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Convener  
Criminal Justice Committee  
The Scottish Parliament  
EDINBURGH  
EH99 1SP

10 June 2024

Dear Convener

### **Stage 1 Evidence on the Police (Ethics, Conduct and Scrutiny) Bill 29 May 2024**

Thank you for the opportunity to give evidence to the Criminal Justice Committee on 29 May.

At the session I said I would follow up on the issues that arose during the session, and also wanted to take the opportunity to clarify some areas of the Bill. The Bill amends the Police, Public Order and Criminal Justice (Scotland) Act 2006 (“the 2006 Act”) and the Police and Fire Reform (Scotland) Act 2012 (“the 2012” Act), therefore the changes made by the Bill require to be read alongside the existing legislation.

I wanted to therefore set out some areas to ensure that there is an accurate and shared understanding of the police complaints and misconduct landscape.

### **Complaints v Conduct**

Some discussions at the Criminal Justice Committee have conflated complaints and conduct, but they are actually separate concepts and are dealt with separately in the legislative scheme. To offer clarification, I want to set out the legislative basis for each:

- **Conduct:** Conduct issues can arise in a number of ways, in the same way as in any workplace. Section 52 makes provision about regulations relating to disciplinary procedures. Disciplinary procedures can be in respect of the *conduct* of officers or their performance. In respect of performance, the Bill makes no changes. In respect of conduct, the Bill makes various changes to the disciplinary procedures, as detailed in the explanatory notes to the Bill:
  - It allows the PIRC to have more extensive functions in relation to disciplinary procedures (see paragraph 45 explaining section 5 of the Bill),
  - It allows misconduct processes to apply to former constables in certain circumstances (see paragraph 46 explaining section 6 of the Bill),

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- the Bill removes the requirement that the SPA determine senior officer cases, paving the way for a panel independent of the SPA to take that role, and makes provisions for appeals consequent on that change (see paragraph 59-60 explaining section 8 of the Bill).
- **Complaints:** There is a statutory system for handling those complaints which are “relevant complaints” (as defined in section 34 of the 2006 Act, essentially as one made by a member of the public against the police). The 2012 Act sets out the oversight function of the PIRC in respect of relevant complaints. Section 60 of the 2012 Act places a number of requirements on the SPA and the Chief Constable in terms of dealing with relevant complaints, including a requirement to maintain suitable arrangements for their handling. The Bill makes various changes in respect of complaints handling, as detailed further in the explanatory notes:
  - It clarifies the circumstances in which a complaint made by a police constable will be a relevant complaint (see paragraphs 74-77 explaining section 10 of the Bill).
  - It increases the powers of the PIRC in relation to complaints handling reviews in various respects (see paragraphs 79-81 explaining section 11 of the Bill),
  - It enables the PIRC to call-in and consider complaints (see paragraphs 82-92 explaining section 12 of the Bill).

The processes for dealing with complaints and for dealing with conduct are separate. Many complaints will be handled through the complaints handling system and will not trigger a disciplinary process for conduct. And many disciplinary procedures for conduct are triggered other than by a complaint.

## Police Staff and Police Constables

Committee members raised the issue of parity between Police Constables and Police Staff and, as I explained during the evidence session, it is important to note they are different in very important ways.

- Staff are employees and have their terms and conditions set out in contracts of employment. As civil servants or public sector workers, police staff have historically been treated in common law as servants of the Crown<sup>1</sup>. In most respects, the employment rights afforded to other parts of the public and private sectors also extend to police staff. There are some statutory references to staff, but they are limited.
- Constables are office holders and are appointed to their office: they are not employed. Under the 2012 Act, their terms and conditions, including those around appointment and dismissal, must be set out in legislation and are set out in regulations made under the 2012 Act. Constables are not legally regarded as employees and the general law of employment does not apply to them.

As public servants, police staff are already under a duty of candour: a holistic requirement on public officials to be open and truthful<sup>2</sup>, as set out in case law, particularly with regards to assisting courts by providing relevant information. The Bill, in addition, will place Police Staff under the organisational duty of candour via the Policing Principles, which will require Police

<sup>1</sup> Sir Tom Winsor, [Independent Review of Police Officer and Staff Remuneration and Conditions](#) at paragraph 2.1.16.

