



OFFICIAL REPORT
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Criminal Justice Committee

Wednesday 8 May 2024

Session 6



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POLICE (ETHICS, CONDUCT AND SCRUTINY) (SCOTLAND) BILL: STAGE 1 1

CRIMINAL JUSTICE COMMITTEE

17th Meeting 2024, Session 6

CONVENER

*Audrey Nicoll (Aberdeen South and North Kincardine) (SNP)

DEPUTY CONVENER

*Russell Findlay (West Scotland) (Con)

COMMITTEE MEMBERS

*Katy Clark (West Scotland) (Lab)

*Sharon Dowe (South Scotland) (Con)

*Fulton MacGregor (Coatbridge and Chryston) (SNP)

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

*Pauline McNeill (Glasgow) (Lab)

John Swinney (Perthshire North) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Stephanie Griffin (Equality and Human Rights Commission)

Chief Superintendent Rob Hay (Association of Scottish Police Superintendents)

David Kennedy (Scottish Police Federation)

Dr Genevieve Lennon (Scottish Institute of Policing Research)

David Malcolm (Unison Police Staff Scotland Branch)

Kate Wallace (Victim Support Scotland)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 8 May 2024

[The Convener opened the meeting at 10:00]

Police (Ethics, Conduct and Scrutiny) (Scotland) Bill: Stage 1

The Convener (Audrey Nicoll): Good morning, and welcome to the 17th meeting in 2024 of the Criminal Justice Committee. We have apologies this morning from John Swinney.

Today, we continue our stage 1 evidence taking on the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill. I welcome Stephanie Griffin, Scotland policy manager with the Equality and Human Rights Commission; Dr Genevieve Lennon from the Scottish Institute for Policing Research; and Kate Wallace, chief executive at Victim Support Scotland. Thank you all for taking the time to attend today's meeting; it is greatly appreciated.

I refer members to papers 1 to 3. I intend to allow around an hour and 20 minutes for this evidence session. I will kick things off with a question on the code of ethics. Quite a bit of the evidence that has been submitted to the committee refers to not just the establishment of a code of ethics and support for that, but the need to make sure that compliance and the effectiveness of such a code is monitored.

I note that the Equality and Human Rights Commission's original response to the Justice Sub-Committee on Policing's call for views referenced the recommendations that were made in Elish Angiolini's review around equality training for police officers and/or staff and that it should, at a minimum, include learning around protected characteristics, acceptable behaviour, the risk of ignoring inappropriate behaviour and so on. I know that training is not a specific provision within the bill, but nonetheless it relates to the provisions around the code of ethics and how Police Scotland ensures that officers and staff are equipped as much as they can be with the knowledge, understanding and skills that they need to comply with a code of ethics. That was teased out a little bit in the SIPR submission as well.

Stephanie Griffin, can you say a bit more about the Equality and Human Rights Commission's views on the code of ethics and how it can be monitored to ensure it is working effectively?

Stephanie Griffin (Equality and Human Rights Commission): In our original submission in response to Lady Elish Angiolini's

recommendations, we made a couple of recommendations about specific training to make officers aware of their obligations in relation to equalities and human rights. We said that training should at least include knowledge of the current law around protected characteristics and what is and is not acceptable, the risk of ignoring or seeming to approve inappropriate behaviour and personal liability. I think that we also said something about the need for officers to be made aware of how discrimination can affect the way that Police Scotland functions and the public's perception of how Police Scotland functions. That was also encompassed in what we said about making sure that officers are aware of relevant policies, including equality and workplace harassment policies, why they have been introduced and how they are put into practice. However, while training is obviously very valuable and important—we have stressed that in our submissions to previous calls for views—it cannot be an end in itself. Training must be reviewed regularly, and that should be standard in line management practices.

I do not think that we have a view on how the code of ethics should be monitored with regard to what is in the legislation. That feels like a procedural issue for those probably more in the know about the structure of policing. I am not sure how useful our view is.

The Convener: Thank you, that has given us a helpful bit of background.

Genevieve Lennon, the point about monitoring was touched on in the SIPR submission. It is all very well to have a code of ethics that looks nice and shiny and new, but what is important is the application of the code of ethics and ensuring that its effectiveness continues as, for example, new officers come in, policing functions change and so on. Can you expand on what was in your submission on that point?

