described in another, similar context as displaying “the complexity of a wiring system from the star ship Enterprise”² This is certainly also the case in Scotland and it was put to this Review in evidence that “the current arrangements for handling complaints about the police are overly complex, lack clarity and can be open to a range of different interpretations”.

The vast bulk of complaints should properly be investigated by the police service itself but it is critical that those processes are clear, transparent and trusted. Independent supervision and audit is also critical. In those cases rightly requiring independent investigation the police must also provide the fullest co-operation and assistance to allow timely and effective action. The effectiveness of the relations among and between each of the four organisations charged with these responsibilities in Scotland is also critical to success of the process. While the interaction of these organisations requires a degree of autonomy, and in respect of the COPFS and PIRC, independence from the police, independence does not equate to isolation, which undermines the independence of an organisation. In order for the independence of organisations to be maintained and enhanced, and for checks and balances to be effective, there must be regular and meaningful interaction at all levels of these agencies. There must also be mutual respect and an atmosphere of genuine co-operation.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/385911/An_Independent_Review_of_the_Police_Disciplinary_System_-_Report_-_Final....pdf

This preliminary report identifies and discusses a number of issues about these central matters for immediate consideration and others about which further comment is invited before the full report next year.

Elish Angiolini

21 June 2019

INTRODUCTION

Terms of Reference and purpose of the Independent Review

1. The Terms of Reference for this Independent Review, which commenced in September 2018, are set out in full at Annex A and state that the purpose of the Review is to:

- consider the current law and practice in relation to complaints handling, investigations and misconduct issues, as set out in relevant primary and secondary legislation;
- assess and report on the effectiveness of the current law and practice; and
- make recommendations to the Cabinet Secretary for Justice and the Lord Advocate for improvements to ensure the system is fair, transparent, accountable and proportionate, in order to strengthen public confidence in policing in Scotland.

2. A number of issues have been identified where clarification of the governing legislation is required in the light of application and practice. I will also be recommending consolidation of the legislation and substantive changes, some of which are detailed in the following chapters.

Initial call for evidence

3. On 13 December 2018 an initial call for evidence was published online and contributions invited by 13 March 2019. I am very grateful to all those individuals and organisations who took the time to offer their evidence. The process of gathering evidence has also included engagement with members of the public, serving and retired police officers, experts in relevant fields, police staff associations, unions, and a range of interested organisations. I have found these many and varied contributions and conversations to be thought-provoking and invaluable.

4. Since September last year I have undertaken over 80 interviews with individuals, held over 30 meetings and organised two focus groups. Further

engagement in Scotland, and elsewhere in the UK, is planned for the second phase of the Review. This engagement, and the call for evidence, has contributed to a substantial body of evidence together with research and reports that will be crucial in informing the ultimate recommendations.

5. The four principal organisations in the system responsible for dealing with complaints in Scotland are Police Scotland, the Scottish Police Authority (SPA), the Police Investigations and Review Commissioner (PIRC) and the Crown Office and Procurator Fiscal Service (COPFS). The Review will make recommendations in respect of the first three of these organisations. The Terms of Reference for this Review make it clear that “*Whilst the Review will encompass the investigation of criminal allegations against the police, it will not address the separate role of the Lord Advocate in investigating criminal complaints against the police*”. The role of COPFS does have a bearing on the operations of the other three principal players and the efficacy of the system as a whole. I have therefore also interviewed a number of officials from the Crown Office and Procurator Fiscal Service.

6. I am very grateful to members of those four organisations for their contributions to the Review, and to the Chair of the SPA, the Chief Constable, the Police Investigations and Review Commissioner and the Crown Agent for facilitating the participation of their colleagues in my evidence-gathering phase. I look forward to continuing to engage with these organisations and many others in the next phase of the Review.

Principles that underpin police complaints arrangements

7. The Terms of Reference incorporate principles that it is suggested should underpin and guide any complaints system: **fairness** to all those who make or are the subject of a complaint or allegation; essential **accountability** both of individual public servants and of those organisations which have any role in holding them and their parent organisation to account; **transparency**, which makes systems easy to understand and facilitates public, parliamentary and media scrutiny while respecting both the necessary confidentiality of any disciplinary process and the privacy of

individuals and their families; **proportionality** in the response and the resource committed to operating the systems and in the handling of individual cases to ensure best value for the public; **effectiveness and efficiency** in dealing with serious and sensitive matters expeditiously; and, critically, protecting the **human rights** of all the people involved.

8. The European Court of Human Rights has made clear the importance of the victim involvement principle. Meaningful victim involvement and constructive engagement with complainers is a fundamental requirement for a fair and effective system and the complainer should be consulted and kept informed of developments throughout the process. Participation in the investigation process through liaison with the investigating body and regular communication can protect the complainer's interests without prejudicing the interests of the officer complained against. As the Commissioner for Human Rights said in his 2009 opinion³, adherence to the victim involvement principle will "*enhance independence by ensuring that the complainant's interests are not marginalised by the interests of a powerful police service*".

9. The independence of the investigation of complaints against the police becomes increasingly critical as the seriousness of the complaint increases. The range of issues which may be encompassed in the phrase "Complaints against the police" is extraordinarily wide-ranging. A complaint may be made about the quality of police service provided by the police as an organisation. A complaint may relate to the alleged actions or inactions of an individual officer or several officers as well as inferring wider issues about the police as an organisation. The categories are not mutually exclusive. The need for independence and impartiality in the investigation process becomes more or less acute depending on the nature and the substance of the complaint being made. In certain circumstances there is a legal requirement for independence in the investigation. This includes allegations against the police where it can be inferred from the nature of the complaint that the individual's rights under Article 2 (Right to life – unlawful killing by State agents) or Article 3 (Prohibition

³ <https://rm.coe.int/opinion-of-the-commissioner-for-human-rights-thomas-hammarberg-concern/16806daa54>

of torture - inhuman or degrading treatment or punishment) or Article 5 (Right to liberty and security - unlawful detention) are engaged⁴.

10. There is, however, a vast raft of quality of service complaints which are most effectively and usefully dealt with by the police organisation itself in order to accelerate learning and improvements in the systems and services that the police are providing. In this context there is a need for a learning culture, as opposed to a punitive approach to complaints. This is seen as vital to organisations if they are to improve service and learn from failings.

11. *“From sanctions to solutions”*⁵ is a document published by the Police Complaints Commissioner for Scotland, Professor John McNeill in 2011 and it remains the statutory guidance for police complaints handling in Scotland. The Chapman Report⁶ was an Independent Review of the Police Disciplinary System in England and Wales published in 2014. The consistent philosophy that underpins both of these documents is that police services need to learn from complaints if they are to improve their service to the public and enhance public confidence in those services. An emphasis on finding solutions rather than focusing on an exclusively punitive approach to failures also characterises the approach they advocate.

Public expectations of police officers and the role of a constable

12. In the United Kingdom the power of the police to fulfil their functions and duties is dependent on public approval of their existence, actions and behaviour, and on their ability to secure and maintain public respect. This longstanding concept of policing by consent is reflected in Peel’s principles which stated that a relationship should be maintained with the public at all times that “gives reality to the historic tradition that the police are the public and the public are the police; the police being only members of the public who are paid to give full-time attention to duties which

⁴ [Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights, \(3rd edition\) \(p.779\)](#)

⁵ https://pirc.scot/media/1211/pccs_statutory_guidance_web.pdf

⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/385911/An_Independent_Review_of_the_Police_Disciplinary_System_-_Report_-_Final....pdf

are incumbent on every citizen in the interests of community welfare and existence”⁷. This fundamental principle is also inherent in the declaration made by every Scottish police officer:

“I, do solemnly, sincerely and truly declare and affirm that I will faithfully discharge the duties of the office of constable with fairness, integrity, diligence and impartiality, and that I will uphold fundamental human rights and accord equal respect to all people, according to law”.

13. We the public ask a huge amount of police officers; we give them powers over us including the power to deprive citizens of their liberty; we hold them to account often very publicly; we put them in positions of great vulnerability, both physically and constitutionally; we do not allow them to withdraw their labour; we rely on them when we are in trouble; and we ask them to do things on our behalf that we would never contemplate doing ourselves.

14. As I said in my 2017 report⁸ for the then Home Secretary: “the vast majority of police officers conduct themselves with integrity at all times, often during very challenging conditions. However, when things do go wrong, the public have a right to expect that the actions of police officers are properly investigated, and where there have been failings on the part of the police, that these will be dealt with appropriately”.

15. We expect police officers in the 21st century to be equipped with the skills to reduce, so far as possible, the threat of harm and danger to themselves and others arising from the perceived potential for violence. Emotional intelligence, integrity and empathy should be in play, along with physical competence. We expect them to be exemplary individuals, or as the Chapman Report⁹ put it: “The majority of police officers are good people. But they must be better than good – they must be ‘exemplary’.”

⁷ https://www.college.police.uk/What-we-do/Ethics/Ethics-home/Documents/Code_of_Ethics_ReadingList.pdf

⁸ Independent Review of Deaths and Serious Incidents in Police Custody, Home Office: <https://www.gov.uk/government/publications/deaths-and-serious-incidents-in-police-custody>

⁹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/385911/An_Independent_Review_of_the_Police_Disciplinary_System_-_Report_-_Final....pdf

16. Where it is alleged that police officers have fallen short of their obligations or breached the rights of members of the public, decisions within the system of investigations must be fair, transparent, swift and effective. Decisions not to instigate disciplinary action where complaints have been made against an officer, must be transparent in order to safeguard public confidence, and to give greater certainty to the police themselves. Officers need to know as soon as possible if they are to face disciplinary action but often they may be left in uncertainty over many months or years due to the length of investigations.

17. The Review has received evidence of delay of that kind at various points in the system and in different organisations and these issues are addressed in this report at paragraphs 270-272. Where such processes have been instigated any delays may leave officers in a state of anxiety due to the duration of the investigation. Where an officer has been suspended as a result of an allegation the impact on the officer and his or her family can be profound. It is also the case that those who have complained against the police suffer greatly from lengthy and extended investigations.

Public expectations of the complaints system

18. Police officers, as office-holders in a position of privilege and power, have a higher duty to account for their actions. The public have a legitimate expectation that they will be listened to, get fair treatment, be given clear explanations, receive timely responses and, where they have been wronged, sincere apologies and, if relevant, action. They also need to be assured that police officers and support staff will be held accountable for their actions where the complaint is upheld.

Further analysis and final report

19. This preliminary report raises a number of issues for early consideration and discussion that will be developed in the final report. These include issues that have been brought to my attention by organisations and individuals who have submitted evidence. The final report, to be published in the summer of 2020, and drawing on further evidence-gathering from Scotland and beyond, will contain an in-depth analysis of a range of other issues which are listed at paragraph 347.

20. The Independent Review Secretariat can be contacted here:

Independent Review of Complaints Handling, Investigations and Misconduct
Issues in relation to Policing
Secretariat
Room 1W-01
St Andrew's House
EDINBURGH
EH1 3DG
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<https://www.gov.scot/groups/independentpolicingreview/>

BACKGROUND

21. In 2012 the Scottish Parliament passed the Police and Fire Reform (Scotland) Act which, amongst other things, paved the way for the establishment of both a single Police Service of Scotland (Police Scotland) and a single Scottish Police Authority to which the Chief Constable became accountable. The statute also provided for the transformation of the office of Police Complaints Commissioner for Scotland (PCCS) into the office of Police Investigations and Review Commissioner (PIRC). In addition, it updated and expanded the functions of Her Majesty's Inspectorate of Constabulary in Scotland (HMICS) to include making "such other inquiries as they think fit about the state, efficiency and effectiveness of the Authority and the Police Service".

22. When the Act came into force the role of the Scottish Government changed. A new set of relationships was established between Scottish Ministers and the new public bodies. The SPA is accountable to Scottish Ministers; the Chief Constable is not. Scottish Ministers appoint the Chair and board members of the SPA, they provide SPA with grant in aid to fund their budget and Police Scotland's budget, they have a power of direction¹⁰ (as yet unused) over the SPA, and they approve the appointment of the Chief Constable. In relation to the PIRC, it is Scottish Ministers who appoint the Commissioner and directly fund the organisation.

23. The independent role of the Lord Advocate as head of the systems of prosecution and investigation of deaths in Scotland was not altered by police reform. It remains the case that the Lord Advocate (or the appropriate Procurator Fiscal) can direct the Chief Constable in the investigation of crime.

24. Prior to 1 April 2013 when Police Scotland and the SPA came into being, policing in Scotland was based on a structure of eight regional constabularies which were accountable to eight police authorities. Those eight authorities were part of local government structures and comprised elected members. The Scottish Crime and Drug Enforcement Agency had a specialist Scotland-wide remit and was accountable, for non-operational matters, to the Scottish Police Services Authority

¹⁰ <http://www.legislation.gov.uk/asp/2012/8/section/5>

and through them to Scottish Ministers. The Association of Chief Police Officers (Scotland), (ACPOS), which represented the views of the chief constables and developed national policing policy, ceased to exist after 2013.

25. For a jurisdiction the size of Scotland with a small population and a diverse geography, the prospect of improvement of efficiency and effectiveness represented the rationale for police reform. The Scottish Government described police reform as being about protecting and improving local services, creating more equal access to specialist support and national capacity, and strengthening the connection between police services and communities.

26. The draft legislation was put together rapidly, the passage of the Bill was completed by the Scottish Parliament in a relatively short period of time and the implementation period for the changes was compressed and challenging. In these first years of Police Scotland and the SPA a number of high-profile issues and problems have been the subject of intense media and public scrutiny and the atmosphere around the fledgling force appeared at times to be febrile.

27. In the area of complaints and investigations the turbulence of the post-reform period reached its peak in 2017 when two senior officers were investigated by the PIRC. It is important to have a resilient system that is driven by certain procedures and not short-term imperatives. It is important that the system is not shaped by a crisis and accompanying media interest in specific cases; but a system that looks to the long term and is grounded in sound practice, sensible procedures and co-operative working by those operating the essential checks and balances upon which it is built.

Legal and ethical framework

28. Prior to police reform in 2013 allegations of non-criminal misconduct were generally investigated within each constabulary, or in certain instances by another constabulary when another chief constable could be asked to provide an external investigation. This external investigation was particularly important in the case of

senior officer conduct matters. In the case of senior officers the regulations¹¹ specified that any investigating officer should be “a chief constable of a police force in Scotland other than the force of which the senior officer is a member”. In 2012 the Police and Fire Reform (Scotland) Act amended the Police, Public Order and Criminal Justice (Scotland) Act 2006 and provided for a new centralised approach to investigating significant matters. In addition to its central provisions mentioned above, the 2012 Act gave the Police Investigations and Review Commissioner (PIRC) wide-ranging powers to investigate serious incidents involving the police, senior officer conduct, and, when directed to do so by Crown Office, criminal allegations against police officers or deaths involving the police.

29. The PIRC is an office-holder and organisation independent of the police. It also has the responsibility for reviewing how Police Scotland handle complaints, auditing Police Scotland’s complaint handling arrangements and researching and identifying trends. This centralised approach was tested in the full glare of publicity in 2017 and 2018 when the PIRC carried out separate independent investigations into allegations and complaints against two of Police Scotland’s most senior officers¹².

30. Following commencement of the primary legislation in 2013, the Scottish Parliament approved a suite of regulations authorised by the Act governing the duties, performance and conduct of police officers. Unlike most other public servants, police officers’ conditions of service and many other related matters are set out in regulations made under the Act. These arrangements reflect the unique nature and historical development of the role of the constable. Police officers are Crown servants who hold the office of constable and are not employees in the normal sense. Some aspects of employment law apply to police officers but these have to be considered alongside the relevant police regulations which have primacy. Police constables generally do not have access to the Employment Tribunal (Employment Rights Act 1996, Section 200¹³), however, certain EU law provisions do apply to them, so the Employment Tribunal does have jurisdiction to

¹¹ <http://www.legislation.gov.uk/uksi/1999/1074/regulation/5/made>

¹² Police Scotland has 12 senior officers who hold the office of constable: one Chief Constable, three Deputy Chief Constables and eight Assistant Chief Constables.

¹³ <https://www.legislation.gov.uk/ukpga/1996/18/section/200>

consider certain discrimination type claims. This was clarified in a UK Supreme Court case¹⁴ in 2017 which confirmed a right of access to some constables to the Employment Tribunal to challenge decisions made by misconduct panels.

31. Prior to the police reforms of 2013, the Scotland Act 1998 and the Human Rights Act 1998 came into force requiring the Lord Advocate and the Scottish Ministers to act compatibly with Convention rights and in particular, in the current context, with Articles 2, 3, 5 and 8 of the European Convention on Human Rights.

32. It has been suggested by the Scottish Human Rights Commission that there should be explicit reference to Convention Rights in all appropriate Scottish legislation for the purpose of emphasising their importance although those rights are effectively implied by virtue of the Scotland Act 1998 and Human Rights Act 1998. The Human Rights Act requires provisions in legislation to be interpreted in a way that is compatible with ECHR. In the case of Acts of the Scottish Parliament, if that is not possible, for the provision to be struck down as outwith the competence of the Scottish Parliament or ultra vires the powers conferred in the Scotland Act.

33. The question of whether the Scottish Parliament wishes to make explicit provision to badge every Scottish statute with a specific acknowledgment that it has to be construed in this way is a matter for the Scottish Parliament to consider. I understand that at least four recent Acts of the Scottish Parliament have given some degree of recognition to international Human Rights treaties (these are the Children and Young People (Scotland) Act 2014; the Community Empowerment (Scotland) Act 2015; the Land Reform (Scotland) Act 2016; the Social Security (Scotland) Act 2018). There is however a drafting presumption that legislators will draft only for a substantive purpose. These other Acts deal with the different issue of how to give effect to rights in international treaties that have not been incorporated in Scots law in the same way as the European Convention on Human Rights.

34. Policing is undoubtedly an area in which Convention Rights are central to its purpose and, if Parliament considers it appropriate, any amendment to the primary legislation could reflect their importance by explicit reference to the Convention rights

¹⁴ <https://www.supremecourt.uk/cases/docs/uksc-2016-0041-judgment.pdf>

but this would be a significant departure from parliamentary drafting practice. Absence of such explicit reference does not imply that Convention Rights are not at the heart of the legislation.

35. The relevant provisions of primary and secondary legislation dealing specifically with complaints against the police are listed at Annex B. That statutory framework is supported by various sources of guidance and procedures.

36. It is evident from the work undertaken to date during the Review and from previous statements by principal stakeholders that the legislation is not as clear as it could be in respect of a number of important matters. These issues are dealt with in detail at Chapter 15.

37. The framework that sets out standards of police officer and staff behaviour includes the Convention Rights incorporated in the Human Rights Act 1998, Police Scotland's Code of Ethics and, in the case of all ranks of constable, statutory provisions including the Standards of Professional Behaviour¹⁵, as well as the existing relevant statutory and common law provisions of Scottish law. Police officers must comply with the law of Scotland and, when serving outwith Scotland, with those of other jurisdictions. (The Standards of Professional Behaviour are also reproduced at Annex C. These are replicated in the equivalent regulations for senior officers, the only difference being a reference to "other senior officers" rather than "other constables".)

¹⁵ The Police Service of Scotland (Conduct) Regulations 2014
<http://www.legislation.gov.uk/ssi/2014/68/schedule/1/made>

COMPLAINTS HANDLING PROCESS, INVESTIGATIONS AND MISCONDUCT

38. There are several distinct processes in Scotland for dealing with the behaviour and conduct of police officers and support staff.
39. The internal arrangements within Police Scotland cover welfare, performance, grievance, complaints and conduct. Complaints and conduct matters are managed and investigated by Police Scotland's Professional Standards Department (PSD) in liaison with local police divisions.
40. Complaints and conduct matters across the service as a whole are also overseen by the Scottish Police Authority (SPA). The SPA is not part of the police; it was created by the Scottish Parliament in 2013 in order to hold the Chief Constable to account and to create separation between Scottish Ministers and Police Scotland.
41. Non-criminal allegations of misconduct by officers of the rank of Assistant Chief Constable and above are dealt with by the Scottish Police Authority which can ask the independent Police Investigations and Review Commissioner (PIRC) to investigate the allegations and report back. If the allegation is of a criminal nature the SPA must report the matter to the Procurator Fiscal. The SPA's Complaints Handling Procedures¹⁶ state that "*where the SPA considers that it can reasonably be inferred that a senior officer may have committed a criminal offence it must refer the matter to the appropriate prosecutor*". Similarly, any allegation of a breach of Articles 2, 3 or 5 against a senior officer must be reported forthwith to the Procurator Fiscal for independent investigation by the Procurator Fiscal or by the PIRC under direction of the Lord Advocate.
42. Any member of the public can make a complaint to Police Scotland about the police service or about an individual officer and, if they are not satisfied with how their complaint was handled, they can ask the PIRC to review that. Complaints about senior officers will be referred to the SPA who, apart from the investigation by the PIRC, are responsible for the whole process.