<sup>2</sup> Simon Gardiner, Douglas Morrison & Simon Robinson, Integrity in Public Life: Reflections on a Duty of Candour, *Public Integrity*, 24:2, 217-228, 5 (2022)

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Scotland as a whole to police in a way which is candid. This organisational duty does not place any direct duty of candour on individual members of staff, nor does it provide for any sanction should they fail to be candid.

The duty of candour on individual constables is being placed on them in the Standards of Professional Behaviour contained in the regulations on conduct. There is no statutory equivalent for staff of the Standards of Professional Behaviour. Instead, staff have a code of conduct that they are expected to adhere to as part of their terms and conditions of employment. The SPA and Chief Constable should carry out their own consideration as to whether candour should be reflected in the staff code.

As well as the duty of candour, the difference in legal status between staff and constables will also be crucial to the implementation of the HMICS recommendation to the Scottish Government regarding vetting.

### **Independence of the complaints handling process**

Committee members reflected on evidence heard where some individuals with lived experience called for more independence in the process.

The PIRC is legally and structurally entirely independent from Police Scotland, the SPA and the Scottish Government. The PIRC's role is to independently investigate incidents involving policing bodies in Scotland and review the way policing bodies in Scotland handle complaints made about them by members of the public. PIRC conducts its work fairly and independently, ensuring all evidence is considered objectively and decisions are based on sound professional judgement. PIRC's values are: integrity, fairness, respect and compliance with human rights, which are central to its professional approach.

In relation to PIRC's independence and impartiality, Lady Elish Angiolini stated at the Criminal Justice Committee on 16 May that Michelle Macleod "was a very senior prosecutor and is utterly aware of the importance of the independence of an investigation. If you have people of that calibre leading your organisation, you are not going to have any room within it for people who might be of a disposition to be corrupt."

Those staff members who are former police officers bring a high level of investigatory expertise to the organisation, which is complemented by the staff from other backgrounds, who bring a range of different skills and experiences to the organisation. The PIRC have told the Scottish Government that only 13% of PIRC staff involved in the complaint review side have a policing background. More generally across the PIRC as a whole, the majority of staff are from a non -policing background (52%).

The Scottish Government regards the PIRC as independent currently, as I have set out above. Any new body created to fulfil the same role as the PIRC might also have to recruit some persons of a policing background to ensure there were sufficient numbers of persons in the organisation with the right skill set to investigate from the outset. Even if they were to train up people to be investigators, this takes time and resource. It is difficult to see how a new body would be legally, practically or presentationally more independent than the PIRC.

Finally on the independence of the complaints handling process, it should be noted that the Dame Elish review recommended front line resolution to be dealt with by PS Professional

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Standards Department to ensure no participation by officers close to the complaint, improve the experience of the complainer, improve efficiency and effectiveness of the resolution and to enable further organisational learning and improvements.

Taking this into account, this is why we have sought to strengthen the PIRC rather than overhaul the complaints handling system, which would then remove the opportunity for front line resolution. While such a model can be found in the Police Ombudsman for Northern Ireland, internationally that is a very rare example and the resource-intensiveness of that model justified only because of the very particular and acute circumstances which persist around policing in Northern Ireland.

## **PIRC Accountability**

One of the Members asked about the PIRC accountability. In the Dame Elish review, Recommendation 35 was for the PIRC to be accountable to Parliament for non-criminal matters. The Cabinet Secretary for Justice and Veterans wrote to the Presiding Officer on this and the Presiding Officer highlighted a number of governance issues that caused concern to the Parliament, linked to the PIRC being accountable to a different person (the Lord Advocate) for criminal matters, and the PIRC not being accountable to the Parliament for operational matters.

The Scottish Government's assessment is that the PIRC can be held to account through the Scottish Ministers, who are ultimately accountable for the activities of the PIRC and its use of resources, and who are accountable to the Scottish Parliament. It is also the case that the PIRC can be called to give evidence to the Criminal Justice Committee. There are other routes of accountability, for example, to the Lord Advocate in respect of deaths in custody and allegations of criminal matters and to the Auditor General for Scotland on financial matters.

## **Implementation and Secondary Legislation**

The Bill is being scrutinised by the Scottish Parliament and therefore I am unable to set out exactly what will follow and when, but I believe that it is generally accepted that Parliament expects legislation to be brought into force and powers used to benefit society relatively soon after the passing of legislation. I do expect delivery will need to be phased so as not to delay elements which can be brought into force quickly, as they have no contingent dependencies - such as policing partners ability to take on responsibilities.

