

HM Inspectorate of Prosecution in Scotland

# **Inspection of the management by COPFS of criminal allegations against the police**

September 2021

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## Introduction

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The aim of this inspection was to assess the management of criminal allegations against the police by the Crown Office and Procurator Fiscal Service (COPFS), with a view to providing assurance to the Lord Advocate, the public and other stakeholders that such cases are dealt with effectively and efficiently.

Criminal allegations against the police have been the subject of much media and public interest in recent years in Scotland, the UK and around the world. Particularly in relation to allegations that a police officer has committed an offence while on duty, given the privileged place that the police occupy in our society and the powers they exercise on behalf of the state, it is essential that allegations are investigated thoroughly and independently, and in a manner that maintains public confidence in the criminal justice system.

In Scotland, all criminal allegations against those serving with the police are reported to COPFS, our sole prosecuting authority. COPFS is able to independently oversee and direct the investigation into criminal allegations, before making a decision as to whether the person complained about should be prosecuted. COPFS has separate processes for dealing with criminal allegations against the police depending on whether the alleged criminal conduct was committed while on duty or while off duty. We reviewed how COPFS manages both types of allegations. Part 1 of this report focuses on the management of criminal allegations against those serving with the police while they are on duty, while Part 2 focuses on off duty allegations.

Overall, we conclude that the quality of decision making by COPFS is good and that the public should be reassured by the robust scrutiny which is applied to on duty criminal allegations against the police. There is scope for improvement, however. There is a need for greater clarity about how on and off duty allegations should be managed among those agencies that report allegations to COPFS and among its own staff. Reporting agencies and COPFS can also make improvements to their processes, to ensure that COPFS is able to properly fulfil its role in independently overseeing and directing investigations. There is work to be done to ensure that decisions on whether criminal allegations should result in a prosecution are made timeously, and are communicated effectively to complainers and those complained about. We also highlight the need for greater transparency in the handling of criminal allegations against the police by COPFS and we hope our report helps in this regard.

We gathered evidence for the purpose of our inspection between December 2020 and May 2021. This included interviewing almost 40 COPFS personnel who are involved in the investigation and prosecution of criminal allegations against the police, reviewing relevant documentation and data, and observing meetings. We also engaged with a range of stakeholders and partner organisations with an interest in criminal allegations against the police. This included Police Scotland, the Scottish Police Authority, the Police Investigations and Review Commissioner, British Transport Police, the Scottish Police Federation, the Association for Scottish Police Superintendents and the Scottish Chief Police Officers' Staff Association. We met with solicitors who have represented those who have made a criminal allegation against the police, and solicitors who have represented police officers and staff who have been accused of a crime.

We also carried out an extensive case review. We reviewed a statistically significant sample of 80 cases reported to COPFS in which a person serving with the police was alleged to have committed an offence while on duty, and a sample of 40 cases in which the offence was committed while off duty.



In carrying out our inspection, as in all of our scrutiny activity, we applied our Inspection Framework. The framework provides a structure within which we ensure a consistent and professional approach to our work. Based on the European Foundation for Quality Management (EFQM) Excellence Model, the framework has six themes:

- Outcomes
- Leadership and governance
- Process
- People
- Resources
- Collaborative work.

Our inspection was delivered in compliance with the law and guidance relating to the Covid-19 pandemic. This was facilitated by inspectorate staff working from home but having direct, remote access to COPFS systems, while all interviews were carried out via video conferencing. While we have adapted well to inspecting remotely and video conferencing undoubtedly offers benefits such as minimising travel time and expense for inspectors and interviewees, we have nonetheless found that delivering an inspection of this scale has taken longer than would likely have been the case had our inspection team been co-located.

In response to our inspection, COPFS will be asked to create an action plan so that our recommendations can be addressed. We will monitor progress against this plan.

We are grateful to all those who participated in our work and shared their views and experiences with us. We would particularly like to thank the Head of the Crown's Criminal Allegations Against the Police Division and his team who assisted us throughout our inspection.

Laura Paton  
HM Chief Inspector of Prosecution in Scotland



## Key findings

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### **On duty criminal allegations against the police**

The creation in 2013 of CAAP-D, a national unit to manage all on duty criminal allegations against the police, has resulted in consistent decision making by specialist prosecutors and has facilitated more effective relationships with stakeholders.

Allegations of on duty criminal conduct are subject to robust scrutiny by COPFS with the aim of providing reassurance to the public that such allegations are investigated thoroughly and independently. Criminal proceedings against the police can only be instructed by a Law Officer.

The quality of decision making is good.

The most common complaint made by stakeholders is the length of time CAAP-D takes to decide whether a criminal allegation should result in the prosecution of the subject officer. In the 80 cases we reviewed, the average time taken to decide whether to prosecute was 18 weeks.

Over the years, CAAP-D has consistently met a 12-week target for decision making. However, this target is based on flawed data and there is a lack of robust and accurate management information about CAAP-D's work.

While communication with many complainers in the cases we reviewed was good, more can be done to involve complainers in the investigation process and to ensure they are kept up to date on the status and progress of their complaint. The quality of communication with some complainers could also be improved and communication could be better tailored to meet their needs.

There are effective leadership and internal governance arrangements in place for the management of criminal allegations against the police, albeit that governance would be strengthened if better quality data was available.

There is a lack of written policy or guidance about how COPFS manages criminal allegations against the police. This includes a lack of guidance for reporting agencies as well as internal guidance for its own staff.

There is scope to be more transparent about how criminal allegations are handled and to routinely publish data about CAAP-D's work, such as the volume of cases and their outcome.

There is a lack of information about the protected characteristics of complainers and those complained about, and there may be scope to give greater consideration to the role that race may play in complaints.

CAAP-D is not being routinely notified by the police of the existence of criminal complaints at a sufficiently early stage, which risks compromising its ability to direct or provide independent oversight of investigations.

The introduction of a procedure for reporting agencies to request advice and guidance from CAAP-D about criminal complaints has been a positive development. CAAP-D generally responds promptly to these requests.

While the investigation of some criminal complaints may be complex or protracted, there is scope for investigation reports to be submitted to CAAP-D more quickly, and for CAAP-D to have greater oversight of the progress of investigations.



While most investigation reports submitted to CAAP-D by the police and PIRC were of a high standard, others were of a variable quality. This affects how effectively and how quickly CAAP-D is able to make decisions on whether there should be a prosecution.

Investigation reports should contain more information about those complained about, to better support prosecutorial decision making.

There can be unnecessary delays in CAAP-D's processing of investigation reports upon receipt.

There is scope for CAAP-D to improve its approach to disclosure in cases where the complainer in the criminal complaint against the police is being prosecuted for a related offence.

Where there is a sufficiency of evidence in a case involving a criminal allegation against the police, the case is reported to Crown Counsel for their instruction. Their instruction was given promptly in the majority of cases we reviewed.

Once a decision is taken to prosecute a person serving with the police, CAAP-D transfers the case to the local procurator fiscal office for prosecution. We support this approach to prosecuting cases but the transfer process could work more effectively, and local prosecutors could be given more support with these cases.

It is difficult to assess whether CAAP-D's resources are appropriately matched to demand because of the lack of robust data about the journey time of cases.

There has been a reliance on experienced and expert members of CAAP-D to provide on the job training and guidance to new staff, however this is unsustainable due to recent staff turnover and the move to working from home. More formal induction and guidance will be needed in future.

On-going training opportunities for staff in CAAP-D, particularly those delivered in collaboration with partner organisations, are well-received.

Staff were very positive about their experience of working for CAAP-D and reported a good level of job satisfaction.

The lack of an electronic reporting system for criminal allegations against the police causes CAAP-D staff additional work, carries unnecessary risk and is not appropriate for a modern, digitally-enabled prosecution service.

CAAP-D works well with its internal and external partners.

### **Off duty criminal allegations against the police**

Criminal allegations against the police while they are off duty are managed by COPFS in a way which is more akin to the process for managing allegations of criminality against any member of the public.

The definition of on and off duty criminal allegations against the police requires clarification. Of the 40 off duty criminal complaints we reviewed, a quarter should have been subject to the process for on duty criminal complaints.

Oversight of off duty criminal complaints could be strengthened.

The current, informal process for managing off duty criminal complaints is reasonable, but there is a need to ensure it is followed in every case and that a broader range of staff are aware of it.



# Recommendations

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## **Recommendation 1**

COPFS should review its policy and practice in relation to the involvement of complainers in the process for managing criminal allegations against the police.

## **Recommendation 2**

COPFS should review its approach to communicating with complainers in cases involving criminal allegations against the police. It should develop a strategy for ensuring that communication is timely, sufficiently frequent, good quality and tailored to the individual needs of the complainer.

## **Recommendation 3**

COPFS should develop guidance for the police on the investigation and reporting of criminal allegations against the police, as well as guidance for its own staff on the handling of such cases.

## **Recommendation 4**

COPFS should make more information publicly available about its role in investigating and prosecuting criminal allegations against the police. COPFS should also publish data regarding its handling of such allegations, and work towards gathering and publishing data that is disaggregated by race and other characteristics.

## **Recommendation 5**

COPFS should ensure that it receives early notification of the existence of criminal allegations against the police. It should require reporting agencies to report criminal allegations within a specified timescale that is commensurate with the nature of the allegation and it should monitor adherence to those timescales.

## **Recommendation 6**

COPFS should consider setting target timescales for reporting agencies to submit investigation reports regarding criminal allegations against the police. It should work with those agencies to consider how best to monitor compliance with the targets.

## **Recommendation 7**

COPFS should work with reporting agencies to review what information about subject officers should be included in reports submitted to CAAP-D.

## **Recommendation 8**

Pending the introduction of an electronic reporting system for criminal allegations against the police, COPFS should ensure that it records the receipt of such reports as soon as possible after they have been submitted (such as by the next working day).

## **Recommendation 9**

COPFS should review its processes and its training for CAAP-D staff to ensure that it meets its disclosure obligations in related cases.

## **Recommendation 10**

COPFS should review its use of experts in cases involving criminal allegations against the police to ensure they are sufficiently independent when this is appropriate in the circumstances of the case. COPFS should also work with the police to improve the quality of expert reports and ensure that the reports include a declaration regarding any potential conflict of interest.

**Recommendation 11**

COPFS should review its process for transferring criminal allegations against the police to local court for prosecution.

**Recommendation 12**

COPFS should consider appointing 'CAAP champions' in each Sheriffdom who will have responsibility for and oversight of the prosecution of all criminal allegations against the police.

**Recommendation 13**

COPFS should review its induction processes and operational guidance for CAAP-D staff.

**Recommendation 14**

COPFS should work with its partners to introduce an electronic reporting system for criminal allegations against the police.

**Recommendation 15**

COPFS should provide written guidance to its staff and to reporting agencies covering the definition of on and off duty criminal allegations against the police. COPFS should also work with reporting agencies to ensure they submit on and off duty cases via the correct route.

**Recommendation 16**

COPFS should ensure that there is strategic oversight of how on and off duty criminal allegations against the police are managed, and greater dialogue between those responsible for handling each type of allegation.

**Recommendation 17**

COPFS should provide guidance to the police on ensuring that SPRs are completed with the correct occupation information.

**Recommendation 18**

COPFS should clarify the purpose of its approach to off duty criminal complaints against the police and design a process for handling such cases that supports that purpose. All relevant staff should be made aware of the process and it should be followed in all off duty cases.



## Context

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1. The Lord Advocate is the head of the systems of prosecution and investigation of deaths in Scotland, functions which she exercises independently of any other person. COPFS is the sole prosecuting authority in Scotland. It receives reports about crimes from the police and other reporting agencies and then decides what action to take, including whether to prosecute. All criminal allegations against the police are reported to COPFS. Where it is alleged that a crime was committed by a police officer while on duty, a report is made to and investigated by the Criminal Allegations Against the Police Division (CAAP-D), a specialist unit within COPFS.
2. In cases where the accused is not an on duty police officer, a report is normally only made to COPFS where the police or other reporting agency assesses that there is sufficient evidence to establish that a crime has been committed and that the accused person is responsible. However, where the accused person is an on duty police officer, police conduct regulations require that all allegations where criminality can be reasonably inferred are referred to COPFS for independent investigation, regardless of whether there is a sufficiency of evidence.<sup>1</sup> These bespoke arrangements for managing allegations against police officers reflect their privileged place within our society and the power and authority they exert by virtue of their role. Where criminal wrongdoing is alleged, it is essential that complainers have recourse to a criminal justice process which is fair, effective, timely, transparent and independent.
3. On receipt of a criminal allegation against the police, CAAP-D may direct that the investigation be carried out by the police service's Professional Standards Department (PSD) or by the Police Investigations and Review Commissioner (PIRC). Whichever course is taken, the investigation remains under the direction and control of COPFS.
4. Where it appears to CAAP-D that, following investigation, there is a sufficiency of evidence, a report is submitted to Crown Counsel for their instructions on whether criminal proceedings should be commenced. Where Crown Counsel recommend a prosecution, the case is also considered by the Law Officers as it is COPFS policy that on duty police officers are only prosecuted on the personal instruction of a Law Officer. Decisions are made in accordance with the Scottish Prosecution Code – there must be sufficient credible, reliable and admissible evidence, and proceedings must be in the public interest. If the decision is to prosecute, the case is transferred from CAAP-D to the relevant local procurator fiscal office for prosecution.
5. The above process is also applied to police staff and special constables when a criminal allegation is made against them while they are acting in the course of their duties, albeit that they are not subject to the same police conduct regulations. The above process applies to those working for Police Scotland as well as other police services operating in Scotland, such as British Transport Police.<sup>2</sup>
6. Table 1 shows the number of criminal complaints against the police received by CAAP-D and the number which were closed with no action being taken or which resulted in criminal proceedings. It should be remembered that the low prosecution

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<sup>1</sup> Police Service of Scotland (Conduct) Regulations 2014 and Police Service of Scotland (Senior Officers) (Conduct) Regulations 2013.

<sup>2</sup> Other police services operating in Scotland include the Ministry of Defence Police, Civil Nuclear Constabulary, National Crime Agency, Her Majesty's Revenue and Customs, and UK Border Force.



rate is a result of cases being reported to COPFS where there is only a reasonable inference of criminality.

Table 1 – Decision making in criminal complaints against the police (on duty)<sup>3</sup>

Criminal complaints	2020-21	2019-20	2018-19	2017-18
Received	277	285	192	169
Closed as no action	257	244	199	221
Closed as prosecute	10	4	6	5

### Off duty criminal allegations

7. Where an allegation of criminality is made against a police officer, police staff or special constable while they are off duty, a report will usually only be made to COPFS where it is assessed there is sufficient evidence to establish that a crime has been committed and that the accused is the perpetrator. Off duty allegations are therefore usually treated in much the same way as if the accused was any member of the public, and are dealt with by the local procurator fiscal office, rather than CAAP-D. Such cases may, however, be referred to CAAP-D in particular circumstances, for example, if information emerges that the criminal conduct alleged extended to when the accused was on duty.

### Previous scrutiny

8. HM Inspectorate of Prosecution in Scotland previously reviewed how criminal allegations against the police are managed by COPFS in 2008.<sup>4</sup> The purpose of that inspection was to examine the quality of investigation and prosecutorial decision making. The inspection concluded that overall compliance with policies, procedures and targets was high, but that there were inconsistencies in the referral of cases from local fiscal offices to the Crown Office. There was also concern about the high rate at which complainers and witnesses withdrew from cases. IPS noted that some time had elapsed since policy regarding criminal complaints against the police had been reviewed and concluded that, *'the time may be ripe to consider a fundamental review of policy and practice in this area.'*
9. Since 2008, there have been significant systemic and institutional developments in how criminal allegations against the police are reported and investigated, both within and outwith COPFS. At the time of our 2008 inspection, on duty criminal allegations were dealt with by Area Procurators Fiscal, roles which no longer exist within COPFS. Instead, all on duty allegations have been dealt with by CAAP-D since 2013. In addition, the Police and Fire Reform (Scotland) Act 2012 led to the creation of Police Scotland, the Scottish Police Authority (SPA) and PIRC, all of whom now play a role in the police complaints handling process.

### Angiolini review

10. In 2018, the Rt. Hon. Dame Elish Angiolini DBE QC was commissioned by the then Cabinet Secretary for Justice and Lord Advocate to conduct an independent review of the handling of complaints against the police in Scotland. The review considered the effectiveness of law and practice in relation to complaints handling, investigation and misconduct issues, and made recommendations for improvements to ensure the complaints handling system is fair, transparent, accountable and proportionate. While the review included consideration of the investigation of criminal allegations against

<sup>3</sup> Source: COPFS Management Information Book, accessed 12 July 2021. The cases closed as no action and closed as prosecute do not add up to the cases received each year, as some cases will be received one year but concluded the next.

<sup>4</sup> IPS, [Report on complaints against the police](#) (2008).



the police, the review's Terms of Reference excluded the separate role of the Lord Advocate in investigating criminal complaints.

11. The final report of the review was published in November 2020.<sup>5</sup> It makes a number of recommendations for improving the handling of complaints against the police which are now being taken forward by the Scottish Government and the other organisations to which they were directed. We intended that our inspection of the COPFS management of criminal allegations against the police would address the area excluded from the review's Terms of Reference. The review provided useful context to our inspection, and highlighted some issues regarding the role of COPFS in relation to criminal complaints which we have explored in more detail. Our intention was that our inspection would complement the work carried out by Dame Elish Angiolini, rather than duplicate it.

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<sup>5</sup> The Rt. Hon. Dame Elish Angiolini DBE QC, [\*Independent review of complaints handling, investigations and misconduct issues in relation to policing – Final report\*](#) (November 2020) (hereinafter 'Angiolini final report'). This final report followed a preliminary report which was published in June 2019.



## Case review

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12. To support our inspection, we carried out two case reviews. The first related to criminal allegations made against the police while on duty and which were managed by CAAP-D, and the second related to allegations made against the police while they were off duty. In both case reviews, we considered a range of issues including the quality and timeliness of decision making, the processes followed, and the involvement of and communication with complainers, witnesses, the subject officer or accused and the reporting agency. The results of our review are included throughout this report.
13. Those who have been accused of a crime and who have been reported to COPFS are typically referred to as the 'accused'. This includes police officers and staff who are accused of criminal behaviour while off duty. However, where the case involves an on duty allegation against the police, the accused person is referred to as the 'subject officer' (this term is used for police officers, police staff and special constables). This reflects the fact that on duty cases are reported to COPFS regardless of whether there is a sufficiency of evidence and generally before the person has been charged. We have adopted this approach in our report, although it is worth noting that in on duty cases where a decision to prosecute is taken (as well as in cases where the police have already charged the person), the subject officer becomes an accused.

### On duty case review

14. We reviewed 80 cases in which a criminal allegation or allegations were made against the police.
15. We selected cases that had been reported to COPFS between 1 April 2019 and 30 September 2020. The cases were drawn from this period in an effort to strike a balance between recently reported cases, and cases where sufficient time had passed that we could assess how they had been progressed. We initially identified a statistically significant sample of 78 cases.<sup>6</sup> For the most part, our sample was randomly selected. However, we purposively sampled all cases in which a prosecution was instructed. Given the low number of cases in which a prosecution was instructed, we also reviewed two additional cases which had been reported prior to 1 April 2019, but in which a decision to prosecute was made during our sample period,<sup>7</sup> giving a total sample size of 80. We reviewed the progress of each case until 18 March 2021. Most had concluded by that date but some, particularly those being prosecuted, were ongoing.

### Who made the complaint?

16. In Scots criminal law, the 'complainer' is the person against whom the offence is alleged to have been committed. However, in the context of on duty criminal complaints against the police, the complainer is the person who made the complaint regardless of whether they are the alleged victim of the offence or a witness to it.
17. In 64 (80%) cases, the complaints were made by members of the public. Of the remaining cases:
  - the complaints were made by the police in 13 (16%) cases

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<sup>6</sup> Our sampling approach was based on data drawn from COPFS management information. The results are statistically significant with a confidence level at 95% ± 10%.

<sup>7</sup> One of these cases was reported a few days before our sample period, while the other was reported in a previous year.



- the complainers were not known or anonymous in two (3%) cases
  - the complaint was made by COPFS in one (1%) case.<sup>8</sup>
18. Of the 13 complaints made by the police:
- four involved an officer or staff member making a complaint where they were the alleged victim of the criminal allegation
  - seven involved an officer or staff member making a complaint where they were witness to the criminal allegation
  - two involved Police Scotland making the complaint where the service itself was also the alleged victim of the criminal allegation.
19. In 54 (68%) cases, the complainer was male, while in 14 (18%) cases the complainer was female. There were seven (9%) cases involving multiple complainers of both sexes. In the remaining five cases, the sex of the complainer was not known or the complainer was an organisation.
20. We sought to identify further information about the complainers during our case review, such as other protected characteristics or vulnerabilities. However this information was not routinely gathered by the reporting agency or COPFS. We explore this further, particularly in the context of race, at paragraph 129. We did note that two of the complainers were under the age of 18 and the complainer or alleged victim's poor mental health was a feature in at least 10 (13%) cases.

### **The person complained about**

21. The person complained about, or subject officer, was male in 70 (88%) cases and female in five (6%) cases. In four (5%) cases, allegations were made against multiple subject officers – one incident involved two male officers, and three incidents involved a mixed group of male and female officers. In one (1%) case, the identity of the subject officer was not known.
22. In all but one of the cases we reviewed, the complaint related to an officer or member of staff working for Police Scotland. In one case, the complaint related to a member of staff working for another police service operating in Scotland.
23. Of the 79 criminal complaints where the identity of the subject officer was known, 75 (95%) related to police officers. This is unsurprising given that officers are generally more likely to have direct contact with the public than staff. The officers complained about served in a range of ranks, but the vast majority were police constables. Police staff were accused of criminality in three (4%) cases. In one (1%) case, both officers and staff were the subject of a complaint.
24. All but one of the cases involved on duty criminal allegations against the police. In one case, the subject officer was off duty but the case was managed by CAAP-D and followed the process for on duty cases because of the nature of the offence.<sup>9</sup>

### **The complaint**

25. Criminal complaints against the police were made in relation to a variety of incidents, and some complaints involved multiple allegations. Chart 1 shows the main offence in each of the 80 cases. We deemed the main offence to be the one that would result in the most severe penalty.

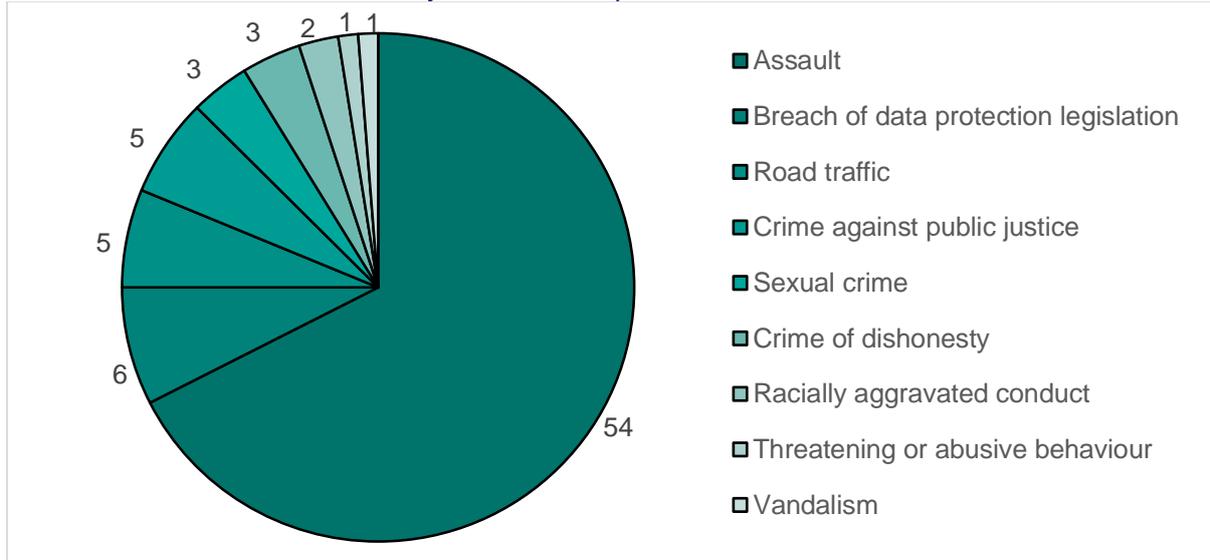
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<sup>8</sup> Throughout this report, percentages may not add up to 100 due to rounding.