Dr Genevieve Lennon (Scottish Institute of Policing Research): First, the SIPR submission supported the code of ethics being a discipline code. I realise that that is not what it is at the moment and may not be what is implemented but, were it to be a discipline code, as it is in various other jurisdictions, it would offer additional review mechanisms. Whether that choice is made or not—perhaps that is something that we can return to—any breach of the code that is dealt with by internal complaints within professional services and anything that goes to the Police Investigations and Review Commissioner should be flagged so that there is a review process and data is easily obtainable on whether the code is being adhered to, what type of breaches we are seeing and issues of that sort.

If you wanted to go further, we are now 10 years into Police Scotland, so there is an excellent opportunity to conduct some extensive research, such as the ethics culture surveys that have been conducted in several other jurisdictions—a fairly standard version from Klockars and others has been used in Australia, America and various other countries. That would provide a baseline that could be very informative in future and could be carried out again at regular intervals. It would be ideal if something like that could be done, so we can determine what impact having this code of ethics has had.

Going back to review mechanisms, I think that the policing board should be responsible for gathering and disseminating a review of adherence to the code of ethics, whether in terms of breaches or whatever else. That is comparable to the approach that is taken, for example, in Northern Ireland, where the Northern Ireland Policing Board is responsible for monitoring adherence to the code of ethics.

As I set out in my written evidence, the Northern Ireland Policing Board also considers training, which you have already mentioned. It also reviews quantitative information on breaches of the code and evaluates qualitative information on how the Police Service of Northern Ireland investigates and addresses such breaches, including disciplinary action. That might also link into discussions later about the expanded powers of the PIRC to make broader policy recommendations and responses to that.

The Convener: I am sure that members will come back with some more questions on that interesting notion around an ethics culture survey. That is certainly a new one on me.

I have one follow-up question around breaches of the code and the implications of breaches. What came into my head when you set that out was how easy or difficult the practicalities of being able to respond to breaches of the code would be, given the vast range of breaches that could take place. Do you have a view on that?

Dr Lennon: It will obviously depend on exactly what the code looks like, and whether it is simply a repetition of what is already there or is developed. There are a lot of models out there, some of which are slightly more expansive, and which I would suggest, because of that, perhaps offer themselves as more of a tool to police, to aid them in dealing with dilemmas.

On how to monitor the effectiveness of the code, all of those issues should already be captured either internally by line managers or, if a breach is sufficiently severe, within professional standards or, indeed, by the PIRC. I would hope that simply adding something that says, “The code of ethics is

engaged”, would not be particularly onerous, administratively.

The Convener: Thank you.

Kate Wallace, I will come to you and then open up questions to members. The Victim Support Scotland submission sets out support for a requirement for a code of ethics. It says:

“The need for a robust ethical framework to policing is also underscored by a recent inspection by HM Inspectorate of Constabulary in Scotland, which made a number of recommendations to improve underlying culture within Scotland’s police force.”

Some of the recommendations do, indeed, speak to improved leadership behaviours, delivering a set of actions to address fundamental inequalities between officers and staff and so on. The submission also says:

“it is crucially important that the Code is both read and fully understood by all constables”.

The issue therefore comes back to the effectiveness of the code and the understanding that officers and staff have of what it means to them. Could you expand a little bit on that position?

Kate Wallace (Victim Support Scotland): As others have said, training on its own is not sufficient. This committee has previously heard our concerns about the victims code for Scotland, which is routinely not adhered to and not understood. We do not want this to go the same way, with obligations on the police that they are routinely not fulfilling, and for which there is no accountability structure. That is where those comments were coming from.

There are various ways in which you could continue to test people’s knowledge and understanding of the code throughout their career. There are also various ways that you could apply that test at the point of entry and screen people out of the process of becoming police officers in the first place, based on their understanding of what that code means to them and their behaviour.

We agree with what others have said about a culture of ethics. There are two points on that. The first is about using it as a positive tool to promote improvements in the way that people behave and things are done. The other is to ensure that, when there are breaches, they are monitored, addressed and dealt with properly in every instance. You need both of those things to be in place.