¹⁶ <http://www.spa.police.uk/assets/128635/293595/complaint-handling-procedures>

43. Members of the public can report to Police Scotland any allegation of criminality by a member of the police service or, if they are not comfortable going to the police, can report the matter direct to the Crown Office and Procurator Fiscal Service (COPFS). COPFS is independent of the police and investigates allegations of criminal conduct.

44. If at any time a constable or employee of Police Scotland is engaged in alleged criminal behaviour on duty that should be reported to the Crown Office by Police Scotland, by the SPA in the case of senior officers, or by a member of the public. On-duty allegations are dealt with by the Crown Office's Criminal Allegations Against Police Division (CAAP-D); allegations of off-duty criminality are reported to the local Procurator Fiscal who may consult with CAAP-D if the allegations are relevant to the officer's capacity as a police officer. CAAP-D will independently consider all on-duty allegations and may carry out further inquiry themselves or instruct the PIRC or Police Scotland. In all cases the investigation will be under the direction and control of the Crown.

How do I make a complaint about the police?

45. Any member of the public who wants to make a complaint about the police can call Police Scotland on 101, or send them a letter or e-mail, or attend at a police station to complete a complaint form, or can complete the same form online¹⁷. Where the complaint relates to a senior officer (Assistant Chief Constable, Deputy Chief Constable or Chief Constable) they should contact (by letter, e-mail, phone or online) the Scottish Police Authority (SPA)¹⁸ which has statutory responsibilities for holding the Chief Constable to account and assessing the conduct of senior officers. The SPA also has the power to suspend or discipline them. Where, at the conclusion of the process a member of the public is not satisfied with the way in which Police Scotland or the SPA has handled their complaint they can ask the PIRC to carry out a complaint handling review (CHR). The PIRC is responsible for carrying out independent reviews of the way in which complaints about the police have been

¹⁷ Police Scotland's online complaints page and guide: <https://www.scotland.police.uk/about-us/police-scotland/complaints-about-the-police/how-to-make-a-complaint/>

¹⁸ SPA's complaints guide: <http://www.spa.police.uk/assets/128635/293595/guidetomakingspacomplaints>

handled by Police Scotland or the SPA. The PIRC is also responsible for ensuring that the SPA, Police Scotland, and other police bodies, have suitable systems in place for handling complaints.

46. As can be seen from the above, the provision which exists for members of the public to make complaints about the police in Scotland is complex. The Police Scotland website is challenging to navigate, the online complaints form is not sufficiently prominent and it is not always easy to understand where responsibilities lie or which avenue should be pursued. Depending on the circumstances of the incident and the nature of the complaint or allegation, there may be a role for Police Scotland, the SPA, COPFS or the PIRC on how the complaint should be taken forward. In the event that the complaint is of a highly sensitive nature, there is no indication of the route the individual may take. There is a need to simplify and streamline systems to make it as easy as possible for members of the public to navigate this opaque landscape and as easy as possible for them to access and understand information on how to make a complaint.

47. In terms of standards of customer service, complainers should reasonably expect to receive a sincere apology and any appropriate action when that is justified, know that they will be listened to respectfully and be given a clear and candid explanation of the causes of any failing or perceived failing. They are also entitled to have their telephone calls returned promptly, and be kept advised both of progress and of what steps will be taken to address the issue. The public have a legitimate expectation that they will receive fair treatment at all times; police officers and support staff also have a right to be treated fairly when being held accountable for their actions.

48. Every complaint is important to the complainer. The recipient of the complaint should be receptive and from the start the premise should be that the complaint is taken at face value, will be dealt with politely, with an open mind and from an impartial standpoint.

49. This Review’s remit encompasses a broad range of police and public behaviours. No one response covers all the potential circumstances that might generate complaints, require to be investigated, or be defined as misconduct. It is therefore self-evident that we need a nuanced and careful approach to dealing with them. The table below illustrates that diversity and the possible overlaps between categories of behaviour by officers or support staff while on duty.

Category	Example	Proportionate response
Public complaint	Rudeness by an on-duty officer	Investigation and resolution
HR issue	Unauthorised absence	Line management/HR action
Internal grievance	Unfair treatment by line manager	Bilateral discussion and resolution, which failing grievance procedure
Organisational failing	Insufficient local police presence	Consideration by local Divisional Commander or Force Executive
Individual failing	Failure to follow up a call	Remedial action by line manager and individual, and in some cases HR
Poor performance	Failure to complete paperwork	Line management action and individual improvement action
Misconduct	Failure to obey an instruction	Misconduct proceedings
Gross misconduct	Sexual impropriety on police premises	Misconduct proceedings or COPFS and the courts
Corruption	Abuse of position for personal gain	For COPFS and the courts
Criminal offence	Assault by an on-duty officer	For COPFS and the courts
Whistle-blowing	Internal reporting of a health and safety risk	Whistle-blowing procedure including statutory protections for reporter

50. It is impossible to classify precisely the vast range of possible circumstances and human behaviours and interactions in a simple tabular form because the real world is not like that. There are many overlaps between these categories; categorisations may change as evidence emerges or people change their views or recollections; criminality can encompass a number of the other categories; the distinction between human error and wrong-doing is not always clear; and individuals’ motivation to make a complaint can vary enormously.

51. Elsewhere in this report it is suggested that changes to increase public understanding of how to make a complaint about the police are implemented. There is also an imperative for Police Scotland to improve police and support staff understanding of their own internal complaints system, which matters belong within that system and which properly belong elsewhere. The evidence suggests that very often minor matters follow a complaints route when they should be resolved through discussion, mediation or management action and in some other instances conduct is wrongly categorised, for example as excessive force when the allegation would, if proved, amount to assault.

52. Policing by its very nature often involves situations of stress, conflict and disagreement. Whatever the circumstances, it is in the public interest that each instance is dealt with in a proportionate, timely and effective manner.

53. A large proportion of complaints by the public are about quality of service. This is something that is recognised and constantly addressed by Police Scotland. However, it can be difficult for the public to see this as a failure in the more abstract concept of service delivery, and they are more likely to focus on the individual frontline police officer and thus, unfairly complain about that individual officer rather than the apparatus above him or her that results in his or her inability to provide an adequate response.

SCOTTISH PARLIAMENT JUSTICE COMMITTEE POST-LEGISLATIVE SCRUTINY INQUIRY

54. On 25 March 2019 the Justice Committee of the Scottish Parliament published a report on its Post-Legislative Scrutiny Inquiry into the Police and Fire Reform (Scotland) Act 2012¹⁹.

55. This important report included a recommendation in relation to police complaints that:

“Police Scotland review its complaint handling processes to ensure that it is able to provide data on how it categorises and investigates complaints, and that the SPA review its oversight and audit processes to ensure that they can effectively determine whether Police Scotland’s complaints handling processes are being implemented correctly.”

56. I support this recommendation and have more to say on the subject of audit at paragraphs 289-302 of this report.

57. In autumn 2018 the Committee heard oral evidence, which generated a great deal of media coverage, suggesting mis-categorisation by Police Scotland of complaints, including allegations of assault by police officers being wrongly categorised as excessive force. The suggestions of mis-categorisation are a matter of serious concern. Allegations of excessive force or assault engage Article 3 of the European Convention on Human Rights and any early decision as to what the allegation of the conduct amounts to in this context should be taken independently of the police. It is crucial for Police Scotland to understand how such mis-categorisations of complaints come about and to make any necessary changes in practice to deliver the right and appropriate procedures, founded on clear and well understood definitions and training.

58. In November 2018 COPFS instructed Police Scotland to submit a sample of cases for review by its Criminal Allegations Against Police – Division (CAAP-D).

¹⁹ <https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2019/3/25/Report-on-post-legislative-scrutiny-of-the-Police-and-Fire-Reform--Scotland--Act-2012---The-Scottish-Fire-and-Rescue-Service/JS052019R10.pdf>

This allowed a retrospective review of a representative sample of complaint cases that have been characterised by Police Scotland as complaints of excessive force and/or unlawful detention. COPFS also instructed Police Scotland to report all cases to CAAP-D where they propose to categorise the complaint as one of excessive force.

59. COPFS have informed the Review that they are committed to working closely with the PIRC to identify further categories of cases that may be referred to them at an early stage for investigation and report.

60. With the agreement of the Crown Agent the Review was authorised to view the CAAP-D sample of allegations of excessive force. In the sample I examined, regional variations in Police Scotland's practice were evident. I believe that further audits should be undertaken and evidence gathered by PIRC to examine consistency and correctness of approach.

61. **Recommendation: Given the importance and sensitivity of such allegations it is recommended that all such allegations of excessive force should continue to be reported immediately by PSD to CAAP-D for instruction and investigation by the independent Procurator Fiscal or by PIRC on the directions of the Procurator Fiscal of CAAP-D.**

POLICE SCOTLAND

62. Police Scotland's stated purpose is to improve the safety and wellbeing of people, places and communities in Scotland; and its stated values are integrity, fairness and respect. It is the second-largest police service in the UK, comprising 13 local policing divisions, each headed by a local police commander at Chief Superintendent rank who is charged with ensuring that local policing in each area is responsive, accountable and tailored to meet local needs. Local policing is supported by a number of national specialist divisions and corporate services.

63. The Chief Constable is the head of the service and is supported by a Force Executive comprising three Deputy Chief Constables, eight Assistant Chief Constables, a Deputy Chief Officer and three Directors. The DCC for People and Professionalism has a wide-ranging portfolio that includes people and development, legal services, corporate communications, professional standards and complaints and conduct. The Professional Standards Department is headed by a Chief Superintendent who reports to the ACC for Professionalism and Assurance.

Professional Standards Department of Police Scotland

64. The Professional Standards Department (PSD) was established in April 2013 to improve efficiency and consolidate professional standards functions across Police Scotland. PSD receives complaints, records and assesses them, allocates them for local or specialist investigation, supports the determination process, records organisational and individual learning and notifies the complainers of the outcome. PSD's objectives are to:

- Support Police Scotland in the delivery of a service, compliant with the requisite code of ethical practice
- Ensure service delivery is achieved in line with the values of integrity, fairness, respect, professionalism and honesty
- Ensure public trust and confidence is secured in the service, which is provided by Police Scotland
- Reduce complaints through a programme of prevention and learning

- Address concerns pro-actively through organisational learning, training and promoting personal responsibility
- Robustly investigate complaints in relation to the service which is provided to the communities of Scotland

65. In 2016 PSD evolved into the current national functional model which is based in 3 regional hubs (east, north and west). The structure of PSD includes the functions of the Complaint Assessment and Resolution Unit (CARU), National Gateway Assessment Unit (NGAU), Investigations, Misconduct, Partnerships and Support, Vetting and the Anti-Corruption Unit (ACU).

66. The four superintendents for Misconduct, Support and Partnerships, Investigations West and Investigations North and East report to the Chief Superintendent Head of PSD. The geographical deployment of officers in hubs is designed to provide the ability to give independence to investigations if and when required within the context and supervision of a national department. Where required, PSD can call on Police Scotland's specialist units, such as Road Traffic, the National Rape Taskforce or Domestic Abuse Taskforce, to assist with complaints investigations.

67. Police Scotland received 5,919 complaints in 2018-19. The most common on-duty allegation categories are Irregularity in Procedure, Incivility and Excessive Force. Around 22% of complaints related to quality of service, for example lack of police presence or the time taken to respond to a call. Between 1 April 2018 and 28 February 2019 PSD assessed approximately 500 reports of alleged misconduct on the part of police officers. These ranged from minor matters through to those assessed as gross misconduct and relate to conduct both on and off duty. In 2018-19 21 misconduct hearings and 11 misconduct meetings took place.

68. As the central points for managing Police Scotland's complaints caseload, PSD's three regional Complaints Assessment and Resolution Units (CARUs) receive, assess and endeavour to resolve complaints direct with the complainer. Where they cannot be resolved in this way CARUs can allocate cases for local divisional action. CARUs can also investigate certain complaints themselves or, in

more serious cases or cases alleging criminality, pass them to the National Gateway Assessment Unit (NGAU). The NGAU can refer a case for specialist investigation or to the Anti-Corruption Unit (ACU). Complaints which allege criminal behaviour are reported to the CAAP-D Procurator Fiscal.

69. Four of the 13 local police divisions have small dedicated CAP (Complaints Against the Police) Units, which liaise closely with PSD but are not part of PSD. These units co-ordinate complaints to be followed up in their local division. They receive non-serious, non-criminal complaints which have been assessed by PSD's Complaints Assessment and Resolution Units (CARUs) for local divisional action. The units will then investigate those complaints themselves or allocate the complaint to other local sergeants or inspectors to investigate.

70. All complaints will be recorded by PSD on the Centurion database. PSD staff in CARU agree with the complainer the specifics of the complaint (known as Heads of Complaints) and assess the appropriate route for the complaint, and may allocate complaints to a local division to respond to if the matter is not suitable for resolution over the telephone. Where a complaint is initiated and resolved at a local police station, details of the complaint will be recorded and passed to PSD.

71. The PSD staffing profile consists predominantly of police officers at sergeant rank and above. The majority of complaints relate to the rank of constable. (Police Scotland has over 13,500 constables compared with around 2,400 sergeants.) Most roles within PSD require police officers with experience and understanding of policing and the law, but there may be scope to employ more non-police officer support staff in PSD with appropriate seniority, skills and level of knowledge of complaints handling. This is an option that Police Scotland may wish to ask HMICS to review.

72. The Review received evidence that PSD personnel did not receive training in mediation. For the relevant officers in PSD Police Scotland should consider the importance of providing all officers involved in frontline resolution with training in mediation and customer-handling. This would ensure a consistent approach that is

aligned with the objectives and the values of the organisation, including the ethos and values set out in the statutory guidance provided by the PIRC in its publication “*From sanctions to solutions*”²⁰.

Frontline resolution

73. The National Complaints Assessment and Resolution Units (CARUs) have teams in the North, East and West Hubs and these are the initial first points of contact in PSD with members of the public. The CARUs receive phone calls, letters, e-mails, online complaint forms and referrals from Police Scotland’s service centres. They assess the information and log the complaint. Where the CARU identifies potential criminality from the information provided, it will be passed to the PSD Investigations team to investigate the allegations which may subsequently be notified to COPFS.

74. Frontline resolution (FLR) is the process whereby complaints are resolved through a telephone conversation between the complainer and an officer in the CARU. Frontline resolution can also involve a local supervisor resolving a complaint. In 2018-19 39.8% of all complaints were resolved by PSD Frontline Resolution and 8.5% were resolved by Divisional Frontline Resolution. Police Scotland’s Standard Operating Procedure on Complaints²¹ makes clear that frontline resolution is only suitable for complaints which are ‘non-criminal, non-serious and non-complex’, and can be resolved without investigation other than familiarisation with the circumstances of the incident. Police Scotland provided a paper²² to the SPA Complaints and Conduct Committee which stated that in 2018-19 39.8% of complaints were frontline resolved by PSD through explanation. Frontline resolution is an appropriate and proportionate response where the matter is not serious, not complex and non-criminal, and where an apology, an explanation, or local action or assurance is sufficient remedy for the member of the public making the complaint.

²⁰ https://pirc.scot/media/1211/pccs_statutory_guidance_web.pdf

²¹ <https://www.scotland.police.uk/assets/pdf/151934/184779/complaints-about-the-police-sop>

²² <http://www.spa.police.uk/assets/126884/182288/552914/item7>

75. This vital aspect of complaints should however be subject to close and regular monitoring through internal and meaningful audits of decision-making. It is also critical that the process is subject to regular external audit by the PIRC and SPA. Although it is part of the statutory responsibility of the PIRC, no such audits of frontline resolution have been carried out by the PIRC since 2014; and while the SPA have carried out regular quarterly dip-sampling these exercises have until very recently been superficial and unsatisfactory. In the following sections consideration will be given to whether this function should remain with Police Scotland or, as has been suggested by the PIRC, transferred elsewhere outwith the police.

76. Another possible method of ensuring confidence in the use of FLR would be to provide PIRC with the capacity to carry out concurrent supervision of decision-making through remote access to Police Scotland's computer system known as Centurion, to ensure that it is used only in appropriate circumstances and is not subject to error or misuse to influence complainers in any way. The SPA is seeking direct access to Centurion for audit purposes and is developing a business case to that end.

Resolution letters

77. Where complaints cannot be resolved by frontline resolution or complainers remain dissatisfied, candid and frank written responses outlining the outcome are critical to maintaining public confidence; responses which are not clear or open have the potential to undermine the process. Evidence of the use of ambiguous language in correspondence was provided. For example, it is common practice for a final resolution letter to the complainer to feature the phrase "the matter has been resolved" in circumstances where the final determination of that complaint by Police Scotland was that the complaint was not justified. Describing that outcome as "resolved" might readily be interpreted by the complainer as a positive outcome when in fact what is recorded on the Centurion complaints database in such cases is "Not upheld". This practice could be viewed as disingenuous and I understand has now ceased.

78. The Working Group that I have proposed at paragraph 285 should have a role in reviewing the language used by Police Scotland in its correspondence with complainers, simplifying and clarifying the language used, with a view to increasing openness both with complainers around outcomes and with those who scrutinise Police Scotland. Furthermore, the group should oversee a review of the guidance on the categorisation of complaints published in 2011. That task should consider in particular use of “incivility”, “excessive force” and “unlawful detention”.

Triage

79. Triage in the context of police complaints is the process of assessing the information provided in order to decide how serious the matters are and how it should be dealt with. It is a critical stage in the whole system which takes place prior to any investigation and includes the initial decision on whether the complaint is assessed as a quality of service issue, poor individual performance, potential misconduct, or criminal in nature. That decision can have significant ramifications for everyone involved. The Review heard evidence that these processes and practice lack flexibility and that once a complaint starts down a particular route, it is seldom reconsidered when it becomes clear that it should be re-routed down a more appropriate and proportionate avenue. Complaints could escalate very quickly and disproportionately in an unhelpful way that was described as “*from flash to bang*”.

Malicious or vexatious complaints

80. Anyone who knowingly makes a false complaint or allegation about a police officer or member of police support staff may be prosecuted by the Procurator Fiscal for the offence of wasting police time or attempting to pervert the course of justice. (In recent years there have been two such cases arising out of complaints against the police where proceedings were taken by COPFS for wasting police time.) Such individuals may also be liable to civil action by the person complained about. In order to deal effectively with malicious complaints all the receiving organisations should have a policy that ensures consistency in handling, and helps to mitigate potential reputational damage from false allegations. Those policies should be consistent

and, in appropriate circumstances, the organisations should be able to confer about their lists of malicious or vexatious complainers.

81. In 2014 the Chapman report²³ recommended that the relevant legislation in England and Wales should be amended to include a provision to tackle vexatious complainers. The Scottish Government should also consider the case for legislation on this subject.

82. While Police Scotland's *Unacceptable, Persistent or Unreasonable Actions by Complainers* Standard Operating Procedure²⁴ makes clear that "All complainers have a right to be heard, understood and respected" it also sets out the process for restricting contact with complainers whose behaviour justifies that.

Anonymous complaints

83. There are a number of different reasons why people make anonymous complaints. It may be because they wish to protect their privacy, it may be that they fear some form of reprisal or it may be because their complaint is spurious or malicious. Arrangements for handling anonymous complaints should be set out in policy and, as with any other complaint, the starting point should be that the allegation should be treated with an open mind. Anonymous complaints are more difficult to investigate because the complainer cannot always be contacted or the allegation verified. The response needs to be proportionate based on an assessment of the reliability and credibility of the information provided and the individual complaining, as far as that is possible, as well as the seriousness of the allegations. Because of the very nature of anonymity these complaints require to be treated with caution because of the potential false, vexatious and defamatory nature of the allegation.