Detailed discussions will be needed with policing partners to develop an implementation plan which is realistic and deliverable, mindful of budgetary pressures, the interaction between the reforms and the delivery context in which partners operate.

For some sections of the Bill, delivery requires secondary legislation, including changes to Conduct Regulations. The time to ensure appropriate scrutiny, consultation and process for these needs to be built into the implementation plan.

Recommendations 51, 52, 53, 55, 56, 57 and 58 in the Dame Elish Review, relating to Police Conduct regulations and enhancing the Police Investigations and Review Commissioner's scrutiny role, are able to be delivered in secondary legislation from powers already held by Scottish Ministers under 2006 Act and 2012 Act.

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Recommendations 25 (transfer of statutory preliminary assessment function to the PIRC), 27 (composition of panel including legally qualified chair) 39 (PIRC to take on responsibility for key stages of the senior officer misconduct process), 40 (PIRC to present senior officer cases) and 41 (PIRC to have power to recommend suspension) are dependent on sections of the Bill.

Recommendations 22 and 23 (for gross misconduct hearings to continue after officer has left the force) are dependent on section 6 of the Bill.

## Former Constables

It may be helpful to clarify in this letter what the Bill does and does not do regarding allowing conduct proceedings to commence or continue for those who have ceased to be constables.

Given that conduct proceedings are currently all provided for in the conduct regulations, the Bill only requires to make it clear, by amending the powers to make the conduct regulations, that in certain circumstances the conduct regulations can make provision for former constables.

The Bill sets out that the conduct regulations **must** allow gross misconduct cases to be able to commence or continue once the constable has ceased to be a constable, and that, if proceedings do commence or continue, then a decision must be made as to how the person would have been dealt with had they still been a constable.

The Bill also gives the Scottish Ministers **the power (but not an obligation)** to set a point in time after which conduct procedures cannot happen in respect of the person, unless particular criteria are met. Whether there will be a time restriction, when it is, and what the criteria are for being able to carry on past this point in time are not therefore set in stone by the Bill. These would be subject to further consultation at the time they are added to draft regulations.

However, the Scottish Government thinking is set out in the consultation on the Review, and also at paragraph 74 of the policy memorandum. **This thinking is subject to consideration of representations made during the consultation process for the regulations.** The policy memorandum explains that the proposed time beyond which proceedings cannot be taken unless specific criteria are met is 12 months from the time the person ceased to be a constable. The proposed criteria for a case being brought after that point are that:

- The case is serious and exceptional,
- The case is likely to damage public confidence in policing, and
- The PIRC has determined disciplinary proceedings are reasonable and proportionate.

The time restriction proposed is similar to what is in place in England and Wales regarding former officers.

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## HMICS direction by Scottish Ministers

Sharon Dowey asked, “Have you directed HMICS to look at any aspects of police regulations or conduct procedures and if I “know of any direction that has been given to HMICS to look into any of the policies and procedures of Police Scotland?”

The Scottish Government and Lord Advocate jointly commissioned Dame Elish Angiolini, (now Lady Elish Angiolini) to independently review the complaints and conduct landscape. The Bill delivers on the recommendations that require primary legislation.

Since I gave evidence on 29 May, my officials have consulted with HMICS to Ms Dowey’s question and I can confirm that Scottish Ministers have directed inspections, as provided for in the 2012 Act, on three occasions before I became Cabinet Secretary for Justice and Home Affairs. These Ministerially ‘Directed Inspections’ are:

- Independent assurance review Police Scotland – Call Handling (2015)
- Strategic review of Undercover Policing in Scotland (2018)
- Independent assessment of Police Scotland’s response to a breach of Home Detention Curfew (HDC) (2018)

It will be of interest for the Committee to note that HMICS Scrutiny Programme 2022-25 states that HMICS will seek to examine how misconduct is dealt with by the organisation, whilst also looking at preventative approaches and how Police Scotland seek to ensure appropriate behaviours by all members of staff, which is vital for public confidence.