Another aspect is public awareness of the code. It should be made publicly available and a lot of effort should be made to ensure that people are encouraged to use it as a tool when they feel that it has been breached. However, we would take the

learning from the situation with the victims code and say that you should not create another code that will just sit on a shelf and not do anything. There needs to be a robust framework around it.

The Convener: In your submission, there is quite a lot of reference to the perspectives and reflections of the victims whom you support. Could you outline what their reflections were on the point about a code of ethics?

Kate Wallace: The view is that anything that is transparent and publicly available and will hold people to account is better than the existing situation.

As you know, the feedback is that people have no trust in the process. There is a feeling of a lack of transparency, independence and impartiality, so the code of ethics is seen as an important step, if used properly. There is a level of cynicism about the extent to which it will make any difference. Most of the experiences—we can maybe come back to this later—that we have been writing about come from people involved in our support for families bereaved by crime service, which is our specialist national service that supports those affected by murder and culpable homicide. Several cases of dissatisfaction and trauma being caused by the complaints process have come to light through that service.

10:15

The Convener: That is very interesting to hear. I will open questions up to members.

Russell Findlay (West Scotland) (Con): I will start with Dr Lennon and pick up on something that you have already referred to, which was about the proposed code of ethics. You said in your written submission—and in your verbal contribution—that, for the code to be effective, it should be monitored. You used Northern Ireland as an example of where it happens effectively and suggested that the Scottish Police Authority could do the same, but you also say that it could be achieved by amending existing legislation, specifically the Police and Fire Reform (Scotland) Act 2012. In layman's terms, why is this so important and why is it needed? Have you had any discussions with or feedback from the Scottish Government since your written evidence was submitted and published?

Dr Lennon: I have not had any feedback from the Scottish Government since this evidence was submitted. As for why it is so important, do you mean why the code of ethics is so important?

Russell Findlay: I am more interested in the specifics of the enforcement and monitoring. Is that perhaps quite an unusual way of ensuring that

the code is monitored? Could the legislation that we are looking at not be amended to do it?

Dr Lennon: It could. The suggestion in my written submission to amend the 2012 act is because that is where the policing board's powers are set out, so it would be the most natural place to put it. You could add it to this bill if you wanted. I think that that is possibly more a drafting issue.

Russell Findlay: I suppose that it goes to the point that Kate Wallace was making about accountability and effectiveness.

Dr Lennon: I agree with Kate Wallace that there is a need for transparency. To have effective accountability, you need to have transparency within the various accountability bodies: the committee, the PIRC, His Majesty's Inspectorate of Constabulary in Scotland and the SPA board—those are the major ones in relation to Police Scotland. There is also accountability to wider society and expert groups, be it non-governmental organisations, the Scottish Human Rights Commission, academics such as me and so on. Although this has been changing in a positive way, there has tended to be a dearth of data on Police Scotland activities. Equally, the PIRC's data could be improved. To effectively monitor it, there should be someone in charge, which is something that we can come back to again when we discuss the amendments to the PIRC. There should be an onus on full disclosure and there should be more on policing coming into the public domain. I think that that is a necessary step for accountability. It is not enough to say, "This is done and, believe us, people are following it."

Russell Findlay: Thank you.

Stephanie Griffin, I will ask you about the duty of candour provision in the bill. We have written evidence from the Association of Scottish Police Superintendents that suggests that the duty of candour provision might be at odds with existing legislation that gives everyone the right to silence or to protect themselves against self-incrimination. I think that the Scottish Police Federation has said something similar to us. Are you aware of a likely clash between those two rights, or is that likelihood overstated?

Stephanie Griffin: Again, I am not sure that that is within the EHRC's remit. Our focus is very much on the provisions of the Equality Act 2010 and being the regulator of that act.

What we said about the duty of candour in our submission to the call for views—I am not sure that this exactly answers your question, but it is an important point to make—is that, in the provisions of the Equality Act 2010 as they stand, and while completely understanding the devolutionary restrictions around re-legislating for equality and legislating in areas of equal opportunities, there

still very much has to be a focus on the reasonable adjustment duty with the duty of candour. That is maybe a point for implementation or for guidance or something like that, but it is an important point to make. The duty of candour is there and we understand why it is there, but to make it work and to make it effective, the reasonable adjustment duty has to be at the forefront of the minds of those who are involved in the complaints process.