²³

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/385911/An_Independent_Review_of_the_Police_Disciplinary_System_-_Report_-_Final....pdf

²⁴ <https://www.scotland.police.uk/assets/pdf/151934/184779/unacceptable-actions-by-complainers-sop>

Early intervention

84. When any police officer is the subject of four complaints within a twelve-month period the recording of those complaints on the police Centurion database will, following investigation, trigger what is referred to by Police Scotland as “Early intervention”. At that point the complaints procedure²⁵ provides that the officer will be spoken to (up until that point the officer may not have been made aware that the complaints have been made if the complaints have been resolved through frontline resolution by PSD or their line manager). The purpose of the intervention is to allow the officer to act on the feedback, review and modify their behaviour as appropriate or undertake further training. These are exactly the right steps that should be considered but I believe that “Early intervention” that takes place at the end of a 12-month period is a misnomer and in some circumstances these steps should in fact be considered at a much earlier stage.

85. Although a line manager might want to observe the officer over a period prior to intervention, there can seldom be any justification for delaying feedback for as long as 12 months. Members of the public may reasonably expect an officer about whom they had complained would be advised of a complaint at an early stage to allow the officer to address his or her behaviour and change their approach. While acknowledging that some complaints can be spurious, malicious or vexatious, in general it is important and in the interests of transparency and service improvement that officers should be told about complaints against them as soon as practicable, unless there are clear operational or welfare reasons suggesting otherwise.

Independent investigation

86. The European Court of Human Rights has developed five principles²⁶ for the effective investigation of complaints against the police that engage Article 2 or 3 of the European Convention on Human Rights including ‘Independence’ meaning that there should not be institutional or hierarchical connections between the

²⁵ <https://www.scotland.police.uk/assets/pdf/151934/184779/complaints-about-the-police-sop>

²⁶ <https://rm.coe.int/opinion-of-the-commissioner-for-human-rights-thomas-hammarberg-concern/16806daa54>

investigators and the officer complained against and there should be practical independence. Those five principles are:

- **Independence:** there should not be institutional or hierarchical connections between the investigators and the officer complained against and there should be practical independence;
- **Adequacy:** the investigation should be capable of gathering evidence to determine whether police behaviour complained of was unlawful and to identify and punish those responsible;
- **Promptness:** the investigation should be conducted promptly and in an expeditious manner in order to maintain confidence in the rule of law;
- **Public scrutiny:** procedures and decision-making should be open and transparent in order to ensure accountability; and
- **Victim involvement:** the complainant should be involved in the complaints process in order to safeguard his or her legitimate interests.

87. This principle of independence was the crux of the Court of Session judgement in the Ruddy case²⁷ in 2013, and was also reflected by retired Major-General Chip Chapman who expressed the view in his 2014 Independent Review of the Police Disciplinary System in England and Wales that “investigations relating to Chief Officers must be independently conducted by the IPCC and not another external Home Department Police Force to ensure transparency”.

88. Where the allegation is one that relates to a death in police custody or at the hands of the state, the allegation could amount to a breach of Article 2 of the Convention Rights, assault or inhuman or degrading treatment could amount to a breach of Article 3 or where it relates to unlawful detention these matters must also be dealt with independently of the police. It is incumbent upon the police therefore that where a complaint is made that reasonably infers conduct of a criminal nature or a breach of the Convention rights under Articles 2, 3 and 5 these matters must be reported forthwith to the Procurator Fiscal, who is entirely independent of the police. In the case of a death in custody or following police contact the PIRC should also be informed. Likewise, any other allegations of criminality by any police officer should also be referred to the Procurator Fiscal for instruction or consideration.

²⁷ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=e3b186a6-8980-69d2-b500-ff0000d74aa7>

89. Independence is a fundamental principle that provides greater confidence to the public, and to any individual who is under investigation, confidence that the matter under investigation will be dealt with in an impartial way. Strengthening the independence of those charged with investigating complaints against the police where independence is a necessary component raises a number of questions. For example, the use of police officer line managers to investigate a non-criminal matter may not be impartial, either because the investigator knows the subject officer and already has a positive or negative knowledge or perception of them. On the other hand, if the matter is of a minor non-criminal nature such investigations may be best carried out by those who have responsibility for leading and managing that individual.

90. PSD officers carry out investigations of more serious non-criminal complaints and may therefore be perceived as the police investigating the police and lacking institutional independence. The question is one of degree. The Police Investigations and Review Commissioner is independent of the police but employs several very experienced former police officers as well as investigators from non-police backgrounds. While these people are no longer police officers, members of the public may nonetheless have concerns about the perception of impartiality of such investigations. (This has been a major issue for the Independent Office for Police Conduct (IOPC) in England and Wales; but two thirds of its staff in investigative roles now do not have any type of policing background.) On the other hand serving police officers have indicated in their evidence that former police officers within the PIRC may take an overly robust disposition to the investigations they carry out by being hard on police officers. This aspect of the PIRC's responsibilities is discussed further at paragraphs 227-231. The PIRC has a statutory duty to investigate the most serious matters, that is those referred to it by the Chief Constable or COPFS, but there is evidence that where the investigators are former police officers, members of the public have expressed views that this still feels as if the police are investigating the police.

91. A third-party investigatory function needs to be mature, proportionate and trusted; the level of actual or perceived independence is very often a critical determining factor in gaining or losing that trust. There are degrees of independence

and the more serious complaint or incident will always demand a higher degree of separation. Independence matters enormously and brings clear benefits but it is in the public interest that the systems in place also provide a proportionate response.

92. It is sensible to deal with high-volume, low-level cases within Police Scotland, but that has to be dependent on effective triage/assessment arrangements and robust internal and external audit. It requires regular and meaningful audit by Police Scotland, by SPA and most importantly by the PIRC. At present there is evidence that no such audits have been carried out by the PIRC since 2017 and those carried out by SPA have, until very recently, been superficial and inadequate.

93. If the triage system is working correctly it is a reasonable system to have in place to deal with complaints as soon as possible and to allow the organisation to learn from any deficiencies in the response or behaviours of officers or in their own organisation. It is imperative that such information regarding these complaints is used to allow the organisation to improve with a view to driving up its standards of performance and service. The recent creation of an Assistant Chief Constable post for Professionalism and Assurance in Police Scotland will ensure that the information gleaned from these reports is put to the greatest effect in ensuring that Police Scotland continuously improves its performance.

94. At the other end of the spectrum, in cases involving allegations of criminality against police officers, COPFS fulfils the role of the independent investigator and can also direct the PIRC or the police to investigate on its behalf. The most serious cases would be referred to the PIRC or retained within the COPFS.

95. Between the less serious and non-criminal allegations and those which are criminal as described above there is a range of incidents where the degree of independence demanded for investigation has been the subject of considerable discussion and disagreement between the PIRC and Police Scotland. This debate has centred on the discretion afforded to Police Scotland in how they investigate certain categories of complaint and the scope afforded to the Chief Constable in deciding which serious incidents he will refer to the PIRC for independent investigation. Where the Chief Constable is made aware of a serious incident which

may come into this category, he should as a matter of good practice consult the Commissioner before he or she decides whether to refer.

96. In her submissions to the Review the Police Investigations and Review Commissioner expressed concern that matters which appropriately should be independently investigated, may be routed away from an independent PIRC investigation, due to the level of discretion the police retain in dealing with complaints from members of the public. She proposed allowing all complaints by members of the public to be made to an independent body such as the PIRC; and she reiterated an earlier proposal that the minimum standard should be that within 48 hours of any allegation of criminality being made, an initial report should be submitted by the police to COPFS. The PIRC also considered that within 48 hours of receipt, COPFS should indicate whether or not the matter is to be referred to the PIRC for an independent investigation.

97. I comment on the first structural proposal later in this report at paragraph 224, but at this point I consider there is merit in the second proposal by the PIRC that COPFS in its role as independent investigator should have early (that is, within 48 hours) notification of allegations of criminality against on-duty police officers so that it can determine whether and how they should be investigated. It is for the Lord Advocate to consider whether he would wish to set a deadline for the Procurator Fiscal to provide directions to the PIRC. At paragraph 76 I also propose that the PIRC should be given direct and supervisory access to monitor the Centurion system to more readily facilitate early PIRC awareness of criminal allegations. This access should be followed by regular triage meetings between PIRC and Police Scotland to ensure consistency and accuracy of approach to decision-making.

98. In their evidence on criminal complaints against police officers, Police Scotland compare and contrast definitions related to how allegations of criminality by police officers are identified and dealt with at various stages within the overall complaints process. They highlight the importance of consistency of interpretation, and cite three relevant documents:

- “The Lord Advocate’s Guidelines on the Investigation of Complaints Against the Police published in 2002 however it is not clear if they are still considered ‘live’. They state: ‘Area Procurators Fiscal have a duty to investigate all complaints and allegations which are made against police officers where it is alleged that a crime may have been committed by a police officer or officers in the course of their duty’ ”
- “Regulation 9(1) of the Police Service of Scotland (Conduct) Regulations 2014, provides: ‘If the Deputy Chief Constable considers that it can reasonably be inferred that a constable may have committed a criminal offence, the Deputy Chief Constable must refer the matter to the appropriate prosecutor’ ”
- “Further to this, Section 33A(b)(i) of The Police, Public Order and Criminal Justice (Scotland) Act 2006 highlights it is a general function of the Commissioner: ‘where directed to do so by the appropriate prosecutor, to investigate any circumstance in which there is an indication that a person serving with the police may have committed an offence’ “

99. While acknowledging the different functions of the respective parties involved, this is an area where it would be appropriate to have consistency. In paragraph 276 I have suggested that COPFS may wish to consider whether the Lord Advocate’s Guidelines on the Investigation of Complaints Against the Police should be updated, and this issue could be considered in that context.

Grievance procedure

100. The ACAS Code of Practice on Disciplinary and Grievance Procedures²⁸ defines grievances as concerns, problems or complaints that employees raise with their employers. Within Police Scotland support staff and officers may have issues with other members of the service which they wish to register that may appropriately

²⁸ http://www.acas.org.uk/media/pdf/p/f/11287_CoP1_Disciplinary_Procedures_v1_Accessible.pdf

be categorised as grievances. The grievance Standard Operating Procedure²⁹ applies to all SPA staff, Police Scotland officers and support staff. It applies to all senior officers and where a grievance concerns the Chief Executive Officer of SPA or the Chief Constable the matter should be referred to the SPA Board.

101. There is a spectrum of behaviour that generates grievances and complaints and in some cases allegations about different levels or types of behaviour may be more serious and may amount to bullying or even criminal matters. There are procedures for the different categories, however there was evidence that suggested that matters were inappropriately escalated by the aggrieved parties to the complaints route when the matters in question should, appropriately and proportionately, have been dealt with under the grievance procedure. This precipitate escalation may reflect a cultural or structural reluctance to engage with the normal employment law grievance practices.

Policing culture

102. At one level Scotland's distinctive policing culture derives from the historical context within which Scottish policing has operated: in a separate jurisdiction and legal system, the unique role of the Lord Advocate, the ethos of the Scottish Police College where all new recruits complete their training and the traditions of the pre-reform forces, constabularies and agencies. At another level the culture of Police Scotland is shaped by the men and women who serve in it and their public service values, their sense of fairness, morality and solidarity, their common sense, and their desire to help the community, the victim, the bereaved and the vulnerable. Such values motivate them to become police officers or support staff in the first place. Many of the strengths of our policing organisations are down to that motivation to fulfil a unique and privileged role in society. Police Scotland's Code of Ethics, based on the values of fairness, integrity and respect supports that culture by setting very clear standards and expectations for all members of the service.

²⁹ SPA/Police Scotland Grievance Standard Operating Procedure, June 2018

103. Policing culture is not monolithic and there are variations across Scotland. The cultures of the eight regional forces still exert a strong influence, not least because the majority of the officers now serving in Police Scotland began their policing careers with those pre-reform forces.

104. The tone and culture of policing comes from the top: in the case of Police Scotland from the Chief Constable and his Force Executive, for the SPA it means the Chair, Chief Executive and Authority members and in the case of the PIRC it stems from the Commissioner and her senior management team. Those leaders are critical in creating a constructive atmosphere between Police Scotland, the SPA and the PIRC, and those relationships are one of the mechanisms which should facilitate the effective operation of the checks and balances within the oversight and scrutiny arrangements. Police Scotland is a young but now established national organisation with a stable leadership team. This is a good opportunity to reflect on the culture of the new service, address any long-standing issues and consider how everyone in the organisation can help to change that culture for the better.

105. A number of cultural factors affect how police officers and support staff engage with the public and interact with each other in the workplace. The police service has always been structured around a command and control hierarchy, strict discipline, adherence to lawful instructions from a senior rank and rules that are often set out in statute. As a result, the culture is formal, deferential and respectful of rank.

106. The broad-based pyramid structure of Police Scotland makes it likely that most constables will serve their police careers as constables, and the Review heard evidence that, for those who are promoted, the average time to reach the rank of sergeant is 15 years. The rank structure and lack of opportunities - Police Scotland has over 13,500 constables compared with around 2,400 sergeants - means that promotion at all ranks is highly competitive and can be a source of frustration that drives internal grievances and complaints. This has been compounded by the reduction in the number of sergeant posts, changes to police pensions and a higher likely retirement age. Resentment around promotion could also be exacerbated by factions, favouritism or litigiousness which existed historically within different parts of policing. There is an obligation on serving police officers and support staff to resolve

non-serious internal differences or disagreements in a professional and respectful way through discussion or mediation rather than by disproportionate use of formal systems.

107. Some evidence was provided of over-stretched line managers: sergeants facing little respite in carrying out their operational and line management responsibilities, and inspectors with increased burdens who were also asked to deal with complaints referred to them from the Complaints Assessment and Resolution Unit (CARU). Against the background of these pressures it was suggested to the Review in focus groups that there was a need to re-empower first and second line managers to take decisions rather than always escalate matters to a more senior rank. There was evidence of a tendency to put things on paper, formalise them and escalate them to the next level of process, when use of the Performance Regulations would represent a more appropriate response to officer behaviour based on learning and improvement rather than punishment. Over-reliance on the Conduct Regulations was seen by some contributors as disproportionate escalation.

108. In the focus group the Review was told that not all line managers understood the management of performance and how to use the Performance Regulations. There was a tendency to shy away from tackling difficult issues, giving negative feedback or telling constables that they were not ready for promotion, and a reluctance to consult HR professionals in Police Scotland to get advice on staffing issues.

109. In its evidence to the Review HMICS highlighted risk aversion on the part of frontline officers and supervisors caused by the complaints process, and the stress caused to subject officers:

“Unfortunately, the complaints process tends to take a long time, and officers can become risk averse and avoid taking bold but correct actions for fear of registering a complaint. Officers who are subject to complaint can find this an extremely stressful experience and this can have a significant impact on their career and wellbeing especially if they are placed on restricted duties until the investigation is complete.”

“...officers’ perceptions of complaints have started to influence operational behaviour and indeed the culture of the force. Officers have told us that supervisors have become more risk averse particularly when dealing with situations involving risk to the public, such as missing person investigations. There is a perceived concern amongst officers that if an officer makes a mistake then a subsequent PIRC investigation will find fault with individual officers’ actions...”

110. Police Scotland rightly aspires to be a learning culture, rather than a blame culture, and that is the underlying ethos of *From sanctions to solutions*³⁰, but the systems in place, and more importantly the way that they are operated, does not always encourage that approach. There is evidence that police officers feel exposed, stressed, and fearful of making a mistake that could result in disciplinary action or, at the extreme end of the spectrum, losing their job.

111. Being a police officer is a stressful profession that puts individuals into pressurised situations where they may be dealing on a daily basis with crime, violence, vulnerable people, victims, deaths and the bereaved. There is an obligation on the service and the other agencies involved to ensure that the conduct and complaints arrangements are fair, so that those at the frontline can enforce the law and take decisions in the best interests of the public with whom they are dealing, without fear of an unjustified complaint against them or their behaviour being distorted by perceptions of unfairness or excessive delay in the system.

Post-incident conferral

112. Conferral happens when police officers or support staff who may have been involved in a serious incident come together at the conclusion of the incident to recover from the trauma of the incident and talk with each other. That is an entirely natural human response but where it happens it has a number of potential implications for the justice process and, in this context, for the complaints process. Post-incident procedures designed to manage the aftermath of a serious incident are

³⁰ https://pirc.scot/media/1211/pccs_statutory_guidance_web.pdf

critical because they mitigate the risk of evidence being contaminated, including the risk that in talking with each other officers who are witnesses might unknowingly influence the views of their colleagues. The perception that such interactions have happened can also have a detrimental impact on public confidence generally and the attitude and involvement of victims, families and other witnesses.

113. I have previously made clear my position on post-incident conferral by police officers in my 2017 report³¹ for the then Home Secretary. This is a particularly important issue where police officers are involved in a major or fatal incident which may be traumatic and in which they will undoubtedly be required to provide evidence. In the case of a death in custody or following police custody, or in certain other circumstances, unless there are reasonable grounds to suspect criminal activity about the actions of an officer or officers, each individual officer should be interviewed as a witness as soon as practicable after the event and without reference to or conferral with other police officers or other witnesses. If during the course of a witness statement the status of the officer changes and the investigating officer is forming a suspicion about the conduct of the police officer being interviewed, the police officer should be cautioned immediately and the interview should become one subject to the usual rights of any individual suspected of criminal conduct.

114. Early separation of officers, other than in pressing operational circumstances, is the best way to ensure non-conferral in practice, give transparency to the process and preserve the integrity of each individual's evidence. This is in the interests of both the individual police officers themselves and the public interest in order to safeguard public confidence in the integrity of their evidence. In any group of people there is a danger of group-think that could contaminate or colour evidence inadvertently or otherwise. The interests of one officer present in a group may also be quite distinct from, and in conflict with, another's interests.

115. Where an officer considers, or is advised, that he or she should have legal advice or representation immediately after a serious incident it is important to be

³¹ Independent Review of Deaths and Serious Incidents in Police Custody, Home Office:
<https://www.gov.uk/government/publications/deaths-and-serious-incidents-in-police-custody>

aware that the individual officers may have conflicting or different interests from each other.

116. Following a death or serious incident police officers may be traumatised and need support in the immediate aftermath. They should have their welfare needs addressed and have support from colleagues as necessary, including their staff association, but support should not, so far as possible, come from colleagues who were also witnesses of fact at that critical point in time.

117. This approach will help to preserve the integrity of evidence, protect the rights of all those involved and the welfare of the police officers. In my report to the then Home Secretary³² I recommended that “other than for pressing operational reasons, police officers involved in a death in custody or serious incident, whether as principal officers or witnesses to the incident should not confer or speak to each other following that incident and prior to producing their initial accounts and statements on any matter concerning their individual recollections of the incident, even about seemingly minor details. As with civilian witnesses, all statements should be the honestly held recollection of the individual officer”.

The obligation of a constable to assist the investigation of a death or a serious incident

118. Evidence to the Review has raised questions, in the context of the investigation of serious complaints, about the importance of securing evidence speedily, for example the retention period for CCTV evidence can be limited to as short a period as 28 days. It has also raised issues about delays in witness interviews and delays in the provision of operational statements or witness statements.

119. A constable’s duties are set out in the 2012 Act, in the declaration³³ that each constable makes on taking up office, in Police Scotland’s Code of Ethics, and in the

³² <https://www.gov.uk/government/publications/deaths-and-serious-incidents-in-police-custody>

³³ The constable’s declaration is prescribed in Section 10 of the Police and Fire Reform (Scotland) Act 2012 <http://www.legislation.gov.uk/asp/2012/8/section/10>

statutory Standards of Professional Behaviour, all of which to some extent express or imply a statutory, ethical or procedural duty on that person to assist in the investigation of a serious incident and uphold Convention rights.

120. In my 2017 report³⁴ on deaths and serious incidents in custody in England and Wales, I noted that when police officers are questioned, “there should be a duty of candour for the police to answer all questions based on their honestly held recollection of events”. It could be argued that duty of candour is an obligation under Article 2 of the European Convention on Human Rights which requires parties to positively assist the state in conducting thorough and effective investigations.