<sup>9</sup> See paragraph 276.



Chart 1 – Main offence in on duty criminal complaints



26. Of the 54 allegations of assault, 34 related to an incident in which the complainant was being arrested and five related to the complainant's time in police custody. The remaining assault allegations arose from other types of interaction between the police and the public.

### Off duty case review

27. We also reviewed 40 cases in which criminal allegations were made against the police while they were off duty. Details of that case review cohort and our findings are set out in Part 2 of this report.



## Part 1 – On duty criminal allegations against the police

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### Outcomes

28. In assessing how COPFS manages criminal allegations against the police, we have kept in mind the five principles for an effective investigation of complaints against the police that engage Articles 2 or 3 of the European Convention on Human Rights:
- independence – there should be no 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 the 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
  - victim involvement – the complainer should be involved in the complaints process in order to safeguard his or her legitimate interests.<sup>10</sup>
29. These principles will also be relevant in managing other types of criminal complaint against the police. As well as the general principles, we have considered specific outcomes that COPFS should be trying to achieve in police complaints handling. For the complainer and the subject officer, and in the interests of justice more generally, we would expect to COPFS to deliver:
- high quality and consistent decision making
  - timely decision making
  - a process which involves the complainer
  - good communication with complainers and the subject officer.
30. These are the high level outcomes on which we have focused in this chapter. Other aspects of service delivery, including those which support the achievement of these outcomes, are addressed throughout this report.

### Consistency and quality of decision making

31. CAAP-D was established in January 2013 to provide a more consistent, specialist approach to managing criminal allegations against the police. Previously, such cases were dealt with locally by Area Procurators Fiscal. CAAP-D's establishment reflected a general move towards specialisms within COPFS, but also coincided with the setting up of a national police service in Scotland and PIRC. It was thought having a national unit to act as a central point of contact for those new organisations would be beneficial. Those we interviewed during our inspection considered that CAAP-D had achieved its purpose – they felt that consistency in dealing with criminal complaints against the police had improved significantly, and they felt having cases dealt with by a dedicated team of people who had developed expertise in this area was helpful. They also felt that having a national unit had facilitated more effective relationships with the police, PIRC and other stakeholders.
32. Allegations of on duty criminal conduct are generally subject to multiple layers of scrutiny. A member of the CAAP-D team will take the lead on overseeing the investigation and assessing the evidence. In cases where they assess there to be a

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<sup>10</sup> Council of Europe, [Opinion of the Commissioner for Human Rights concerning independent and effective determination of complaints against the police](#) (2009).



sufficiency of evidence, a report is prepared for Crown Counsel for their instructions. Other cases where the evidence is finely balanced or which are particularly sensitive may also be reported to Crown Counsel. The report is reviewed by a senior member of CAAP-D as well as the head of the unit before being sent to Crown Counsel.<sup>11</sup> Crown Counsel will either instruct further enquiries, direct that no criminal proceedings be taken, or recommend a prosecution. As in any other case, criminal proceedings will only be instructed where there is sufficient credible, reliable and admissible evidence and where proceedings are in the public interest.

33. As a matter of policy, criminal proceedings against an on duty police officer can only be instructed by the Lord Advocate or Solicitor General. Therefore, where Crown Counsel has recommended a prosecution, the case is passed to the Law Officers for a final instruction. Some cases in which a prosecution is not recommended may also be passed to the Law Officers for their view.
34. Many allegations against on duty officers are of a relatively minor nature and would be prosecuted at summary level. The only reason they are subject to such robust scrutiny is because the alleged offender is serving with the police. The level of scrutiny to which they are subject is more akin to that usually applied to High Court prosecutions and is designed to provide reassurance to the public that criminal complaints against the police are investigated thoroughly and independently.
35. During our inspection, some of those we interviewed queried whether this degree of scrutiny was required in relation to, for example, minor road traffic offences. However, the majority of interviewees felt that the level of scrutiny applied to criminal complaints against the police was appropriate, taking into account the need to maintain public confidence in the police and in the system for police complaints handling.
36. We reviewed 80 cases in which on duty criminal complaints against the police were made and in which COPFS was required to decide whether to prosecute. We found the quality of decision making to be good – in no case did we disagree with the decision based on the evidence available. The cases we reviewed illustrate the robust scrutiny applied to criminal complaints where there is a sufficiency of evidence.
37. In 65 of the 80 (81%) cases we reviewed, a decision was made not to prosecute the subject officer. In 15 (19%) cases, there was a decision to prosecute (see Chart 2).<sup>12</sup>
38. Thirty-nine of the 80 (49%) cases were reported to Crown Counsel for their instructions.<sup>13</sup> In the remaining 41 (51%) cases, prosecutors in CAAP-D decided not to take criminal proceedings. Of the 39 cases reported to Crown Counsel for instruction, CAAP-D recommended:
  - no action in 29 (74%) cases
  - prosecution in nine (23%) cases
  - in one (3%) case, CAAP-D recommended delaying a decision so that an associated case could be considered by Crown Counsel at the same time.

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<sup>11</sup> In some cases, CAAP-D staff prepare abbreviated reports which are reviewed by the Head of CAAP-D only prior to sending to Crown Counsel.

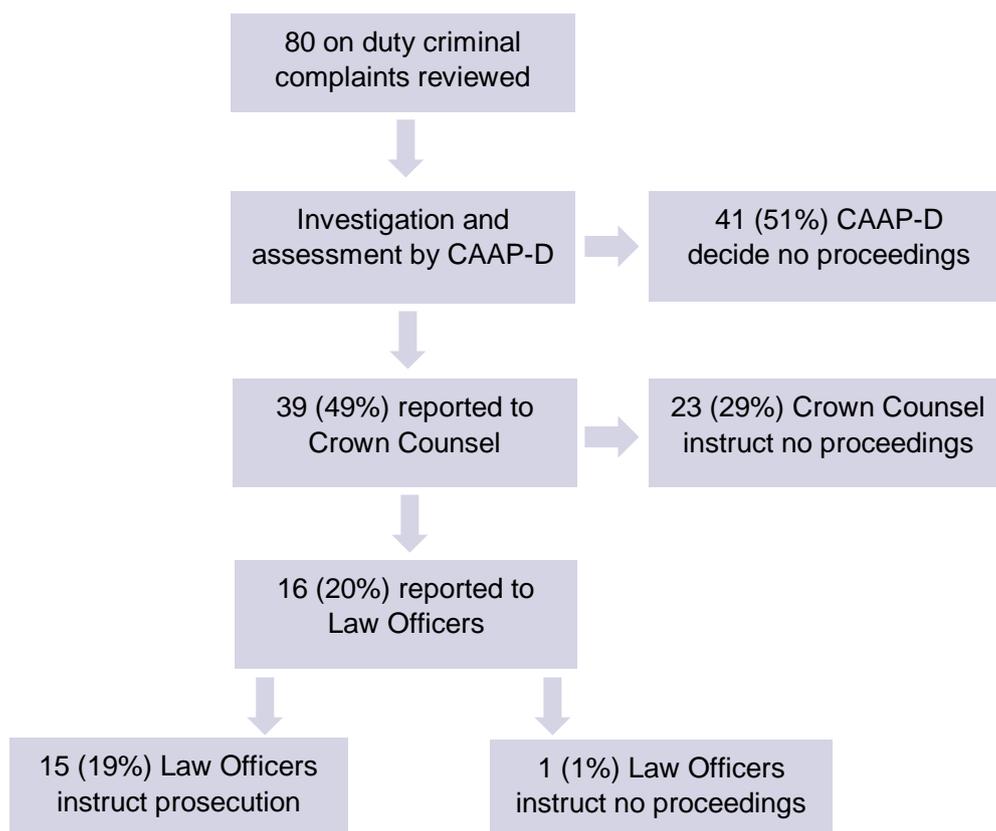
<sup>12</sup> There is a greater proportion of prosecutions in our sample compared to the annual data in Table 1 because we purposively included all cases 'closed as prosecute' from our sample period.

<sup>13</sup> Crown Counsel is the collective term for the Law Officers and Advocates Depute. However, in this report, when we use the term Crown Counsel we are usually referring to the Advocates Depute given that in the context of on duty criminal allegations against the police the Law Officers, who are also Crown Counsel, have a specific and separate role to play.



39. Crown Counsel agreed with CAAP-D's recommendation in 34 of the 39 (87%) cases. In four (10%) cases where CAAP-D recommended no action, Crown Counsel instructed a prosecution. In the case where CAAP-D had recommended a delay, Crown Counsel instructed no action.
40. Of the 39 cases reported to Crown Counsel for instruction, Crown Counsel requested that further work be carried out in only one case, where they asked that a witness be precognosed. In this case, the initial CAAP-D recommendation was for no action, but Crown Counsel instructed a prosecution.
41. Sixteen of the 39 (41%) cases sent to Crown Counsel were also sent on to the Law Officers for their instruction. The Law Officers agreed with Crown Counsel's instructions in all but two cases. In those cases, both CAAP-D and Crown Counsel had recommended no action, but the Law Officers instructed a prosecution.
42. Of the 39 cases reported to Crown Counsel, the final decision was:
  - no action in 24 (62%) cases
  - prosecution in 15 (38%) cases.

Chart 2 – Decision making in our cohort of 80 on duty criminal complaints



43. Where no action was taken in respect of the criminal complaint, this was generally because there was insufficient evidence to support the allegation. There may have been evidence that contradicted the allegation, the evidence in support was not credible or reliable, or there was no corroboration. Other reasons for taking no action included that the allegation related to conduct that was not criminal in nature.



- 44. When providing their written instructions, Crown Counsel and the Law Officers were complimentary about the quality of the CAAP-D reports in several cases, describing them as thorough, comprehensive and clear. This praise for CAAP-D’s work was echoed in our interviews with Crown Counsel.
- 45. Where COPFS decides to take no criminal proceedings against the subject officer, the complainer is informed of their right to have that decision reviewed. Of the 65 cases that we reviewed where no proceedings were taken, the complainer exercised their right to review in four (6%). The decisions were reviewed by staff in COPFS who had no prior involvement in the initial decision. All of the initial decisions were upheld. More generally, COPFS data shows that no proceedings decisions in criminal complaints against the police are rarely overturned (see Table 2).

**Table 2 – Victim’s right to review of decisions regarding on duty criminal complaints against the police<sup>14</sup>**

	2019-20	2018-19	2017-18	2016-17
Number of cases in which victims’ right to review was exercised	19	5	8	31
Number of cases in which the initial decision was upheld	18	5	8	31

- 46. Where CAAP-D assess there to be insufficient evidence to merit criminal proceedings, Principal Deputes in CAAP-D may decide to take no proceedings. While this is an appropriate level of decision making given their seniority and experience, and the data on the victims’ right to review does not indicate any problems, there appears to be no formal in-team scrutiny of those decisions. This is in contrast to the multiple layers of scrutiny applied to other cases. While decisions in some cases are clear cut, others are less so. There may be benefit in CAAP-D introducing occasional quality assurance, such as peer review, to ensure consistency in decision making between deputies, particularly for those who are new to the unit.

**Timeliness of decision making**

- 47. It is in the interests of complainers and subject officers, as well as in the public interest more generally, for the assessment of complaints to be concluded swiftly. In the 80 cases we reviewed, we sought to measure the time taken between the report of the criminal complaint being submitted to CAAP-D and the complainer being advised whether or not the subject officer would be prosecuted. In 15 cases where the complainer was not informed of the outcome (see paragraph 88), we have identified a proxy date on which the outcome of the complaint was known, to get a sense of the time taken to make decisions. In one case, this was when the police service was informed, and in the remaining cases, it was the date of final Crown Counsel’s instructions.
- 48. In the 80 cases we reviewed, the average time taken to decide whether the criminal complaint should be prosecuted was 126 days. This ranged from six to 517 days.
- 49. In 41 of the 80 (51%) cases, CAAP-D made a decision to take no proceedings in relation to the criminal complaint. In those cases, the average time taken from the date the report was sent to CAAP-D to the date the complainer was informed of the decision was 63 days (with a range of between six and 182 days).

<sup>14</sup> Data from COPFS, *Victim’s Right to Review Annual Reports 2016-17 to 2019-20* available at [www.copfs.gov.uk](http://www.copfs.gov.uk).



50. Of the 39 cases that were reported to Crown Counsel, the average time taken from the date the report was sent to CAAP-D to the date the complainer was informed of the decision was 194 days (with a range of 41 to 517 days). There is a common misconception among stakeholders, and among some CAAP-D staff, that Crown Counsel are responsible for the delay in these cases. Our more detailed analysis (see from paragraph 204) shows this is generally not the case – the delay in cases reported to Crown Counsel usually occurs prior to the report being sent to them.
51. The above analysis of timeliness has focused on the time taken for COPFS to decide whether the complaint should result in the subject officer being prosecuted. We have also considered the time taken for those complaints which have been prosecuted to reach their final outcome, however it is difficult to draw any conclusions, except to say that complainers and subject officers may have to wait a significant period of time from the date the complaint was made to the conclusion of any criminal proceedings. There are three reasons why it is difficult to draw any more specific conclusions:
- of the 15 cases we examined that resulted in a prosecution, 10 were still live at the conclusion of our review and so the total journey time is not yet known
  - the small number of cases that have concluded makes it difficult to identify any themes, good practice or learning points
  - the significant impact of Covid-19 on the justice system, particularly summary trials, has meant complainers and subject officers in the cases we reviewed will have waited longer than is usual for their case to be concluded.

### The impact of delay

52. Failing to deal with criminal complaints in a timely manner has an impact on all those involved. Delays in the investigation may result in evidence being lost or its quality reducing over time and a failure to conduct an adequate investigation. Delays in the investigation, as well as delays once proceedings have been initiated, also risk the complainer losing confidence in the system for handling criminal allegations against the police and potentially disengaging from the process.
53. Delays can also have a significant impact on the subject officer. They may be placed on restricted duties or suspended by the police service pending resolution of the complaint. A subject officer's career progression may also be hampered while they are under investigation where, for example, they are precluded from being promoted until the complaint is concluded. The Angiolini review heard evidence from subject officers about the impact complaints can have on their wellbeing and their mental health. They described being afraid of losing their jobs and said the time taken to deal with complaints caused them stress, anxiety, had led to depression and had adversely affected their family life.<sup>15</sup> These experiences were echoed in our own interviews with staff associations and solicitors representing subject officers.
54. Delays in resolving criminal complaints also have a broader impact on the police service itself and can be costly. As at 31 March 2021, for example, Police Scotland had 100 police officers and one member of police staff on restricted duties, while 29 officers and five members of staff were suspended from duty.<sup>16</sup> While only a proportion will have been restricted or suspended due to a criminal complaint, these are officers and staff whose skills and training Police Scotland is not able to make full use of and whose usual roles need to be covered by others. The impact of restrictions or suspensions may be disproportionately felt by other police services

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<sup>15</sup> Angiolini final report (note 5), from paragraph 26.6.

<sup>16</sup> Police Scotland, [Professional Standards Quarterly Performance Report Quarter 4 2020-21](#) (report to a meeting of the SPA Complaints and Conduct Committee, 19 May 2021).



operating in Scotland with far fewer officers, or where the officer complained about is a senior officer.

55. The importance of dealing with criminal allegations against the police promptly is recognised by COPFS in its setting of targets for CAAP-D.

### Performance management

56. The performance of CAAP-D is currently monitored by reference to two measures. The first is a published key target to complete the investigation of criminal allegations against the police and advise the complainer of the outcome within 12 weeks of the date on which the report is received in at least 90% of cases. The second is an internal key performance indicator (KPI) to report 80% of SPR cases within eight months of receipt of the SPR.
57. Performance in relation to the latter KPI is consistently good. In 2020-21, 100% of SPR cases were reported within eight months of receipt of the SPR, up from 95% in 2019-20. CAAP-D receives relatively few SPRs, a good number of which relate to road traffic offences and which are dealt with quickly.
58. In relation to the first measure, it is one of only four published targets set by the Law Officers and whose compliance is reported in COPFS annual reports. CAAP-D has consistently met its 12-week target over the years, as shown in Table 3. This level of performance is, however, at odds with stakeholder perceptions of the time taken by CAAP-D to make decisions. During our interviews with stakeholders, their most common complaint was the length of time CAAP-D takes to decide whether a subject officer should be prosecuted. They cited cases which took several months or even years before a decision was made. Stakeholders, including the police and police staff associations, were generally unaware of the 12-week target and were taken aback to learn that it was routinely met in 90% of cases.

Table 3 – Key target compliance since 2015-16<sup>17</sup>

Target	2020-21	2019-20	2018-19	2017-18	2016-17	2015-16
Complete the investigation of criminal allegations against the police and advise the complainer of the outcome within 12 weeks of the date on which the report is received in at least 90% of cases	91%	91%	91%	92%	93%	92%

59. In our on duty case review, the complainer was advised of the outcome of their complaint within 12 weeks in only 32 (40%) of the 80 cases. A further two cases appeared to have been concluded within 12 weeks but they cannot be said to be in-target as in neither case was there any evidence that the complainer had been informed of the outcome. Thirty of the 41 cases in which CAAP-D decided to take no action, and only two of the 39 cases reported to Crown Counsel, were concluded within 12 weeks.

<sup>17</sup> Data on key target compliance is available in COPFS annual reports at [www.copfs.gov.uk](http://www.copfs.gov.uk).



60. Until 1 April 2021, CAAP-D was able to report better performance than that found in our review because it was 'freezing' the 12-week target, and did not include the time the case was frozen in its calculation. CAAP-D had frozen the 12-week target in 41 (51%) of the cases we reviewed. We were told that targets were generally frozen when further information from PSD or PIRC was needed before the investigation could be concluded and a decision made. The further information may have taken the form of, for example, additional statements or an expert opinion. As the length of time taken to gather the information was outwith CAAP-D's control, the target would be frozen on the day the information was requested, and unfrozen on the day it was received. In our case review, the length of time for which targets were frozen varied from case to case, depending on the extent of the further information requested. In some cases, the target was frozen more than once.
61. We had significant concerns about the practice of freezing targets. The practice was described as 'freezing' but rather than the 12-week period being frozen or paused when the information was requested and restarted when the information was received, the target was actually re-set from zero (that is, the 12 weeks started afresh when the information was received). This meant that any time spent on a case prior to the information being requested (including any periods in which the case had simply been un-actioned) was not counted. This was at odds with the purpose of freezing targets as described to us, which was to account for delays outwith the control of CAAP-D. In our case review, for example, we examined one case where very little if any work appeared to have been done on the case for 10 weeks before additional information was requested from PSD. This request resulted in the target being re-set and the previous 10 weeks being discounted for target purposes.
62. Reporting compliance rates of 90% and above against a 12-week target has given a misleading impression of the time taken to decide whether proceedings should be initiated in cases involving criminal allegations against the police. Cases that were considered to be 'in target' could take considerably longer than 12 weeks. For example, in one of the cases we reviewed, the target was frozen for over a year while PSD was instructed to carry out further enquiries. Added to the time CAAP-D considered the case before instructing those enquiries, 67 weeks passed before the enquiries were complete and the 12-week target reset. While a final decision on proceedings was taken soon after the target was reset and the case was considered to be 'in target', the actual journey time was almost 74 weeks.
63. We were also concerned that there were no business rules or guidance on the freezing or re-setting of targets. This had resulted in a varied understanding of why and when it should be done among CAAP-D personnel. Some staff thought targets should only be frozen when no further work could be done to progress a case, while others said targets could be frozen when any piece of additional information was requested, even when other work on the case could continue. In our case review, we saw examples of cases where significant work on the case continued even while the targets were frozen. More recently, there also appeared to have been a relaxation of the scrutiny of freezing targets with some staff having stopped seeking their manager's authorisation to freeze targets. There was also a failure to routinely record the reasons why a target was being frozen. This information was often contained in an email instructing administrative staff to freeze the target but, too often, this instruction was in a staff member's personal files rather than being imported into the case file.
64. In our case review, we found several examples where target freezing appeared to have been used inappropriately. The lack of clear rules and the absence of robust



scrutiny likely contributed to this. Examples of inappropriate use of target freezing included:

- freezing the target when no further work had been instructed
- failing to freeze or unfreeze the target timeously, including when the further information requested had been provided (in one case, the target was not re-set until 10 weeks after the information was provided)
- keeping targets frozen for no discernible reason, such as until after the case had been reported to Crown Counsel or, as we observed in several cases, until the date the case itself was closed.

65. When cases were frozen, there was a risk that they were insufficiently scrutinised because they were still considered to be 'in target'. In a few of the cases where targets were frozen for considerable periods of time, it did not appear that the further enquiries instructed were being carried out expeditiously. Had closer scrutiny been applied to these cases, intervention at a more senior level may have resulted in a speedier completion of the enquiries requested by CAAP-D. This was in contrast to cases which were known to have missed the 12-week target and which are included on a weekly bulletin and monitored by the Head of CAAP-D.
66. While some CAAP-D staff thought that freezing targets was necessary to maintain the unit's compliance with targets, others thought it was open to abuse. Indeed, we were concerned that CAAP-D had developed an unhealthy and misguided approach to managing its targets which failed to understand the purpose of performance management. To ensure it met its target of completing investigations of criminal complaints within 12 weeks in 90% of cases, each month CAAP-D would only close one out-of-target case for every nine in-target cases. Where there were more cases that were out of target, they were kept open until there were sufficient in-target cases that they could be closed without adversely affecting performance. It should be noted that this practice did not affect the conduct of individual cases, nor the communication of CAAP-D's decision to the complainant and subject officer. The practice was purely administrative in nature.
67. We are also aware that CAAP-D inherited criminal complaints against the police which had been concluded prior to the unit's creation but which had not been administratively closed. These cases dated from 2011-12 and 2012-13. At the time our inspection began, these cases had remained open on the COPFS database so as not to adversely affect the CAAP-D 12-week target though they have since been closed.
68. The freezing and re-setting of targets and the failure to administratively close cases when they were concluded had allowed CAAP-D to report consistently good performance over the years. However, this masked the reality of what was happening in the unit, undermined the purpose of performance management and misled senior managers, Law Officers, stakeholders and the public as to how quickly decisions in criminal complaints against the police were made.
69. One of the purposes of performance management is to help senior managers understand how a service is performing and take action in response. Performance data can help highlight, for example, a lack of resources or changes in demand. Used more effectively, performance data can also help pinpoint which parts of a process are working well, and which require improvement. In the case of CAAP-D, it has the potential to identify issues not only within the unit itself, but among the agencies which investigate criminal complaints and whose efficiency (or lack thereof) contributes to that of the Crown. The absence of accurate and robust performance



data limits an organisation's ability to chart genuine improvements in service delivery, or the impact of an increase or reduction in staffing.

70. Concerns about the practice of freezing targets and about the quality of CAAP-D's performance data were raised by the Head of CAAP-D in March 2020, shortly after his appointment. The issues were brought to the attention of the Crown's Operational Performance Committee and, during the course of our inspection, the Committee instructed CAAP-D to cease the practice of freezing targets. This instruction was retrospectively applied from 1 April 2021. We welcome this change in approach. We also welcome a decision by COPFS to close all out-of-target cases by 1 July 2021, regardless of the impact this has on its performance target, which should address the concerns raised at paragraph 66.
71. During our inspection, we formed the view that COPFS should review its targets for the management of criminal allegations against the police. We are pleased to note that such a review is now being taken forward. Any new targets should be achievable and reflect the reality of investigating such cases. There may also be scope for the targets to be more nuanced, such as different targets for different types of cases. To inform its review, COPFS requires significantly more and better quality data to understand how CAAP-D is currently performing. At present, there is a lack of management data about its work, including data on:
  - the average journey time of cases
  - the shortest and longest journey times
  - the age profile of all CAAP-D's cases, particularly those that are out of target
  - disaggregated data that helps the Crown understand at which point in the process delays typically occur
  - how many cases require further enquiries to be instructed, and the average length of those enquiries.
72. The previous practice of freezing targets led to a lack of robust and accurate data about how criminal allegations against the police were being handled. This made it impossible to challenge stakeholders' view that CAAP-D takes too long to deal with its cases, or to evidence the anecdotal suggestion from some that there has been a recent improvement in journey times.
73. Only once more and better quality data is available on the handling of criminal complaints will COPFS be able to properly assess whether its decision making in these cases is sufficiently timely, and whether its resources are appropriately managed to meet demand. In setting new targets, as well as being informed by the level of service CAAP-D is currently able to provide, consideration should be given to what length of time complainers and subject officers can reasonably be expected to wait for the complaint to be resolved. Inevitably, there will be some cases which are particularly complex and where the investigation may be protracted. Where it is not possible to meet target timescales, CAAP-D can mitigate the impact on complainers and subject officers by communicating effectively with all parties so they are at least kept up to date on progress and their expectations are managed.