## Review of non-legislative recommendations

Sharon Dowey MSP also asked if a full review of the benefit of the non-legislative work has been undertaken and if it is worth going ahead with some of the legislative recommendation given the feedback from England and Wales on how these processes have embedded. I am happy to pick up on any specific aspects with the member directly, however, I would like to remind the Committee about the letter I sent on 14 December 2023 following the Ministerial Group (MG) meeting held on 7 December. In that letter I confirmed that MG members took the opportunity to reflect on what has been achieved so far and consider whether those recommendations signed off as completed have delivered the intended improvements. Members were confident about the transformational change and improvements that have been made through implementation of the recommendations. They also recognised the need for, and are committed to, continuous review and improvement through their own assurance frameworks to ensure that systems and processes adapt to changing circumstances and remain fit for purpose into the future. A [copy of the letter was published](#) by the Criminal Justice Committee on 14 December 2023.

I would like to clarify that although the last Thematic Progress Report stated that 58 recommendations were signed off as completed, since then the most recent meeting of the Ministerial Group held on 7 December 2023 confirmed that one further recommendation had been signed off as completed. This brings the current total of the non-legislative recommendations signed off as completed to 59.

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## Legally Qualified Chairs

In England and Wales, hearings will move away from legally qualified chairs to enable Chief Constables to be more accountable for their own force. This will be aligned with our approach, where the Scottish Government position is to retain the Chief Constable as the senior accountable officer for hearings in relation to non-senior officers.

In terms of senior officers, our position is that they hold positions of power in society and set the tone of the organisation, and it is right that they are held to the high standards the public expects. The Bill paves the way for independent legally qualified chairs to hold senior officers to account, where Dame Elish identified the need for independence from the SPA. Dame Elish recommended this to address concerns around the perceived proximity with senior officers (of whom there are few) and SPA members. A legally qualified chair (LQC) could properly hold a senior officer to account and also not leave the process open to perceptions of proximity bias. This rationale does not apply to non-senior officers.

## Costs

In regard to what the Government knew and when and what they did about it, I explained the key milestones to the Committee but offered to follow that up in writing. The Financial Memorandum for the Police (Ethics, Conduct and Scrutiny) Bill utilised the best information that was available at the time the Bill was introduced. My officials became aware that Police Scotland had adjusted their position two days prior to the evidence being published on 8 November last year. Once officials became aware that the information had changed, and it was Police Scotland's official position, they began a process of questioning and testing the new information, including engaging in written questions and answers with Police Scotland. In March 2024, we arrived at the position where the Government accepted the revised costs. Reflecting back with the Bill team, I think Scottish Government should have been proactive in writing to your Committee and the Finance and Public Administration Committee to acknowledge there was divergence and what the government intended to do about it.

I want to also set out that this change came about as a result of Police Scotland adopting more robust processes to consider the impact of legislation on them as an organisation, which is seeing them develop a more comprehensive understanding of financial impacts across all of Police Scotland. The Police (Ethics, Conduct and Scrutiny) Bill has now been through that process, where it had not originally been.

## Heads of Complaints

Fulton MacGregor MSP asked about Heads of Complaint. This is part of the Six Stage Complaint Handling Process in [PIRC's Statutory Guidance](#). The guidance sets out that the policing body and complainer should formally agree a list of the complaints to be dealt with/progressed. Within Police Scotland, this is done by listing the complaints on a standard "heads of complaint" form which the complainer must be asked to agree.

Complainers or witnesses (to a complaint) who are subject to a report to the Procurator Fiscal/Reporter to the Children's Panel are given a warning that the information they share as part of the complaint may be shared with the Procurator Fiscal. This is to protect the complainer and witnesses right to avoid self-incrimination. A copy of the Warning to a

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Witness, Warning to Complainers and Heads of Complaints forms are attached separately at Annex A.

## **Time limits for complaints**

Pauline McNeill MSP queried if the Bill will help ensure time limits are met regarding complaints and asked for clarification of PIRC powers in ensuring Police Scotland respond to the complaint within a time limit.

I would like to clarify that Dame Elish considered whether Scottish legislation should set statutory time limits for the completion of misconduct processes, other investigations or the submission of complaints by members of the public, concluding it would **not** be appropriate to put such detailed targets in statute. However, she did recommend they should be reviewed and published in guidance and that performance against these targets should be measured and reported on regularly. These recommendations are being taken forward through the non-legislative work, as are many recommendations which improve the way in which complaints made by members of the public are dealt with and handled by Police Scotland. I gave the committee some examples of the work that has been done since the Review took place and again, as I set out, the progress of those recommendations have been published in five thematic progress reports, published since June 2021.