121. The Review has begun to consider whether the current position is sufficiently clear to police officers, and to the public who have a legitimate expectation that police officers will give every assistance after a serious incident. That assumption of co-operation should be put beyond doubt in the primary legislation, including in the wording of the constable’s declaration. Where such an incident is being investigated by the PIRC, the investigators should also have a power, where it is necessary and proportionate, to compel police officers to attend within a reasonable timescale for interview.

122. In certain incidents, different and sometimes competing Human Rights obligations of the state may be engaged. The fundamental Article 6 right of a suspect to remain silent outweighs the Article 2 obligation of the state to provide an effective investigation in the event of a death at the hands of the state or in an investigation of an alleged breach of Articles 3 (inhuman or degrading treatment) or Article 5 (unlawful detention). Other than in those very restricted circumstances any officer who is a witness to a serious incident should be under an obligation to assist.

123. It has been suggested to me that, subject to the fundamental right to silence or privilege against self-incrimination of a suspect under Article 6, consideration should be given to the creation of a duty of candour for officers in Scotland in the execution of their duty. In the meantime I would welcome specific evidence and

³⁴ <https://www.gov.uk/government/publications/deaths-and-serious-incidents-in-police-custody>

views from interested organisations and individuals on this particular matter to help inform my final report.

124. My starting point is that those in the office of constable and holding the powers of that office have a higher duty than others to account for their actions and record what they did or saw in the execution of their duties.

Officer and support staff welfare

125. As this report has acknowledged earlier, police officers do a difficult and often dangerous job in Scottish society. The issue of how they are supported in that role and their welfare needs is one that will form an important part of the next phase of evidence-gathering. The final report will look in detail at the impacts that complaints can have on officers and their families, including impacts on mental health and the effects of trauma, confrontation and anger. It will also examine the existing welfare provision.

126. There has been some disparity in evidence gathered on this subject. On the one hand evidence of what is on offer in terms of welfare provision and other support mechanisms suggests provision is adequate; and on the other hand officers describe difficulties in accessing what is available for any meaningful length of time. The evidence also suggests a lack of recognition that some behaviours may be attributable to the environment in which police officers operate and a need for underlying causes of those behaviours to be identified and addressed at the earliest opportunity before they manifest themselves in performance or conduct issues.

127. The Review also noted the recent Court of Session judgement³⁵ by Lord Woolman in respect of ill-health retirement by police officers in which he said: “There is an unbridged gap between the alleged involvement of the officers in a high profile incident and the conclusion that it was in the public interest that they should be prevented from retiring.”

³⁵ <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019csoh35.pdf?sfvrsn=0>

Capturing best evidence and reducing complaints

128. The availability of a recorded account of an incident provides significant assistance in investigating complaints against the police or wider investigations. Over the last few decades the availability of such evidence has increased significantly and has been of immense assistance in many investigations and subsequent trials.

129. In some areas of the public services, body-worn cameras have been introduced in order to facilitate transparency, trust within the community and to assist courts when addressing the actions of officers.

130. The arguments in favour of the use of body-worn cameras include keeping the police accountable by providing evidence and corroboration; protecting officers from assaults or false accusation because the action of recording moderates the behaviour of all parties; reducing time and money spent on investigating complaints; it also reduces time spent in court proceedings and increases the likelihood of guilty pleas.

131. The risks associated with the use of body-worn cameras include violation of the privacy of third parties who are not the subject of interaction; and insufficient capacity of IT systems to store and transmit footage. In order to mitigate those risks, clear and consistent guidelines and Codes of Practice would be necessary to govern operational practice and manage the data in accordance with the relevant legislation.

132. Scottish Police Federation representatives gave evidence that where all systems were in place in COPFS and Police Scotland, body-worn video could be an asset to the service. However, they considered that the issue of funding was one that has to be addressed.

133. Police Scotland have a long-term aim in Policing 2026³⁶, their 10-year strategy document, to expand the use of body-worn cameras, but this objective will only be a realistic prospect when financial and structural constraints are addressed.

³⁶ <https://www.scotland.police.uk/assets/pdf/138327/386688/policing-2026-strategy.pdf>

The associated Implementation Plan³⁷ states that Police Scotland will, “Undertake body-worn video public consultation to inform appropriate implementation and use”.

134. There is a range of evidence about the pros and cons of body-worn video but relatively little that deals specifically with the impact on complaints. Research carried out with the Tulsa Police Department in the USA suggests that the benefits in relation to gathering evidence on complaints could be significant: “We have found the body-worn camera system to be very beneficial thus far as the cameras have not only provided transparency, but provided valuable video evidence in investigations.” (Police Chief Chuck Jordan, Tulsa Police Department). A 2014 study³⁸ in the United States found that the likelihood of force being used in control conditions, that is, without cameras, was roughly twice that when cameras were in use; and analysis of use-of-force and complaints data also supported this result with the number of complaints filed against officers dropping from 0.7 complaints per 1,000 contacts to 0.07 per 1,000 contacts.

135. The potential benefits of body-worn video cameras in reducing and resolving complaints against police officers support the aspiration of Police Scotland to make more use of body-worn cameras. Subject to the supporting infrastructure being in place, cameras should be rolled out nationally to all police officers working in the custody environment or in a public-facing role.

Support and liaison for members of the public

136. Victim involvement, that is, allowing the complainer to be involved in the complaints process in order to safeguard his or her legitimate interests, is one of the five principles that the European Court of Human Rights has developed for the effective investigation of complaints against the police that engage Article 2 or 3 of the European Convention on Human Rights.

³⁷ <https://www.scotland.police.uk/assets/pdf/138327/386688/policing-2026-3-year-programme-2017-2020>

³⁸ [Ariel B, Farrar W, Sutherland A \(2014\) The Effect of Police Body-Worn Cameras on Use of Force and Citizens' Complaints Against the Police: A Randomized Controlled Trial, Journal of Quantitative Criminology, September 2015, Volume 31, Issue 3](#)

137. In all complaints it is vital that individuals submitting a complaint to the police are supported throughout the process. The level of support should be proportionate to the seriousness of the complaint and the vulnerability of the complainer. The principal organisations provide varying degrees of support to members of the public whether they be complainers, victims of crime, witnesses or relatives. For example, Police Scotland and the PIRC employ specially trained Family Liaison Officers, and COPFS have a Victim Information and Advice service (VIA) with offices around Scotland. All three organisations also give information on a variety of appropriate support and advocacy groups on their websites.

138. In the final report this important element of the systems in place will be explored and addressed.

Recommendations in relation to Police Scotland

139. Recommendation: Police Scotland should review the service-wide capability of its line managers to line manage effectively, including the adequacy of training and mechanisms of support for line managers.

140. Recommendation: Police Scotland should consider the scope for employing more non-police officer support staff in PSD with appropriate seniority, skills and level of knowledge of complaints handling. This is an option that Police Scotland may wish to ask HMICS to review.

141. Recommendation: Police Scotland should scrutinise complaints thoroughly on receipt so as to ensure that grievance matters that would in any other walk of life be treated in an HR context are not artificially elevated and dealt with as conduct matters.

142. Recommendation: Frontline resolution of complaints should be subject to close and regular monitoring through regular, meaningful internal and external audits, and monitoring of decision-making.

143. Recommendation: Police Scotland should adjust its practice in respect of “Early intervention”. Officers should be made aware that they are the subject of a complaint against them at the earliest practicable point, provided that such early disclosure would not prejudice any investigation of a complaint.

144. Recommendation: PIRC should be given appropriate access to the Police Scotland Centurion system for the purposes of contemporaneous audit of complaints and to help facilitate early PIRC awareness of criminal allegations.

145. Recommendation: Police Scotland should simplify and streamline systems to make it as straightforward as possible for members of the public to

navigate this rather opaque landscape and as easy as possible for them to access and understand information on how to make a complaint. In particular the online complaints form on the Police Scotland website should be made more prominent.

146. Recommendation: To encourage appropriate use of mediation and grievance procedures Police Scotland should raise awareness and understanding amongst all members of the service of their own internal systems and which matters belong where in order to ensure a proportionate response.

147. Recommendation: Police Scotland should consider the importance of providing all officers involved in frontline resolution with training in mediation and customer handling.

148. Recommendation: Police Scotland should accelerate its plans to expand the use of body-worn video technology.

149. Recommendation: Police Scotland is a young but now established national organisation with a stable leadership team. This is a good opportunity to reflect on the culture of the new service, address any long-standing issues and consider how everyone in the organisation can help to change that culture for the better.

150. Recommendation: The Scottish Government should consider the case for amending the legislation to include a provision to deal with vexatious complainers.

151. Recommendation: Subject to the fundamental right to silence or privilege against self-incrimination of a suspect under Article 6 of the Convention Rights, police officers should give every assistance after a serious incident. That assumption of co-operation should be put beyond doubt in the primary legislation, including in the wording of the constable's declaration.

152. Recommendation: Where a serious incident is being investigated by the PIRC, the investigators should also have a power, where it is necessary and proportionate, to compel police officers to attend within a reasonable timescale for interview.

SCOTTISH POLICE AUTHORITY

153. The Scottish Police Authority is a creature of statute established in 2013 to support, oversee and hold Police Scotland to account. It is a separate entity from Police Scotland but does have responsibility for recruiting senior police officers. The SPA is governed by a Board of up to 15 non-executive public appointees, appointed by Scottish Ministers. The Board is supported by an Executive team which consists currently of approximately 40 staff. The civilian Chair of the Authority is accountable to Scottish Ministers.

154. The SPA was established by the Police and Fire Reform (Scotland) Act 2012. The Act sets out the five key functions of the authority:

- to maintain the Police Service
- to promote the policing principles
- to promote and support continuous improvement in the policing of Scotland
- to keep under review the policing of Scotland
- to hold the Chief Constable to account for the policing of Scotland

155. The SPA also has a number of statutory responsibilities in relation to “relevant complaints” under Section 41 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 as amended. Specifically, the handling of complaints about:

- the SPA itself;
- staff members of the SPA; and
- senior police officers of the rank of Assistant Chief Constable, Deputy Chief Constable and Chief Constable.

156. The SPA also performs functions under the Police Service of Scotland (Senior Officers) (Conduct) Regulations 2013 (the 2013 Regulations). These include the preliminary assessment of “misconduct allegations” about senior officers, the appointment of panels to determine misconduct hearings, and the determination of appeals against the decisions of those panels.

157. The Act requires the SPA to “keep itself informed as to the manner in which relevant complaints are dealt with by the Chief Constable, with a view to satisfying itself that the arrangements maintained by the Chief Constable for handling relevant complaints are suitable” (Section 60 of the 2012 Act). The SPA does this through:

- dip-sampling complaints received by Police Scotland;
- receiving automatic notification of complaints made against officers and staff of the Anti-Corruption Unit for further independent review;
- working with the PIRC on reviewing audits; and
- receiving and reviewing reports into Police Scotland’s own complaints handling performance.

158. The evidence given to the Review suggests that the relationship described at the third bullet above is not working as it might and there should be more effective co-operation and interaction between the SPA and PIRC in their oversight and review of Police Scotland’s complaint handling arrangements.

159. The SPA is the legal employer of all support staff within Police Scotland and the SPA itself (including SPA Forensic Services). The Authority carries out some “employer” functions in respect of senior officers, although like all other constables they are office-holders rather than employees. Unlike other constables, senior officers have a fixed tenure agreed on appointment which may be extended by the Authority. Those functions include recruitment and selection, appointment, termination of contract, suspension and, in the case of the Chief Constable, grievance and leave of absence.

160. Although the SPA is the legal employer of all support staff in the Authority, Police Scotland and SPA Forensic Services, it only has a small HR capacity and relies on Police Scotland HR staff to provide the bulk of HR services. The Head of HR Governance in the SPA is able to draw on advice from the Director of People in Police Scotland. There is evidence that that imbalance in capacity has affected the SPA’s ability to deal with some complex and challenging employment issues, and this has been a contributory factor to the tendency, also seen within Police Scotland, to escalate to conduct procedures issues which are truly HR matters.

161. Complaints against senior officers (Assistant Chief Constable and above) are not dealt with by Police Scotland but by the SPA to whom the Chief Constable is accountable, and which has the statutory duty to deal with complaints against all senior officers.

162. Complaints against senior officers are not uncommon. Great scrutiny and vulnerability come with such authority and complaints can stem from public dissatisfaction with the actions or inaction on part of the organisation, or of the office-holder or from an internal source such as an aggrieved subordinate or an anonymous source. There is also ample scope for those engaged in organised crime to create disruption through malicious anonymous complaints against senior officers. Processes for dealing with complaints against senior officers must therefore be robust, timely and fair.

163. In its evidence to the Review, the SPA noted that “almost as many complaints and conduct cases assessed by the SPA relate to complaints from within the police service (46%) as come from members of the public (54%)”.

SPA’s governance and decision-making in relation to complaints

164. When the SPA was established in April 2013, a complaints handling team was set up to support the Authority’s statutory functions and to put in place written complaints handling procedures. The Complaints and Conduct Committee, comprising members of the Board of the SPA, oversaw this work, commissioned dip-sampling of Police Scotland’s complaint handling and took steps to develop accessibility for complainers. Complaints cases were presented to the Committee, which generally met on a quarterly basis, for discussion and decision based on the recommendations of the SPA Complaints Team.

165. At the end of 2016, the SPA Complaints and Conduct Committee was stood down following publication of a Governance Review of the SPA carried out by its then Chair. As a result, decisions in relation to complaints cases were delegated to the Chief Executive, with full SPA Board involvement on an *ad hoc* basis.

166. The SPA experienced a challenging, unstable and disruptive period between 2013 and 2017 with numerous changes of Chair and Chief Executive, while facing hostile media scrutiny and dealing with a high level of complaints against senior officers.

167. In evidence to the Review, the SPA advised that following the appointment of the current Chair in December 2017, a number of improvements to their handling of complaints were set in train including:

- the re-establishment of the Complaints and Conduct Committee in January 2018;
- the introduction of a lead Director to support the Complaints and Conduct Committee's activities and requirements, and a requirement for all Committee decisions to be supported by professional written advice and legal opinion when required, for all decisions to be properly recorded; and
- introduction of quarterly meetings between senior officials within SPA, Police Scotland, COPFS and PIRC (known as the Quad meeting) to identify and address any strategic or system-wide issues.

168. The SPA's evidence also confirmed that a number of other improvement actions have been implemented to strengthen their complaint handling procedures:

- additional training undertaken by the SPA Complaints Team;
- a joint working group with Police Scotland to review and improve the complaint handling procedures across all complaints received by the SPA, including misconduct allegations, 'relevant complaints', internal grievance matters and whistle-blowing;
- Director-level triaging and supervision of complaints on at least a monthly basis;
- a new reporting format to the Committee to allow for more streamlined case assessment; and
- a substantial reduction in the number of complaints awaiting determination.

169. The issue of what amounts to a ‘relevant complaint’ has been the subject of some confusion and is dealt with at Chapter 16.

Preliminary assessment of alleged misconduct

170. For conduct on or after 1 April 2013, Regulation 8³⁹ of the Police Service of Scotland (Senior Officers) (Conduct) Regulations 2013 requires the SPA to undertake a ‘preliminary assessment’ where a misconduct allegation about an officer of Assistant Chief Constable or above comes to its attention.

171. The Regulations do not otherwise specify what action should be taken in support of that preliminary assessment. Nor is it clear whether the assessment relates simply to whether what has been received in writing libels a relevant complaint or a more active process of evaluating the substance of the complaint through preliminary enquiries. An assessment is not the same as an investigation but it is obvious that the term has created uncertainty and insecurity as to just what steps the SPA can legitimately take without trespassing into the territory more properly occupied by the jurisdiction of the PIRC. This gap in the drafting can lead to problematic differences in interpretation and expectation – between and within supervisory organisations, as well as amongst complainers and subject officers – as to who does what, when, and why. (The Oxford English Dictionary definition of *preliminary* is initial, and *assessment* is defined as evaluation, judgement, or appraisal, all of which are qualitative actions.)

172. Against this background, it is perhaps not entirely surprising that the PIRC’s 2017 Audit of SPA Complaints⁴⁰ noted that, between 1 April 2015 and 31 March 2017, having “received 14 complaints about senior officers that should, in the view of the audit, have been progressed as potential misconduct allegations against senior officers“ and “in 8 misconduct allegations, the SPA’s Complaints Department did not carry out sufficient enquiries to establish details of the misconduct allegations to enable or assist the SPA with a preliminary assessment”.

³⁹ <http://www.legislation.gov.uk/ssi/2013/62/regulation/8/made>

⁴⁰ <https://pirc.scot/media/4447/spa-audit-report-2017.pdf>

173. Evidence was provided about the challenges that the SPA faces in discharging effectively the role currently assigned to it in relation to the preliminary assessment of misconduct allegations against senior officers. The challenges are in:

1) identifying at the outset whether any particular referral constitutes a 'relevant complaint' (as per the 2006 Act's definition⁴¹), or a misconduct allegation, or both, or neither (such an identification is required early on, in order to determine which further process to follow); and

2) in identifying the scope of the information that the SPA can properly take into account, and the sources from which that information can properly be obtained, at this 'preliminary' stage – too little and there may be a risk of ill-judged or premature decisions, too much and there may be a risk of pre-empting or prejudicing subsequent investigations.

174. Further challenges stem potentially from the perceived familiarity – for good or ill – of the SPA members and senior officials with the senior officers within its remit, and the relatively limited resources of the SPA Complaints and Conduct Team, both of which I comment on elsewhere in this report.

175. The challenges, significant in themselves, appear to be exacerbated by the SPA's sense of being overshadowed in some measure by the knowledge that their decisions are subject to review and audit by PIRC and concern that the PIRC's yardstick is not necessarily clear and fully understood.

176. In her evidence to this Review Her Majesty's Chief Inspector of Constabulary in Scotland said that:

"The conduct regulations for senior officers are silent on how the SPA will undertake its preliminary assessment of a misconduct allegation and there is no provision to appoint an investigator or commence an investigation until

⁴¹ <http://www.legislation.gov.uk/asp/2006/10/section/34>

after the preliminary assessment has been made. HMICS believes clarity is required on the activity that constitutes “preliminary assessment”. “

“HMICS does not believe that the SPA currently has the skills, experience or knowledge to undertake the assessment role for chief officer complaints to the standard required. A review of the SPA’s capability in this area is required and other options, such as immediate referral to the PIRC, should be considered.”

177. For the longer term, there may be a case for removing the preliminary assessment function from the SPA, although with appropriate safeguards to ensure that the SPA has sufficient information about allegations to enable it to discharge its wider statutory functions. This will be a matter for further consideration and recommendation in the Review’s final report.

178. The senior officer conduct preliminary assessment, to the agreed higher standard proposed below, could be carried out by senior PIRC staff but be decided by the Commissioner or one of the two Deputy Commissioners proposed in this Review at paragraph 208.

179. For the more immediate future, it is imperative – and the Review recommends – that PIRC should work collaboratively with the SPA to agree and embed a proportionate and effective approach to preliminary assessment (for Regulation 8 of the senior officer regulations). That approach should be one which takes account of the important aim (explicitly recognised in previous Regulations and arguably implicit in the latest ones) of weeding out allegations which, on the basis of relatively routine fact-checking, can reasonably be inferred to be unfounded, frivolous or trivial in nature. It should be a fact-checking process that assesses objectively and readily verifiable facts supporting or undermining the credibility and reliability of the information provided rather than an investigatory process, and it should consider if any allegation is malicious or vexatious. The SPA is not an investigating body and does not have the necessary capacity to carry out investigations. Insofar as possible, because they are undertaken for similar purposes, the approach to preliminary assessments by Police Scotland under

Regulation 10 of the Police Service of Scotland (Conduct) Regulations 2014⁴², in respect of more junior officers, and preliminary assessments under Regulation 8 of Police Service of Scotland (Senior Officers) (Conduct) Regulations 2013⁴³ should be consistent. In all cases, the fact-checking involved in preliminary assessment should avoid prejudicing any subsequent investigation.

180. The preliminary assessment to be made is currently defined in regulations as, “whether the conduct which is the subject matter of the misconduct allegation would, if that conduct were proved, amount to (a) misconduct, (b) gross misconduct, or (c) neither”. It is recommended that any future process for preliminary assessment should also require the relevant authority to take into account whether the allegation is made anonymously, is sufficiently specific in time and location, and whether it appears, on the face of the allegation, to be either vexatious or malicious. The relevant authority should then take a decision, in the public interest, taking account of all of the above factors, on whether the matter should be referred to the PIRC. This approach should be reflected in the legislation and guidance on senior officer conduct.