### **Involving the complainer**

74. As noted at paragraph 28, where criminal complaints against the police engage Articles 2 or 3 of the European Convention on Human Rights, an effective investigation requires that complainers be involved in the complaints process to safeguard their legitimate interests. There is an expectation that complainers are consulted and kept informed throughout the process. It has been said that this helps ensure complainers' interests are not marginalised by the interests of a powerful



police service.<sup>18</sup> Although the requirement for victim involvement applies only to more serious complaints, the general principle has long been reflected in COPFS policy on managing all criminal allegations against the police.

75. Current COPFS policy, which appears to have been last updated in 1999, states that as a general rule, *'the complainer and the alleged victim (if he is other than the complainer) must be invited to attend for precognition. Any other person who appears to be a material eyewitness should be invited to attend for precognition or at least given the opportunity to attend.'*<sup>19</sup> As an exception to this general rule, the policy states that where the prosecutor is of the opinion that the complaint is of a minor nature or may not have substance, the prosecutor may write to the complainer enclosing a copy of the complainer's statement (the 'copy statement procedure'). The complainer should be asked to check it for accuracy and completeness, to make any necessary amendments and to list any witnesses to the incident. The policy goes on to state that, *'Where a complainer is written to in this way, he should be asked if he wishes to be interviewed about his complaint by a member of the Procurator Fiscal Service.'*
76. Although this policy pre-dates CAAP-D by several years, we heard that this was still the approach that should be taken to involving complainers in the investigation process. This approach was also cited by COPFS in correspondence to the Scottish Parliament's Justice Committee in 2015.<sup>20</sup> The use of precognition in cases involving criminal complaints against the police varies from that used by COPFS in other types of case where there is a general presumption against precognition.
77. During our inspection, we noted inconsistencies in the application of the policy on precognition and sending the complainer a copy of their statement. We observed these inconsistencies in our case review and noted a lack of clarity among CAAP-D staff when we asked about the circumstances in which precognitions and the copy statement procedure were used.
78. Complainers were invited for precognition in only 19 of the 80 (24%) cases we reviewed. Only 11 of the 19 complainers attended. Six complainers failed to attend, while in two cases, CAAP-D cancelled the precognition due to Covid-19. In these cases, it was not clear why the precognition could not have been carried out by telephone or video conferencing. Of the 11 precognitions that went ahead:
  - four took place in person
  - five were done by telephone
  - one was by video conferencing
  - in one case, there was no record of how the precognition took place.
79. Complainers were sent a copy of their statement to review in 45 (56%) cases. Generally, complainers were either sent a copy of their statement or invited to precognition. However, both occurred in four cases. This was usually because new information had come to light during the course of the investigation that required to be discussed with the complainer.
80. In 20 (25%) cases, it did not appear that complainers were sent a copy of their statement and were also not invited or cited to precognition. In half of these, this was

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<sup>18</sup> Council of Europe, [Opinion of the Commissioner for Human Rights concerning independent and effective determination of complaints against the police](#) (2009) at paragraph 79.

<sup>19</sup> COPFS, *Book of Regulations*, Chapter 2, Appendix A. Precognition is an interview of a witness by COPFS (or a defence lawyer) to help them find out more about a crime and prepare a case.

<sup>20</sup> COPFS, [Letter to Convenor of the Scottish Parliament Justice Committee](#) (23 March 2015).



appropriate given the circumstances of the case. For example, the complainer was anonymous or had withdrawn from the case, or the complainer was Police Scotland or COPFS. However, in the other 10 (13%) cases, the complainer was a member of the public and we could see no reason why they should not have been either precognosced or written to with a copy of their statement.

81. Generally, complainers (as well as material witnesses) were not precognosced in all cases where we would have expected it, including in cases where there was a sufficiency of evidence and which resulted in a prosecution. There were also some cases in which the copy statement procedure was used, when precognition may have been more appropriate. We also noted that letters to complainers enclosing their statements sometimes did not include an offer to be interviewed, as the policy sets out. CAAP-D staff told us this was done deliberately in some cases where, for example, they would have been concerned for their own safety had the complainer requested an in-person interview. However, we found that the exclusion of the offer to be interviewed was made in cases which did not seem to fall within this kind of exception.
82. Given the inconsistencies we observed in the application of the current COPFS policy on precognition and copy statements, we believe COPFS should review and clarify its approach. This should be done with a view to ensuring that policy and practice meets the requirements of an effective investigation<sup>21</sup> in more serious complaints and, for less serious complaints, reflects the need for complainer participation in a proportionate way.
83. Of the 45 complainers who were sent a copy of their statement to review, only 16 (36%) returned it to CAAP-D. Given that almost two thirds of complainers did not respond to the copy statement letter, CAAP-D should try to understand the reasons for not responding and should consider whether there is any aspect of the process that could be improved. While there may always be some complainers who do not respond to correspondence, CAAP-D should consider how it can encourage and maintain their engagement throughout the process.

### **Recommendation 1**

COPFS should review its policy and practice in relation to the involvement of complainers in the process for managing criminal allegations against the police.

### **Communication with the complainer**

84. As well as requiring the participation of the complainer in the investigation process, a human rights compliant approach to criminal complaints against the police requires the complainer to be kept up to date on the progress of an investigation. COPFS is also required to fulfil other duties in respect of victims and witnesses including those set out in the Victims and Witnesses (Scotland) Act 2014.
85. We have assessed the Crown's communication with complainers in cases involving criminal complaints against the police, taking account of the general principles set out in sections 1 and 1A of the Victims and Witnesses (Scotland) Act 2014 to which the Lord Advocate must have regard. We particularly focused on the following principles:
  - a victim or witness should be able to obtain information about what is happening in the investigation or proceedings

<sup>21</sup> The requirements of an effective investigation are set out in paragraph 28.



- a victim or witness should have access to appropriate support during and after the investigation and proceedings
- in so far as it would be appropriate to do so, a victim or witness should be able to participate effectively in the investigation and proceedings
- victims should be treated in a respectful, sensitive, tailored, professional and non-discriminatory manner
- victims should, as far as is reasonably practicable, be able to understand information they are given and be understood in any information they provide
- victims should have their needs taken into consideration
- when dealing with victims who are under 18, the best interests of the child should be considered, taking into account the child's age, maturity, views, needs and concerns.

86. We also took account of the Victims' Code for Scotland which, as well as reiterating the above principles, states that if their case is not prosecuted, victims have the right to be told the reasons why and to request a review of the decision.

### **Receipt of criminal complaint**

87. We noted that CAAP-D does not notify complainers when it has received the report concerning their allegation. This is in keeping with the Crown's usual approach in relation to other cases where complainers are not routinely notified when COPFS receives a report from the police. However, the bespoke process in place for handling on duty criminal allegations against the police involves CAAP-D operating a hybrid approach which has some features in common with how COPFS deals with other cases and some features in common with a more general complaints handling process. Complainers should be advised when CAAP-D receives a report and begins its assessment of whether to initiate criminal proceedings. We understand that consideration is being given to doing so, which we would welcome. This affords the opportunity to:
- commence communication with the complainer and set out the independent role of CAAP-D and what will happen next
  - reassure the complainer that their allegation is being dealt with, particularly if the investigation by the reporting agency has been protracted
  - establish if the complainer has any additional support needs which require to be addressed to ensure effective communication.

### **Notification of outcome**

88. We found that complainers were advised of the outcome of their complaint (that is, whether the subject officer would be prosecuted) in 65 of the 80 (81%) cases we reviewed. However, in one of these 65 cases, there were two complainers and only one was advised of the outcome. Of the remaining 15 (19%) cases, it was not possible to advise the complainer of the outcome in two cases because they were anonymous, and in one case, the decision to prosecute had only just been made at the end of our review and there had not yet been an opportunity to communicate it to the complainer. In the remaining 12 (15%) cases, we could find no record of the complainer being advised of the outcome of their complaint:
- in one case, we could find no record of a decision to take no proceedings being communicated to the complainer
  - in 11 cases, the decision to prosecute the subject officer did not appear to have been communicated to the complainer.
89. It appears from our case review that where a complaint results in a decision to prosecute, CAAP-D does not routinely advise the complainer of the outcome. This is a gap in its approach to communicating with complainers. Complainers should



always be advised of the outcome of their complaint and, where proceedings are being taken, CAAP-D should explain what will happen next.

90. Where COPFS decides that no criminal proceedings will be taken against the subject officer, it generally notifies the complainer of this decision by letter. In the cases we reviewed, all of the no proceedings letters to the complainers included a reason why no action was being taken. However, the quality of the rationale varied. In most cases, there was a good explanation of the decision to take no proceedings and this should have been easily understood by the complainer. In some cases, the rationale was perfunctory, used jargon that may not have been understood by the complainer, or was not explained in relation to the facts of the particular case. These letters may have resulted in the complainer knowing that no action was being taken, but not fully understanding why.
91. CAAP-D has a tendency to rely on written communication with complainers. While this can provide a useful record for both CAAP-D and complainers, consideration could be given to other forms of communication, particularly where trying to convey a more nuanced message. As Dame Elish Angiolini noted in her report on police complaints handling, '*Human interactions can build relationships and prevent misconceptions, misunderstandings and pre-empt lengthy correspondence.*'<sup>22</sup>
92. The no proceedings letters sent to complainers routinely advise them of their right to request a review of the decision to take no action against the subject officer.
93. At paragraph 48, we noted the length of time it takes for COPFS to decide whether to prosecute the subject officer in criminal complaints. We sought to identify the journey time for all the cases we reviewed, including those where the complainer had not been informed of the outcome. Here, we provide data on the journey time of cases *only* where the complainer has been informed of the outcome.
94. In the 65 cases where the complainer was advised of the outcome of their complaint, the time between a report being submitted to CAAP-D and the complainer being advised by CAAP-D of the outcome ranged from six to 315 days. The average journey time was 114 days.

Table 4 – Time between report to CAAP-D and complainer being advised of outcome

Timescale	Number of complainers advised of outcome
0 to 12 weeks	32
12 to 24 weeks	18
24 to 36 weeks	9
36 to 48 weeks	6

95. We also assessed the time taken between the initial complaint and the complainer being advised by CAAP-D of the outcome. In most cases, the complaint was initially made to Police Scotland before later being reported by Police Scotland (or PIRC) to CAAP-D. While the Crown is not responsible for the duration of the investigation prior to the case being reported to it, this metric provides a sense of the length of the investigation from the perspective of the complainer, regardless of which agency is dealing with the case. The time between a complaint being made and the complainer being advised by CAAP-D of the outcome ranged from 66 to 886 days. The average journey time was 227 days.

<sup>22</sup> Angiolini final report (note 5), paragraph 41.



Table 5 – Time between complaint being made and complainer being advised of outcome

Timescale	Number of complainers advised of outcome
0 to 12 weeks	4
12 to 24 weeks	26
24 to 36 weeks	12
36 to 48 weeks	11
48 to 60 weeks	7
60 to 72 weeks	3
Over 72 weeks	2

### Type and timeliness of contact

96. In the cases we reviewed, contact between CAAP-D and complainers was generally limited to CAAP-D sending the complainer a copy of their statement for review, inviting the complainer to precognition, or informing the complainer about the outcome of their complaint. However, each of these three types of contact did not take place in all cases. As we have noted above, complainers were sent a copy of their statement in 45 (56%) of the 80 cases, were invited for precognition in 19 (24%) cases, and were informed of the outcome of their complaint in 65 (81%) cases.
97. For the majority of complainers in the cases we reviewed, the first time they were contacted by CAAP-D was when they were sent a copy of their statement for review. In the 45 cases where this occurred, the length of time that had passed since their complaint was reported to CAAP-D ranged from two to 118 days. In 34 of the 45 cases, the statement was sent within 28 days.
98. Where complainers were neither sent a copy of their statement to review nor invited to precognition, their first contact from CAAP-D was usually the letter informing them of the outcome of their complaint (this occurred in 13 cases). In four such cases, the complainer waited over 100 days and in a further five such cases, the complainer waited over 200 days before this first contact from CAAP-D, which we consider to be too long without any previous communication or update.
99. With the exception of the three types of contact listed at paragraph 96, we found communication between CAAP-D and complainers to be limited. There was little evidence of complainers being proactively updated about the status and progress of their complaint. While updates may not have been required in cases that were dealt with swiftly and where complainers did not wait too long before being informed of the outcome, we consider that complainers should have been updated in cases where CAAP-D's consideration of the case was protracted. In cases where lengthy consideration is necessary, perhaps due to the need for further enquiries or complex legal issues that require to be resolved, complainers should be kept informed.
100. In one case, there was more regular communication with the complainer, compared to the level of communication in other cases. However, the communication was driven by the complainer seeking updates about the case rather than by CAAP-D being proactive. Nonetheless, CAAP-D responded to the complainer each time he sought an update, and the quality of the update provided was good.

### Quality of communication

101. In each of the 80 cases we reviewed, we assessed whether communication with the complainer was satisfactory. In making this assessment, we took account of the general principles of the 2014 Act set out at paragraph 85. The timeliness and frequency of contact were also factors in our assessment.



102. In two out of the 80 cases we reviewed, there was no need to assess communication with the complainant as the complaints had been made anonymously. Of the remaining 78 cases, communication was satisfactory in 49 (63%) cases and unsatisfactory in 29 (37%) cases.
103. In cases which were satisfactory, communication tended to be timely, accurate and CAAP-D staff were responsive to requests for information. In three cases, complainants or witnesses were also referred to the Crown's Victim Information and Advice service, although this only occurred after a decision had been made to prosecute.
104. Where we assessed communication as being unsatisfactory, this was for one or more of the following reasons:
- there were long delays before contact was initiated with the complainant, or once contact was initiated, there were long periods of time in which there was no communication
  - there was a failure to tailor communication to meet the complainant's needs
  - there was no evidence of any communication with complainants
  - the complainants likely did not receive the correspondence. In one case, CAAP-D wrote to the complainant's home address when it was clear from the information supplied by the police that he was in prison. In another case, letters to the complainant were returned to CAAP-D but there was no record of any steps being taken to establish the complainant's current address and resend the correspondence
  - complainants had not been informed of a decision to prosecute the subject officer
  - the quality of correspondence was poor. For example, key information was missing from letters to the complainant or template letters were not appropriately adapted to the circumstances of the case.
105. We were particularly concerned at the cases where there had been a failure to tailor communication to meet the complainant's needs. For example:
- in one case, the police had advised that all communication with the complainant be routed through her support worker given her very poor mental health, but this advice was not acted upon by CAAP-D
  - in one case, it was clear from the investigation that the complainant was unable to read or write, but he was sent the standard letters regarding his statement and the decision to take no proceedings. No additional measures appeared to have been taken to help him participate in the investigation or inform him of the outcome
  - in one case, the complainant required an interpreter to provide his statement to the police, but correspondence from CAAP-D was in English
  - in cases involving children, there was no evidence of communication being tailored to their age and level of understanding.
106. The cases we reviewed highlight that CAAP-D is generally reliant on the reporting agency noting any vulnerabilities or communication issues which might require CAAP-D to adapt its approach. There is no additional mechanism by which CAAP-D routinely identifies complainants who have additional support or communication needs.
107. We also noted scope for improvement in communication where the complainant is a police officer or police staff. It is reassuring that police officers and staff feel able and are willing to report criminal behaviour by colleagues. In the cases we reviewed, police officers and staff made criminal allegations where they were the victim of the



alleged crime and where they were a witness. However, we noted a tendency in several cases for CAAP-D not to treat them as they would a member of the public who had made a complaint. There was either no communication between CAAP-D and the police officer or staff, or there was an expectation that PSD would pass on information. CAAP-D may wish to review its approach to communicating with police officers and staff who make a criminal complaint. Depending on the circumstances, direct communication may be more appropriate, particularly in light of the effort it may have taken to speak out against a colleague.

### **Victim Information and Advice Service**

108. The Victim Information and Advice Service (VIA) offers assistance to victims of crime by, for example, providing information about the criminal justice system and signposting to organisations which offer support. Complainers in cases involving a criminal complaint against the police do not automatically fall within the remit of VIA, and would only receive assistance if the alleged offence was of a particular type (such as a hate crime or a sexual crime) or if they appeared to be vulnerable or may benefit from VIA's involvement. CAAP-D has no dedicated VIA resource, but is able to make use of the VIA resource attached to the Health and Safety Investigation Unit. In our case review, three complainers were referred to VIA. While VIA input was unnecessary in the majority of cases, there were some additional cases where it may have been appropriate (for example, for particularly vulnerable complainers or in relation to a sexual assault allegation). While VIA do not generally offer assistance to complainers until after their case has been marked, given the lengthy journey time of some criminal complaints, an earlier referral may be appropriate.

### **Withdrawal of complaints**

109. In our 2008 inspection of how COPFS manages criminal allegations against the police, we were concerned at the number of complainers who withdrew from the investigation process. In our current inspection, few complainers withdrew and it was reassuring that even when this occurred, CAAP-D and the reporting agencies would continue to investigate and assess their complaint.

### **Contacting CAAP-D**

110. Where complainers wish to contact COPFS about their case, they are encouraged to communicate with CAAP-D via Enquiry Point. Enquiry Point is the Crown's contact centre, handling enquiries from members of the public, including victims and witnesses, and other agencies. Because the volume of CAAP-D cases is not high, this does not create significant additional demand for Enquiry Point but we nonetheless consider it to be unnecessary. We share the view of some CAAP-D staff who told us there was no reason why complainers cannot contact CAAP-D more directly, via its generic email address.

### **Overall assessment of communication with complainers**

111. While communication with many of the complainers in the cases we reviewed was good, there remains scope for improvement. We believe there is benefit in CAAP-D reviewing its current approach taking into account our findings, and developing a strategy or improvement plan for its communication with complainers. In developing this strategy, CAAP-D should consider:

- notifying complainers that it has received a report on the complaint and what they should expect to happen next
- how often complainers should be updated about the status and progress of their case
- ensuring that all complainers are advised whether their complaint will result in criminal proceedings



- whether anything can be done to address the low response rate to its copy statement letters
- whether the reliance on written correspondence is appropriate in every case
- how it can better identify complainers' individual communication needs and tailor its service to meet them
- how it can provide more or better quality information about the reason for its decisions to take no action
- whether it is making referrals to VIA when appropriate
- quality assurance of its correspondence with complainers to eliminate careless errors
- whether it is appropriate to rely on PSD to convey information to police officers or police staff who make a criminal complaint, instead of communicating with them directly.

### **Recommendation 2**

COPFS should review its approach to communicating with complainers in cases involving criminal allegations against the police. It should develop a strategy for ensuring that communication is timely, sufficiently frequent, good quality and tailored to the individual needs of the complainer.

### **Communication with subject officers**

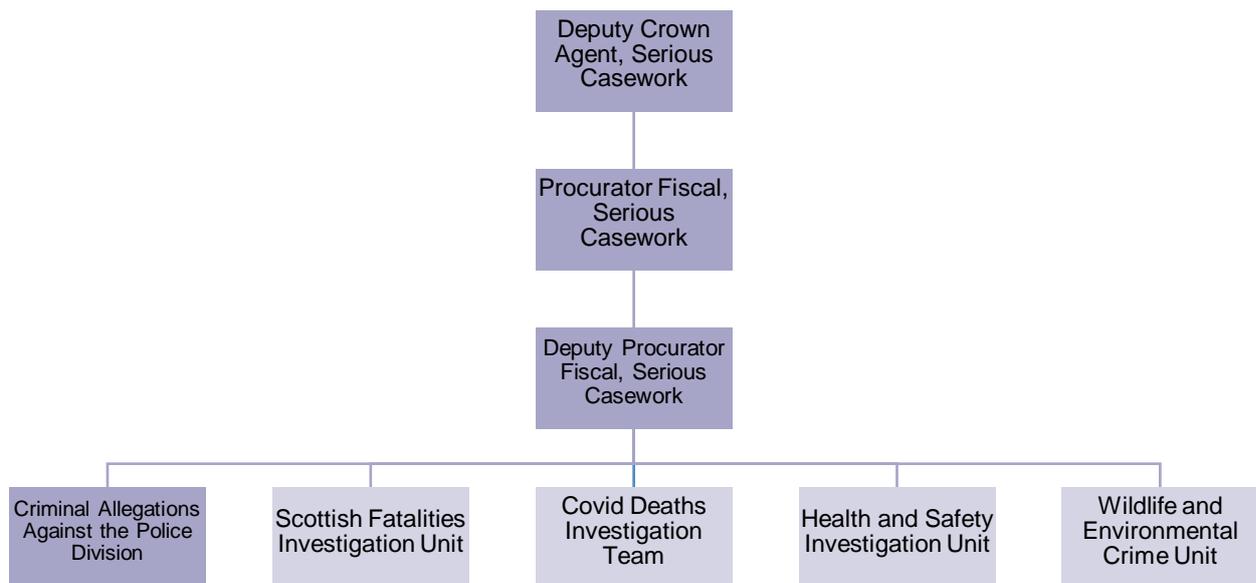
112. Once COPFS has decided whether to prosecute the subject officer in a criminal complaint, it notifies the Professional Standards Department of the police service for whom the subject officer works. There is no direct contact between COPFS and the subject officer regarding the outcome of the case or to provide any update on its progress before a final decision is made. The expectation is that the police service will share this information with the subject officer while also providing any support necessary for the officer's wellbeing.
113. While the police's desire to provide support to the subject officer is understandable and appropriate, we heard from some staff associations and solicitors who represent subject officers that there can be delays in the police service passing this information on and that information can be 'filtered' by the police service before it reaches the subject officer. The police service clearly needs to be made aware of the outcome of the criminal complaint so that it can take any necessary action, including providing welfare support, but CAAP-D may wish to discuss its current approach with the police and whether more can be done to ensure officers receive the right information at the right time.



## Leadership and governance

114. CAAP-D is one of 10 units making up the Crown's Serious Casework function, five of which are led by the same Deputy Procurator Fiscal. The Deputy Procurator Fiscal reports to a Procurator Fiscal who in turn reports to the Deputy Crown Agent with responsibility for Serious Casework. Serious Casework is one of three business areas within COPFS, the others being Local Court and Operational Support. The Head of CAAP-D is an experienced prosecutor at Assistant Procurator Fiscal level who, at the time of our inspection, had been in post for around one year.

Chart 3 – Organisation chart



115. There appears to be a good understanding of the work of CAAP-D among senior leaders in COPFS and an appropriate level of oversight and support. Senior leaders within COPFS and within CAAP-D also have a good understanding of why complaints of criminal conduct against the police while they are on duty are treated differently from other cases. They appreciate the special role of the police within society and the need to ensure criminal complaints are dealt with appropriately, to maintain confidence in policing and the wider justice system. There is scope to develop a similar level of understanding among less senior members of CAAP-D and some of its non-legal staff.

116. The Head of CAAP-D is seen as a capable and talented leader by his peers and by key stakeholders including Police Scotland and PIRC. Stakeholders consider him to be approachable and accessible, and appreciate his commitment to collaborative working and ensuring information flows appropriately between organisations. The Head of CAAP-D and other senior members of the unit are viewed positively by their colleagues in CAAP-D and more widely across COPFS, and are seen as important sources of advice and guidance regarding criminal allegations against the police.

117. There are effective governance arrangements in place for the management of criminal allegations against the police, albeit that governance would be strengthened if better quality data was available for scrutiny (see paragraph 71). The work of CAAP-D is discussed at weekly and monthly meetings chaired by the Deputy Procurator Fiscal. Performance is also reported to a bimonthly Serious Casework



Leadership Board as well as the COPFS Executive Board's Operational Performance Committee which is chaired by a Deputy Crown Agent.