Russell Findlay: Thank you.

Kate Wallace, I will turn to you now. I want to quickly touch on a very brief selection of comments from some of the witnesses we have heard from so far. Stephanie Bonner, the mother of a child who died, called the complaints process

“a hellish merry-go-round of distractions, deceit, deception and manipulation”.

Maggie Robertson, who was a victim of rape, has said

“the system needs to be changed completely.”

Bill Johnstone, who was falsely assigned a criminal record, said:

“The system is ... not fit for purpose”

and

“fatally flawed.”—[*Official Report, Criminal Justice Committee*, 17 April 2024; c 2, 25, 12.]

Margaret Gribbon, a lawyer who represents police whistleblowers, talked of

“weaponisation of the complaints handling procedure.”—[*Official Report, Criminal Justice Committee*, 24 April 2024; c 4.]

I suppose that many of those people represent different definitions of victim. From the perspective of VSS, can you give us an idea of what kinds of cases you typically see relating to police negligence, misconduct and criminality and say how they might be relevant to the need for this legislation?

Kate Wallace: The complaints process cases of victims that we have been supporting or have been involved with have been quite wide ranging: everything from criminal behaviour on the part of police officers, where they have been abusing victims who they come into contact with through their role as police officers, right through to—

Russell Findlay: I have heard of examples of domestic abuse victims suffering from their encounter with the police. Is that the type of thing that you are talking about?

Kate Wallace: Yes. We are aware of cases where officers have been involved in sexual exploitation of victims they have come into contact with through the system. I will come on to that, because I think that it is relevant to the 12-month

limit for officers who have left. One of the challenges has been officers resigning and leaving midway through a complaints process. Some victims may not know that they are victims until much further down the line. There is quite a broad range. That is at one extreme end.

The other end is poor communication. I am involved with quite a few cases now in the SFBC team, as I mentioned, where we have had staff in the room with victims who have met police officers who said certain things in those meetings and have then denied that they did.

Some families—and, given the types of situation that I am describing, such as families bereaved by murder or culpable homicide, these are quite serious issues—have taken up complaints and been concerned about, for example, the length of time for the complaints process, the lack of transparency and, to go back to the previous point, the lack of candour, which has been problem. It is interesting that what you described has been the response, because we are not talking about a criminal matter if, for instance, the problem has been poor communication, but if your automatic cultural position is one of not saying anything at all or defending yourself or not being honest when you have been challenged on something, that is probably the reason why we are having this conversation now. That all needs to change.

There are various experiences: complaints about personal property not being returned and being lost, and then turning up, all of a sudden, once the complaint has been pursued in a formal process. It is quite difficult to say here, but we have agreed with the clerk that we would submit some written testimonies from families who have been through the complaints process or are going through it now to give you examples. We have been involved with quite a wide range.

Russell Findlay: It is a very broad range, yes. Thank you, I will not take up any more time.

The Convener: Pauline McNeill, do you want to come in with a supplementary?

Pauline McNeill (Glasgow) (Lab): It is not a supplementary—well, it kind of is.

The Convener: I will hand over to you.

Pauline McNeill: Good morning. I wanted to examine the question of what difference the bill would make to the duty of candour and ethics in relation to current codes for police officers. Police Scotland is very concerned about this and you will have read its evidence. Police Scotland says that the insinuation is that most police officers do not currently abide by some code of ethics and all the rest of it. You probably read that. I am trying to discern what difference the bill would make.

Kate Wallace, you said several things to Russell Findlay. The first thing that you said was that you have had some cases where there has been sexual exploitation by police officers, and I just want to separate out the different things. Sexual exploitation is obviously a criminal act. Do you have concerns that there are gaps here when there is a criminal act by a police officer in some of your cases?

Kate Wallace: That is not our main concern with this. I used that example because of the examples that Russell Findlay gave me, just to agree that, yes, that is part of what we have experienced in some cases. There are obviously processes around that. That is not our main—

Pauline McNeill: That is covered.