Misconduct proceedings

181. Police Scotland’s senior officers form a small group of 12 officers above the rank of Chief Superintendent. The members of this group are in regular contact with members and officials of the SPA at meetings of the Board of the Authority and its committees. The SPA, by its nature, also consists of a small group of members and executives. Regular engagement is right and proper and an essential part of the current accountability arrangements whereby it is the statutory function of SPA to hold the Chief Constable to account for the policing of Scotland. However, the regularity of that contact and the familiarity of senior police officers with board members and senior officials could lead to actual or perceived partiality, or antipathy, when it comes to disciplinary matters in which any of those same officers might be involved as the officer under complaint, a supporter to a subject, or a witness.

⁴² <http://www.legislation.gov.uk/ssi/2014/68/regulation/10/made>

⁴³ <http://www.legislation.gov.uk/ssi/2013/62/contents/made>

182. The key stages of the senior officer misconduct proceedings (both misconduct and gross misconduct) should in future be removed from the responsibility of the SPA and made subject to consideration by an independent legally chaired panel appointed by a very senior member of the judiciary such as the Lord President. The Lord President should be consulted on this matter. The other members of the Panel should consist of an expert in senior policing and a lay person. The process should follow the steps specified below:

- 1) receipt of the complaint/allegations by SPA;
 - 2) meaningful preliminary assessment and scrutiny of the complaint (within a strict deadline) by a senior Director;
 - 3) prompt referral to the PIRC, or in the case of a criminal allegation to COPFS;
 - 4) an independent investigation by the PIRC of the allegations which should remain confidential unless or until a *prima facie* case is established;
 - 5) referral by the PIRC to an independent legally chaired panel and determination by the panel as to whether, in the light of the PIRC's report, there is a case to answer of misconduct or gross misconduct;
 - 6) a preliminary independent hearing by an independent, legally chaired panel to identify any evidence that is not in dispute and can be agreed, and any other matter which can be resolved prior to the formal hearing of the misconduct;
 - 7) a hearing by the panel to consider the evidence, to determine the matter and if proven to decide the appropriate disciplinary action;
 - 8) a right of appeal to a further and different legally chaired independent panel; and finally;
 - 9) the implementation of the disciplinary action by the SPA as the "employer" of the senior officer.
- (Any constable may further appeal to a Police Appeals Tribunal against any decision to dismiss or demote him or her, and that should remain the case.)

183. The Panel should consist of independent people from other organisations or jurisdictions, and the Lord President should be consulted by the Scottish Government about the proposal that he should appoint suitable individuals. It is suggested that stages 5, 6 and 7 described in the preceding paragraph could be carried out by an independent 3-person panel comprising a legally qualified chair, one member with a senior UK policing background and one lay member; while the role of the SPA would be limited to stages 1, 2, 3 and 9. The appeal stage could also be conducted by a different independent panel appointed by the Lord President.

184. I believe that the principle of having an independent legally qualified chair for a misconduct hearing should also be extended to gross misconduct hearings for non-senior officers, that is, the rank of Chief Superintendents and below.

185. I will address this issue of separation of functions and whether the SPA should be responsible for deciding misconduct cases against senior officers in depth in my final report and would welcome views on these preliminary proposals.

186. I believe that introducing independent consideration and determination of the complaint alongside independent investigation by the PIRC would serve to increase public confidence in the process and I would welcome further views and evidence on this suggestion or on alternative approaches.

187. It would be of practical assistance to the SPA if the range of options available to the Authority when a senior police officer is under investigation was clarified and expanded. The options should be determined having regard to the particular circumstances and an assessment of the risk of interference in any investigation. They should include: the possibility of a senior officer remaining in post with their duties otherwise unaffected by the process; placing the senior officer on restricted duties (although at a senior level that option is seldom practicable); seconding them to another police force or third party organisation; and suspension. Suspension is however a significant step to take and may not be seen as a neutral act.

188. Given the overwhelming public interest and private interest in fair and expeditious investigation, complaints against senior officers should be prioritised and dealt with, by both the PIRC and the SPA, as speedily as is reasonable, not because senior officers who are a subject officer should be accorded some special status but because of the destabilising impact a prolonged investigation can have on the leadership of Scotland's police service and public confidence in the same.

Recommendations in relation to SPA

189. Recommendation: Complaints against senior officers should be prioritised and dealt with, by both the PIRC and the SPA, as speedily as is reasonable, because of the destabilising impact a prolonged investigation can have.

190. Recommendation: Further training for complaints and conduct officers in SPA should be consolidated and broadened in order to ensure the right skillset and up-to-date knowledge of complaint handling best practice in other sectors.

191. Recommendation: The range of options available to the SPA when a senior police officer is under investigation under the conduct regulations should be clarified and expanded, to provide alternatives to suspension.

192. Recommendation: Any process for preliminary assessment of senior officer misconduct should require the relevant authority both to take into account whether the allegation is made anonymously, is specific in time and location, or whether it appears, on the face of the allegation, to be either vexatious or malicious. Scottish Government should consider amending the conduct regulations to reflect this process.

POLICE INVESTIGATIONS AND REVIEW COMMISSIONER

193. The PIRC's stated purpose and vision is "to increase public confidence in policing through independent scrutiny of police actions and promoting continuous improvement."

194. Section 45 of the Police, Public Order and Criminal Justice (Scotland) Act 2006⁴⁴ gives the PIRC the power to issue statutory guidance on the handling of complaints about the police. The current guidance, *From sanctions to solutions*⁴⁵ was published in 2011 and was subject to minor revision in 2013 at the time of police reform. The purpose of the guidance is "to contribute to the modernising of police complaint handling in Scotland by moving from a culture of blame and sanction towards one of learning from complaints, which in turn strengthens the accountability and integrity of the police complaint handling system".

Functions of the PIRC

195. The office of the Police Investigations and Review Commissioner was created in April 2013 to provide a new independent investigatory service for certain police matters. The PIRC inherited the former Police Complaints Commissioner for Scotland complaint handling review functions which had operated since 2007 under the Police, Public Order and Criminal Justice (Scotland) Act 2006 and assumed the new investigatory functions prescribed in the Police and Fire Reform (Scotland) Act 2012. The PIRC's remit also includes carrying out specific functions set out in the Police Investigations and Review Commissioner (Investigations Procedure, Serious Incidents and Specified Weapons) Regulations 2013 and the Police Service of Scotland (Senior Officers) (Conduct) Regulation 2013.

⁴⁴ <http://www.legislation.gov.uk/asp/2006/10/section/45>

⁴⁵ https://pirc.scot/media/1211/pccs_statutory_guidance_web.pdf

196. The PIRC can investigate:

- incidents involving the police, where directed to do so by COPFS. These may include any death involving a person serving with the police, and allegations of criminality made about police officers;
- serious incidents involving the police, at the request of the Chief Constable or the SPA. Reasons for requests for investigations from the Chief Constable may include the serious injury of a person in police custody, the death or serious injury of a person following contact with the police or the use of firearms by police officers. (Firearms for this purpose includes TASER weapons and PAVA spray);
- allegations of misconduct by senior police officers of the rank of ACC and above, if requested by the SPA; and
- relevant police matters which the Commissioner considers would be in the public interest.

197. At the conclusion of an investigation, the Commissioner can recommend improvements to the way the police operate and deliver services to the public in Scotland.

198. The PIRC in her evidence seeks additional powers to investigate former police officers who at the time of the act or omission in question were serving with the police. She also suggested that the Lord Advocate's guidelines be amended to provide that the reporting of both on and off duty criminality by police officers is expedited to COPFS and/or the PIRC. These issues are addressed in Chapter 15.

199. The PIRC also independently reviews the way the police and the SPA handle complaints from the members of the public. If a complainer is dissatisfied with the response at the conclusion of the police or SPA process, they may then apply to the PIRC for a Complaint Handling Review (CHR). Once the CHR is completed PIRC may publish the findings.

Accountability

200. The Police Investigations and Review Commissioner is appointed by the Scottish Ministers for a fixed term of office. The 2006 Act prescribes that the

Commissioner is not a servant or agent of the Crown, and it precludes former police officers from being appointed to that office. The PIRC as an organisation is an independent Non Departmental Public Body.

201. The Commissioner is accountable to the Scottish Ministers for certain matters which are set out in a Governance and Accountability Framework⁴⁶. The Framework states that “the Scottish Ministers are ultimately accountable to the Scottish Parliament for the activities of the PIRC and its use of resources. They are not however responsible for day to day operational matters”. The Director General for Education, Communities and Justice in the Scottish Government is responsible for ensuring that there is continuous assessment and appraisal of the performance of the Commissioner.

202. The Commissioner is also held accountable for financial matters by the Auditor General for Scotland. Like any other devolved Scottish public body the PIRC may be held to account by the Scottish Parliament, primarily through its committees.

203. The Commissioner is accountable to the Lord Advocate in respect of investigations into deaths in custody and allegations of criminality which the appropriate Procurator Fiscal directs the PIRC to carry out.

204. Prior to police reform the PCCS created an Audit and Accountability Committee to advise on audit, finance and risk. This remains a helpful administrative arrangement to assist the Commissioner and the PIRC senior management team. It has four members who were invited to join the Committee. The Committee’s functions are providing independent oversight and scrutiny of finances; providing risk management and governance; approving the appointment of internal auditors; reviewing PIRC’s annual accounts and internal audit reports. Apart from this Committee however there is no formal Board or other governance mechanism within the PIRC structure.

⁴⁶ <https://www.gov.scot/publications/police-investigations-review-commissioner-governance-accountability-framework-document-2019/>

205. The operational independence of the body which investigates the police is of paramount importance as it is in the public interest that the Commissioner and the investigation teams can act without fear or favour. The role of the Commissioner is central to the effective investigation of policing and crucial to public confidence in that system. The Commissioner must be independent and must be seen to be independent. The office places heavy responsibilities on the individual appointed to hold what is a singleton post with neither Board nor peers to give support.

206. COPFS may direct the Police Investigations and Review Commissioner or the Professional Standards Department of Police Scotland to undertake further investigations into allegations of criminality. Whichever course is taken, the investigation remains under the direction and control of COPFS, consistent with the fundamental principle that the responsibility for overseeing and investigating any allegation of criminality rests with the Lord Advocate and COPFS as independent public prosecutor.

207. In considering evidence to this Review I have formed the view that the accountability and support arrangements for the PIRC should be clarified and strengthened. In reaching this view I have taken into account written evidence from HMICS that PIRC accountability is “an area of weakness with the current arrangements. It is not clear to whom the PIRC is accountable for the progress or quality of its work”.

208. This is a matter of fundamental importance and in the final report it will be considered in detail, but views would be welcome over the next six months on a number of options that could help to clarify accountability, reduce the involvement of Scottish Ministers, strengthen support and make the PIRC more accountable for matters for which the PIRC is not otherwise accountable to the Lord Advocate. Those suggestions, which are not all mutually exclusive, are set out below:

- The PIRC could be made accountable to the Scottish Parliamentary Corporate Body in the same way that independent parliamentary commissioners appointed by the Parliament are accountable to and

scrutinised by the relevant parliamentary committee. The Scottish Parliament would have to be consulted on this matter.

- The PIRC could be made accountable to the Lord Advocate for non-criminal matters in the same way that the office of Commissioner is accountable to the Lord Advocate for criminal matters and the investigation of deaths involving the police. The Lord Advocate would have to be consulted on this matter.
- Given the sensitivity of the office of Commissioner the role could be strengthened and supported by the creation of two additional part-time Deputy Commissioners with relevant legal expertise and experience who are not former senior police officers.
- The PIRC should be made accountable to a new statutory Board of members appointed through the Scottish public appointments process whose role would be to scrutinise the work of the organisation, review the performance of the Commissioner and offer supportive advice and expertise.

209. I would welcome further views and evidence on these proposals.

210. The Police Investigations and Review Commissioner has suggested that the name, “Police Investigations and Review Commissioner” is “ill-conceived as it immediately suggests to the public that the organisation is part of the police”. That assertion is supported by the evidence to the Review from PIRC investigators.

211. Consideration should be given to adjusting the title of the organisation. This may or may not involve primary legislation to effect the change as it would be possible for the organisation to function under a different title even if its legal name was unaltered. What matters is the public perception. The precise wording is a matter for the PIRC and Scottish Government, but it should emphasise the inherent and crucial independence of the Commissioner and give some indication of the core functions. If the number of Commissioners were to be increased, as suggested in one of the options set out in paragraph 208, consideration should be given to re-designating the PIRC as a “Commission”.

Location of PIRC staff

212. A number of contributors in their evidence have commented on the location of the PIRC's office which is based entirely in Hamilton in Lanarkshire. This is perceived as an operational weakness in the arrangements because of the logistical difficulties associated with attending deaths or other serious incidents which require the PIRC teams to travel long distances in response to referrals from Police Scotland or directions from COPFS. In evidence to the Review the Commissioner explained that investigators could travel by car to most locations in Scotland in a few hours. The PIRC operates an on-call system which provides 24-hour cover but the more distant the location from the central belt, the longer the gap before the local Police Scotland officers hand over the incident scene to the PIRC investigation team. In certain circumstances the local procurator fiscal may attend the scene but that is not always the case. As stated in my report to the then Home Secretary⁴⁷, the first hours following a death or serious incident, referred to as "The Golden Hour" are crucial. Not only can they fundamentally set the shape and tone of an ensuing investigation because of the importance of evidence-gathering, but an individual's or a family's experience of the entire process may be coloured by the way they are treated in these crucial hours.

213. The PIRC should consider the case for creating some measure of regional presence to enhance its capacity to respond immediately to the most serious incidents wherever they occur. Furthermore, guidance should be agreed between the PIRC, COPFS and Police Scotland about the criteria for attendance at the scenes of deaths or serious incidents by the PIRC investigator and the local Procurator Fiscal, and the handover of a potential crime scene to the PIRC by Police Scotland.

⁴⁷ <https://www.gov.uk/government/publications/deaths-and-serious-incidents-in-police-custody>

Statutory powers on complaint handling

214. One of the statutory functions of the Police Investigations and Review Commissioner (PIRC) is to carry out complaint handling reviews of non-criminal complaints against the police. After a relevant complaint has been dealt with by Police Scotland or dealt with by the Scottish Police Authority, the Commissioner may, at the request of a complainer or the appropriate authority, carry out a review of the manner in which the complaint has been dealt with.

215. The 2006 Act, as amended by the 2012 Act, provides that the Commissioner must draw up a report of any complaint handling review including conclusions, reasons and any action proposed by the Commissioner.

216. After completing a review of the handling of a complaint the Commissioner may direct Police Scotland or the SPA to reconsider a complaint. The Commissioner may also require that reconsideration of the complaint be carried out under PIRC supervision. The person appointed to carry out the reconsideration must be someone who has no previous involvement and, in the case of a supervised reconsideration, must comply with any requirements imposed by the Commissioner as to how the reconsideration should be carried out.

217. The Commissioner does not have the power to overturn a decision on a complaint or to instruct Police Scotland or the SPA to do so.

218. PIRC's complaint handling reviews often include recommendations that are relevant to the specific complaint and may also include generic recommendations relevant to Police Scotland or SPA practices.

219. The Commissioner may also issue guidance to Police Scotland or the SPA, and regularly does so in the form of Learning Points which are made public on the PIRC's website.

220. We received evidence that the use of reconsideration directions by the PIRC had increased with the intention of ensuring a higher level of compliance by Police

Scotland. The PIRC took the view that this change in practice was necessary because too many of their non-statutory recommendations were not being implemented. This change in PIRC practice has had a resource implication for Police Scotland who noted that it was “causing significant additional enquiry”.

221. The Commissioner has suggested that the primary legislation, Section 35(3) of the 2006 Act, be amended to clarify that the actions proposed in a complaint handling review report may include recommendations as well as directions. I support this suggestion as a means of ensuring action on complaint handling review recommendations and learning points, without the highly labour intensive requirements of a direction.

222. In evidence to the Review, the Police Investigations and Review Commissioner also suggested that all complaints about the police should go to an independent organisation in the first instance: “There would appear to be merit in all complaints about the police, by members of the public, being directed to an independent body, right from the outset. It is appreciated that such a model would represent a transformation of the investigation of police complaints in Scotland but perhaps such a change is necessary in the new environment in order to maintain public confidence and ensure that the police complaints system is seen to be independent and fair. This would require new legislation and adequate resources to be put in place.”

223. This suggestion is supported by the Law Society of Scotland in its evidence: “There appears to be a case possibly for the creation of a single investigatory body (such as an ombudsman) that can independently deal with all police complaints raised by members of the public.”

224. I am unconvinced at this stage about such a fundamental change in functions and structures. The majority of complaints about Police Scotland go in the first instance to Police Scotland and are dealt with by them. I comment elsewhere in the report on ensuring effective triage, the possibility of direct and supervisory monitoring of the Centurion system by the PIRC, the identification of potential criminality or breaches of Convention Rights, the crucial importance of independent oversight and

how all those elements can be strengthened. These can be achieved under the current structures. Directing all complaints from the most minor to the more serious to an enlarged independent body may be a disproportionate and bureaucratic arrangement which will create further delay for those individuals complaining about quality of service matters.

PIRC structure and staffing

225. The structure of the PIRC organisation includes investigation teams, a Complaint Handling Review Team, HR professionals, Communications, Finance and corporate services. A striking omission is the absence of any legal support within the staff. Although the current Commissioner and the Head of Reviews and Policy are legally qualified this might not be the case in the future.

226. Given the sensitive nature of the functions of the PIRC, the key role the organisation plays in the Scottish justice system, the complexity of the legal framework around complaints and investigations, the wide-ranging investigatory powers of many staff, and the level of interaction with COPFS and law enforcement agencies the PIRC should consider the case for building legal support and advice capacity into its structure.

Composition and profile of PIRC investigation teams

227. I support the current policy of the PIRC to reduce reliance on the employment of retired police officers as investigators. At the point at which the PIRC was establishing the investigation teams in 2012-13 it made complete sense to recruit retired police officers. The new, expanded organisation was put together very rapidly after the passage of the legislation and there was an imperative to get it up and running in time for 1 April 2013. This policy was appropriate and necessary for a new organisation taking on new investigative functions.

228. There are significant benefits in making good use of investigation skills and previous policing experience, but it is also true that this can be perceived as diminishing the independence of the investigation because it has the appearance of

the police investigating their former colleagues in the police. There is also a risk that as policing practices change, skills will diminish, particularly in specialist areas, and therefore there is a need to maintain current skills and knowledge in those who have come from a policing background.

229. The process of diversifying the investigator cadre, and training recruits from outwith policing should continue and evidence was provided by PIRC investigators who come from different backgrounds and have brought relevant skills to the organisation. There will in the next 5 to 10 years be a place for former police officers in the functions of the PIRC, however following the retirement of former police officers the aim should be to replace them with non-officers. Investigative skills are not the sole domain of the police service. They exist elsewhere and can be learned through training on and off the job. The PIRC might also consider as part of its recruitment policy whether there would be benefit in employing former Procurators Fiscal as investigators.

230. Currently most senior investigative personnel in the PIRC are former police officers who served in Scotland. This contrasts with the situation in England and Wales where the most senior posts within the Independent Office of Police Conduct (IOPC) must now be filled by non-police officers. As in the case of the Police Investigations and Review Commissioner, the legislation prescribes that a former police officer cannot be appointed as the Director General of the IOPC. In its one-year report, the (then) IPCC pointed out that the most senior members of its management team were all from a non-police background. The PIRC should adopt a similar policy. There are obvious benefits in drawing on the experience and expertise of those who have served with the police but it does leave the PIRC open to criticism based on the danger of unconscious bias. It is important that public confidence is not affected by the perception of a close relationship between the investigator and those being investigated. The need for balance and the risk of loss of organisational memory suggest that any changes in staffing should be gradual.

231. It is neither feasible nor desirable for the PIRC to replicate the full range of specialist policing skills that exist within Police Scotland, and I support the current

practice of the PIRC to draw on those specialists whenever their skills are required to conduct an investigation.