118. As well as governance of the delivery of CAAP-D's function as a whole, individual criminal complaints against the police are also subject to scrutiny. For example, cases which are of particular public interest are included in a weekly briefing note to the Law Officers. This is in addition to the multiple layers of scrutiny applied to particular types of cases (see paragraph 32) and the need for Law Officers' instructions before any proceedings can be raised against the police.
119. There are separate leadership and governance arrangements for off duty criminal allegations against the police. While we consider it appropriate that off duty allegations are subject to the same decision making process as criminal complaints against members of the public rather than the bespoke CAAP-D process for on duty complaints, the lack of a single point at which both on and off duty issues are considered is a weakness. There should be some strategic oversight of both on and off duty complaints to, for example, discuss and agree issues of policy, decide which process a complaint should be subject when it is not immediately clear, and ensure that each process is working effectively.<sup>23</sup>

## Policy and guidance

120. There is a lack of written policy or guidance about how COPFS manages criminal allegations against the police. This includes a lack of guidance for reporting agencies as well as internal guidance for its own staff. In her preliminary report on police complaints handling, Dame Elish Angiolini made reference to Lord Advocate's Guidelines on the investigation of complaints against the police from 2002. These guidelines were directed at the police and covered issues such as the reporting and investigation of complaints, reporting targets and concurrent disciplinary proceedings. Dame Elish Angiolini suggested that COPFS may wish to consider whether they should be updated.<sup>24</sup>
121. During our inspection, we found that most COPFS staff had never seen nor heard of the 2002 guidelines, and the guidelines themselves were no longer available albeit there was no record of the guidelines having been withdrawn or replaced. We found evidence of various attempts being made over the years to update the guidelines, but none of those drafts appear to have been finalised. While Police Scotland has a standard operating procedure on complaints against the police<sup>25</sup> and PIRC has published statutory guidance on police complaints handling,<sup>26</sup> there are no current, formal guidelines from COPFS to the police on the reporting of criminal complaints.
122. Within COPFS, limited information on the handling of criminal complaints against the police is available to staff. What little information exists is:
- hard to find. Staff working across COPFS, including in CAAP-D, told us they had looked for guidance on criminal allegations against the police but had been unable to find any. In particular, staff who had joined CAAP-D in recent years said they had been unable to find out information about their new role prior to joining the unit
  - out of date. What little guidance exists is considerably out of date and pre-dates the creation of CAAP-D. It makes reference to roles and departments within

<sup>23</sup> For further discussion, see paragraph 282 and Recommendation 16.

<sup>24</sup> The Rt. Hon. Dame Elish Angiolini DBE QC, [Independent review of complaints handling, investigations and misconduct issues in relation to policing – Preliminary report](#) (June 2019) at paragraph 276.

<sup>25</sup> Police Scotland, [Complaints about the police standard operating procedure](#) (2018).

<sup>26</sup> PIRC, [Statutory guidance on the handling of complaints about the police in Scotland](#) (March 2021).



COPFS that no longer exist as well as approaches to the investigation and prosecution of crime that are no longer current. The information has also not been updated to reflect the significant structural changes that occurred in Scottish policing in 2013 including the creation of a national police service, the SPA and PIRC, nor was it updated after HM Inspectorate of Constabulary in Scotland ceased to have a role in respect of police complaints in 2007.

123. The lack of written guidance on criminal allegations against the police creates unnecessary risk. For staff in CAAP-D, that risk had been mitigated to some extent by senior members of the unit having been in post for some time and providing support to their colleagues. However, recent staff turnover has highlighted the need for written guidance rather than verbal briefings. COPFS staff who did not work for CAAP-D had little awareness of how criminal complaints against the police were handled, despite this being relevant to their role. In particular, those managing off duty complaints would welcome clarification of the definitions of on and off duty complaints, while those prosecuting on duty complaints would benefit from a greater understanding of the in-depth investigation and decision making process to which those cases had already been subject.
124. There is also a risk that changes to policy are not recorded or easily accessible. Our review of CAAP-D's files showed that, over the years, various policy decisions have been made regarding the handling of criminal complaints but those decisions have not been recorded in any one place. This risks inconsistent approaches, policy drift or simply decisions being forgotten about over time and as personnel change, and decisions not being communicated to all those who need to know. In particular, while there appears to be good communication with Police Scotland, it appears that other police services operating in Scotland are not as well sighted on COPFS policy as they could be. Where policy changes are being considered, there is a need to consult with and communicate the change to all those with an interest. Because the vast majority of complaints relate to those working with Police Scotland, there is an understandable tendency to focus engagement there but this may be to the detriment of other policing services.
125. Almost all those we interviewed, including COPFS staff and stakeholders, said they would benefit from written, easily accessible guidance on police complaints. We are aware that consideration is being given to developing new guidance in the wake of Dame Elish Angiolini's report and our findings should add weight to the need for it. As well as guidance for the police on the investigation and reporting of criminal allegations against the police, COPFS should develop more detailed internal guidance for its own staff. Guidance could cover, for example:
  - the role and remit of CAAP-D
  - the role of Crown Counsel and the Law Officers in decision making
  - the definition of on and off duty criminal complaints
  - the process to be followed for both on and off duty complaints, including timescales for reporting, investigating and decision making
  - why on duty criminal complaints are subject to a bespoke process
  - who is covered (police officers, special constables and police staff, and the various police services operating in Scotland)
  - any bespoke approaches to particular types of offence, such as breaches of data protection legislation
  - the role of local court in the prosecution of criminal complaints and guidance on the agreement of pleas.



### Recommendation 3

COPFS should develop guidance for the police on the investigation and reporting of criminal allegations against the police, as well as guidance for its own staff on the handling of such cases.

## Transparency

126. Among the stakeholders we spoke to, including those who work closely with CAAP-D, there was a surprising lack of awareness of CAAP-D's processes. Generally, stakeholders spoke of a lack of transparency about the Crown's handling of criminal allegations against the police and said that complainers, and those about whom allegations had been made, did not know what to expect when their case was reported to COPFS. Some staff within CAAP-D felt that the public's lack of awareness about their role led to misunderstandings and discontent among some complainers. Even within COPFS, while there was good awareness of the existence of CAAP-D, little was known about its processes, including fundamental issues such as the need for a Law Officer's instruction before the subject officer can be prosecuted for on duty criminal conduct.
127. While 'investigating allegations of criminal conduct against police officers' is listed as one of COPFS's main roles and responsibilities on its website, very little additional information is provided about how this is done or about the role of CAAP-D. A very thorough search would find some limited information scattered piecemeal across the site and in publications, such as the annual report, but this is insufficient. Providing stakeholders and the general public with more information about the Crown's handling of criminal allegations against the police would improve transparency, increase awareness of the robust processes in place to deal with such cases and help build public confidence.
128. There is also a lack of publicly available data about COPFS's handling of criminal allegations. The only data routinely available relates to compliance with the 12-week target (see Table 3, above). Over the years, several Freedom of Information requests to COPFS have been made seeking additional data. These requests are often of a similar nature. In the interests of transparency, COPFS should routinely publish data such as the number of reports it receives regarding criminal allegations against the police, the timescales for decision making, how many result in a prosecution and the final outcome. Consideration could also be given to publishing data about cases involving off duty allegations against the police.
129. As well as a general lack of data on the Crown's handling of criminal allegations against the police, there is a lack of data about the protected characteristics of complainers (and those complained about). This makes it impossible to assess whether particular groups within the community are disproportionately represented in such cases. In the cases we reviewed, there appeared to be no consideration by either the reporting agency or CAAP-D of whether race (or any other protected characteristic) was a factor in the incident complained about. This is surprising, particularly in light of the recent focus on race and policing across the world. The Crown appears to treat all cases the same, regardless of the race of the complainer or subject officer. While some might consider this to be a fair or 'colour-blind' approach, it risks failing to notice when race may actually be a factor in an incident. In cases we reviewed where the complainer was a person of colour, issues of race appeared to have been left unexplored during the investigation and during CAAP-D's assessment of the evidence.



130. A recent report by the UN High Commissioner for Human Rights set out a four-point agenda towards transformative change for racial justice and equality, in recognition of the experiences of Africans and people of African descent regarding excessive use of force and other human rights violations by law enforcement.<sup>27</sup> To ensure the accountability of law enforcement, the High Commissioner recommends that States should *'regularly publish data, disaggregated by victims' race or ethnic origin, on deaths and serious injury by law enforcement officials and related prosecutions and convictions, as well as any disciplinary actions.'*
131. The absence of data was also identified as a weakness by Dame Elish Angiolini in her review of police complaints handling, resulting in recommendations to Police Scotland and the SPA.<sup>28</sup> Dame Elish also noted concerns raised by members of the public and police officers of discriminatory conduct and attitudes within Police Scotland. In their June 2021 report on progress made against Dame Elish Angiolini's recommendations, the Scottish Government and Crown Office noted ongoing work by Police Scotland and the National Complaints Handling Development Group to improve the collation of diversity data.<sup>29</sup> They also noted the establishment of the Cross Justice Working Group on Race, Data and Evidence which is seeking to improve the collection and reporting of race data and evidence on people's interaction with Scotland's justice system. We welcome the work being taken forward by these groups, of which COPFS is a member.
132. As well as working with its partners on these issues, there is more COPFS itself can do in its handling of criminal allegations against the police by people of colour, particularly if it is to achieve the equality outcomes it has set for 2021-25 in furtherance of its public sector equality duty.<sup>30</sup>

#### **Recommendation 4**

COPFS should make more information publicly available about its role in investigating and prosecuting criminal allegations against the police. COPFS should also publish data regarding its handling of such allegations, and work towards gathering and publishing data that is disaggregated by race and other characteristics.

133. Data about police complaints handling is available from Police Scotland and PIRC, and should be available from COPFS. However, the data available from each organisation can be hard to reconcile. Consideration could be given to all organisations contributing to an annual publication on police complaints handling.

#### **Angiolini review**

134. In November 2020, Dame Elish Angiolini published the final report of her independent review of complaints handling, investigations and misconduct issues in relation to policing.<sup>31</sup> Although the role of the Lord Advocate in investigating criminal complaints was excluded from her Terms of Reference, her report included recommendations either directed to COPFS or to others but which will have a bearing on the Crown's handling of criminal allegations against the police.

<sup>27</sup> UN High Commissioner for Human Rights, [Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers](#) A/HRC/47/53 (June 2021).

<sup>28</sup> Angiolini final report (note 5), Recommendations 5, 19, 60.

<sup>29</sup> Scottish Government and Crown Office, [Complaints, Investigations and Misconduct in Policing: Implementation of Recommendations – Thematic Progress Report](#) (June 2021).

<sup>30</sup> COPFS, [Equality Outcomes for 2021-25](#).

<sup>31</sup> Angiolini final report (note 5).



135. The Scottish Government and the Crown Office are working together to coordinate their response to the Angiolini report, alongside Police Scotland, PIRC, the SPA and others. Governance and oversight of the response will be provided by:
- the Ministerial Group for Police Complaints and Investigations, co-chaired by the Cabinet Secretary for Justice and the Lord Advocate
  - the Strategic Oversight Group for Police Complaints and Investigations, which had met informally prior to the Angiolini review but which was formally established following publication of her preliminary report. It comprises senior representatives of COPFS, the Scottish Government, PIRC, Police Scotland and the SPA and is co-chaired by the Deputy Crown Agent
  - the Practitioner Working Group for Police Complaints and Investigation, which has a similar organisational membership to the Strategic Oversight Group but with a more operational focus. The Head of CAAP-D is a member of the Practitioner Working Group.
136. The Scottish Government and Crown Office published their joint response to Dame Elish Angiolini's report in February 2021<sup>32</sup> and, in June 2021, a report on progress so far against the recommendations.<sup>33</sup>

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<sup>32</sup> [Joint Scottish Government and Crown Office response to the Report on complaints handling, investigations and misconduct issues in relation to policing in Scotland](#) (February 2021).

<sup>33</sup> Scottish Government and Crown Office, [Complaints, Investigations and Misconduct in Policing: Implementation of Recommendations – Thematic Progress Report](#) (June 2021).



## Process

### Reporting criminal allegations against the police to COPFS

137. Criminal allegations against the police whilst they are on duty can be made to CAAP-D via several routes. In the majority of cases however, a complaint is made directly to the police and, where it contains a reasonable inference of criminality, the police are required to refer it to CAAP-D.<sup>34</sup> Other reporting routes include:

- complaints about Police Scotland's senior officers are made to the SPA.<sup>35</sup> Where there is a reasonable inference of criminality, the SPA must refer the complaint to CAAP-D
- where PIRC, during the course of its work, identifies an inference of criminality, it must notify CAAP-D at the earliest opportunity<sup>36</sup>
- members of the public can make criminal complaints directly to CAAP-D.

138. In our review of 80 on duty criminal complaints:

- 78 (98%) were initially reported to CAAP-D by the police
- one (1%) was initially reported by PIRC
- one (1%) was reported directly to CAAP-D by a member of the public.

### Early notification to CAAP-D

139. There appears to be no formal, up-to-date guidance from COPFS for the police on the timescales for reporting criminal complaints to CAAP-D. However, Police Scotland's standard operating procedure on complaints about the police states that, where there is an indication that a crime may have been committed, it will contact CAAP-D to advise them. Contact should be made, '*as soon as reasonably practicable and within two working days of the evidence coming to light*'.<sup>37</sup>

140. Early notification of criminal complaints to CAAP-D is essential in cases where there is an alleged breach of Articles 2 and 3 of the European Convention on Human Rights. In these cases, independence is an important characteristic of an effective investigation. Early notification ensures that CAAP-D is aware of the allegation and has oversight of any investigation from an early stage. It also affords CAAP-D the opportunity to either instruct the police to investigate the complaint on its behalf or to instruct PIRC to carry out the investigation. PIRC is only able to investigate a criminal allegation on the instruction of CAAP-D.<sup>38</sup> Early notification of the criminal complaint to CAAP-D can also assist COPFS in its disclosure obligations (see from paragraph 184).

141. In her report on police complaints handling, there is a clear expectation from Dame Elish Angiolini that all criminal allegations against the police be reported to COPFS within 48 hours of receipt and that some more serious allegations, including alleged breaches of Articles 2, 3 and 5, be reported 'forthwith'. She states that criminal complaints, even those not involving a potential breach of a Convention right, should be the subject of immediate consideration, investigation or oversight by a prosecution service independent of the police.<sup>39</sup>

<sup>34</sup> Police Service of Scotland (Conduct) Regulations 2014, Regulation 9.

<sup>35</sup> Police Service of Scotland (Senior Officers) (Conduct) Regulations 2013, Regulation 7. A senior officer is an officer holding the rank of Assistant Chief Constable or above.

<sup>36</sup> *Memorandum of Understanding between COPFS and PIRC* (2013).

<sup>37</sup> Police Scotland, *Complaints about the police: Standard operating procedure* (2018), paragraph 6.10.2.

<sup>38</sup> Police, Public Order and Criminal Justice (Scotland) Act 2006, section 33A(b)(i).

<sup>39</sup> Angiolini final report (note 5), page 12 and paragraph 6.



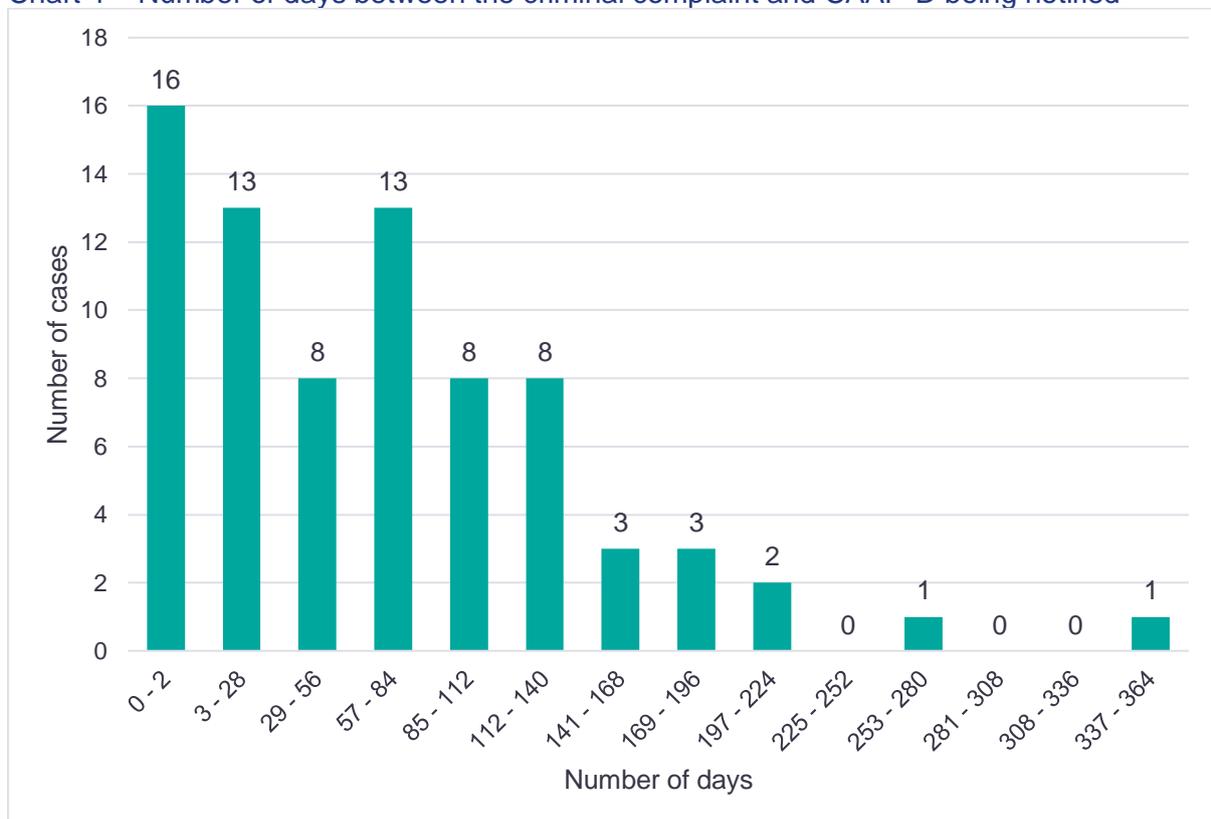
142. In the majority of cases we reviewed, there was no evidence that CAAP-D had been informed of a criminal complaint as soon as reasonably practicable or within two working days or, in cases referred from PIRC, at the earliest opportunity. It is possible that early intimation may have been received by telephone or email and not recorded within the case file, although our interviews with CAAP-D staff indicated that early notification was neither the norm nor routinely expected. It is also possible that when some complaints are made, the fact they may be criminal in nature may not be immediately apparent. However, in almost all of the complaints we reviewed, the criminal nature of the allegation was clear from the start.

143. Of the 80 cases we reviewed:

- in 16 (20%) cases, CAAP-D was made aware by the reporting agency of the criminal complaint within two days of the complaint being made. In these cases, the early notification was made by PSD either by way of a briefing paper to CAAP-D, a request for advice and guidance, or verbally
- in 60 (75%) cases, there was no evidence that CAAP-D had been informed of the complaint within two days. In 59 of those cases, CAAP-D was notified of the complaint by PSD and in one case, by PIRC
- in three (4%) cases, we were not able to establish the timescale for notification to CAAP-D because, for example, the date the complaint was made was not recorded
- in one (1%) case, CAAP-D was immediately aware of the complaint because it had been made directly to CAAP-D.

144. Chart 4 shows the length of time elapsed from the date the complaint was made to CAAP-D being first notified of the incident by the reporting agency in the 76 cases where this was relevant and for which we had information.

Chart 4 – Number of days between the criminal complaint and CAAP-D being notified





145. In 10 of the 60 cases where CAAP-D was not notified of the criminal complaint within two days, CAAP-D was first made aware of the complaint via a request for advice and guidance. These requests were made between four and 117 days of the criminal complaint being made. In the remaining 50 cases, there was no evidence to suggest CAAP-D was informed of the criminal allegation until a full report of the investigation was submitted by PSD. In these 50 cases, the average number of days between the allegation being made and a report being submitted was 101.
146. Our analysis shows that in 50 out of 76 (66%) cases, CAAP-D was not made aware of the existence of a criminal complaint until the reporting agency finished its investigation. While CAAP-D may instruct additional investigation, this was not necessary in almost two thirds of the cases we reviewed. While this reflects well on the quality of the initial investigation, it means CAAP-D is neither directing nor overseeing the investigation from the start. This is of particular concern where investigations are lengthy and opportunities to capture or preserve evidence requested by CAAP-D may be lost. Current practice in relation to notifying CAAP-D of allegations of criminal complaints risks non-compliance with the requirement for an independent investigation of potential breaches of Articles 2 and 3. For other types of criminal complaints, current practice risks a lack of oversight of the investigation by an independent prosecutor, and also deprives CAAP-D of the opportunity to ask PIRC rather than the police to investigate. A lack of independent investigation or independent oversight of the investigation also risks undermining public confidence in the system for handling criminal allegations against the police. CAAP-D should be notified of the existence of allegations at an early stage. It should work with reporting agencies to establish an effective process for the notification and recording of allegations.

### **Recommendation 5**

COPFS should ensure that it receives early notification of the existence of criminal allegations against the police. It should require reporting agencies to report criminal allegations within a specified timescale that is commensurate with the nature of the allegation and it should monitor adherence to those timescales.

### **Advice and guidance**

147. The advice and guidance procedure is a method by which early intimation of a criminal allegation can be made to CAAP-D and, as the name suggests, the reporting agency can seek advice and guidance on how the complaint should proceed. It is most often used by the police to seek CAAP-D's view on whether they should investigate the complaint or whether CAAP-D wishes to refer it to PIRC for independent investigation. It can also be used, for example, to seek CAAP-D's view on whether the allegation is criminal or non-criminal. The advice and guidance procedure was introduced in 2018 following publication of Dame Elish Angiolini's preliminary report on police complaints handling. Initially introduced to help ensure allegations of excessive force and assault were being appropriately investigated, requests for advice and guidance now cover a broader range of allegation types.
148. Current practice involves the police or other reporting agency sending a briefing paper to CAAP-D requesting advice and guidance. In urgent cases, CAAP-D may be contacted by phone for a verbal instruction. We consider the process to be useful – it provides CAAP-D with early notification of the complaint and allows CAAP-D the opportunity to guide the investigation from the beginning. Of the 80 cases we reviewed, 25 (31%) began with a request for advice and guidance. All were submitted by the police, except one which came from PIRC. Thirteen were submitted



within two days of the complaint being made (with several being made within one day). Others were, however, submitted at a considerably later stage. CAAP-D tended to respond promptly to these requests.

149. Requests for advice and guidance have increased since the procedure was introduced and will likely increase further if this process is used to help facilitate the implementation of Recommendation 5. The number of requests received and the timeliness of responses could be included in the management information used to monitor activity within CAAP-D and help inform resourcing decisions. We welcome the introduction of the advice and guidance process which we heard from both CAAP-D and stakeholders has been a positive development.

### The reporting process

150. Currently, most investigations of criminal allegations against the police are carried out by the relevant police service's own Professional Standards Department. On occasion, investigative reports are submitted by other policing units such as the Counter Corruption Unit. In our review of 80 cases:

- 71 (89%) were investigated and reported to CAAP-D by PSD
- two (3%) by other policing units<sup>40</sup>
- seven (9%) by PIRC.

151. PIRC was established in 2013 and is independent of Police Scotland and other policing bodies in Scotland. One of PIRC's roles is to independently investigate incidents involving the police. There is a statutory requirement that when directed by CAAP-D, PIRC is to '*investigate any circumstances in which there is an indication that a person serving with the police may have committed an offence.*'<sup>41</sup> This affords COPFS wide discretion in relation to cases it refers to PIRC.

152. An early memorandum of understanding between COPFS and PIRC stated that it was for COPFS to decide what to report to PIRC but that, in general terms, it would include any criminal allegation against a senior officer and any case that involves a serious criminal allegation against someone serving with the police where there is a requirement for an independent investigation.<sup>42</sup> Since then, the types of cases that will be referred to PIRC have been further specified. In 2015, it was agreed that allegations of sexual offences, corruption and perjury should be referred to PIRC for investigation.