In regard to strengthening the PIRC's ability to hold Police Scotland and the SPA to account in responding to complaints, I think it would be helpful to draw the committee's attention to Section 11 of the Bill. This section includes a provision to enable PIRC to carry out a complaint handling review, even in the absence of a request made by the complainer or the appropriate authority, if it is in the public interest to do so. It also enables the PIRC to make recommendations in relation to the complaint in its report of the review, and requires the SPA to respond within the timescales set out in the report, setting out the action taken or planned in response to the recommendations, or explaining why nothing will be done. The PIRC may publish the response if it is considered appropriate to do so. Similarly, section 12 will allow the PIRC to call-in a complaint and do a fresh examination. The PIRC will also be able to make recommendations regarding these complaints and a response is required to any recommendations made to Police Scotland or the SPA. The PIRC can call in a complaint at any time and does not have to wait for front line resolution to conclude.

## **Victim notification of outcome of misconduct investigation**

Pauline McNeill noted her understanding that those who complain are not entitled to information about the outcome of a misconduct investigation. As the Committee is aware, complaints and conduct matters are separate matters and, where it is alleged that Standards of Professional Behaviour have been breached, investigations are governed by conduct regulations.

However, there is in fact a duty to inform those who complain about the outcome of a misconduct. Police Service of Scotland (Conduct) Regulations 2014 require, at paragraph 23(4), that, if the proceedings have arisen from a complaint by a member of the public, that that member of the public is notified in writing of the determination and any disciplinary action ordered. Similar provision exists at regulation 24(4) of the conduct regulations for senior officers. This is reflected in [the Police Service of Scotland \(Conduct\) Regulations 2014 Guidance](#), at paragraph 6.12.5 which sets out that: if the misconduct proceedings have

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arisen out of a complaint made by a member of the public, the Deputy Chief Constable must notify that member of the public in writing of the determination and any disciplinary action ordered.

## Section 15

Finally, I thought it would be useful to clarify that Section 15 of the Bill is about the PIRC's ability to review a practice or policy. As was pointed out in the evidence heard from HMICS in the two years that the current office holder has been in the role, the PIRC has not passed a policy or procedure of Police Scotland to HMICS for review. The Section 15 power for the PIRC was recommended by the Dame Elish review that "*this power should be used to focus on broad themes or trends, or practices which might be of particular public concern*" and although HMICS suggested that it could blur responsibilities, the MOU between PIRC and HMICS will help them collaborate to achieve the best outcome for the public and ensure issues are not missed.

Yours sincerely



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## Complaint about the Police: Witness Warning

Complaint About the Police  
Witness WarningComplaint by: **Warning to Witness**

I wish to make a statement in connection with my complaint about the police by

**Complainer:** \_\_\_\_\_

I have been advised that I am the subject of a report to the Procurator Fiscal/Reporter to the Children's Panel and that I do not require to provide a statement whilst the case is outstanding.

I have been advised that any statement I do provide in relation to the complaint about the police may be disclosed to the Procurator Fiscal/Reporter to the Children's Panel to which I have been reported.

I have been advised that I am not obliged to answer any question(s) relating to any matters, charge or report of which I am subject.

**Signature of Witness:** \_\_\_\_\_

**Counter Signature**  
(where appropriate): \_\_\_\_\_

**Signature of Reporting Officer:** \_\_\_\_\_

**Rank:** \_\_\_\_\_

**Date:** \_\_\_\_\_

**Note:** Where the complainer is a juvenile or considered vulnerable this form should be countersigned by a parent/guardian or appropriate adult.

I understand that my information will be processed in accordance with the Privacy Notice (GDPR) Law Enforcement and may be shared with partner agencies for law enforcement purposes, including the Police Investigations Review Commissioner (PIRC) and Crown Office and Procurator Fiscal (COPFS). More information can be found at [www.scotland.police.uk/access-to-information/data-protection/privacy-notices/](http://www.scotland.police.uk/access-to-information/data-protection/privacy-notices/)

# Complaint About the Police



## Complainer Warning

Complaint by:

### Warning to Complainer

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(where appropriate):

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# Complaint about the Police: Heads of Complaint



## Heads of Complaint

<b>Reference Number</b>	
<b>Name</b>	
<b>Address</b>	

I confirm the following is a comprehensive list of my complaints about the police arising from my contact with Police Scotland on ..... and there are no other matters which I wish to raise relative to this subject.

1.

2.

3.

4.

5.

Continue overleaf if there are additional allegations

<b>Name</b> (printed)	
<b>Name</b> (signed)	

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