Access to the Criminal History System

232. The Review heard evidence that PIRC investigators did not always find it easy to get access to relevant information from Police Scotland's Criminal History System (CHS) when they were preparing to visit witnesses. Given the nature of PIRC's business this is a genuine business need and Police Scotland should facilitate or provide access to CHS to PIRC investigators promptly as a matter of course in order to mitigate any personal safety risks PIRC officers face when interviewing certain witnesses in locations outwith official premises.

Confidentiality and transparency

233. The PIRC has until recently adopted the practice of putting into the public domain information relating to the investigations it was carrying out into the conduct of senior officers on receipt of the referral from SPA. At the point when a referral is received by the PIRC from the Scottish Police Authority there has been no more than a preliminary assessment of the complaints or allegations. At this early stage of the investigation the need for confidentiality is important to avoid deterring or intimidating potential witnesses or subjecting officers or their families to media attention when there is still very often no evidence and certainly no *prima facie* case in the PIRC's possession. I raised my concern with the Commissioner in the early stages of the Review and this practice has since ceased. On 6 November 2018 the Commissioner confirmed this change of practice to the Justice Committee of the Scottish Parliament that, "In light of our experience last year, we agree that there should be confidentiality around the process and, like the SPA, have determined that in future we will not normally provide comment on senior officer misconduct investigations."

234. While the principle of transparency is appropriate in relation to many of the functions of public bodies it is not always appropriate in relation to any public body charged with investigating allegations of misconduct or criminality at the earliest stages. Investigations into such matters should be sealed temporarily, not only to protect individual and family privacy when the investigation is only at a very early and crucial stage, but in order to create a safe space in which witnesses feel more comfortable to come forward with their evidence against senior and powerful people/officers as well as for those giving exculpatory evidence. There may be a time for transparency about the outcomes but not while the investigation is at its earliest stages, is ongoing or the decision on any action yet to be determined.

235. Premature publication of information and unauthorised disclosure of sensitive information, from whatever source, detracts from the efficacy of the investigation, may create unhelpful and distorted speculation, place potential witnesses under immense pressure and cause profound reputational damage without good cause.

236. I will give further consideration to the whole question of privacy, the public interest and the role of the media in my final report, but welcome further views on this issue from the public and members of the press and media.

The Complaint Handling Review Team and relationships within the PIRC organisation

237. In the process of gathering evidence it has become apparent that as an organisation the PIRC consists of two distinct and quite disparate parts: the small Complaints Handling Review Team which existed previously and was the core function of the PCCS organisation, and the much larger investigations teams. This historical dichotomy has a number of manifestations and effects that persist today.

238. We heard evidence that the CHR Team is perceived to have, and often perceives itself to have, the status within the PIRC of the “poor relation”; that a lack of coherence and unity of purpose exists within the organisation, and that there exists a perception within the CHR team that they are under-resourced to carry out

their audit function is a matter of concern. This inevitably has a detrimental impact on staff morale and motivation in the team, which is compounded by a lack of obvious career development within the organisation and, until more recently, training opportunities. The impact of dealing with complaints, an inherently negative subject matter, every working day is not moderated by the wider research and audit activities which PIRC have the power to carry out but have not done since 2017.

239. In the Commissioner's written evidence to the Review she explained that the functions of the CHR Team are distinct from the investigation functions and, because they are more akin to complaint handling than policing, they would sit more comfortably elsewhere within the office of the Scottish Public Services Ombudsman (SPSO). The point is also made that this option was considered when the PIRC legislation was being drafted in 2011-12. I am not currently persuaded of the merits of this proposal. Complaint handling reviews, audits and research provide an opportunity to identify whether the categorisation and treatment of complaints is appropriate. This has been a major concern of the PIRC and has been discussed before the Justice Committee. Having this function conjoined with the investigation team allows familiarity with the developing criminal law to be maintained in order that wrongly categorised complaints can be spotted. I will give further consideration to this proposal in the full report and any other major proposals for structural changes elsewhere. In the meantime there is considerable merit in greater interaction, co-operation and training with the SPSO to share best practice.

240. The benefits of a transfer of these functions to SPSO are in my initial view outweighed by the benefits of a closer alignment of the CHR team with the investigations team and the ability and opportunity within the CHR team to recognise and highlight issues of potential criminality or liaise with the investigations team when they have not been identified and addressed by the police. For example, it is because the CHR Team observed the inappropriate categorisation of conduct as excessive force, rather than assault, that a change of practice was instituted whereby the Procurator Fiscal charged with investigating complaints against the police now sees all allegations of excessive force and unlawful detention before determining where such complaints should be directed for investigation. The CHR

function is a critical part of the system which provides an appropriate and impartial check not only on handling but also on the appropriate categorisation of complaints.

241. I am also concerned about the suggested wholesale removal of the CHR team from the PIRC but will give further consideration to the PIRC's proposition in my final report.

242. There is significant scope to enhance and widen the current functions of the CHR team and how it pursues its role by engaging in its statutory responsibilities of audit and research. Their focus should be on what the complainers' complaints are focused on, but they may also observe collateral issues that should go back to Police Scotland systematically and be brought to the attention of the ACC and the DCC on a thematic basis. Currently, too much time and effort is spent identifying every single issue at fault in the complaint handling, even those aspects of the complaint which were handled to the satisfaction of the complainer. This is disproportionate and can be better directed into thematic reviews rather than reworking of a whole case by the police.

243. In 2015 the Commissioner asked Robert Gordon, until recently a member of PIRC's Audit and Accountability Committee, to lead a *Review of PIRC Procedures in relation to Complaint Handling Reviews*. The insight and conclusions of that review have much to commend them despite the passage of time. In respect of relations between the CHR Team and Police Scotland the review concluded that: "...by determined and sustained effort, much could be done to build a real spirit of common endeavour without offending the need for separation and independence in the consideration of individual complaint handling reviews (CHRs)."

244. The tension then apparent between the two organisations was captured in this section: "PIRC reviewers argue that the police should be doing more to improve the quality of complaint handling by following their own operational and complaint handling guidance. On the other hand the police will argue for the review activity to pay more attention to outcomes and less to procedural minutiae, to focus on materiality and proportionality and resist pedantic and bureaucratic counsels of

perfection”. The review also commented that: “there needs to be developed a greater sense of fitness for purpose in conducting reviews”.

245. The 2015 Review also commented on supervision and checking of CHR work: “In comparing the management hierarchy for PIRC review work with the oversight structures for similar activities elsewhere, I was surprised by the high ratio of senior managers to review officers. I was also surprised by the limited delegated authority enjoyed by experienced review officers – again in comparison with other organisations discharging similar functions. ... I consider that given the range of responsibilities PIRC discharges compared with the predecessor body, there is a need to reflect on the level of management resource devoted to review work and the scale of revising of review officers’ work which seems to be undertaken. It is, of course, ultimately for the Commissioner to determine the scheme of delegation which should apply and the level of checking and quality assurance she requires.”

PIRC training

246. I welcome the additional training that has been put in place within PIRC over the last nine months but consider that this should have been implemented much earlier in the lifetime of the organisation. It was clear that staff had benefited from the new provision of training. For the CHR staff to understand complaints against the police there must be significant understanding, familiarisation with real-life policing and experience of what officers face in unregulated and sometimes frightening environments. The training that has been available to the CHR should be extended to ensure that they have that kind of informative familiarisation, and a concerted effort made to ensure closer liaison with the Complaints and Conduct Team in the SPA.

247. Later in this report comment is made on learning from outwith Scotland and that was a theme picked up in the 2015 Review led by Robert Gordon: “Experience elsewhere...has shown that a strong focus on work flow, swift inquiry handling, case filtering and early disposal of less complex cases yields productivity improvements and enhanced staff and customer satisfaction”. The Commissioner has met with her

counterparts in other jurisdictions in the United Kingdom and that engagement and learning should be extended to other levels of the organisation.

PIRC culture

248. The PIRC is a relatively young organisation and is still developing. The Review has considered evidence around its staffing, training, structure and culture. The cultural issues and tone of the organisation will be addressed more fully in the final report. The PIRC vision includes promoting continuous improvement. There is much more that can be done to realise that vision, and the essence of that is adopting a more positive approach, emphasising improvement and driving up Police Scotland's standards, rather than adopting a predominantly punitive, fault-finding approach.

249. While the investigative role and the CHR function are both critical to thorough examination of what may have occurred to cause a complaint or public dissatisfaction, there was little evidence of the philosophy described in the PIRC's overarching statutory guidance, *From sanctions to solutions*⁴⁸, in which the executive summary is introduced with the purpose of the guidance as "to contribute to the modernising of police complaint handling in Scotland by moving from a culture of blame and sanction towards one of learning from complaints...".

250. The PIRC is one of the vital checks and balances within policing in Scotland created to instil public confidence in independent investigations and the complaints system. The culture of the organisation should reflect and engage the ethos of *From sanctions to solutions* with a view to assisting the police with continuous improvement in policing services.

251. The roots of the organisation lie in the complaints handling review function described earlier in this report, however the PIRC is now much more heavily focused on its investigatory functions and this was very much reflected in evidence. This

⁴⁸ https://pirc.scot/media/1211/pccs_statutory_guidance_web.pdf

evidence included indications of a 2-tier organisation where investigators heavily outnumber other functions and the Complaint Handling Review team is perceived as the second tier.

252. The PIRC employs a large number of very able and very experienced former police officers in its investigation teams who share with serving police officers a commitment to public service, a sense of fairness and a desire to help others. They carry out a challenging role in investigating serious and sensitive matters. Dealing with allegations or situations that can range across the whole gamut of policing specialisms from within a relatively small organisation presents challenges. These were highlighted in the HMICS evidence to the Review:

“It is difficult for retired officers to maintain competence in contemporary investigation techniques, particularly if those officers reached senior rank and had not have carried out operational roles for some time prior to retirement. This explains anecdotal evidence from serving officers that PIRC investigations can feel more like the 1990s than 2019.”

253. While keeping skills up to date is a challenge that should be addressed through training programmes, a related issue that also needs to be considered is the tenure of investigators and what the optimal duration for such a role is taking into account, experience, training and career development.

254. The key product from PIRC investigations is the investigator’s report. The evidence given to the Review suggested that the time and effort devoted at many layers of management to the quality assurance of these reports was excessive; in some instances reports were checked five times before being completed. There was evidence that this kind of excessive supervision caused delays, disempowered staff and had an effect on morale. Notwithstanding that level of intensive supervision, there was evidence that the product that goes to partners can on occasion be lacking in focus, over-lengthy, and does not always identify the relevant material.

255. There would be benefits to both the organisation as a whole, its staff and its partners if its focus was more strategic, its engagement more constructive and its approach more outward-looking. Not only would a shift in emphasis and tone enhance external relationships but it would also boost the confidence and motivation of staff across all teams.

256. In the light of the evidence provided about the organisation and its culture, I consider that there should be an immediate management review by an independent consultant to ensure that it has appropriate leadership, skills and culture to carry out its functions in the future, and to examine interactions with other stakeholders and how they can be improved.

Recommendations in relation to the PIRC

257. Recommendation: The PIRC should consider the case for creating some measure of regional presence to enhance its capacity to respond immediately to the most serious incidents wherever they occur.

258. Recommendation: The PIRC should have the support of a new statutory Board of members appointed through the Scottish public appointments process whose role would be to scrutinise the work of the organisation, review the performance of the Commissioner and offer supportive advice and expertise.

259. Recommendation: The Commissioner, or potentially a Deputy Commissioner, should be vested with a statutory power to make recommendations in addition to the existing powers to direct reconsideration of complaints. The corollary to that is that there should be a statutory duty, subject to a public interest test, on the Chief Constable to comply with recommendations unless there are sound overriding operational or practical reasons for not complying with a PIRC recommendation and an obligation on PSD to report progress back to the PIRC. Those statutory arrangements should be supported by agreement between the PIRC and Police Scotland on how the PIRC will be kept advised of progress.

260. Recommendation: The PIRC should consider the case for building into its structure legal support and advice capacity.

261. Recommendation: Following the retirement of former police officers PIRC policy should be to replace them with non-police officers. The PIRC should also adopt a similar policy to the IOPC's in England and Wales by recruiting non-police officers when recruiting to the most senior posts.

262. Recommendation: There should be a management review by an independent expert to ensure that the PIRC has appropriate leadership, skills and culture to carry out its functions in the future, and to examine interactions with other stakeholders and how they can be improved.

CROWN OFFICE AND PROCURATOR FISCAL SERVICE

263. As noted earlier in this report, the role of the Crown Office and Procurator Fiscal Service does have a bearing on the operations of Police Scotland, the Scottish Police Authority and the Police Investigations and Review Commissioner, and the efficacy of the system for handling complaints against the police. The following sections take cognisance of, and should be read in the context of, the Review's Terms of Reference which state that, "Whilst the Review will encompass the investigation of criminal allegations against the police, it will not address the separate role of the Lord Advocate in investigating criminal complaints against the police".

Role of the Lord Advocate

264. The Lord Advocate is the head of the systems of prosecution and investigation of deaths in Scotland, functions which he exercises independently of any other person. Within that system, COPFS, as Scotland's independent public prosecution service, fulfils the responsibility for overseeing and investigating any allegation of criminality – and, by contrast with the position in the other parts of the UK, in Scotland the work of the police in investigating crime is subject to direction from the Crown. The Crown's responsibility extends to the investigation of allegations of criminality by police officers and is reflected in Police Service of Scotland (Conduct) Regulations 2014, which require that all allegations inferring criminality by police officers must be referred for independent investigation by COPFS.

265. Reports alleging criminal conduct by police officers acting in the course of their duties are made to and investigated by a specialist division within COPFS: the Criminal Allegations Against Police Division (CAAP-D). This division is headed by a senior prosecutor who leads an experienced and senior team of investigators and prosecutors. It deals with a significant number of allegations of criminal conduct that are of wide-ranging sensitivity and complexity. CAAP-D was created to provide a high level of consistency of practice and decision-making across Scotland. The

practice of COPFS directing and overseeing investigations into criminal allegations against the police has existed for many years. The thorough and independent investigation of such allegations is essential in a democratic society.

266. The framework for a report to be submitted to COPFS differs from the position in criminal cases where the accused person is not an on-duty police officer. Where the accused person is not an on-duty police officer, a case will normally only be reported to COPFS where it is assessed by the police (or other reporting agency) that there is sufficient evidence to establish that a crime has been committed and that the accused person is the perpetrator. Where the criminal allegation is against an on-duty police officer, there is a statutory requirement that the matter be reported to COPFS where the Deputy Chief Constable considers that it can be reasonably inferred that a constable may have committed a criminal offence, irrespective of the question of sufficiency of evidence.

267. COPFS may direct the PIRC or the Professional Standards Department of Police Scotland to undertake further investigations into the allegation. Whichever course is taken, the investigation remains under the direction and control of COPFS, consistent with the fundamental principle that the responsibility for overseeing and investigating any allegation of criminality rests with the Lord Advocate and COPFS as independent public prosecutor.

268. In every case where there appears to CAAP-D to be a sufficiency of evidence, a report will be submitted by CAAP-D to Crown Office for Crown Counsel's instructions. Crown Counsel⁴⁹ may instruct further enquiry before reaching a final decision as to whether criminal proceedings should be instituted in any case.

269. COPFS policy is that criminal proceedings will only be instructed against an on-duty police officer on the personal instructions of a Law Officer, who will usually have available to them both CAAP-D's analysis and a recommendation from Crown Counsel. The decision is made in accordance with the criteria in the Scottish Prosecution Code, that is, before a prosecution is instituted, there must be sufficient

⁴⁹ Together, the Lord Advocate, Solicitor General and the Advocate Deputes are known as "Crown Counsel".

credible, reliable and admissible evidence, and where proceedings are in the public interest.

270. One of the emerging themes from the evidence to the Review is that delays at various stages of the principal organisations' processes are inimical to the effectiveness and efficiency of the arrangements. This has included comment in relation to CAAP-D. Police Scotland said in their submission that:

“There are recent examples of criminal allegations having been reported to CAAP-D and officers placed on restricted duties for between two and three years before a decision was made regarding ‘No Proceedings’. Matters consistently take a disproportionate amount of time at CAAP-D before a determination is reached with ultimately the vast majority concluding with ‘No Proceedings’”.

271. The evidence from the PIRC also commented on the absence of a timescale for COPFS decisions: “Where this organisation submits its reports expeditiously to the COPFS, there is no overarching target for the COPFS to aim for in reaching a determination on proceedings”. Oral evidence from PIRC investigators also indicated that receiving increased feedback and clarity around decisions by CAAP-D would be beneficial.

272. There should be a collective effort on the part of all the principal organisations to reduce delays in the system. Some investigations are complex and require wide-ranging evidence gathering from different sources and experts, but where this is not the case it is in the interests of justice, and all parties concerned, that cases are dealt with expeditiously. In addition to contributing to a joint examination of how processes can be made more efficient, COPFS may wish to consider whether there is a case for increasing the resources available to CAAP-D in order to address the issue of delay. I understand that additional resources have, since this Review commenced, been allocated to CAAP-D.

273. The evidence suggests that there has been relatively little joint training involving CAAP-D and PIRC staff. Given the very close proximity of the CAAP-D office in Hamilton to the nearby PIRC office that appears to be an opportunity for

familiarisation and learning that has been missed. Participation in Police Scotland's Officer Safety Training has been offered and taken up by both organisations and this is an excellent example of giving those who investigate the police an insight into the dangers they face and the techniques that they deploy when responding to situations of conflict, situations that can readily result in complaints against the police.

Reporting of off-duty criminality to COPFS by Police Scotland

274. In her submission to the Review the Police Investigations and Review Commissioner suggested that the Lord Advocate's guidelines be amended "to provide that the reporting of both on and off duty criminality by police officers is expedited to COPFS and/or the PIRC", and notes that "those guidelines provide that off-duty criminality should be reported to the District Procurator Fiscal in the same way as any criminality by a member of the public. Accordingly, they are frequently investigated by local police officers and later reported to COPFS once that investigation is complete, without the opportunity for COPFS to instruct an independent investigation".

275. I believe there is merit in adjusting the reporting arrangements so that cases involving allegations of criminality against off-duty police officers are reported simultaneously to both the local Procurator Fiscal and to CAAP-D. Such an arrangement would ensure that CAAP-D are sighted, can make any connections to any ongoing on-duty case involving the off-duty officer (or his or her immediate colleagues) and can have the opportunity to discuss with the local Procurator Fiscal how the allegation will be investigated.

276. COPFS may wish to consider whether the Lord Advocate's Guidelines on the Investigation of Complaints Against the Police should be updated to take into account the new police structures and the PIRC. COPFS may also wish to consider how best this could be done to take into account current legislation and recent experience, and any other pertinent issues arising from this Review. COPFS might also wish to draw upon any work that might be done in future by the cross-agency Working Group to review guidance across the board which is recommended at paragraph 285.

INTERACTIONS BETWEEN THE FOUR PRINCIPAL ORGANISATIONS, RELATIONSHIPS AND CULTURE

277. This preliminary Report describes the role of the principal organisations that have a crucial role in dealing with complaints against the police. In the main they are motivated to carry out their functions in a thoroughly professional way. What has however become clear through the evidence to the Review (and from recent media coverage) and is a matter of serious concern, is that certain aspects of those relationships are sub-optimal, are characterised by an absence of constructive engagement and coloured by a tone of cynicism. Suspicious is not impartial, and impartiality is the foundation of every component part of the justice system. Suspicion can breed a lack of professional respect and a lack of confidence in other parties which can be corrosive. Suspicion must not be allowed to damage the trust on which relationships depend and the responsibility for ensuring that does not happen rests with the leadership teams.

278. A concerted effort is required to make these crucial professional relationships work more effectively. Better liaison at every level of interaction is needed to increase understanding and to reduce the unnecessary tension evident over the first few years of new structures. I very much welcome the establishment in August 2018 of the Quad meeting, which brings together senior representatives of Police Scotland, the SPA, the PIRC and COPFS, as a means to address some of the problems which have arisen and to consider practical issues collectively. There would have been benefit in having such a mechanism in place earlier but now that it is in place it needs to meet on a regular basis. The senior cross-agency joint Working Group to review guidance that is recommended at paragraph 285 below should take direction from, and report to the Quad meeting. That meeting might also be the forum at which the prioritisation of the most serious cases is discussed, trends analysed prior to papers being submitted to the SPA Complaints and Conduct Committee and information-sharing protocols updated.