153. The final Angiolini report recommended that there should be a further broadening of the types of cases that CAAP-D should instruct PIRC to investigate, to include all criminal complaints which allege a breach of Article 3 and possibly Article 5.<sup>43</sup> This would involve a number of criminal complaints which are currently being investigated by the police to be investigated instead by PIRC. Implementation of this recommendation is being taken forward by a short life working group comprising COPFS, PIRC and Police Scotland.<sup>44</sup>

154. During our interviews with COPFS staff and stakeholders, we heard that there was a lack of clarity regarding the types of cases that should be referred to PIRC. While it may be impossible to set out a definitive list, consideration should be given to setting

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<sup>40</sup> A criminal allegation may be referred to another policing unit where, for example, the allegation is about a PSD officer.

<sup>41</sup> Police, Public Order and Criminal Justice (Scotland) Act 2006, section 33A(b)(i).

<sup>42</sup> *Memorandum of Understanding between COPFS and PIRC* (2013), para 6.1.

<sup>43</sup> Angiolini final report (note 5), Recommendation 47.

<sup>44</sup> Scottish Government, [Complaints, Investigations & Misconduct in Policing: Implementation of Recommendations – Thematic Progress Report](#) (June 2021), page 7.



out a framework for deciding which complaints should be referred to PIRC. This could be included in the guidance for COPFS staff and for the police recommended at Recommendation 3. Written and easily accessible guidance on which cases should be considered for investigation by PIRC may also support decision making by on call COPFS staff when CAAP-D staff are not available.

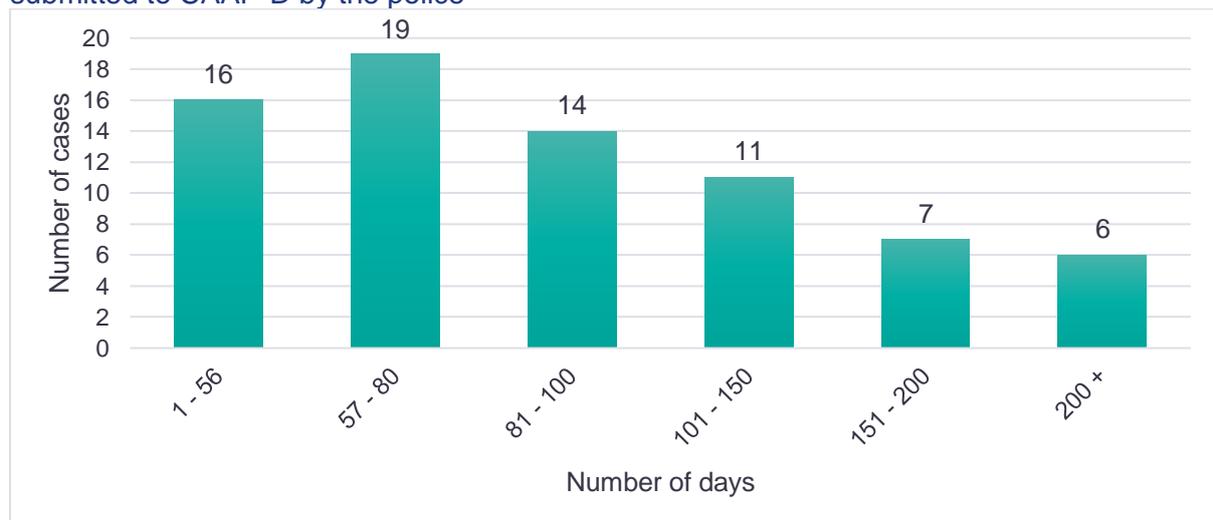
### Timeliness of investigation reports

155. There appears to be no formal, up-to-date guidance from COPFS on how quickly investigations into criminal complaints must be carried out and reports submitted to CAAP-D. From internal papers, we noted that there had been an agreement with Police Scotland shortly after CAAP-D was established that reports would be submitted within 56 days of the complaint being made. This agreement is reflected in Police Scotland's standard operating procedure.<sup>45</sup> PIRC aims to submit 80% of investigation reports to CAAP-D within three months of the start of the investigation.<sup>46</sup>

156. In the cases we reviewed, the majority of reports were not submitted to CAAP-D within these timescales. Of the 73 reports submitted by the police, only 16 (22%) were submitted within 56 days. In 57 (78%) cases, the 56-day target was not met. Twenty of the cases that missed the target had previously been the subject of advice and guidance requests to CAAP-D. This may have resulted in a delay to the investigation while advice was sought on how it should proceed. Some criminal complaints present investigative challenges, such as the complainer or witnesses disengaging from the process. The police tend to make significant efforts to re-engage complainers in order to carry out an effective investigation. In other cases, the circumstances of the complaint were complex and therefore the investigation was comparatively more protracted. However, these investigative challenges did not appear to be present in all the delayed reports.

157. Chart 5 shows the time taken for Police Scotland to report the 73 cases that we reviewed to CAAP-D. The shortest time taken to report a case was one day, and the longest was 757 days. The average was 105 days.

Chart 5 – Number of days between complaint being made and investigation report being submitted to CAAP-D by the police



<sup>45</sup> Police Scotland, *Complaints about the police: Standard operating procedure* (2018), paragraph 6.10.1.

<sup>46</sup> PIRC, [Business plan 2021-22](#).



158. In the cases we reviewed, seven investigations were carried out by PIRC. Five were reported within PIRC's three-month target and two were reported after three months. Both out-of-target cases were complex and required significant investigation. More generally, PIRC reports publicly on its performance in relation to investigations. In 2019-20, it submitted 86% of its investigation reports to CAAP-D within three months.<sup>47</sup>

159. From speaking to CAAP-D staff, we know that many are unaware of the targets for submitting investigation reports and there appears to be no monitoring of compliance by CAAP-D or holding to account even when reports are substantially delayed. While CAAP-D is often not aware of the existence of the criminal complaint while it is being investigated (see from paragraph 142), even where early notification has been provided, we saw no evidence in our case review of CAAP-D seeking updates on progress. This again suggests that CAAP-D is not always overseeing investigations of criminal allegations against the police in the way many would have expected. Where investigations drift without justification, CAAP-D should be in a position to intervene.

### **Recommendation 6**

COPFS should consider setting target timescales for reporting agencies to submit investigation reports regarding criminal allegations against the police. It should work with those agencies to consider how best to monitor compliance with those targets.

### **Content of investigation reports**

160. When submitting their investigation reports to CAAP-D, the reporting agencies categorise them based on the nature of the allegation, whether it is corroborated and the substance of the evidence. These categories are unique to the reporting of criminal allegations against the police. There are five categories, of which Category 1 is the most serious. The categories were agreed by CAAP-D and the reporting agencies shortly after the national unit was established, and their purpose was to help CAAP-D identify the most serious complaints and potentially allow for prioritisation.

161. At one stage, consideration was given to CAAP-D using the categories to determine which cases should be reported to Crown Counsel, and what the timescales should be for submitting investigation reports, although it does not appear these proposals were ever taken forward. Indeed, the CAAP-D staff we spoke to said they rarely relied on the categories assigned to the case by the reporting agency and preferred to assess the category of the case for themselves. We felt this was appropriate as in the cases we reviewed, there were several examples of cases being miscategorised. The most common error was that the police assessed that the allegation was uncorroborated when corroboration in fact existed (albeit that they may not have considered it credible or reliable). In these cases, the police categorised the case at a lower level than it should have been.

162. However, we also heard from CAAP-D staff that in practice the categories served no real purpose for them. They did not use them to prioritise their work. At a more strategic level, there appeared to be no monitoring of the number of cases in each category. Provided the categorisation is correct, such monitoring could be used to predict how long it may take to handle each case and allocate cases more evenly across staff members and, indeed, to prioritise cases as was originally intended. If CAAP-D wishes to set more nuanced targets for managing its workload (as

<sup>47</sup> PIRC, [Annual report and accounts 2019-20](#).



suggested at paragraph 71), categorisation could be the mechanism by which this is achieved. If, however, categorisation is serving no useful purpose for CAAP-D, then it should consider whether it is worthwhile.

### Quality of investigation reports

163. The quality of reports submitted by the reporting agencies will influence how effectively and how quickly CAAP-D is able to make a decision on whether there should be a prosecution. From our own review of cases, and from interviews with CAAP-D staff, we noted that many investigations by the police were particularly thorough and their subsequent reports were of a high standard.
164. While many reports were of a high standard, others were variable and several lacked necessary information. Issues included a lack of a detailed analysis of CCTV evidence, a lack of significant enquiry and statements not being obtained from all witnesses. In these cases, CAAP-D was required to instruct further work which inevitably delayed its decision making. More positively, PSD has adopted the practice of attaching all statements and often the copy productions when submitting its reports. This was done in the majority of cases and facilitated CAAP-D's consideration of the case.
165. We only reviewed six reports submitted by PIRC making it difficult to draw any broader conclusions about the quality of its reports.<sup>48</sup> However, we heard from CAAP-D staff that while they thought PIRC's collation of evidence was good, further analysis of the evidence in its reports would be helpful. They were also keen for PIRC to adopt the police practice of routinely submitting statements and copy productions with its reports. We heard from PIRC that it has recently redesigned its report template to address some of these issues. It also intends to recruit additional legal expertise which should assist with the analysis of evidence.

### Subject officers' antecedents

166. In our case review, we noted that there was generally very little information about the personal circumstances of the subject officer (generally referred to by the police and COPFS as 'antecedents'). Often, no information was included about, for example, the subject officers' mental health, family situation or any contributing or mitigating factors surrounding the alleged criminal behaviour. This is in contrast to reports submitted to COPFS about members of the public, where reporting officers are encouraged to include such information so that the prosecutor is equipped with relevant information to reach the most appropriate prosecutorial decision.
167. There were mixed views among CAAP-D staff about the benefits of including antecedents in the report. However, stakeholders, particularly defence practitioners, tended to strongly believe that CAAP-D should be provided with such information. In one of the few cases we reviewed which did include information about the subject officer, the officer was accused of breaching data protection legislation. While there was a prima facie case against the officer, detailed information was provided about the mitigating circumstances of the breach and a decision was made not to prosecute.
168. We also noted that reports to CAAP-D did not tend to say whether the police service had suspended the subject officer from duty or placed them on restricted duties. Where this is the case, consideration could be given to expediting the case, both for

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<sup>48</sup> While PIRC investigated seven of the cases we reviewed, there were reports for only six. This was because in the seventh case, the allegation was immediately refuted by CCTV evidence and it was thought a full report of the case was unnecessary.



the benefit of the subject officer and for policing more generally.<sup>49</sup> In one case we reviewed, the existence of a criminal complaint against a probationer resulted in his probationary period being extended by the police until CAAP-D had reached a decision. This would have had financial as well as other impacts on the officer. This information was provided in the report and was used by the CAAP-D depute to ensure that a decision to take no proceedings was communicated to PSD as quickly as possible.

### **Recommendation 7**

COPFS should work with reporting agencies to review what information about subject officers should be included in reports submitted to CAAP-D.

### **Direct reporting to CAAP-D**

169. It is possible for members of the public to report criminal allegations against the police directly to COPFS. This reporting option will be particularly attractive to members of the public who lack confidence in reporting their allegation directly to the police. The Angiolini report described the ability to report a criminal allegation directly to COPFS as an important safeguard but one which is little known by the public, and recommended that direct reporting be much better publicised and made more accessible to the public.<sup>50</sup>
170. Currently, there is very limited information on the COPFS website about its role in investigating criminal complaints against the police and about the work of CAAP-D. Substantially more information about how to make a complaint against the police is provided on the Police Scotland website, as well as a link to a leaflet which provides more detail on how to make a complaint and how criminal complaints are managed, including by COPFS. This leaflet also advises the public that if they do not have confidence reporting a criminal complaint to the police, they can report it directly to CAAP-D.<sup>51</sup> The leaflet appears to be jointly published by Police Scotland, PIRC, the Scottish Government and COPFS, but it is not featured on the COPFS website.
171. Of the 80 cases we reviewed, only one was reported to CAAP-D directly by a member of the public. While only a small proportion of the criminal complaints CAAP-D receives each year will have been directly reported to it, there was a reluctance among staff we interviewed for this reporting route to be publicised further. There was a concern that it may result in an increase in directly reported criminal complaints, and that CAAP-D did not have the capacity or capability to investigate the complaints itself. There was also a concern that publicising direct reporting to COPFS may undermine public trust in the police's ability to deal with criminal complaints.
172. We support the Angiolini report's recommendation that the ability to directly report criminal allegations against the police to COPFS should be better publicised. This reporting route exists so that those who lack confidence in reporting a criminal complaint to the police have another means by which it can be raised. Increased publicity of this reporting route should encourage members of the public to complain directly to the police, while also setting out that there is an alternative where they feel unable to do so. The public's expectations should be managed so they are aware that on receipt of the allegation, CAAP-D will instruct the police (or PIRC) to investigate. Direct reporting can reassure the complainer, however, that CAAP-D is

<sup>49</sup> See from paragraph 52 regarding the impact of delay on subject officers and the police service.

<sup>50</sup> Angiolini final report (note 5), Recommendation 46.

<sup>51</sup> [A guide for complaints about the police.](#)



sighted on the allegation from the outset and is independently overseeing any subsequent investigation. We welcome efforts by COPFS and its partners to implement the Angiolini recommendation.

### CAAP-D processes

173. When the police or PIRC submit the report of their investigation to CAAP-D, the large majority are emailed to generic CAAP-D mailboxes. Only a small number of reports are submitted as SPRs using the Crown's electronic reporting system. CAAP-D's administrative staff monitor the mailboxes and upload the reports to the COPFS case management system. Thereafter, it is generally the unit's Principal Deputies who first consider each case and assess if there is a prima facie sufficiency of evidence.
174. The usual practice is that, if there is insufficient evidence but the Principal Deputy considers that there are further enquiries to be carried out, she will instruct those enquiries. If, however, there is an obvious insufficiency of evidence and no further lines of enquiry, the Principal Deputy will write to the complainant, enclosing a copy of their statement and asking if the complainant has any additional information to provide in support of their allegation. Additionally, at this stage, the Principal Deputy will consider whether there is a related case and whether COPFS has disclosure obligations linked to that case.<sup>52</sup>
175. On receipt of any additional information from either the reporting agency or the complainant, the Principal Deputy will again review the evidence. If there remains an insufficiency of evidence, the case will be marked as 'no proceedings'. If the case raises any concerns, it may be referred to the Head of CAAP-D.
176. In cases where there is a sufficiency of evidence, the Principal Deputy prepares an allocation note and allocates the case to a case preparer<sup>53</sup> with a view to it being reported to Crown Counsel. The case preparer considers all statements and productions, and instructs any additional enquiries and expert witnesses. The case preparer may also precognosce the complainant or any witnesses. The case preparer's report will include a recommendation on whether the subject officer should be prosecuted. The report is shared with the Principal Deputy and then the Head of CAAP-D who add their own comments and recommendation, before being sent to Crown Counsel. All cases where there is a sufficiency of evidence, including all cases where a prosecution is recommended, are sent to Crown Counsel for their consideration and instruction. Additionally, some cases where there is insufficient evidence but where the circumstances are particularly sensitive, complex or concerning, may be sent to Crown Counsel.

### Receipt of cases

177. During our inspection, we noted that there were often discrepancies between the date that the report was submitted by the police or PIRC via email and the date CAAP-D recorded it as having been received and uploaded it to the case management system. In only 11 of the 80 (14%) cases we reviewed were the cases recorded as being received on the same day they were submitted (that is, the day they were actually received). Thirty-four (43%) cases were recorded as being received between one and four days after they had been submitted. In 35 (44%) cases, however, the reports were recorded as being received at least five days after they were submitted. In four of these 35 cases, several weeks passed between the cases being submitted and being recorded as received.

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<sup>52</sup> For further information on related cases and disclosure, see from paragraph 184.

<sup>53</sup> The case preparer may be one of CAAP-D's senior deputies, deputies or precognition officers.



178. The practice of recording the cases as received on the date they are processed by administrative staff rather than the date they are actually received is problematic. The 12-week target for decision making in CAAP-D cases is supposed to commence from the day the case is received, but instead is being calculated from the date the case is processed. The effect of the delay in recording the case as received is that CAAP-D buys itself more time to meet the 12-week target, albeit there was no evidence this was what was intended. This would not be an issue if cases were being processed promptly on the next working day, but our review showed this is often not happening and delays of several weeks in cases being recorded as received are not acceptable. The delay in processing the case can also hamper CAAP-D's efforts to meet its disclosure responsibilities effectively (see paragraph 184 and case study 2).
179. The lack of an electronic reporting system for reports to CAAP-D contributes to this delay. The vast majority of other reports submitted to COPFS by the police are sent via an electronic reporting system and the date sent and date received are the same. In contrast, CAAP-D relies on administrative staff regularly monitoring mailboxes and manually uploading its reports. Our review suggests that mailboxes are not being monitored and actioned sufficiently frequently although it was not clear why. It may be that CAAP-D lacks sufficient administrative capacity, or that there is a lack of understanding among staff that reports should be uploaded as soon as possible. This issue would be resolved by the introduction of an electronic reporting system for reports to CAAP-D (see paragraph 243). Until that time, to bring CAAP-D into line with majority of other COPFS units and to promote the integrity of its performance data, CAAP-D should process its reports as soon as possible after they are received.

### **Recommendation 8**

Pending the introduction of an electronic reporting system for criminal allegations against the police, COPFS should ensure that it records the receipt of such reports as soon as possible after they have been submitted (such as by the next working day).

180. From the cases we reviewed, there appeared to sometimes be a delay between the case being received and it being initially reviewed by a Principal Depute. However, it could also be difficult to establish an accurate timeline for each case and to know what happened when. This was echoed by staff in our interviews who said it could be a challenge to ascertain the history of a case. CAAP-D records all its cases on a spreadsheet and this can be a useful source of information, but the extent of the information recorded about each case can be limited. The Principal Depute's allocation note can also be helpful, but this is not completed in every case and does not contain a timeline.
181. From our case review, we also noted that the recording of decisions about a case was variable. Decisions and instructions about a case, legal or otherwise, were often handwritten on case papers and could be limited. The practice of handwriting decisions on case papers had to be revised as CAAP-D staff began working from home due to the Covid-19 pandemic.
182. To their credit, CAAP-D staff have recognised the problems with their recording processes. To address them, they have recently created a new document known as the 'CAAP-D case record'. This is a living document the purpose of which is to record all the material information, decisions and instructions about a case. It should be regularly updated by both legal and administrative staff. If used effectively, this document will be of benefit in recording the life of a case and bringing together all salient information in one place.



183. This new document was only introduced once we had completed our case review and we were not able to fully assess how it is working. However, we briefly reviewed five cases in which it had been piloted. It was not yet being used to its fullest potential, although we acknowledge it had only been recently introduced and more time is needed for staff to become familiar with it and use it appropriately. CAAP-D may wish to review the use of the case record after several months and to seek feedback from staff, to ensure it is being used effectively and is having the desired effect.

### Disclosure in related cases

184. When a criminal allegation is made against the police, there is often a related criminal case arising from the same set of circumstances. The most common example is where a person is being arrested and they allege that they are assaulted during the course of the arrest. The offence for which they were initially being arrested and which has formed the basis of a report to COPFS is the 'related case'.

185. Chapter 24 of the COPFS Disclosure Manual contains detailed guidance for all staff on the process to be followed regarding information obtained during a CAAP-D investigation so that the Crown can discharge its disclosure responsibilities where there is a related case.<sup>54</sup> The guidance says it is essential that there is a process by which CAAP-D must identify all the information obtained or generated during the CAAP-D investigation that may be relevant to the prosecution of the related case. Copies of this information should be provided to the local court prosecutor along with a note completed by CAAP-D setting out which information has been assessed as being material. The guidance goes on to state:

*'Where there is a related criminal case, [CAAP-D] must ensure that the Prosecuting Office is made aware of the existence of the CAAP case in order that this fact can be clearly marked in the case papers. This ensures that the Case Preparer or the prosecutor of the related criminal case is aware that there may be relevant information held in the CAAP case... If the related criminal case has not yet been reported to the PF Office, [CAAP-D] should proactively arrange for the related prosecution report to be submitted as a matter of priority.'*

186. Accordingly, CAAP-D has responsibility to intimate the existence of a criminal complaint against the police case to the local prosecutor, even where CAAP-D has not received the full report from the reporting agency. This, of course, depends upon CAAP-D having received early notification of the existence of the criminal complaint from the reporting agency which, in our case review, did not happen in most cases (see paragraph 142).

187. Of the 80 criminal complaints against the police that we reviewed, 41 (51%) had a related case. In 12 of the 41 cases, the related case had concluded either prior to the complaint being made or prior to CAAP-D being notified of its existence. The cases had concluded, for example, by way of a warning or a fiscal fine. In these circumstances, the Crown's disclosure obligations did not apply.

188. In 17 of the 41 cases, CAAP-D was in receipt of the full report and the supporting documentation (such as witness statements). This information was shared with the local prosecutor and CAAP-D was able to provide an assessment of its relevancy and materiality. However, in four of these 17 cases, while CAAP-D provided the local prosecutor with the appropriate information to facilitate disclosure, it did so at a very late stage, either the day before or on the day of the trial in the related case.

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<sup>54</sup> COPFS, *Disclosure Manual*, paragraph 24.3.2.



189. In three of the 41 cases, CAAP-D received early notification of the case from the reporting agency. CAAP-D demonstrated good practice by intimating the existence of the criminal complaint to the local prosecutor even before it had received the full report of the investigation. The related cases did not proceed and therefore an assessment of the relevancy and materiality of information gathered during the investigation was not ultimately necessary.

#### **Case study 1**

In one case, the incident resulting in the criminal allegation against the police and the related case occurred in November 2018. CAAP-D was informed of the circumstances in January 2019 by PSD. On the same day, CAAP-D notified the local prosecutor of the existence of the criminal complaint. CAAP-D received the full investigation report in March. It assessed the relevance and materiality of the information gathered during the investigation and shared this with the local prosecutor within 10 days, well before the date of the intermediate diet in the related case. This allowed sufficient time for the local prosecutor to consider the information and, if appropriate, disclose it to the defence.

190. In eight of the 41 cases where there was a related case, CAAP-D had received the full report and supporting documentation, but had neither forwarded the information to the local prosecutor nor provided an assessment of its relevancy or materiality. No explanation for this omission was recorded in the case file. In one further case, CAAP-D had received early notification of the criminal complaint but had not received the full report. CAAP-D had not intimated the existence of the criminal complaint to the local prosecutor. Thus, in nine of the 41 cases, CAAP-D did not comply with the process set out in Chapter 24 of the Disclosure Manual.

#### **Case study 2**

In one case, the incident resulting in the criminal allegation against the police and the related case occurred in April 2019. The complainer was charged with a breach of the peace but he alleged that he had been assaulted by an officer. The police advised CAAP-D of the criminal complaint within two days of the incident but there is no record of CAAP-D being advised of the related case. There is also no record of the local prosecutor being advised of the existence of the criminal complaint.

A trial was fixed in the related case for the beginning of July 2019. CAAP-D received the full report and supporting documentation for the criminal complaint at the end of June. CAAP-D recorded and processed the full report seven days after it had been received, which was the day before the trial. The information from the police included mobile phone footage of the incident which was, to a degree, exculpatory with regard to the related case. CAAP-D advised the local prosecutor of the existence of the criminal complaint and forwarded to them a schedule listing the information that it considered appropriate to disclose to the defence. However, this was sent at 4pm on the day before the trial.

The related case concluded on the day of the trial. There was no record of either the mobile phone footage or the information being disclosed to the defence. This case has been brought to the attention of COPFS and is being reviewed.

191. The case studies demonstrate the importance of early notification to CAAP-D of the existence of a criminal complaint and any related case, as well as the need for regular monitoring by CAAP-D of its mailboxes and the prompt processing of any reports submitted. In some circumstances there may not be sufficient time for CAAP-D to assess the evidence gathered during the investigation into the criminal



complaint and to forward it to the local prosecutor. In these cases, there should however be intimation of the existence of the criminal complaint to the local prosecutor so that the defence can be advised.

192. In summary, of the 41 criminal complaints which had a related case:

- in 12 (29%) cases, the related case had concluded at an early stage and the Crown's disclosure obligations did not apply
- in 20 (49%) cases, CAAP-D fulfilled its responsibilities in accordance with the process set out in Chapter 24 of the Disclosure Manual, albeit that in four of these cases there was scope to have done so more quickly
- in nine (22%) cases, CAAP-D did not comply with the process set out in Chapter 24.

193. There is scope for CAAP-D to improve its approach to disclosure. The COPFS Disclosure Manual clearly sets out what is required of CAAP-D. However, guidance on the Crown's approach to disclosure in cases involving criminal allegations against the police is still included in its Book of Regulations which is available to all staff on the intranet. This disclosure guidance is out of date and should be deleted, removing the risk that staff will follow it in error. There is also scope for CAAP-D to require reporting agencies to make it aware of any related cases when submitting reports of criminal complaints, and to encourage those submitting SPRs to highlight whether a criminal complaint against the police has arisen out of the same incident.

### **Recommendation 9**

COPFS should review its processes and its training for CAAP-D staff to ensure that it meets its disclosure obligations in related cases.

### **The use of experts**

194. In assessing whether a criminal complaint against the police should result in a prosecution, CAAP-D frequently requires to seek the views of experts. Of the 80 cases we reviewed, CAAP-D used experts in 31 (39%). The experts provided advice on officer safety training (26 cases), road traffic issues (four cases) and firearms (one case). Officer safety training (OST) experts will most often be called upon to give a view in relation to an officer's use of force against a member of the public.<sup>55</sup> Expert opinion was usually provided by way of a written report and, in some cases, the experts were also precognosed. In the cases we reviewed, the expert opinion was used by CAAP-D to inform its assessment of whether the criminal complaint about the police should result in the prosecution of the subject officer.<sup>56</sup>

195. The quality of the expert opinion provided to CAAP-D was variable. In some cases, the written reports were particularly thorough and of a good standard. However, we had concerns about the quality of the OST reports in several cases where, for example:

- the expert report was cursory and lacked detail
- the expert report was poorly written, sometimes to the extent that it could compromise the reader's understanding of the assessment of the incident

<sup>55</sup> The use of force by an officer must be lawful, necessary, reasonable and proportionate. Where the use of force is, for example, unlawful or disproportionate, it may constitute an assault.

<sup>56</sup> In cases which result in a prosecution, the experts may also be used as witnesses at court. Experts were listed as Crown witnesses in six of the cases we reviewed which resulted in a prosecution. Where an OST expert gives evidence in court, they will speak to the subject officer's training but the decision as to whether the force used was necessary, reasonable and proportionate will be one for the fact finder.



- the expert report appeared insufficiently balanced by, for example, failing to adequately explore the incident from the complainer's perspective.

196. In all of the cases we reviewed where expert opinion was sought, the expert worked for the same policing organisation as the officer who was the subject of the complaint (in all but one case, this was Police Scotland). In cases where expertise was sought on OST, the expert stated whether the officer's use of force was in accordance with their training, and gave a view on whether the force was reasonable and proportionate. While an OST expert from the subject officer's own police service will be needed to state what training the officer has received and what an appropriate use of force would have been taking into account that training, it may sometimes be appropriate to seek the views of an independent expert to help inform CAAP-D's consideration of whether the force was necessary, reasonable and proportionate. In 21 of the 26 cases we reviewed in which an expert opinion was provided by OST, the decision was to take no proceedings against the subject officer. In these cases, it appeared that CAAP-D either agreed with or had relied upon the views of the OST expert when deciding whether a criminal offence had been committed and whether to prosecute.

197. While we heard that CAAP-D will instruct independent experts from time to time, they were not used in any of the cases we reviewed. Particularly in cases where it is not clear whether the force used was appropriate or where the circumstances of the incident are especially sensitive, public confidence in police complaints handling may be best served by the more frequent use of independent experts to help inform CAAP-D's assessment of the use of force. In cases involving a potential breach of Articles 2 or 3, the use of an independent expert may also be necessary to meet the requirements of an effective investigation.

198. We appreciate that there can be challenges in identifying independent individuals with the appropriate expertise, and that instructing them may involve additional cost and time. Prior to the creation of a national police service, this issue would not have arisen as COPFS would easily have been able to draw on expertise from another Scottish force. This can still be done (and sometimes is) when expertise is sought from a police force in England and Wales.

199. Concerns about a perceived lack of independence in the experts used by CAAP-D were expressed by almost all the stakeholders we interviewed, including police staff associations and defence agents, many of whom were surprised by the practice of using experts from the same police service as the subject officer. We heard that PIRC, for example, is considering employing its own OST experts to address these concerns, which would be a positive development.

200. We consider that CAAP-D should review its use of experts to ensure its consideration of criminal allegations against the police is informed by independent advice where appropriate, including where this would best serve public confidence. It should also work with Police Scotland to improve the quality of the expert reports provided. Where CAAP-D uses experts from the same police service as the subject officer, to combat perceptions of a lack of independence, it would be good practice to ensure that all expert reports include a declaration from the expert regarding any potential conflict of interest, for example, that they had not previously worked in close contact with the subject officer. We found no such declaration in any of the cases we reviewed. We heard that consideration is being given to including such a declaration in future, which we would recommend.



### Recommendation 10

COPFS should review its use of experts in cases involving criminal allegations against the police to ensure they are sufficiently independent when this is appropriate in the circumstances of the case. COPFS should also work with the police to improve the quality of expert reports and ensure that the reports include a declaration regarding any potential conflict of interest.

### Reports to Crown Counsel

201. Where there is a sufficiency of evidence in a case involving a criminal allegation against the police, the case is considered by both an Advocate Depute and a Law Officer. Additionally, they may consider cases where there is not a sufficiency but where the circumstances of the case are particularly sensitive or complex or concerning. The Lord Advocate, Solicitor General and the Advocates Depute are known collectively as Crown Counsel.

202. Prior to March 2020, all reports from CAAP-D to Crown Counsel were sent in hard copy. The Covid-19 pandemic and the move to home working resulted in reports being sent electronically. This change has been well-received by those we interviewed.

203. There are no dedicated Advocates Depute dealing with reports from CAAP-D. Instead, reports are considered by whoever is available, which enables an efficient turnover of work. The majority of the reports are, however, considered by a senior Advocate Depute. While there are no target timescales within which Crown Counsel should consider a criminal complaint against the police, we heard that they try to provide instructions on the same day as they receive the report. Where that is not achievable, they aim to provide instructions within the week.

204. Of the 80 cases we reviewed, 39 (49%) were reported to Crown Counsel for instructions, and 16 (20%) were sent on to the Law Officers for instructions. Table 6 shows the length of time between:

- CAAP-D reporting the cases to Crown Counsel and the instruction of the Advocates Depute
- where the cases were sent on to the Law Officers, the time between the instruction of the Advocates Depute and those of the Law Officers
- the total length of time between CAAP-D reporting the cases and the final Crown Counsel instruction.

Table 6 – Time between CAAP-D report and Crown Counsel’s instructions

Timescale	CAAP-D report to Advocate Depute instruction (number of cases)	Advocate Depute instruction to Law Officer instruction (number of cases)	CAAP-D report to final Crown Counsel instruction (number of cases)
Same/next day	15	5	14
2 to 7 days	15	4	11
7 to 14 days	4	2	3
14 to 21 days	1	1	1
21 to 28 days	1	1	3
28 to 35 days	0	2	2
35 to 42 days	1	1	2
Over 42 days	2	0	3



205. In 30 (77%) cases, the Advocates Depute provided instructions within a week of receipt of the report from CAAP-D and in 15 of those cases, the instructions were given on either the same or next day. The longest time that CAAP-D had to wait for an Advocate Depute's instruction was 88 days. No reason was given for the protracted consideration given to this case, although the circumstances were particularly complex and the report to Crown Counsel was over 100 pages. In one of the other cases where the Advocate Depute's instructions took longer than 14 days, a delay was caused by them being unable to view discs that had been supplied with footage of the incident.
206. Of the 16 cases reported to the Law Officers, an instruction was provided within seven days in nine (56%) cases. An instruction was provided on either the same or next day in five of those cases.
207. Having regard to the overall length of time it took to receive a final Crown Counsel instruction, in almost two thirds of cases (64%) the instruction was provided within seven days. In one case, 370 days passed before a final instruction was received although, in this case, it was necessary to await the outcome of a related case before further work could be instructed and submitted to the Law Officers for consideration.
208. During our inspection, we noted a widely held perception that delays in reaching a final decision in criminal complaints against the police were more often than not attributable to Crown Counsel. Our analysis does not support this perception. As shown above, Crown Counsel provided prompt instructions in the majority of cases. Where delay did occur at this stage, this was usually in respect of cases which were complex or where further work required to be carried out.
209. During our inspection, we noted a lack of clarity regarding which cases should be reported to Crown Counsel for instruction. Some staff in CAAP-D believed it was only cases where there was a sufficiency of evidence. The view of some Crown Counsel was that all criminal complaints against the police should be reported to them, except those of a trivial nature or where there was manifestly not a sufficiency of evidence. While it may prove impossible to provide an exhaustive list of which cases should be reported to Crown Counsel, consideration could be given to developing a framework to help staff in making this decision or setting out the general principles which should be taken into account.

### **Prosecution of criminal allegations against the police – the transfer process**

210. Following an instruction from a Law Officer to initiate the prosecution of a person serving with the police, CAAP-D asks the reporting agency to submit an SPR. Upon receipt, CAAP-D formally marks the case on the case management system. At this point, the case acquires a new COPFS reference number relating to the area in which the prosecution will be raised. Alongside the new reference number, the case has a new electronic file which relates solely to the criminal prosecution.
211. Once the case is marked, CAAP-D transfers it to the local office in the Sheriffdom where the prosecution is to be raised. CAAP-D has prepared the case to the point of receiving the Law Officer's instruction. While it may often be fully prepared at this stage, on occasion there are outstanding matters to be managed. The responsibility for those matters, together with disclosure obligations, transfers to the local prosecutor. When transferring the case, staff in CAAP-D are required to complete a transfer form which is sent to the local prosecutor.
212. By this stage, CAAP-D has investigated and prepared the case often over a period of several months. The purpose of the transfer form is to assist the local prosecutor,



advise them of relevant information and support a smooth handover of the case. The transfer form also advises that CAAP-D is available to assist the local prosecutor with any issues. The transfer form includes:

- the case reference number, details of the accused, the applicable court, court dates and relevant contacts within CAAP-D
- a section for disclosure issues to be recorded and for details of any information obtained during the CAAP-D investigation that may be relevant and material but not required for the prosecution case
- a section for any material differences between any precognitions and statements to be detailed
- details of any expert witnesses and CCTV
- confirmation that all materials from the CAAP-D precognition folder have been uploaded to the new electronic criminal file.

213. The transfer form states that all prosecutions of those serving with the police should proceed as Advance Notice Trials and should be afforded appropriate priority. An Advance Notice Trial is one which is allocated to a specific depute who should be given sufficient time, having regard to the complexity of the case, to prepare the case thoroughly. It is the responsibility of the depute within the local office to consider all the CAAP-D materials, statements and productions for disclosure purposes and for the support staff to thereafter implement disclosure.

214. Only a small proportion of criminal complaints against the police result in a prosecution. Of the 80 cases we reviewed, there was an instruction to prosecute in only 15. In one case, the instruction was received just before our review was complete and an SPR had not yet been submitted. Two of the cases were rolled up. This meant there were only 13 cases for us to review the transfer and prosecution process. All 13 were prosecuted on summary complaint within the Sheriff Court. With only a small number of prosecutions to review, it is more challenging to identify any trends, whether they relate to effective practice or areas for improvement.

215. Nonetheless, we found there to be a general misunderstanding by some staff working in local offices that when a CAAP-D case is transferred it is fully prepared and requires no additional work. While in certain large or complex cases there can be a degree of flexibility with CAAP-D staff continuing to assist their local prosecutor colleagues, which is to be commended, this is not the usual practice.

216. We noted that CAAP-D dealt with the transfer process efficiently:

- in 10 (77%) cases, an SPR was requested within seven days of the Law Officer's instruction
- in nine cases (69%), CAAP-D marked the case within seven days of receiving the SPR
- in 11 cases (85%), CAAP-D transferred the case to the local prosecutor within a day of marking the case
- in all 13 cases, CAAP-D marked the case to proceed as an Advance Notice Trial.

217. Despite its efficiency, we found there to be issues regarding the effectiveness of the transfer process. For example, there was no evidence that the transfer form had been completed in six of the 13 cases. In the seven cases where the form had been used, there were examples of good practice with the local prosecutor being provided with comprehensive information about the case. In one case, the transfer form advised of disclosure issues relating to precognitions taken from the witnesses, there was a helpful analysis of the evidence and all the material documents, including informative emails from the reporting officer, were imported into the electronic



prosecution file. However, not all transfer forms were completed with the necessary information. In two cases, information relating to disclosure was omitted.

218. Of concern were the six cases in which there was no record of the transfer form having been completed.
219. Feedback from staff within local court and Crown Counsel was that CAAP-D conduct a thorough, exhaustive investigation and transfer a well-prepared case to local prosecutors. However, we heard that the transfer form, even when complete, does not always reflect the level of work that has gone into the case prior to transfer. Staff in local court felt that a more comprehensive handover note from CAAP-D would be of greater assistance to them and would more accurately reflect the work already carried out. Many suggested that this note be supplemented with a phone or video conference call between CAAP-D and the allocated local court depute. This would support a smooth handover and allow for consultation and dialogue at an early stage between CAAP-D and the local prosecutor.
220. We believe there is scope to improve the current transfer form so that it better meets the needs of local prosecutors. The form could include sections for detailing the overall, up-to-date position in the case and any outstanding matters and issues to be resolved, as well as basic information such as whether the accused is suspended or on restricted duties. Additionally, the form could incorporate attachments or links to lists of witnesses and productions, the CAAP-D report to Crown Counsel and Crown Counsel's instructions.
221. From the cases we reviewed and from our interviews with staff, we noted that irrespective of whether a transfer form had been completed, certain material documents which had been prepared during the CAAP-D investigation had not been imported by CAAP-D into the electronic prosecution file. In several cases, the reports prepared by CAAP-D for Crown Counsel's consideration and the instructions from Crown Counsel had not been imported. Often the local court depute was unaware of these documents. This was unfortunate as CAAP-D had invested significant effort in preparing the reports. They were often detailed and lengthy with a helpful analysis of the evidence. Equally, the instructions from Crown Counsel often contained a detailed analysis of the evidence. Having sight of these documents would undoubtedly assist local court deputies in the preparation of the case.
222. During our interviews, particular concerns were raised regarding disclosure. While in some cases CAAP-D had not advised the local prosecutor of disclosure issues, there was also confusion about who implemented disclosure and defence solicitors reported delays in receiving disclosure. The current process involves a degree of duplication of work as CAAP-D is required to raise any disclosure issues with the local prosecutor and thereafter the depute in the local office is required to consider all the materials and, as appropriate, instruct disclosure. This approach adds delay as it is only after the case is transferred to the local office and a dedicated depute has the opportunity to consider and instruct disclosure that the disclosure will be implemented. This is despite the fact that early disclosure to the defence is beneficial in the effective and efficient prosecution of cases.
223. Consideration should therefore be given to CAAP-D considering and instructing all the materials for disclosure purposes. At the point CAAP-D marks and transfers the case to the local prosecutor, it has significant knowledge and understanding of the case. As a result, the completion of a disclosure schedule and the necessary redaction of any statements should not constitute an onerous task, particularly given that so few prosecutions are instructed each year. An advantage of this approach



would be that if CAAP-D already has a letter of engagement from the defence solicitor, it could consider disclosing the materials prior to transfer or, alternatively, place local court support staff in the position of being able to disclose the materials as soon as a letter of engagement is received and without the need to await the local prosecutor's instruction.

224. Additionally, we noted that CAAP-D is not routinely advised of the final outcome of local court prosecutions and that there is no formal mechanism for this to happen. This is a missed opportunity for CAAP-D staff who would benefit from feedback from local court regarding any legal issues that arose, agreed pleas and the outcome of trials. We consider that CAAP-D should put in place a process which provides it with certain relevant information following the conclusion of the case.

### **Recommendation 11**

COPFS should review its process for transferring criminal allegations against the police to local court for prosecution.

### **Prosecution by local court**

225. Local court prosecutors conduct all CAAP-D prosecutions. There are no designated prosecutors for criminal cases against the police. Cases are allocated as Advance Notice Trials to any depute with the appropriate knowledge and experience. Efforts are made to ensure that the accused is not known to the decision maker or prosecutor and, where this is not possible, the case is transferred to a different Sheriff Court.

226. Of the 13 cases that were prosecuted, three resolved by way of an amended plea and all three pleas were tendered at a procedural diet. The remaining 10 cases had outstanding trial diets, with the impact of Covid-19 on the courts being a factor in these cases not having reached a conclusion. Six of the 10 cases had been administratively adjourned in terms of the refixing orders issued by the Sheriff Principals.<sup>57</sup> Two had been administratively adjourned on several occasions.

227. We found no evidence that criminal cases against the police were prioritised and given early court dates. We heard that there are many other cases which merit prioritisation and each case must be assessed on its own merits.

228. We also heard that where criminal cases against the police proceed to trial, the trials often run for several days. This is in contrast to more routine summary trials involving similar offences. Often the accused is represented by counsel, sometimes senior counsel, and identifying a date that is suitable for all parties can be a challenge. We heard that the pressures on the Scottish Courts and Tribunals Service are such that criminal cases against the police cannot be allocated consecutive trial dates, resulting in a delay between the start and end of a trial.

229. We also heard conflicting views regarding whether the local court depute has the autonomy to agree an amended plea in criminal complaints against the police, given that a Law Officer had instructed the prosecution for a specific offence. Some considered that all offers of an amended plea, other than minor amendments, should be re-reported for Crown Counsel's instructions. Others thought that it was within the local court depute's discretion whether to accept the plea. Local court staff would welcome guidance on this point.

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<sup>57</sup> Refixing diets in terms of section 75C of the Criminal Procedure (Scotland) Act 1995.



230. A key issue we considered during our inspection was whether criminal complaints against the police should be prosecuted by CAAP-D or whether it is appropriate that they are transferred to local court for prosecution. We sought feedback on this point from those we interviewed and heard a range of views. Previously, CAAP-D deputes had prosecuted some of their own cases, but this approach had fallen out of favour in recent years.
231. Some we interviewed felt that CAAP-D should retain and prosecute its own cases. They cited various benefits to this approach, including:
- a reduction in the double handling of cases, with CAAP-D able to continue with cases in which it has already invested significant time and effort and about which it has detailed knowledge
  - CAAP-D staff have greater knowledge and expertise regarding common issues in these cases, such as the use of excessive force and officer safety training
  - CAAP-D prosecuting its own cases would not be overly onerous given how few prosecutions there are each year
  - this would offer CAAP-D deputes a good development opportunity and a chance to maintain their court skills.
232. Disadvantages to this approach included CAAP-D deputes being de-skilled in court work and having to travel across Scotland to prosecute cases.
233. Some we interviewed felt that it was appropriate for CAAP-D to transfer all its cases to local court for prosecution. The benefits to this approach included:
- local court deputes being more skilled in prosecuting cases
  - local court deputes having more local knowledge
  - criminal cases against the police are a good development opportunity for local court deputes, and offer the chance to pitch themselves against counsel
  - local offices have the resources to support a prosecution, such as citing witnesses, lodging productions and VIA support.
234. While views varied, most of those we spoke to favoured prosecution of criminal complaints against the police by local court rather than CAAP-D. Local court deputes were generally keen to retain these cases as they found them interesting and challenging. There were concerns however that:
- there is a lack of knowledge and training among local court deputes with regard to criminal complaints against the police, including a lack of an appropriate understanding why often low level offences have been instructed for prosecution by the Law Officers
  - local court deputes can lack sufficient time to prepare the case thoroughly, particularly in light of the vigorous defence they are likely to face
  - cases against the police can run for several court days.
235. If criminal complaints are to continue to be prosecuted by local court, the legitimate concerns that were raised should be addressed. Consideration should be given to appointing a 'CAAP champion' in each Sheriffdom. They should be provided with training and could even attend CAAP-D's own training events to develop their understanding of why on duty criminal complaints against the police are subject to a bespoke process and rigorous scrutiny. The CAAP champions would have responsibility and oversight of all such cases within their Sheriffdom, ensuring that they are appropriately prioritised and that sufficient time is allocated for preparation. The champion could also act as a point of contact for CAAP-D and the police, as well as any defence queries relating to criminal cases against the police. While we consider that CAAP champions should be appointed to support the prosecution of



criminal cases against the police by local court, this should not preclude the possibility that CAAP-D may prosecute one of its own cases where this is appropriate. At paragraph 304, we also discuss the possibility of local CAAP champions having oversight of off as well as on duty criminal complaints against the police.

**Recommendation 12**

COPFS should consider appointing ‘CAAP champions’ in each Sheriffdom who will have responsibility for and oversight of the prosecution of all criminal allegations against the police.



## People and resources

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### CAAP-D staffing

236. CAAP-D has 17 staff split into two teams comprising a mix of legal, non-legal and administrative staff. At the time of our inspection, CAAP-D's legally qualified staff included an Assistant Procurator Fiscal (1.0 full time equivalent (FTE)) who leads the unit, three Principal Deputes (2.31 FTE), three Senior Procurator Fiscal Deputes (2.38 FTE) and two Procurator Fiscal Deputes (2.0 FTE). CAAP-D's non legally qualified staff include four Precognition Officers (3.54 FTE) as well as a section manger and administrative staff, some of whom also support the work of other units. CAAP-D has grown significantly since its creation in 2013 and has recently benefited from a further uplift in staff.
237. While some members of the team, such as the Principal Deputes, have more clearly defined roles, we heard there can be insufficient differentiation between the work allocated to other roles and grades, including between legal and non-legal staff. There is a risk that some staff may be carrying out the same tasks as other members of the team who are more senior, while more senior members of the team may be missing out on development opportunities. This should be kept under review.
238. There was a widely held perception among stakeholders we interviewed that CAAP-D was under-resourced. This was linked to stakeholders' frustration about the timeliness of decision making in cases involving a criminal complaint against the police. CAAP-D appears to us to be a relatively well resourced unit, however the lack of robust performance data makes it difficult to assess whether resources are appropriately matched to demand and to ensure decisions are reached in a timely manner. It can also be difficult to quantify the demand arising from other aspects of CAAP-D's work such as the increase in requests for advice and guidance, auditing excessive force allegations recorded by Police Scotland and contributing to the change programme for police complaints handling being taken forward following the Angiolini review.
239. Perhaps the most significant impact on CAAP-D's resources in recent years however, has been its involvement in sensitive, complex and protracted investigations which involve the police but which do not always arise out of a specific complaint. The resources required to progress these cases can be significant and there is a consequent impact on the time available to manage CAAP-D's more routine cases. We heard that COPFS could be better at trying to identify these complex investigations earlier, and dedicate a specialist resource where appropriate. Recently introduced approaches to managing complex cases which also emphasise strategic oversight may help in this regard.

### Training and development

240. Providing guidance, training and development to staff equips them with the knowledge, skills and confidence to carry out their roles effectively and helps ensure consistency in approach. As noted earlier, there is a lack of written policies and guidance on how COPFS manages criminal complaints against the police. While step-by-step instructions and a training plan are available to administrative staff in CAAP-D, less information is available to legal, precognition and case preparation staff. We heard that they generally rely on 'on-the-job training' from more experienced colleagues who provide advice as and when issues arise. Staff said that while their colleagues were approachable and supportive, they would welcome more written guidance and a more formal approach to induction and initial training. This is



particularly important for new staff and staff working from home due to the pandemic, when immediate access to colleagues is not as readily available as when they are co-located in an office. Moreover, experienced members of the team who were heavily relied on by others have recently moved on to new posts, risking the loss of their extensive knowledge.

### **Recommendation 13**

COPFS should review its induction processes and operational guidance for CAAP-D staff.

241. In contrast, staff were very positive about ongoing training opportunities within CAAP-D, particularly those that were delivered in collaboration with stakeholders such as Police Scotland and PIRC. For example, one of the issues which frequently arises in the cases dealt with by CAAP-D is the use of excessive force by the police and whether the force used is in accordance with officers' safety training. CAAP-D staff therefore welcomed the opportunity to learn more about officer safety training as well as other issues which frequently arise during their work. We believe joint training among the key agencies handling police complaints is a positive development and helps establish a shared understanding of the roles of the respective agencies. We would encourage CAAP-D to also consider training from other non-police sources, who may bring a different perspective to their work.