279. In setting the tone for future engagement and improvement, the Quad meeting should be guided by the ethos of *From sanctions to solutions*⁵⁰ and turn into

⁵⁰ https://pirc.scot/media/1211/pccs_statutory_guidance_web.pdf

a reality its philosophy of non-punitive learning from complaints that do not involve misconduct, gross misconduct or criminality.

280. The Quad meeting brings together organisations that have to be structurally and constitutionally independent but which cannot effectively function in isolation from each other. The efficacy of the system requires professional and positive relationships that can and must take into account distinct responsibilities and essential structural independence, but there has to be a recognition on the part of all those organisations that they are also interdependent.

281. There should be a common understanding and expression of what the organisations are trying to achieve collectively and the kind of culture that they are trying to engender. It is important that the Scottish Parliament, the public, the staff associations and all the other main stakeholders understand and buy in to that philosophy.

282. The approach being adopted south of the border in the light of the Chapman Report will be examined further, but it is worth noting that the developing Home Office approach is based on creating a learning culture which focuses on prevention, early intervention and support for the people involved, and a culture that applies equally to all parties, who should be willing to listen, reflect and learn lessons. Their intention is to remove the explicit link between a complaint and the conduct of an officer, and to make the system less about blame and more about the customer.

283. The evidence suggests that improving communication between organisations needs to be addressed. The evident non-sharing of certain information between organisations concerns me. Memorandums of Understanding (MOUs) exist between a number of the organisations but these tend to be very short and in need of updating. In addition to updating, expanding and adhering to these documents, there is a huge potential benefit in creating and adopting a new 4-way Memorandum of Understanding based on a common purpose and shared objectives. The creation of such a document is a matter for Police Scotland, the SPA, the PIRC and COPFS

to take forward but I believe that it should encapsulate shared objectives shaped around these seven headings:

- Increasing public confidence and satisfaction with service
- Ensuring consistent practice
- Dealing effectively and expeditiously with complaints to reduce delays
- Increasing public awareness and understanding
- Improving communication with the public around progress
- Fostering proactive co-operation between organisations
- Sharing information

GUIDANCE

284. In addition to the statutory framework on conduct, the police and other agencies rely on guidance documents produced to assist implementation of the statutory obligations. The current set of guidance in operation within and across the main agencies involved in complaints against the police is piecemeal, elderly and incomplete and in some significant respects is inconsistent in approach. That is a matter of serious concern because misunderstandings and conflicts between organisations might arise from members of different agencies working from different texts which have not been fully updated or reconciled to take into account the new legislative framework and the new landscape in which they are operating and exercising their responsibilities.

285. It is recommended that there should be the immediate establishment of a senior cross-agency joint Working Group involving the SPA, Police Scotland and the PIRC to develop appropriate and up-to-date guidance drawing on the considerable knowledge and expertise that exists within, and outwith those organisations, consulting other experts and external organisations as and when required.

286. Representation from COPFS to assist with that cross-agency approach would also be extremely helpful. The Crown Office may also wish to consider updating the guidance to the police in this area of their functions and any guidance regarding the PIRC's responsibilities for investigating allegations of criminality.

287. This approach, the remit, the scope of relevant guidance, the membership and chair of the Working Group should be agreed by all from the outset. The Group should report to and take its instructions from the Director-level cross-agency Quad meeting referred to in paragraph 278 above.

288. **Recommendation: There should be the immediate establishment of a senior cross-agency joint Working Group involving the SPA, Police Scotland and the PIRC to develop appropriate and up-to-date guidance.**

AUDIT

289. In relation to thematic scrutiny of the Scottish Police Authority and Police Scotland, there are areas of similarity and interaction between the roles of the Auditor General for Scotland (AGS), HM Inspectorate of Constabulary in Scotland (HMICS), and the Police Investigations and Review Commissioner (PIRC). In recognition of this, therefore, Section 85 of the Police and Fire Reform (Scotland) Act 2012 obliges this triumvirate of scrutiny bodies to “*co-operate and co-ordinate activity with each other with a view to improving the carrying out of their respective functions*” in this regard.

290. Following on from this provision, three broadly analogous bilateral Memorandums of Understanding have been put in place:

- AGS and PIRC in July 2013⁵¹, “*to optimise the skills and experience involved in audits, reviews or investigations, avoid duplication of effort and minimise the burden of scrutiny*”.
- HMICS and AGS in September 2014⁵², “*to optimise the skills and experience involved in audit and inspection, avoid duplication of effort and minimise the burden of scrutiny*”.
- PIRC and HMICS in October 2017⁵³, “*to optimise the skills and experience involved in inspections, reviews or investigations, avoid duplication of effort and minimise the burden of scrutiny*”.

291. Within this general framework for the police landscape, the AGS’s particular focus – consistent with her general remit as regards dozens of organisations across Scotland’s public sector – is financial, ensuring propriety and value for money in the spending of public funds. Central to this is a programme of annual audit. The 2017-18 audit of the Scottish Police Authority, which was published in November 2018, was the seventh such report on the Scottish Police Authority/Police Scotland.

⁵¹ https://pirc.scot/media/1277/mou_audit_scotland.pdf

⁵² https://www.audit-scotland.gov.uk/work/scrutiny/docs/as_140925_hmics_memorandum.pdf

⁵³ <https://www.hmics.scot/sites/default/files/publications/PIRC%20and%20HMICS%20MoU%20-%202019.pdf>

292. While HMICS also has a statutory role in ensuring that obligations are met in terms of best value and continuous improvement, this is in the context of a wider operational remit which is to look into the “*state, effectiveness and efficiency*” of the Scottish Police Authority/Police Scotland. An Annual Scrutiny Plan sets out how HMICS intends to meet its statutory purpose, specifying its key priorities for inquiries over the year.

293. Insofar as it relates to their general remits, there is nothing to prevent the AGS or HMICS auditing/inspecting/evaluating how the Scottish Police Authority/Police Scotland handle complaints (as evidenced, for example, within the June 2019 report from HMICS on “*Inspection of the strategic arrangements for the delivery of police custody*”⁵⁴). However, of the three scrutiny bodies, it is the PIRC alone⁵⁵ that, amongst its other duties, has explicit responsibilities on this matter conferred by statute (Chapter 2 of the Police, Public Order and Criminal Justice (Scotland) Act 2006), notably Section 33A(a):

“to maintain, and to secure the maintenance by the Authority and the chief constable of, suitable arrangements for—

(i) the handling of relevant complaints; and

(ii) the examination of the handling of relevant complaints and the reconsideration of such complaints”.

294. In large part PIRC discharges these responsibilities by reactively conducting individual Complaint Handling Reviews (CHRs) in cases where a complainer remains dissatisfied after having initially gone through the relevant internal Scottish Police Authority or Police Scotland procedures. There is also a proactive element to PIRC’s responsibilities, in that it is also charged with initiating audits and assessments of the organisations’ practices.

⁵⁴ <https://www.hmics.scot/sites/default/files/publications/HMICS20190606PUB.pdf>

⁵⁵ A caveat to this statement is that the Auditor General has a statutory role as regards complaints about fraud, corruption or wrongdoing from employees who have the status of whistle-blowers.

295. Since April 2013 reports of the following audits have been published by the PIRC:

2013	None, since April. (Two prior to April.)
2014	<ul style="list-style-type: none"> • <i>Audit of police adherence to timescales in the handling of complaints</i> (February 2014) • <i>Police Scotland Frontline Resolution Audit</i> (July 2014) • <i>SPA Complaints Audit</i> (July 2014)
2015	<ul style="list-style-type: none"> • <i>SPA Complaints Audit</i> (April 2015)
2016	<ul style="list-style-type: none"> • <i>Police Scotland Complaint Timescales Audit</i> (November 2016)
2017	<ul style="list-style-type: none"> • <i>SPA Complaints Audit</i> (December 2017)
2018	None.
2019	None.

296. Thus, there does appear recently to have been some tailing-off in the proactive element. This is a concern. While it is absolutely right for PIRC to focus attention on dealing with individual CHRs (especially given the backlog which has been reported to the Review), the value of the proactive element should not be overlooked. While it is certainly not a panacea, it does offer an important means of gaining a broader perspective, one which should enable the identification of significant points which might otherwise remain hidden, for instance as regards:

- cases in which there have been particular examples of very good practice, which should be identified, highlighted and disseminated;
- cases in which, although he/she chose for some reason not to progress the matter to PIRC, the complainer (perhaps unwittingly) received an inappropriate service;
- cases in which, although the complainer was happy with the handling of his/her complaint and the outcome, the police officer who was the subject of the complaint was inappropriately treated; or

- cases which collectively show a pattern of systemic concern, for example as regards timescales or categorisation.

297. It is understood that PIRC has sought additional funding, to enable it to establish a 'Compliance Team' which would have auditing various aspects of Police Scotland's complaints process as one of its primary objectives. This is a welcome indication that the value of proactive audit work is recognised in principle within PIRC. However, the implicit suggestion that such work may be viewed as something of a luxury add-on and that, if additional resources are not forthcoming, other work will continue to have greater priority is a matter of concern. Resources within the PIRC should be allocated in such a way that the audit of complaints, the identification of trends and the promotion and support of continuous improvement in policing is prioritised.

298. Alongside these arrangements, the Crown Office and Procurator Fiscal Service (COPFS) has longstanding responsibility for overseeing and investigating any allegation of criminality, including the investigation of allegations of criminality by police officers. In addition to dealing with individual allegations, COPFS also has oversight of the effectiveness of the overall system. Thus, earlier this year, the Crown Agent advised the Justice Committee that, to provide additional reassurance that Police Scotland categorises and routes such allegations correctly:

- the Criminal Allegations Against Police Division (CAAP-D) within COPFS would carry out a retrospective review of a representative sample of complaint cases that have been characterised by Police Scotland as complaints of 'excessive force' and/or 'unlawful detention'.
- Police Scotland would meantime be expected to report all cases to CAAP-D where they propose to categorise the complaint as one of 'excessive force'.

299. Aside from the external audit, review and inspection activities undertaken by COPFS and the three scrutiny bodies specified in Section 85 of the 2012 Act, as summarised above, there is clearly a vital internal quality control function for the Scottish Police Authority/Police Scotland. A pivotal role in this is played by the

Scottish Police Authority's Complaints and Conduct Committee, since it was re-established 18 months ago, and Police Scotland's Professional Standards Department (PSD).

300. The Complaints and Conduct Committee considers information from a range of sources, including statistical reports from PSD, dip-sampling reports produced by the Scottish Police Authority's own staff and trend analysis. There is clear evidence from the Complaints and Conduct Committee's published material of an ongoing effort to focus on thematic and systemic issues, with a view to drawing generally applicable lessons and facilitating organisational learning for the Scottish Police Authority/Police Scotland. It appears, however, that – notwithstanding the view in PIRC's 2017 Audit that "*the current level of resources dedicated by the SPA to complaint handling is sufficient*" – resource and skills constraints in the Authority may at times inhibit its ability to pursue a rigorous, in-depth approach, not least when the small support team is under exceptional pressure, for example on occasions when it is operating below complement and/or is diverted by having to deal with individual complaints about senior police officers or the Authority itself. Against that background, the Review welcomes indications from HMICS that the Complaints and Conduct Committee is making positive efforts to increase its capability. The Chair of the SPA recognises the challenges in this area and is seeking to develop a more robust position.

301. Even now, however, it appears that the Complaints and Conduct Committee provides a useful, open forum for addressing statistically-based emerging themes and systemic issues. The reports that are presented to the Complaints and Conduct Committee and minutes of its discussions are available online to all the aforementioned scrutiny organisations and, indeed, to the general public. However, it is generally the case that the Complaints and Conduct Committee is attended only by the Scottish Police Authority/Police Scotland. Other relevant bodies, such as the PIRC, should consider whether more direct engagement with the Complaints and Conduct Committee could facilitate a clearly focused, whole-system approach to complaints handling. This may offer one additional means of achieving more co-ordination, with regular, thematic, analytically robust outcomes.

302. Recommendation: All the audit arrangements, including regular dip-sampling, designed to identify poor practice, good practice and emerging trends should be prioritised and co-ordinated to support the common objective of improving standards and service to the public.

TRAINING

304. In recent months additional training and programmes have been implemented and these are to be welcomed, especially the training that has been undertaken across or between organisations. It is vital that people have a better knowledge of others' roles, and improved communication along with joint training will assist in this.

305. There are instances where audits of organisations have previously identified gaps in their training needs. For example, PIRC's 2017 audit of the Scottish Police Authority concluded that no staff had undertaken formal complaint handling training since taking up post, and that there was no formal or structured annual training, or continuing professional development programme made available to staff. PIRC therefore recommended more training for staff in the SPA's Complaints and Conduct Team and this has been progressed.

306. In the context of misconduct, the Association of Scottish Police Superintendents (ASPS) expressed the view in their evidence that those in charge of conduct procedures, especially hearings, lacked specific training, and stressed that it is important that those charged with independent oversight are properly trained and resourced.

307. The 2015 *Review of PIRC Procedures in relation to Complaint Handling* Reviews of PIRC led by Robert Gordon recommended that the Scottish Public Services Ombudsman (SPSO) should share their training materials and courses where appropriate, and that a quality assurance check of decisions issued by review officers could offer feedback to identify any training needs. The PIRC should also consider the operational and career development merits of interchange between PIRC staff and SPSO staff.

308. The identification of relevant training for officers, investigators, hearing or chairs of proceedings and support staff across all organisations will be considered in the final report.

WHISTLE-BLOWING BY POLICE OFFICERS AND SUPPORT STAFF

309. The term “whistle-blowing” relates to a worker who reports a certain type of wrongdoing where it is in the public interest for that wrong-doing to be disclosed. Reports, which can be anonymous, must be dealt with confidentially by the body which receives them. The worker is protected by law if they report on any of the following actions:

- a criminal offence
- someone’s health and safety is in danger
- risk or actual damage to the environment
- a miscarriage of justice
- the organisation is breaking the law
- they believe someone is covering up wrong-doing

310. In their evidence to the Review Police Scotland stated that it is good practice to create an open, transparent and safe working environment where staff feel able to speak up. They have recently published up-to-date guidance in order to allow officers to report concerns, or whistle-blow. In February 2019, the company PROTECT (Whistleblowing Advice Ltd) were awarded the contract to provide an independent advice line on behalf of Police Scotland for whistle-blowing matters. Officers have access to specific whistle-blowing report forms. Police Scotland’s publication of new whistle-blowing guidance, was accompanied by a communication programme and an e-learning package.

311. Enhancing protection for whistle-blowers within policing could be achieved by prescribing in legislation another Scottish third-party reporting body or person. In England and Wales the Independent Office of Police Conduct (IOPC) is such a prescribed body, but in Scotland the PIRC is not. In her evidence to this Review the PIRC suggested that “to facilitate independent investigations of appropriate whistleblowing concerns, legislative amendment could be made to provide the PIRC with ‘prescribed person’ status and legislative powers to independently investigate these matters”.

312. The whistle-blowing processes will be examined in detail and further evidence taken from relevant stakeholders on how these processes work in practice. Further consideration will be given to this matter in the final report, and views would be welcome on whistle-blowing generally, and specifically on the question of whether a policing body, such as the PIRC, should have prescribed status as the IOPC does south of the border.

PROTECTING VULNERABLE PEOPLE

Independent custody visiting

313. Since 1 April 2013, the Scottish Police Authority has had a statutory duty to maintain and manage an independent custody visiting scheme to monitor the welfare of people detained in police custody facilities throughout Scotland. Independent Custody Visitors are volunteer members of the local community who visit police stations unannounced to check on the treatment of detainees, the conditions in which they are being held and that their rights and entitlements are being observed.

314. As I stated in my 2017 report on *Deaths and serious incidents in Police Custody*⁵⁶ for the then Home Secretary, Independent Custody Visitor schemes need to be recognised and valued for the vital role they play in helping to safeguard conditions within police custody. This means that they should have all necessary support required to collate and disseminate learning, and see it acted upon.

315. The main focus of the police and other agencies should therefore always be to divert the most vulnerable people from police custody at the earliest stage possible. It is also vital that the police and healthcare providers are properly resourced to do so and that the most effective disposals become more readily available.

316. In the context of the current Review and the scope for complaints to arise from detention, the interaction between members of the public and the police at custody suites should be seen as an area of risk and the scrutiny of independent custody visitors as an additional means of using the learning gained to mitigate that risk.

⁵⁶ <https://www.gov.uk/government/publications/deaths-and-serious-incidents-in-police-custody>

Mental health

317. Increasingly the police are being called to deal with individuals who have mental health problems. Such situations may generate complaints against the police. Many people who come into contact with the police are taken to police stations rather than to a health-based place of safety. In cases where there has been serious criminal wrongdoing this approach may be warranted. However, for more minor offences, healthcare should be a priority where there is an acute need. Even in serious cases the mental fitness of an accused person to be interviewed or detained may require an urgent medical assessment. The necessary communication, de-escalation and diversion required to prevent unwell detainees being detained by the police requires multi-agency co-operation and a clear understanding of the roles, responsibilities and skillsets of the police and healthcare bodies.

JURISDICTIONAL ISSUES

318. While they are sometimes merited, it is the case that boundaries, demarcations and divisions can bring added complexity in many areas of life. In relation to the handling of complaints, investigations and misconduct, there is a range of divisions which can result in jurisdictional challenges.

Former officers

319. At the moment, an officer who is alleged to have been responsible for a wrong and expects to be subject to a finding of misconduct or gross misconduct, can simply resign and bring all those proceedings to a halt. Of course such a departure can have no impact on any criminal proceedings. This “escape route” has some redeeming features (it allows the service to shed alleged wrong-doers relatively quickly, without protracted and costly proceedings), however it does not appear compatible with the principles of natural justice, especially where the alleged misconduct is associated with detriment to members of the public or there is a major issue of public interest at stake.

320. Preventing officers from retiring when they are genuinely ill cannot be justified, nor can any unreasonably punitive approach to pension rights (which has a range of detrimental implications, not least for family members and which could engage Article 8 Convention Rights). Pension forfeiture provisions do currently exist but are seldom used.

321. I consider that:

- there may be merit – for example in terms of the public interest in transparency and justice, and in line with the practice introduced in England and Wales by the Policing and Crime Act 2017 – in allowing/requiring misconduct proceedings to operate, even after an officer has resigned and even if he or she is unable or unwilling to engage with the proceedings; and

- there is also a strong ethical and presentational case for adopting Barred and Advisory Lists, along the lines of those which exist in England and Wales by virtue of Policing and Crime Act 2017. The value of such an innovation and the mitigation of risk to the public sector would be likely to be enhanced if legislation allowed the lists to have cross-border and UK-wide application. (Currently the Advisory List is not accessible to other jurisdictions.) The Scottish Government should engage with the UK Government on this matter to ensure compatibility and learn from their experience.

322. The Barred and Advisory Lists in England and Wales are managed by the College of Policing and cover all forces within that jurisdiction. The unpublished but publicly searchable Barred List contains information about all individuals who have, in essence, been ‘struck off’ and cannot work again in the policing profession (that is, individuals who were dismissed from positions within policing, or who were subject to a finding that they would have been dismissed following proceedings). The unpublished Advisory List, which is used as a vetting tool by policing employers, contains information about individuals who resign or retire during investigations: at the conclusion of an investigation, an individual is either transferred from the Advisory List to the Barred List (if he/she receives a finding of dismissal) or simply removed from the Advisory List (if there is a lesser finding or no disciplinary proceedings are brought).

Definition of a “person serving with the police”

323. The 2006 Act as amended by the 2012 Act uses the term “person serving with the police”, which is interpreted at Section 47, in various provisions in Chapter 2. These are Section 33A (Crown-directed investigations into offences or deaths), Section 41B (Serious incidents involving the police) and Section 41C (Public interest investigations by the PIRC). A longer wording that pre-dates the 2012 amendments is used in Section 34 2(f) (“Relevant complaints” and “person serving with the

police”) to define a relevant complaint: “by a person who, at the time of the act or omission, was a person serving with the police”.

324. The use of the phrase “person serving with the police” has caused ambiguity over its meaning. The moot point is whether this should be interpreted as being a person serving at the time of the current investigation, or a person serving at the time of the act or omission (but since retired). There has also been uncertainty over whether “person serving with the police” means a police officer when he/she is off duty, or a police officer only if he/she is on duty.