### **Working in CAAP-D**

242. Staff were very positive about their experience of working for CAAP-D and reported a good level of job satisfaction. They are kept up to date with developments through weekly and monthly team meetings, they feel supported by their managers and colleagues, and they feel able to contribute ideas for improving the way they work. Their work had likely been less disrupted by the need to work from home during the pandemic compared to many others within COPFS, and they are able to take advantage of flexible working arrangements which contributes to their sense of wellbeing.

### **Information technology**

243. While CAAP-D's staff are generally happy in their work, they consistently reported that the lack of an electronic reporting system for criminal complaints against the police was a source of frustration and additional work. The systems used by CAAP-D for managing its work were described to us as being from the 'dark ages'. Staff also described them as messy, confusing and time consuming, and said the systems opened them up to making mistakes and duplicating work. The introduction of an electronic reporting system was the one thing almost all staff said would transform their work, making it easier and more efficient.

244. In almost every other area of business within COPFS, cases are electronically reported by the police directly into the Crown's case management system. We heard that the police faced challenges in submitting reports of criminal allegations against the police in this way. As a result, the majority of criminal complaints against the police are submitted via email to a CAAP-D mailbox. When CAAP-D receives an email with a new case, administrative staff must first save the email and any attachments to a shared drive, before uploading them to the case management system. This is a cumbersome and time consuming process for staff as some reports are submitted with extensive supplementary documentation and can be spread across multiple emails.



245. This method of processing cases results in documentation relating to each case being held in two places – on the shared drive and on the case management system. It causes delays in recording cases (see from paragraph 177) and is inherently risky and open to human error. In our case review, we found documents had been imported to the wrong case file and we often noted that case documentation was on the shared drive but not the case management system. Moreover, some key documents, such as correspondence with complainers or instructions from Principal Deputes, were not stored in either, but appeared to have been saved in an individual staff member’s personal files. Pending the introduction of an electronic reporting system for criminal complaints against the police, CAAP-D should strengthen its approach to records management.
246. We heard that the submission of criminal complaints via email was introduced as a short term solution, and we saw papers from as long ago as January 2013 highlighting the difficulties and requesting a more modern reporting system. In the intervening period, efforts have been made by CAAP-D’s staff to work with its partners and COPFS’s Information Systems Division (ISD) to identify a solution. These efforts have not been successful as yet and it appears other IT projects have been prioritised over the needs of CAAP-D.
247. There will always be competing demands for ISD’s attention and inevitably it will need to prioritise IT projects from across COPFS. This has never been more true than in the last 18 months, when ISD has been at the forefront of the COPFS response to the pandemic and is now focused on the recovery. Nonetheless, CAAP-D’s IT capability is not in keeping with the COPFS Digital Strategy which describes a commitment to empowering staff by equipping them with digital solutions and capabilities.<sup>58</sup> We have been advised that the need for an electronic reporting system for CAAP-D’s cases has been noted by ISD but is not currently marked for initiation.

#### **Recommendation 14**

COPFS should work with its partners to introduce an electronic reporting system for criminal allegations against the police.

248. On receipt of a case, CAAP-D administrative staff log its details on a spreadsheet which is essentially used to manage workflow within the unit. While spreadsheets can be a useful tool, the CAAP-D spreadsheet is several years old, has multiple users and, as with spreadsheets generally, is prone to error. Consideration should be given to reducing CAAP-D’s reliance on spreadsheets and supporting the unit with a more robust and reliable means of managing its work.
249. When a decision is made to prosecute a criminal complaint against the police, the police will submit an SPR in the usual way. However, where the complaint was investigated by PIRC, it is required to submit an SPR via the Specialist Reporting Agency website. We heard that PIRC experiences extensive problems while attempting to submit reports via this website which can cause delays. However, when we raised this with ISD, we heard that it was not aware of any major concerns with the website. PIRC may wish to document the challenges it faces and raise these formally with ISD so that any necessary corrective action can be taken.

#### **Video footage**

250. In cases involving criminal complaints against the police, there is often CCTV, mobile phone or other video footage of the incident. Such evidence was available in 40% of

<sup>58</sup> COPFS, [Digital Strategy](#) (2017).



the cases we reviewed and can be critical in disproving or supporting the complainer's allegation. In the cases we reviewed however, we noted frequent problems with the transfer, uploading and viewing of footage. Staff also told us about problems with video footage, particularly around its compatibility with COPFS systems. This is a longstanding problem across the criminal justice system and is not unique to CAAP-D cases.

251. To address this problem, COPFS is working with its criminal justice partners on the Digital Evidence Sharing Capability (DESC) which will support the collection and sharing of digital evidence across the criminal justice sector. It is not limited to video footage, but will also include photos, voice and written evidence. Digital evidence will be shared via DESC, rather than being physically transported between agencies and offices. DESC is funded by the Scottish Government and a supplier was still to be identified at the time of our inspection. Once delivered, however, it should support greater efficiency in the criminal justice system.
252. In the interim, consideration is being given to using an already established online information sharing platform to support the investigation of criminal complaints against the police and the transfer of evidence between the reporting agencies and CAAP-D, which we welcome.
253. Although video footage was available in 40% of the cases we reviewed, in none of the 80 cases was the footage drawn from police officers' body worn cameras. This is unfortunate as it would likely have been of evidential value in a large proportion of cases, particularly those where the complainer alleges they have been assaulted by an officer. The use of body worn video cameras by the police offers a range of potential benefits including, in the context of criminal complaints against the police, the opportunity to:
  - reduce the number of complaints made
  - resolve complaints more easily and quickly
  - increase transparency in police interactions with the public.
254. Feedback from CAAP-D staff indicated that body worn video evidence would help them in assessing complaints. However, the use of body worn cameras by Police Scotland officers is currently very limited although, at the time of inspection, a consultation on extending their use had begun. All British Transport Police officers, including those operating in Scotland, use body worn cameras.



## Collaborative work

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255. During our inspection, we noted that CAAP-D works with a range of other functions within COPFS, including local court in relation to the prosecution of on duty criminal allegations against the police, and National Initial Case Processing (NICP) in relation to off duty cases. While CAAP-D works well with its internal partners and is seen as a useful source of advice on criminal complaints against the police, we have highlighted elsewhere in this report ways in which this could be strengthened even further.
256. CAAP-D also works closely with the Scottish Fatalities Investigation Unit (SFIU) in respect of any deaths in police custody or following police contact. At the time of our inspection, a protocol was being developed between SFIU and CAAP-D (as well as other specialist units) to govern how parallel investigations will be carried out where more than one unit is involved in a case. It is expected that this protocol will assist in the management and progression of such cases, and will support more effective coordination between units. In relation to a death following police contact, for example, SFIU's focus will be on investigating the death with a view to preparing for a mandatory Fatal Accident Inquiry (FAI) or assessing whether there should be a discretionary FAI. A parallel investigation by CAAP-D would seek to establish any evidence of criminality in relation to the death. SFIU has also established a case management panel to review any cases over two years old, including any deaths being investigated by CAAP-D. The objective of the panel is to monitor and manage these cases more closely, with a view to investigations being concluded more timeously.
257. CAAP-D also works well with its external partners and we heard that collaboration had increased in recent years. The Head of CAAP-D engages regularly with stakeholders such as Police Scotland and PIRC, and contributes to a range of work being taken forward by the Scottish Government and others in response to the Angiolini report. This includes effective participation in working groups reviewing post-incident procedures and cross-border issues. In recent years, CAAP-D has also carried out audits of excessive force allegations recorded by Police Scotland to ensure that those containing an inference of criminality are being appropriately referred by the police to COPFS. We commend CAAP-D's approach to working with its partners to maintain and improve the system for police complaints handling in Scotland.
258. While the majority of criminal allegations against the police will arise in respect of those serving with Police Scotland simply because it is by far the largest police service, CAAP-D also requires to engage with other services operating in Scotland such as British Transport Police, the Ministry of Defence Police, Civil Nuclear Constabulary and others. There may be scope to increase engagement and communication with these other services and to ensure they remain fully sighted and consulted on policy and practice developments.
259. When interviewing stakeholders, one of the issues raised with us most often was the possibility of police misconduct proceedings running in parallel to the criminal investigation and any criminal proceedings. While the police may suspend or postpone misconduct proceedings until notified by the procurator fiscal that criminal proceedings are not to be brought or have concluded, it is also possible for misconduct proceedings to run in parallel with any criminal investigation. However, stakeholders felt it was almost always the case that misconduct proceedings against



an officer were suspended pending the outcome of CAAP-D's consideration of the case and any subsequent criminal proceedings. They said this resulted in misconduct proceedings being delayed considerably, negatively impacting the subject officer, the police service and the complainant. Delays in commencing misconduct proceedings may also adversely affect the quality of witness evidence when they eventually take place.

260. While suspending misconduct proceedings may sometimes be necessary so as not to prejudice criminal proceedings, we saw examples in the cases we reviewed where it may have been possible for both processes to run in parallel. For example, in one case a criminal allegation against an officer by another officer was accompanied by allegations of inappropriate behaviour which likely amounted to bullying and workplace harassment but which were not criminal. In this case, misconduct proceedings could have been taken in respect of the non-criminal behaviour but there was no evidence to suggest this had been done. The time between the allegations being made and the decision to take no proceedings in respect of the criminal allegation, and the consequent suspension of misconduct proceedings, was over one year. In practice, the decision whether to run the processes in parallel is one for the police rather than CAAP-D. However, there may be scope for the two organisations to be more proactive in their engagement regarding the possibility of parallel proceedings.



## Part 2 – Off duty criminal allegations against the police

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261. While our inspection mainly focused on how COPFS manages criminal allegations made against the police while they are on duty, we also considered how off duty allegations are handled. This was because the boundary between on and off duty behaviour can sometimes be blurred, and because of the high level of public interest in, and need for reassurance about, how all criminal complaints against the police are managed.
262. Off duty criminal allegations are managed by COPFS in a way which is more akin to the process for managing allegations of criminality against any member of the public. Off duty criminal cases are only reported to COPFS where there is a sufficiency of evidence to establish that a crime has been committed and that the accused is the perpetrator. Once reported, there are some bespoke processes for handling off duty cases which are discussed further below.

### Case review

263. We reviewed 40 cases in which criminal allegations were made against the police while they were off duty to help us understand how such cases are managed by COPFS.
264. We sought to select cases that had been reported to COPFS between 1 April 2019 and 30 September 2020. As with our on duty case review, the cases would be drawn from this period in an effort to strike a balance between recently reported cases, and cases where sufficient time had passed that we could assess how they had been progressed. We experienced challenges in identifying off duty cases, but ultimately selected our sample from three sources.
265. We initially requested data from COPFS on all cases which had been reported to it involving off duty police officers or staff during the relevant period. Unfortunately, this data was not available. We then sought Police Scotland's assistance. Police Scotland was able to provide us with the number of off duty allegations made against the police. However, because there may be multiple allegations in each case, this did not correspond with the number of cases reported to COPFS.<sup>59</sup> We also asked Police Scotland for the COPFS reference numbers for off duty allegations so that we might identify the cases on COPFS systems. Police Scotland provided a list of 34 reference numbers, but it was clear from the low number that this list was incomplete.
266. We then carried out our own search of the COPFS case management system to identify cases involving the police. Generally, crime reports are submitted to COPFS by way of a Standard Police Report (SPR). This report has an occupation field in the 'Accused's Details' section which can be completed by the reporting officer selecting from a pre-set list of occupations. In this field, where the accused is a police officer or police staff, reporting officers should select the option 'Local Government (Police)'. This is not particularly instinctive, and a secondary data field is frequently used instead. This is a free text field, and reporting officers use a variety of terms to describe police occupations. We carried out a search of these two occupation fields to identify all cases where the accused was an officer or member of staff working for any police service in Scotland. This yielded 53 cases. Again, we could not be confident that this was a complete list of cases because the reporting officer may

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<sup>59</sup> Police Scotland informed us that between 1 April 2019 and 30 September 2020, there were 278 off duty criminal allegations against the police.



have selected other data fields or entered a term for which we did not search, or the occupation fields may simply have been left blank.

267. We also became aware of a spreadsheet maintained by staff within the National Initial Case Processing (NICP) team which listed 112 off duty cases of which they were aware and which were reported during 2019 and 2020 (although it was not immediately clear how many of these were within our sample period). This helped us to identify additional cases, but again was not a full list of all off duty criminal complaints.

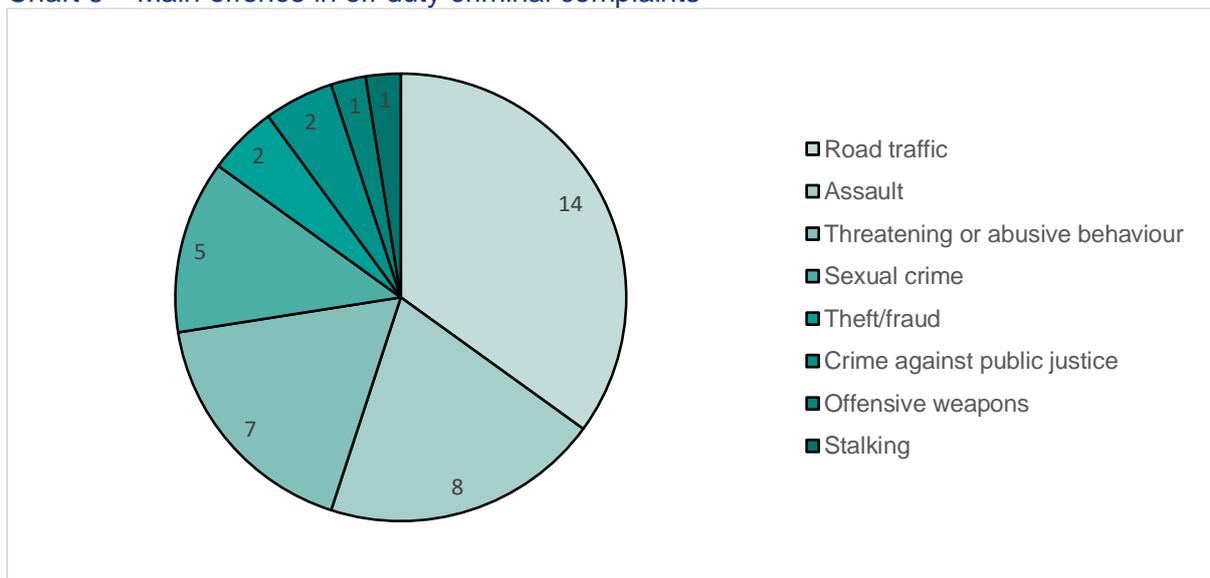
268. We compiled a list of cases drawn from the three sources, eliminated duplicates and randomly selected 40 cases for review.

### Off duty case review cohort

269. In the 40 cases we reviewed, the accused was male in 33 (83%) and female in seven (18%).<sup>60</sup> Thirty-six (90%) cases involved those working for Police Scotland, and four (10%) cases involved those working for British Transport Police or the Ministry of Defence Police. In 39 (98%) cases, the accused was a police officer, and in one case, the accused was a member of police staff. Of the 39 police officers who were accused, their rank was identified in only 25 cases. In the remaining 14 cases, it was unclear from the SPR or any other case documentation what the accused's rank was. Where the rank was specified, it ranged from police constable to chief inspector.

270. The off duty allegations covered a range of criminal offending from minor road traffic offences to serious sexual offences. In 27 (68%) cases, there was a single charge against the accused, while 13 (33%) cases included multiple charges. Chart 6 shows the main offence in each of the 40 cases. For the cases with multiple charges, we deemed the main offence to be the one that would result in the most severe penalty.

Chart 6 – Main offence in off duty criminal complaints



271. In at least 12 (30%) of the 40 cases there was an indication that at least one of the offences featured a domestic element.

<sup>60</sup> Throughout this chapter, percentages may not add up to 100 due to rounding.



## Definition of on and off duty allegations

272. While we sought to review 40 off duty criminal complaints, it would be more accurate to say we reviewed 40 cases that were subject to the process for off duty complaints. This is because we found that 10 (25%) of the cases should have been dealt with as on duty criminal complaints and reported to CAAP-D. In each of these 10 cases, errors were made both by the police service in using the wrong route to report the cases to COPFS, and by COPFS itself in not identifying the cases as on duty and re-routing them to CAAP-D.
273. The lack of a mutually agreed and well understood definition of on and off duty offending among all those dealing with criminal allegations against the police contributed to these errors. Within COPFS, there is no up to date, easily available written definition of on and off duty offending. This is linked to the lack of written policy and guidance noted at paragraph 120. The Lord Advocate's Guidelines on the investigation of complaints against the police from 2002, which appear to be obsolete and are no longer available to COPFS staff, had stated that *'offences committed by an officer or employee whilst 'off duty' should be reported to the District Fiscal in the usual manner, except where the conduct involves an allegation of corruption, or use of the officer's position as a police officer.'* We could find no up-to-date articulation of the distinction between on and off duty to which COPFS staff could refer.
274. In contrast, Police Scotland has sought to define on and off duty complaints. Its standard operating procedure on complaints about the police states that a police officer is on duty when:
- operating within duty hours
  - when off duty and they identify themselves as an officer verbally or by producing their warrant card and uses, or attempts to use, police powers to deal with a situation where it may be inferred they would be in neglect of duty had they not acted. In essence, by their actions, they return to an on duty capacity.
275. It also states that a member of police staff is only on duty when they are operating within duty hours.<sup>61</sup>
276. It is clear from Police Scotland's definition and from the outdated 2002 guidelines as well as current practice we observed in CAAP-D that on duty offending is not confined to when a police officer is at work. Depending on the circumstances, officers' conduct while they are off duty may be treated as if they were on duty. In addition to incidents where an off duty officer has placed themselves on duty by their conduct, CAAP-D has over the years widened its remit by specifying certain types of offences which should be reported to it, regardless of whether they have been committed on or off duty. In correspondence from 2015 to the Chief Constable of Police Scotland and PIRC, CAAP-D noted that any instances of corruption, perjury or sexual offences by officers both on and off duty be referred to CAAP-D. More recent correspondence has suggested that it is only more serious sexual offences that should be referred to CAAP-D.
277. This expansion of the CAAP-D remit is not recorded in any COPFS guidance or policy which is available to all staff. Yet those staff handling off duty complaints need to be aware of it, so that they might divert to CAAP-D any cases which have been wrongly reported by the police using the off duty process. Moreover, it was not clear to us that the policy changes in the correspondence to Police Scotland were

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<sup>61</sup> PIRC also seeks to distinguish on and off duty complaints in its statutory guidance, although it should be noted that this applies to complaints generally and is not specifically about criminal complaints. See PIRC, [Statutory guidance on the handling of complaints about the police](#) (March 2021) at paragraph 69.



communicated to other police services operating in Scotland. It was also not clear that the policy changes were widely known within Police Scotland itself given that it was responsible for reporting serious sexual offences to COPFS using the off duty process.

278. From our case review and from our interviews with staff in COPFS, there is a lack of clarity around the definition of off and on duty criminal conduct. In our case review, we considered that 10 off duty cases should have followed the process for on duty criminal complaints and been referred to CAAP-D either because the cases involved criminal conduct that was clearly committed on duty, the officer had placed themselves on duty during the incident, the conduct was linked to the accused's role as a police officer, or the off duty conduct was of a type that should have been referred to CAAP-D. In some cases, we believed the conduct to have been clearly on duty, whereas others were more finely balanced and advice should have been sought from CAAP-D on how they should be managed. Examples of cases that we believe were wrongly subject to the process for handling off duty criminal complaints included:

- four cases in which the officers committed road traffic offences while driving a police vehicle and where it appeared they were on duty
- a case where an officer, while off duty, became involved in an incident, declared himself to be a police officer and restrained a member of the public
- a case where an officer sent indecent messages while on duty and from within a police station (some messages were sent while he was off duty)
- a case in which an officer met a vulnerable complainer and obtained her contact details through his policing role albeit that the offences were committed off duty (we are aware of a similar case being treated as an on duty criminal complaint and being dealt with by CAAP-D)
- cases in which sexual offences, some of which were serious sexual offences, were committed by officers off duty, but which should have been reported to CAAP-D under the policy noted at paragraph 276. In one of these cases in particular, the circumstances may have merited an independent investigation by PIRC overseen by CAAP-D.

279. In the cases outlined above, generally no consideration appeared to have been given to whether the criminal conduct was on duty and to consulting CAAP-D for advice. In contrast, we reviewed other cases where there was uncertainty about whether the conduct was on or off duty but we saw good engagement with CAAP-D who provided appropriate advice about how the case should be managed. In particular, there appeared to be confusion about whether an officer is on duty while travelling to and from work. While the Head of CAAP-D and most of the unit's staff were clear that a commuting officer is off duty, other staff were less sure.

280. As noted above, it is a matter of policy that on duty officers are only prosecuted on the instruction of a Law Officer. Where cases are wrongly categorised as being off duty, decisions to prosecute are being made without the robust scrutiny to which they should be subject and often by junior members of staff. It is therefore important that cases are categorised appropriately and subject to the correct process. Guidance, supported by efforts to raise awareness of its contents, should be provided to the police and to staff in COPFS to ensure this occurs. They should also be encouraged to seek advice from CAAP-D if there is any uncertainty.



### **Recommendation 15**

COPFS should provide written guidance to its staff and to reporting agencies covering the definition of on and off duty criminal allegations against the police. COPFS should also work with reporting agencies to ensure they submit on and off duty cases via the correct route.

281. One issue we considered during our inspection is whether off duty cases should be subject to the same process as on duty cases and be reported to and assessed by CAAP-D. We consider that this is not necessary. On duty cases are dealt with differently in recognition of the privileged place that the police occupy in society and the powers they exercise on behalf of the state. The current reporting arrangements for off duty cases are appropriate, albeit that there is scope for improvement in how they operate. We believe off duty officers and staff are entitled to be treated as any other members of the public. Where their behaviour while off duty reflects badly on the policing service, then that is for the police to consider via disciplinary or misconduct proceedings rather than COPFS. Having criminal conduct which is genuinely off duty and unconnected to the accused's role with the police dealt with by those in COPFS who have everyday experience and expertise in marking cases involving members of the public is beneficial and should achieve consistency in decision making.

282. However, maintaining separate processes for on and off duty criminal complaints against the police is dependent on the police and COPFS ensuring that on and off duty cases are appropriately distinguished and the correct process used. In her review of police complaints handling, Dame Elish Angiolini suggested there may be merit in reporting off duty criminal complaints to CAAP-D, as well as to the local Procurator Fiscal.<sup>62</sup> We do not consider that dual reporting is necessary, but we do agree with Dame Elish Angiolini that there is a need for strategic oversight of both on and off duty complaints and more dialogue between those responsible for each process. It is not acceptable that a quarter of cases in our off duty sample were managed via the wrong process. If the recommendations and suggestions in this report for improving the management of off duty cases are not implemented effectively, then Dame Elish Angiolini's suggestion of dual reporting, or even the possibility of reporting all criminal cases against the police to CAAP-D, should be revisited.

### **Recommendation 16**

COPFS should ensure that there is strategic oversight of how on and off duty criminal allegations against the police are managed, and greater dialogue between those responsible for handling each type of allegation.

## **Reporting off duty allegations to COPFS**

283. As noted at paragraph 265, COPFS cannot identify from its systems how many off duty criminal complaints are made against the police. This is because the occupation field on the SPR submitted by the police to COPFS is not consistently filled out across police services operating in Scotland and even within Police Scotland. Sometimes the occupation field may be left blank and it is not clear at all from the SPR that the accused is serving with the police. Having a more consistent approach would have two main benefits: firstly, it would allow COPFS to gather data on off duty criminal complaints and make it easier to identify and have oversight of all such

<sup>62</sup> Angiolini final report (note 5), paragraph 16.18.



cases; and secondly, in each case, it would help ensure that the person dealing with it knows the accused is serving with the police. To ensure a more consistent approach, COPFS should instruct reporting agencies on how to complete SPRs with the correct occupation data. This could be supported by adding a new option to the current list of occupations that is easier to find (for example, by replacing 'Local Government (Police)' with 'Police'.

### **Recommendation 17**

COPFS should provide guidance to the police on ensuring that SPRs are completed with the correct occupation information.

284. When we spoke to staff marking off duty criminal complaints, we heard about other ways in which SPRs could be improved. For example, they told us they often require to request the full statements from the reporting officer as the SPR does not furnish sufficient information. They were surprised that reporting officers did not ensure that an SPR relating to one of their colleagues was of a better quality. In our case review, we found that 19 of the 40 (48%) cases involved requests for further enquiries to be carried out before a final marking could be applied, and 12 of those cases included a request for full statements.
285. We also heard that SPRs can sometimes lack detail about the accused and their status. In all 39 cases we reviewed where the accused was a police officer, reference was made to their job in the 'Accused's Details' section of the SPR. However, we heard that prosecutors may not check that section when marking the case and they may be unaware the accused is an officer unless it is mentioned elsewhere in the report. In six (15%) cases we reviewed, there was no mention in the main body of the SPR that the accused was serving with the police. Also, in only six (15%) cases was any information provided about whether the accused had been suspended or placed on restricted duties.
286. We also found that the information provided about the background and personal circumstances of the accused varied across reports. In some, almost no information was provided whereas others provided full information about the family and personal circumstances that were affecting the officer at the time of the offence. While some stakeholders we interviewed suggested there may be a reluctance for personal information to be included in SPRs, such information helps prosecutors make more appropriate decisions taking into account all the circumstances of the case. For example, one case we reviewed referred to the complex family background of the accused officer, prompting the prosecutor to request further information. Once received, the information caused the prosecutor to divert the accused from prosecution which was a more appropriate outcome.
287. The quality of SPRs, regardless of the identity of the accused, has been a recurring theme in our previous inspection reports. We intend to explore this issue further in our future inspection programme.

### **Decision making**

288. COPFS applies prosecution policies and Case Marking Instructions (CMIs) to the individual circumstances of each case in order to ensure consistency in decision making. Nonetheless, some stakeholders we interviewed perceived that off duty police officers are treated more harshly by COPFS than other members of the public. COPFS staff also seemed to hold varying views on off duty cases – some believed the accused should be treated exactly the same as any member of the public, while



others appeared to suggest that those serving with the police may be held to a higher standard, essentially because they should 'know better'. In seven of the 40 (18%) cases we reviewed, we noted that charges were changed, CMIs not followed, or forums changed without explanation. These actions by prosecutors effectively increased the severity of the charge or potential sentencing options when other, less severe alternatives were available and would have been a reasonable action to take. While the action taken may have been reasonable, the lack of a recorded rationale made it difficult to understand or justify. On the other hand, we also reviewed one case where court proceedings should have been initiated due to the severity of the charge however a fixed penalty was offered and accepted instead.

289. More positively, we found evidence of COPFS appropriately reassessing cases at various stages based on new information that had come to light. For example, in three cases, no action was taken after COPFS had initially marked further enquiries and in five cases, COPFS decided to take no further action at a point after proceedings had been initiated.

### **Decision making process**

290. During our inspection, we heard that all SPRs involving off duty criminal allegations against the police should be submitted to NICP. NICP either marks the case itself or refers it to the local sheriff and jury team or a specialist unit. Upon submitting the SPR to NICP, the police should send an email with the case details to the 'NICP off duty mailbox'. This alerts NICP to the case and a bespoke process should follow. This includes all off duty cases being logged on a spreadsheet. Alerting NICP to the cases is important because, as noted above, off duty cases are not always easily identifiable and, without the notification process, there is a risk that the cases will not be recorded on the log. Of the 40 cases we reviewed, there was no evidence in the case record of 29 (73%) cases that the police had alerted NICP to the existence of the case. However, only 14 of the 40 (35%) cases were not logged. This suggests that either the police did notify NICP but the notification was not imported into the case record, or that NICP or other COPFS staff are adding cases to the log as and when they come across them. Despite this, given that just over a third of cases were not logged, it is clear that current processes are not sufficiently effective so as to identify all off duty cases. If Recommendation 17 were to be implemented and the police were to complete SPRs consistently with the correct occupation information, this could provide an additional means of NICP being able to identify and record all off duty criminal cases where the accused is serving with the police.

291. The responsibility for marking off duty criminal complaints lies primarily with NICP. NICP marks all summary level custody, report and one-day undertaking cases. The marking of other undertaking cases is usually carried out by local court teams but, where the case involves an off duty allegation against someone serving with the police, it should be marked by NICP. In our case review however, we found that only 28 out of the 40 (70%) cases were marked by NICP. While three petition custody cases were appropriately marked by other teams, nine summary level undertaking cases which should have been marked by NICP were marked by local court teams. In these cases, it appears that the NICP process was bypassed. Local court staff have recently been reminded by email that all off duty cases should be referred to NICP, although it would be helpful if the approach to dealing with off duty cases was set out in guidance that is easily available to all staff. When marking is more widely distributed among COPFS staff, it can result in errors by those who are less familiar with the latest case marking instructions and processes.



292. The process by which the off duty cases in our review were marked appeared to have an impact on how quickly decisions were taken. In the 28 cases marked by NICIP, 46% were marked within 28 days. In the 12 marked by local court, 83% were marked within 28 days. While marking appeared to be faster in local court, NICIP staff generally delayed their decision pending the receipt of further information. We reviewed two almost identical cases in which domestic offences were alleged to have been committed. In both cases, there was information about the accused officer's mental health, and personal and family issues. In one case, NICIP marked the case after five days. The marking decision was to defer a final decision until further background information was gathered. The information was provided and the final marking decision, taken 92 days after the initial decision, was that the accused be diverted from prosecution. In the second case, the marking decision was taken by local court on the same day the case was received. The marking decision was to prosecute the accused in the Sheriff Court, despite the existence of mitigation against initiating court proceedings.
293. When cases are marked by NICIP, they should follow a bespoke process. An off duty process map drawn up in 2015 and available on the intranet sets out the process. It describes how the police refer the cases to NICIP, who should mark the case and the timescales for marking. We noted an attempt by staff to follow the process map in one of the 40 cases we reviewed. More generally, however, we heard that staff are unaware of the process map, and the steps it describes are not being followed.
294. The process map requires, for example, a Principal or Senior Depute to mark off duty cases within seven days. Generally, the current practice is that off duty cases should be allocated to one of two dedicated Deputies who aim to mark the cases within 14 days. They retrieve the cases from a 'virtual tray' set aside for off duty cases. These Deputies are allocated time, alongside their usual duties, to deal with the cases.
295. One issue we have identified with the current practice is that cases are not always being allocated to the virtual tray set aside for off duty cases. This means they are not brought to the attention of and marked by the dedicated Deputies. In addition, staff in local court and in CAAP-D, who may have cause to re-allocate cases to this virtual tray were not always aware of it. In one case we reviewed, an SPR relating to off duty criminality was submitted to CAAP-D in error. CAAP-D attempted to transfer the case the next day, but sent it to a local court tray. It was not re-transferred to the correct off duty tray until eight months later which significantly delayed the subsequent prosecution.
296. Senior staff in NICIP are aware the process map is out of date and does not reflect current practice, and plans are underway to revise it. In doing so, we would encourage them to consult with CAAP-D and to include information on the need to confirm that the case relates to off duty criminal conduct and is not a case which should be subject to the process for on duty criminal complaints.

### **Decision making timescales**

297. COPFS has a general target that a final marking decision should be made within 28 days in 75% of summary cases. Of the 40 cases we reviewed, 36 (90%) were given an initial marking decision within 28 days and 24 (60%) were given a final marking decision within 28 days (see Table 7).



Table 7 – Timescales for final marking of all off duty cases

Timescale	Marked by NICP	Marked by local court	All cases
Same day	5	5	10
1 to 7 days	5	2	7
8 to 14 days	1	1	2
15 to 28 days	3	2	5
<b>Within 28 days</b>	<b>14</b>	<b>10</b>	<b>24</b>
29 to 84 days (4 to 12 weeks)	4	-	4
85 to 168 days (12 to 24 weeks)	3	1	4
169 to 252 days (24 to 36 weeks)	4	1	5
253 to 365 days (36 to 52 weeks)	2	-	2
Over 52 weeks	1	-	1
<b>Total</b>	<b>28</b>	<b>12</b>	<b>40</b>

298. In the cases where there was a substantial delay of 197 and 259 days, the initial and final marking decisions were made on the same day. In the case that took 197 days, there was no indication in the case records that COPFS was waiting for further information before a decision was made. The reason for the delay was not apparent or recorded. In the case that took 259 days to mark, the delay was caused by the case being transferred to the wrong virtual tray (see paragraph 295).

299. Only 14 of the 28 cases (50%) marked by NICP were given a final marking decision within 28 days (see Table 7). According to the off duty process that appears no longer to be in use, NICP should mark all cases within seven days. It is not clear whether this target is for initial or final marking. Regardless, only 15 (54%) of NICP cases were initially marked within seven days while 10 (36%) of NICP cases were finally marked within seven days. During our interviews, we heard that NICP currently tries to mark off duty cases within 14 days – 20 (71%) of NICP cases were initially marked within 14 days and 11 (39%) were finally marked within 14 days.

300. As noted above, delays in making a final marking decision can be caused by poor SPRs, or simply cases in which deputies require further information before reaching the most appropriate decision. While there will always be more complex cases that require further information, NICP could provide feedback to Police Scotland on how it can improve the information it provides so as to facilitate earlier decision making. It would be for Police Scotland to decide whether additional effort on its part, such as routinely submitting full statements with SPRs, is worthwhile in light of its desire for cases against the police to be resolved as quickly as possible.

301. When revising its off duty process map, NICP should clarify its target timescale for marking cases and be clear whether this target relates to initial or final marking. If it relates to initial marking, consideration could be given to also setting a target for final marking – if senior managers only monitor the timescales for initial marking, they may lose sight of how long it takes to reach final decisions. If the targets are to be more stretching than those it sets for cases where the accused is a member of the public, NICP should be clear about the rationale for this. Until now, the targets NICP has itself set for marking off duty cases are more challenging than for cases where the accused is not serving with the police. There is, presumably, a desire to expedite cases involving the police and a recognition that it is in the interests of policing and the criminal justice system more generally to resolve these cases as soon as possible. However, this must be weighed up against other cases that COPFS also wants to expedite, such as those involving vulnerable complainers.



## Assessment of the off duty decision making process

302. Overall, we considered that the current, informal process for managing off duty criminal complaints, if it was properly followed in every case, is reasonable. While we are aware NICE has plans to revise its off duty process map, which we welcome, we think it may first be useful for NICE to consider the purpose of the off duty process, including why cases are allocated to designated deputies, why there are shorter timescales for marking and for what purpose it is maintaining a log of off duty cases. We do not disagree in principle with any of these aspects of the process and think there can be benefits to each, but while those we interviewed were keen to deliver the process, we were not confident there was a shared understanding of why a separate process existed. For example, while a log of off duty cases is maintained by NICE, awareness of it was very low and those we spoke to were not sure if and how its contents were used. To avoid staff doing unnecessary work, NICE should consider what it is trying to achieve in the management of off duty cases, and then ensure its processes support that goal and are consistently delivered. We consider, for example, that having dedicated staff working on off duty cases helps maintain a consistent approach and facilitates liaison with CAAP-D and with the police. Having a log of off duty cases can support oversight of all criminal allegations against the police and communication with the police particularly on the status and progress of cases. This will only be achieved however, if there is good awareness of the off duty processes and if they are implemented consistently in all cases.

### Recommendation 18

COPFS should clarify the purpose of its approach to off duty criminal complaints against the police and design a process for handling such cases that supports that purpose. All relevant staff should be made aware of the process and it should be followed in all off duty cases.

## Prosecuting off duty criminal cases

303. Once a decision has been made to initiate court proceedings in an off duty criminal case, the case is transferred to local court teams for prosecution. Off duty cases are usually marked to be treated as Advance Notice Trials. This means that the case should be allocated to a specific deputy who should be given sufficient time, having regard to the complexity of the case, to prepare the case thoroughly. Without being treated as an Advance Notice Trial, significant time may pass before the case is reviewed for the intermediate diet shortly before the trial. Some cases are marked as Advance Notice Trials because they include a child witness or because they relate to a sexual crime. However, in some cases, the mere fact the accused is a police officer is the reason why advanced preparation is required. There are several reasons why this may be the case, including:

- there being a possible conflict of interest, particularly in smaller sheriffdoms, where the accused is well-known to COPFS staff and even sheriffs
- the high profile nature of the case and likelihood of significant media interest
- the fact that cases against officers are often vigorously defended, with extensive defence preparation, investigations and the use of experts which would not be the norm for similar cases not involving the police. Because of this, the trials can be longer than expected. For example, one of the cases we reviewed relating to an assault that was captured on CCTV resulted in five days of evidence, including expert testimony.

304. It will not always be clear to local court teams however why the case has been marked as an Advance Notice Trial. The deputies in NICE who mark the majority of off duty cases may wish to consider providing more detailed guidance for local court



staff on the reason advanced preparation is needed. Consideration could be given to the local CAAP champions recommended above for on duty cases (per Recommendation 12), also having oversight of off duty cases as both share similar challenges, such as the need for additional preparation. The champions could build up expertise in cases involving the police, acting as a regular point of contact and establishing relationships with the police and the small number of defence agents who tend act in both on and off duty cases.

305. While additional preparation is often thought to be required for off duty cases, we found no evidence in our case review that such cases are expedited solely because the accused is serving with the police. In the cases we reviewed that were expedited, this was due to the nature of the case or the involvement of vulnerable witnesses. While the police and all those involved in the off duty cases will understandably want them to be resolved as soon as possible, as noted above, COPFS also requires to prioritise a range of other cases such as those involving child witnesses. If efforts are made to prioritise too many types of cases, there is a risk that none are, in fact, prioritised.

### Off duty case review – outcomes

306. Table 8 shows the final marking decision in the 40 off duty cases that we reviewed, as well as the final outcome in each case:

- of the direct measures, six were fixed penalties, one was a fiscal fine and one was a compensation order. Three of the six fixed penalties were not paid, resulting in proceedings in the Justice of the Peace Court
- in one of the Justice of the Peace Court cases and two of the Sheriff summary cases, no further action was taken after proceedings were initiated. This generally occurs when new information comes to light that was not available at the time of final marking.

Table 8 – Final marking and final outcome in off duty criminal cases

Marking decision	Final marking decision (number of cases)	Final outcome (number of cases)
No action	5	5
No further action	n/a	4
Diversion from prosecution	2	2
Direct measures (fixed penalty/fiscal fine/compensation order)	8	5
Justice of the Peace Court	8	9
Sheriff Summary	15	13
Sheriff & Jury	2	2

307. Of the 24 that proceeded to court, in 11 cases the accused pled guilty, the accused was found guilty in two cases, and in 11 cases the accused pled not guilty and the proceedings are ongoing. These ongoing trials will inevitably have been impacted by Covid-19 and the associated court closures and restrictions that began in March 2020.

Table 9 – Outcome of court proceedings

Forum	Pled guilty	Found guilty	Trial ongoing
Justice of the Peace Court	8	0	1
Sheriff Summary	2	2	9
Sheriff & Jury	1	0	1
Total	11	2	11



## Communication with complainers

308. Of the 40 cases we reviewed, there were 16 (40%) in which a referral to VIA was appropriate for the complainer or a witness. Referrals were made in all those cases. In 14 of the 16 cases, we saw evidence of communication with either the complainer or a witness. It is the final marking decision which usually triggers a referral to VIA. However, VIA can sometimes be made aware of cases prior to the final marking (such as a custody case relating to a domestic offence where the marking has been deferred pending further information). In eight of the 14 cases, there was communication from VIA within seven days of the case being reported to COPFS. In a further two cases, there was communication within 28 days and in one other case it was 38 days.
309. In the remaining three cases where we saw evidence of communication with the complainer, we found a substantial delay in that communication. In these cases, the complainer was not contacted until after 121 days, 231 days and 266 days respectively. COPFS may wish to consider their communication strategy for informing complainers or vulnerable witnesses that a case has been received and is under consideration and to reassure complainers they will be notified of the final outcome.
310. We were concerned by the two cases where we found no evidence of any communication with the complainer at all. Both cases involved a domestic element and VIA referrals had been made. Both cases were eventually diverted from prosecution yet there appears to have been no communication of that decision to the complainer. In one of the cases, the complainer wrote to COPFS twice, but there is no record of any response. It is essential that the public have confidence in how criminal allegations against the police, even off duty, are managed and in prosecutors' use of diversion as an appropriate means of dealing with criminality. It is unclear whether there was simply a failure to communicate in these two cases or whether there is a broader issue with how COPFS communicates with complainers in cases where diversion is being considered. COPFS may wish to ensure that its approach to communicating with complainers in cases where the accused is being considered for or has completed diversion from prosecution is appropriate.

## Communication with the accused

311. In Scotland, summary complaints are usually served on the accused person at their home address either by postal or personal service. Those serving with the police, along with those serving in the armed forces, appear to be the only professions where the employer is provided with information on charges and proceedings before the accused themselves. We heard that this approach was taken to protect the accused so their home address does not feature on a complaint which would be a matter of public record and which may be disclosed to the press. However, current (albeit dated) guidance for COPFS in the Book of Regulations states that, '*Where an incident has occurred outside the course of duty ... an officer should be designed as at his or her home address unless there has been a specific request for designation at the place of work and the Procurator Fiscal considers that that request is reasonable.*'<sup>63</sup>
312. We found that in practice, in the vast majority of off duty cases, reporting officers had listed the accused's disclosable or citation address as the Professional Standards Department without stating any reason and without Procurator Fiscal consideration. This practice led to problems in some of the cases we reviewed:

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<sup>63</sup> COPFS, *Book of Regulations*, Chapter 2, Appendix A, paragraph 32.



- in one case, there was failed service of the complaint and no proof of service either on PSD nor the accused resulting in the time bar being missed and no action being taken
- in one case, an accused required to be assessed for suitability for diversion but the only address in the SPR was for PSD. This led to delays in the appropriate social work department making direct contact with the accused
- in one case where COPFS sent the complaint to the accused care of PSD, despite being sent weeks in advance, PSD contacted COPFS two days prior to a pleading diet as they had 'just discovered the complaint' and a new complaint required to be drawn up. This process delayed the court proceedings for the accused by over six weeks
- in one case, COPFS staff changed the citation address of an officer from his home address to that of Police Scotland's PSD. The officer did not serve with Police Scotland however. The complaint was returned to COPFS by Police Scotland, but this error resulted in a six month delay between final marking and the correct service of the complaint.

313. While we understand the desire to keep the home addresses of those serving with the police confidential, COPFS should work with Professional Standards Departments to consider how to avoid the kinds of problems outlined above recurring.

314. Police services require regular updates on the progress of cases involving off duty criminal complaints against their officers. This is particularly important where the officers are suspended or on restricted duties. There is no one process by which a police service's PSD can seek updates. Depending on the status and progress of the case, updates may be provided by NICP or local court. The log of off duty cases maintained by NICP can help in this regard but, as noted above, it is not yet a comprehensive list of all cases and the information it contains is limited. We heard from the police that they can struggle to know where to go for updates and can be relayed around different offices and functions within COPFS. The difficulties in obtaining updates appeared to have led to an unusual step in one case we reviewed, whereby a PSD officer with no involvement in the case was added to the witness list in an apparent attempt to keep track of developments. Given that NICP is already attempting to maintain a log of all off duty cases, consideration should be given to ensuring that the log is more accurate and that the person who manages the log acts as a key point of contact for all PSD enquiries (or that access to the log is granted to another individual who can direct PSD as needed). Access to the log could also be provided to CAAP-D. This could act as an additional safeguard to allow CAAP-D to identify cases which may more appropriately be considered as on duty criminal allegations against the police.



## Appendix 1 – Key terms

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**Accused:** person charged with committing a crime.

**Advanced Notice Trial (ANT):** allocation of a trial case for advanced preparation to a dedicated prosecutor.

**Advocates Depute:** Advocates Depute are prosecutors appointed by the Lord Advocate. Advocates Depute prosecute all cases in the High Court and present appeals in the appeal court.

**CAAP-D:** Criminal Allegations Against the Police Division, a specialist unit of COPFS.

**Case preparer:** members of COPFS staff who interview witnesses and prepare cases.

**Charge:** the crime that the accused person is suspected of having committed.

**Complainer:** the person who made the allegation.

**Crown Office and Procurator Fiscal Service (COPFS):** the independent public prosecution service in Scotland. It is responsible for the investigation and prosecution of crime, the investigation of sudden, unexplained or suspicious deaths, and the investigation of criminal allegations against the police.

**Crown Counsel:** collective term for the Law Officers (Lord Advocate and Solicitor General) and Advocates Deputes.

**Crown Counsel's instructions:** instructions by Crown Counsel to prosecutors.

**Custody case:** when a person is kept in police custody until the case is heard in court.

**Law Officers:** the Lord Advocate and the Solicitor General.

**Lord Advocate:** Ministerial Head of COPFS. She is the senior of the two Law Officers, the other being the Solicitor General.

**Marking:** decision of action to be taken.

**NICP:** National Initial Case Processing Unit.

**No action decision:** a decision made by a prosecutor not to prosecute or to take any action for an offence reported by the police or other reporting agency.

**No further action:** a decision made by a prosecutor to discontinue a prosecution against an accused for an offence that has commenced in court.

**Off duty criminal allegation:** an allegation of criminality made against a police officer, police staff or special constable while they are off duty.

**On duty criminal allegation:** an allegation of criminality made against a police officer, police staff or special constable while they are on duty.

**Petition:** formal document served on accused in solemn proceedings. It gives notice of the charges being considered by the Procurator Fiscal.

**PIRC:** Police Investigations and Review Commissioner.



**Precognition:** an interview of a witness by COPFS or a defence lawyer to help them find out more about a crime and prepare for a court case.

**Procurators Fiscal:** legally qualified prosecutors who receive reports about crimes from the police and other agencies and make decisions on what action to take in the public interest and where appropriate prosecute cases.

**Production:** an item shown in court as evidence.

**PSD:** Professional Standards Department (police).

**Report case:** where a person has been released after arrest and a report is sent to the Procurator Fiscal, who will decide what action to take.

**Roll-up:** where two or more Standard Police Reports are amalgamated into the one COPFS case.

**Scottish Police Authority (SPA):** established by the Police and Fire Reform (Scotland) Act 2012, the role of the SPA is to maintain the police service, oversee and scrutinise policing in Scotland, hold the Chief Constable to account, and support improvement in policing.

**Scottish Police Federation:** represents all police officers in the ranks of constable, sergeant, inspector and chief inspector, and special constables.

**Scottish Prosecution Code:** sets out the criteria for decision making and the range of options available to prosecutors dealing with reports of crime.

**Senior officer:** any officer holding the rank of Chief Constable, Deputy Chief Constable or Assistant Chief Constable.

**Solemn procedure:** prosecution of serious criminal cases before a judge and a jury in the High Court or Sheriff Court.

**Solicitor General:** the Solicitor General is the Lord Advocate's deputy. She is also a Minister of the Scottish Government.

**SPR:** Standard Police Report (also sometimes called Standard Prosecution Report).

**Subject officer:** the police officer or member of police staff against whom a criminal allegation is made.

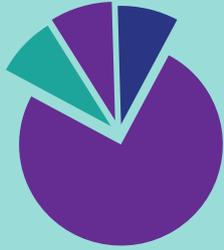
**Sufficiency of evidence:** evidence from at least two independent sources that the crime was committed and that the accused was the perpetrator of the crime.

**Summary proceedings:** prosecutions in the Sheriff or Justice of the Peace Court before a judge without a jury.

**Timebar:** the end of the time limit which regulates the maximum length of time that can elapse prior to the commencement of proceedings for accused persons, whether they are held in custody or granted bail.

**Undertaking:** the document signed by someone who has been arrested and released on police bail after promising to come to court at a later date and agreeing to certain conditions, such as not committing any other crimes.

**VIA:** Victim Information and Advice Service (part of COPFS), which offers assistance to some victims and witnesses.



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## About HM Inspectorate of Prosecution in Scotland

HM Inspectorate of Prosecution in Scotland (IPS) is led by HM Chief Inspector of Prosecution who is appointed by the Lord Advocate to inspect the operation of the Crown Office and Procurator Fiscal Service (COPFS). The functions of HM Chief Inspector are set out in the Criminal Proceedings etc. (Reform) (Scotland) Act 2007. The 2007 Act makes clear that in the exercise of any of the functions conferred by the Act, HM Chief Inspector is independent of any other person. COPFS is the sole prosecuting authority in Scotland and is also responsible for investigating sudden deaths and complaints against the police which are of a criminal nature.

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