325. There are varying views about whether (and in what circumstances) the legislation does or does not preclude the PIRC from investigating the pre-retirement actions or omissions of retired officers which might constitute criminal offences and, if so, whether this was the policy intention. The relevant provision is Section 33A(b)(i) of the 2006 Act, as inserted by Section 62 of the 2012 Act: "33A The Commissioner's general functions are...(b) where directed to do so by the appropriate prosecutor...(i) to investigate any circumstances in which there is an indication that a person serving with the police may have committed an offence."

326. The Police Investigations and Review Commissioner in her evidence to the Review suggested that to remove the ambiguity “the legislation be amended to provide clarity and express provision that the PIRC can undertake investigations into those who, at the time of the act or omission, were serving with the police.” I support this proposal and believe that the position should be put beyond doubt in the legislation.

327. It has been put to the Review that this ambiguity over the meaning of a “person serving with the police” can also lead to differential treatment of on-duty and off-duty officers and so, for example:

- if an officer is alleged to have committed a criminal offence while off duty, he/she will invariably be reported to the local Procurator Fiscal and then

investigated by his/her local police colleagues (instead of being referred at the outset to COPFS / PIRC for potential independent investigation).

- if a mixed group of on-duty and off-duty officers are alleged to have been involved in wrongdoing, it may be that investigations into the former can be conducted by PIRC while a separate investigation into the latter has to take place in parallel.

328. There has traditionally been one set of detailed Conduct Regulations for senior police officers (ACC and above) and another set for all other officers. In many respects, however, the Regulations are broadly similar. It is open for consideration whether a single, all-encompassing set of regulations (incorporating appropriate rank-specific variations where necessary) would bring more advantages than disadvantages.

329. Consideration will be given to the merits of consolidation of the Conduct Regulations for all ranks in the final report.

330. As long as there are differences in the actual procedure for dealing with officers of different rank, there will be jurisdictional issues. For instance:

- there are questions about how most appropriately to deal with a complaint against an ACC, which relates to what he or she is alleged to have done previously in a less senior rank, for example as a Superintendent many years before.
- there are questions as to how to proceed with handling allegations which involve both senior and non-senior officers who are alleged to have acted together in a misconduct matter.

331. For such reasons, even if it is concluded that senior and non-senior regulations cannot be integrated, there should be a focus on minimising any unnecessary divergence or rigidity in procedure which prevents a common-sense approach to such proceedings. Any new regulations could not have retrospective effect, and more specifically, could not apply penalties that were not in existence at the time of the misconduct.

332. In her evidence to the Review, it was suggested by the PIRC that she be “provided with powers to investigate matters of misconduct by police officers (both senior and non-senior) where they become apparent and linked to an ongoing PIRC investigation”. This pragmatic suggestion should be implemented. Where it makes practical and operational sense to extend an ongoing investigation about alleged senior officer misconduct that should happen, although the subsequent process would have to be kept separate. This could also reduce duplication of inquiries and multiple interviews of witnesses.

333. The passage of time presents a further issue of jurisdiction because the conduct of senior officers is governed by three sets of conduct regulations, depending on when the alleged misconduct occurred, while the conduct of all other ranks is governed by three separate sets of conduct regulations. Thus, it seems clear that while the previous regulations have been largely revoked, 1990s regulations continue to govern the historical conduct of officers who were serving prior to police reform in 2013.

334. If a misconduct allegation is made today against an officer in relation to events that happened in 1998, for example, the officer would be dealt with in terms of the 1996 regulations. There is a question as to whether, in relation to non-serious, non-criminal matters, it is fair and proportionate to have them open to such historical challenge, insofar as it relates to misconduct matters, whether a time-bar should be considered. Consideration of the introduction of any time-bar should however also take into account that a course of conduct over a period of time can be indicative of a pattern of behaviour.

335. The range of jurisdictional issues reflects the complexity of the various pieces of legislation and changes over many years. The final report will examine jurisdictional issues in greater depth.

336. Recommendation: The Scottish Government should introduce Barred and Advisory lists and should engage with the UK Government to ensure compatibility and learn from their experience.

337. Recommendation: The Scottish Government should amend the relevant provisions at the earliest opportunity to put beyond doubt the definition of a “person serving with the police”.

CLARIFYING DEFINITIONS

“Relevant complaint” and “member of the public”

338. In evidence to the Review, the SPA suggested that the policy intention of Section 34 of the Police, Public Order and Criminal Justice (Scotland) Act 2006, which created the Police Complaints Commissioner for Scotland and defined his functions, should be made clear: “If the intention of the 2006 Act is to exclude police officers from those who may make relevant complaints, this should be made clear in the legislation.”. The functions of the PCCS are now vested in the Police Investigations and Review Commissioner by virtue of the 2012 Act and include reviewing how complaints have been handled by Police Scotland or the SPA.

339. Section 34 defines “relevant complaint”, as it relates to the Commissioner’s functions, as one that is made by:

- “(a) a member of the public who claims to be the person in relation to whom the act or omission took place;
- (b) a member of the public not falling within paragraph (a) who claims to have been adversely affected by the act or omission;
- (c) a member of the public who claims to have witnessed the act or omission;
- (d) a person acting on behalf of a person falling within any of paragraphs (a) to (c).”

340. Section 34 defines “relevant complaint” but does not define “member of the public”. In some other jurisdictions “member of the public” is defined in the equivalent complaints legislation to exclude police officers, or to exclude on-duty police officers.

341. The general approach taken by the PIRC is that police officers who make complaints about matters occurring on duty are not regarded as “members of the public” for the purposes of the 2006 Act, but the clarification sought by the SPA would be helpful. This is ultimately a question for the Scottish Parliament, but it would seem logical that an off-duty police officer who receives a poor quality of

service from Police Scotland should have the same entitlement to complain and seek redress as any other citizen.

342. Recommendation: The Scottish Government should consider the case for amending the legislation to put beyond doubt the definition of a member of the public who may make a relevant complaint.

LIST OF ALL RECOMMENDATIONS

1. Recommendation: Given the importance and sensitivity of such allegations it is recommended that all such allegations of excessive force should continue to be reported immediately by PSD to CAAP-D for instruction and investigation by the independent Procurator Fiscal or by PIRC on the directions of the Procurator Fiscal of CAAP-D.
2. Recommendation: Police Scotland should review the service-wide capability of its line managers to line manage effectively, including the adequacy of training and mechanisms of support for line managers.
3. Recommendation: Police Scotland should consider the scope for employing more non-police officer support staff in PSD with appropriate seniority, skills and level of knowledge of complaints handling. This is an option that Police Scotland may wish to ask HMICS to review.
4. Recommendation: Police Scotland should scrutinise complaints thoroughly on receipt so as to ensure that grievance matters that would in any other walk of life be treated in an HR context are not artificially elevated and dealt with as conduct matters.
5. Recommendation: Frontline resolution of complaints should be subject to close and regular monitoring through regular, meaningful internal and external audits, and monitoring of decision-making.
6. Recommendation: Police Scotland should adjust its practice in respect of “Early intervention”. Officers should be made aware that they are the subject of a complaint against them at the earliest practicable point, provided that such early disclosure would not prejudice any investigation of a complaint.
7. Recommendation: PIRC should be given appropriate access to the Police Scotland Centurion system for the purposes of contemporaneous audit of complaints and to help facilitate early PIRC awareness of criminal allegations.

8. Recommendation: Police Scotland should simplify and streamline systems to make it as straightforward as possible for members of the public to navigate this rather opaque landscape and as easy as possible for them to access and understand information on how to make a complaint. In particular the online complaints form on the Police Scotland website should be made more prominent.
9. Recommendation: To encourage appropriate use of mediation and grievance procedures Police Scotland should raise awareness and understanding amongst all members of the service of their own internal systems and which matters belong where in order to ensure a proportionate response.
10. Recommendation: Police Scotland should consider the importance of providing all officers involved in frontline resolution with training in mediation and customer handling.
11. Recommendation: Police Scotland should accelerate its plans to expand the use of body-worn video technology.
12. Recommendation: Police Scotland is a young but now established national organisation with a stable leadership team. This is a good opportunity to reflect on the culture of the new service, address any long-standing issues and consider how everyone in the organisation can help to change that culture for the better.
13. Recommendation: The Scottish Government should consider the case for amending the legislation to include a provision to deal with vexatious complainers.
14. Recommendation: Subject to the fundamental right to silence or privilege against self-incrimination of a suspect under Article 6 of Convention Rights, police officers should give every assistance after a serious incident. That assumption of co-operation should be put beyond doubt in the primary legislation, including in the wording of the constable's declaration.

15. Recommendation: Where a serious incident is being investigated by the PIRC, the investigators should also have a power, where it is necessary and proportionate, to compel police officers to attend within a reasonable timescale for interview.
16. Recommendation: Complaints against senior officers should be prioritised and dealt with, by both the PIRC and the SPA, as speedily as is reasonable, because of the destabilising impact a prolonged investigation can have.
17. Recommendation: Further training for complaints and conduct officers in SPA should be consolidated and broadened in order to ensure the right skillset and up-to-date knowledge of complaint handling best practice in other sectors.
18. Recommendation: The range of options available to the SPA when a senior police officer is under investigation under the conduct regulations should be clarified and expanded, to provide alternatives to suspension.
19. Recommendation: Any process for preliminary assessment of senior officer misconduct should require the relevant authority both to take into account whether the allegation is made anonymously, is specific in time and location, or whether it appears, on the face of the allegation, to be either vexatious or malicious. Scottish Government should consider amending the conduct regulations to reflect this process.
20. Recommendation: The PIRC should consider the case for creating some measure of regional presence to enhance its capacity to respond immediately to the most serious incidents wherever they occur.
21. Recommendation: The PIRC should have the support of a new statutory Board of members appointed through the Scottish public appointments process whose role would be to scrutinise the work of the organisation, review the performance of the Commissioner and offer supportive advice and expertise.

22. Recommendation: The Commissioner, or potentially a Deputy Commissioner, should be vested with a statutory power to make recommendations in addition to the existing powers to direct reconsideration of complaints. The corollary to that is that there should be a statutory duty, subject to a public interest test, on the Chief Constable to comply with recommendations unless there are sound overriding operational or practical reasons for not complying with a PIRC recommendation and an obligation on PSD to report progress back to the PIRC. Those statutory arrangements should be supported by agreement between the PIRC and Police Scotland on how the PIRC will be kept advised of progress.
23. Recommendation: The PIRC should consider the case for building into its structure legal support and advice capacity.
24. Recommendation: Following the retirement of former police officers PIRC policy should be to replace them with non-police officers. The PIRC should also adopt a similar policy to the IOPC's in England and Wales by recruiting non-police officers when recruiting to the most senior posts.
25. Recommendation: There should be a management review by an independent expert to ensure that the PIRC has appropriate leadership, skills and culture to carry out its functions in the future, and to examine interactions with other stakeholders and how they can be improved.
26. Recommendation: There should be the immediate establishment of a senior cross-agency joint Working Group involving the SPA, Police Scotland and the PIRC to develop appropriate and up-to-date guidance.
27. Recommendation: All the audit arrangements, including regular dip-sampling, designed to identify poor practice, good practice and emerging trends should be prioritised and co-ordinated to support the common objective of improving standards and service to the public.

28. Recommendation: The Scottish Government should introduce Barred and Advisory lists and should engage with the UK Government to ensure compatibility and learn from their experience.
29. Recommendation: The Scottish Government should amend the relevant provisions at the earliest opportunity to put beyond doubt the definition of a “person serving with the police”.
30. Recommendation: The Scottish Government should consider the case for amending the legislation to put beyond doubt the definition of a member of the public who may make a relevant complaint.

SUMMARY OF WHAT HAPPENS NEXT

343. In the preceding chapters of this report a range of important issues are set out that will be considered in depth over the next 12 months and will form the basis of the final report. That final report will be submitted to the Cabinet Secretary for Justice and the Lord Advocate in August 2020 and be published at the same time. Between then and now further evidence-gathering will help to inform future recommendations and broaden the range of contributions.

344. Whether they are complainers, victims or families, members of the public have accounts and experiences of the complaints handling system that will help to shape improvements in that system. Engagement with those individuals will also guide my thinking over the next 12 months and I would encourage them to think about volunteering to participate in one of the Review's focus group discussions with me later this year. Anyone who would be willing to contribute in this way should get in touch with the Secretariat at the address below.

345. I look forward to continuing engagement with the Scottish Parliament. The Justice Committee's important report on the 2012 Act made a number of recommendations in the area of complaints and the follow-up to those recommendations is largely a matter for the organisations to which they were directed. The key issues raised by the Committee will continue to be the subject of consideration.

346. There is much that can be learned from other jurisdictions and sectors and so the second phase of the Review will expand on its engagement with policing organisations in England and Wales, Northern Ireland and the Republic of Ireland, and also with organisations dealing with complaints outwith the world of policing.

347. Further views and evidence are being sought on a number of major issues which are listed below:

- The case for structural change across the system.
- Strengthening the learning culture across the organisations charged with dealing with complaints.
- Leadership and management culture.
- Accountability arrangements for the office of Police Investigations and Review Commissioner (PIRC).
- The obligation of a constable to assist the investigation of a death or a serious incident.
- Misconduct proceedings for police officers of all ranks.
- The role of the media and social media as they relate to the Review's subject matter.
- Other related structures such as the role of local scrutiny committees and independent custody visiting in police complaints.
- Jurisdiction over retired police officers.
- United Kingdom cross-border jurisdictional issues.
- Best practice in the other United Kingdom jurisdiction oversight bodies.
- Potential benefits of the proposed changes to regulations applying to police officers in England and Wales resulting from the Policing and Crime Act 2017.
- The experience of those who have made complaints over the last six years.

348. In some instances this preliminary report suggests a number of significant options for change and I would welcome responses on those options before 1 December 2019.

349. Further written evidence on any matter discussed or any option set out in this report may be submitted online via the Review website:

<https://www.gov.scot/groups/independentpolicingreview/> or by writing to or e-mailing the Secretariat at:

Independent Review of Complaints Handling, Investigations and Misconduct
Issues in relation to Policing

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21 June 2019

TERMS OF REFERENCE

The purpose of the Review is to:

- consider the current law and practice in relation to complaints handling, investigations and misconduct issues, as set out in relevant primary and secondary legislation;
- assess and report on the effectiveness of the current law and practice; and
- make recommendations to the Cabinet Secretary for Justice and the Lord Advocate for improvements to ensure the system is fair, transparent, accountable and proportionate, in order to strengthen public confidence in policing in Scotland.

Whilst the Review will encompass the investigation of criminal allegations against the police, it will not address the separate role of the Lord Advocate in investigating criminal complaints against the police or the role of HMICS in scrutinising the state, effectiveness and efficiency of both the Police Service of Scotland (Police Scotland) and the Scottish Police Authority (SPA). The consideration of specific complaints and investigations will not form part of the review beyond informing an overall assessment of the efficacy of current systems and processes.

The Review will consist of two phases:

- The **first phase** will include a consideration of current procedures and guidance to identify areas for immediate improvement;
- The **second phase** will include a wider assessment of the frameworks and practice in relation to complaints handling, investigations and misconduct issues, covering the Police Investigations and Review Commissioner, the SPA and Police Scotland. Recommendations in the final report should take into account human rights considerations, as well as seeking to identify longer-term improvements.

Relevant legislation and guidance

- The Police, Public Order and Criminal Justice (Scotland) Act 2006 as amended
- Police and Fire Reform (Scotland) Act 2012
- Ethical Standards in Public Life etc. (Scotland) Act 2000
- Equality Act 2010
- The Police (Conduct) (Senior Officers) (Scotland) Regulations 1996
- The Police (Conduct) (Senior Officers) (Scotland) Regulations 1999
- The Police Service of Scotland (Senior Officers) (Conduct) Regulations 2013
- The Police (Conduct) (Scotland) Regulations 1996
- The Police Service of Scotland (Conduct) Regulations 2013
- The Police Service of Scotland (Conduct) Regulations 2014
- The Police Service of Scotland (Senior Officers) (Performance) Regulations 2016
- The Police Service of Scotland (Performance) Regulations 2013
- The Police Investigations and Review Commissioner (Investigations Procedure, Serious Incidents and Specified Weapons) Regulations 2013
- The Police Service of Scotland Regulations 2013
- From sanctions to solutions PCCS/PIRC Statutory Complaints Handling Guidance
- Revisions to sanctions to solutions, following creation of PIRC on 01 April 2013
- SPA/Police Scotland Code of Conduct (September 2016)

Standards of Professional Behaviour

(replicated from Schedule 1 to The Police Service of Scotland (Conduct) Regulations 2014)

- **Honesty and integrity**

Constables are honest, act with integrity and do not compromise or abuse their position.
- **Authority, respect and courtesy**

Constables act with self-control and tolerance, treating members of the public and colleagues with respect and courtesy.

Constables do not abuse their powers or authority and respect the rights of all individuals.
- **Equality and diversity**

Constables act with fairness and impartiality. They do not discriminate unlawfully or unfairly.
- **Use of force**

Constables use force only to the extent that it is necessary, proportionate and reasonable in all the circumstances.
- **Orders and instructions**

Constables give and carry out only lawful orders and instructions.
- **Duties and responsibilities**

Constables are diligent in the exercise of their duties and responsibilities.
- **Confidentiality**

Constables treat information with respect and access or disclose it only in the proper course of their duties.
- **Fitness for duty**

Constables when on duty or presenting themselves for duty are fit to carry out their responsibilities.
- **Discreditable conduct**

Constables behave in a manner which does not discredit the Police Service or undermine public confidence in it, whether on or off duty.

Constables report any action taken against them for a criminal offence, any conditions imposed on them by a court or the receipt of any penalty notice.
- **Challenging and reporting improper conduct**

Constables report, challenge or take action against the conduct of other constables which has fallen below the Standards of Professional Behaviour.

List of written submissions to the call for evidence

94 individuals made written submissions

1. Police Scotland
2. Her Majesty's Inspectorate of Constabulary in Scotland
3. Scottish Chief Police Officers Staff Association
4. Scottish Public Services Ombudsman
5. Law Society of Scotland
6. Police Investigations and Review Commissioner
7. Association of Scottish Police Superintendents
8. Scottish Women's Rights Centre
9. Scottish Police Authority
10. Scottish Police Federation
11. Retired Police Officers Association Scotland
12. Scottish Legal Complaints Commission

GLOSSARY

ACC	- Assistant Chief Constable
ACPOS	- Association of Chief Police Officers (Scotland)
ACU	- Anti-Corruption Unit (part of Police Scotland)
AGS	- Auditor General for Scotland
ASPS	- Association of Scottish Police Superintendents
CAAP-D	- Criminal Allegations Against Police – Division (part of COPFS)
CARU	- Complaints Assessment and Resolution Unit
Centurion	- Police Scotland’s complaints database
CHR	- Complaint Handling Review
CHS	- Criminal History System
COPFS	- Crown Office and Procurator Fiscal Service
DCC	- Deputy Chief Constable
ECHR	- European Convention on Human Rights
FLO	- Family Liaison Officer
Frontline Resolution	- Early discussion of a complaint with the complainer
HMICS	- Her Majesty’s Inspectorate of Constabulary in Scotland
IOPC	- Independent Office of Police Conduct (England and Wales)
NGAU	- National Gateway Assessment Unit
PCCS	- Police Complaints Commissioner for Scotland
PIRC	- Police Investigations and Review Commissioner
PONI	- Police Ombudsman for Northern Ireland
PSD	- Professional Standards Department
PSoS	- Police Service of Scotland (known as Police Scotland)
Relevant complaint	- A complaint against the police, as defined in the Police, Public Order and Criminal Justice (Scotland) Act 2006, as amended
Senior officer	- Any Constable holding rank of Chief Constable, Deputy Chief Constable or Assistant Chief Constable
SOP	- Police Scotland has multiple Standard Operating Procedures covering a huge array of subjects
SPA	- Scottish Police Authority

SPSO	- Scottish Public Services Ombudsman
The 2012 Act	- Police and Fire Reform (Scotland) Act 2012
The 2006 Act	- Police, Public Order and Criminal Justice (Scotland) Act 2006
VIA	- Victims Information and Assistance service (part of COPFS)



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