Kate Wallace: Yes.

Pauline McNeill: I just wanted to be clear about that.

I am not talking about the complaints process, because it is clear that, when complaints take a long time, that is unacceptable, and it is something that could be fixed.

I am sure that you, of all people, are very familiar with the tragic circumstances of the Emma Caldwell case, as we all are, but one of the issues with that case is the way in which the police investigated it. It was a long time ago. Is there anything in the bill that would change anything about the way in which that case was investigated, simply being that the police followed lines of inquiry that did not stand up and, eventually, 20 years on, that became clear? Is there anything in the bill that would allow for a complaint or anything? I am trying to come at it with a view to what difference the bill would make to big cases like that.

Kate Wallace: That is an interesting question. There are a couple of issues there, for instance complaints made by the family at the time about the course of the investigation. I find it easier to answer in terms of current complaints that we are aware of where, certainly, I could see that the duty of candour would make a big difference. Our experience has been that officers are not forthcoming. Certainly, if they have made a mistake, officers are not forthcoming in admitting that they have made a mistake. That can lead to bigger problems.

There is potentially a broader question with the Emma Caldwell case, which comes back to human rights, potential discrimination and the potential types of attitudes that were around then that led a dominant line of inquiry, but there will be others on this panel who are more qualified than me to answer whether the bill would have made any difference, in retrospect, to that element of

that case. There is other stuff around misogyny and misogynistic views within the police and all that, but I am sure that we will get to that.

Pauline McNeill: Would any other witnesses like to contribute to that?

Stephanie Griffin: I can speak without any sort of authority on that one case. I think that one of the important aspects of the bill to be considered is to do with the procedures around the preparation of, consultation on and review of the code of ethics. From an EHRC perspective, having those procedures in place in legislation aligns the process more easily with the requirements of the Equality Act 2010, particularly the provision for consulting, reviewing and collecting data, which should be central to those processes and a huge part of meeting the requirements of the Scottish-specific duties. I think that that could have a positive impact in terms of embedding the consideration of equality in the code of ethics.

10:30

The bill is not fully prescribing everything that should be in a new or updated code of ethics; it is more of a framework for the process. This is not exactly related to your question, but we have some views on that aspect of the bill that I would be happy to come back on later, acknowledging that we do not have the mandate for human rights here in Scotland—that is for the Scottish Human Rights Commission—so my focus would be very much an equality focus.

Pauline McNeill: That is helpful—thank you. Dr Lennon, is there anything that you want to add?

Dr Lennon: Putting the code of ethics on a statutory footing is symbolically important. Without making it a disciplinary code, I am not sure how much difference it will make day to day. Equally, with the duty of candour, as I think that the Angiolini report noted, that is implicit anyway, so putting it on a statutory footing is again primarily symbolic.

The code could be strengthened. Other police forces, for example, the gendarmerie and the police nationale in France, are required to answer all questions that are put to them on administrative issues. That is not uncommon. The question of the right to silence is entirely separate. That is only for criminal investigations, and it is important to make that distinction. Perhaps we should ask why there should not be an onus on the police to answer questions in administrative settings. That is not uncommon among other professions, as well as among police in other jurisdictions. That would make a big difference.

The duty of candour could make a difference—which is maybe not the difference that it would

make currently—were it to be expanded to apply to retired officers and their conduct as officers. That issue is partially addressed later in the bill. However, the duty of candour does not apply. Maybe that could be expanded.

Pauline McNeill: That is very helpful. Thank you very much.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I want to go back to Kate Wallace's point about the bill allowing misconduct proceedings against former officers to commence or continue up to 12 months after an officer has left the force. What are your views on that? I think that you said at the time that you would give a view on that later, so this is your opportunity to do so.

Kate Wallace: That is really important. We are aware of cases in which officers resign part way through a process. That is really unsatisfactory and can be traumatising for victims and families who have raised complaints.

I agree with the previous comment about extending the duty of candour so that it applies after an officer has left and covers the period of service. On that point, we think that the wording of the bill could be strengthened and include not just serving police officers but civilian staff in Police Scotland.

Fulton MacGregor: What do you make of the 12-month time limit? Are you satisfied with that?

Kate Wallace: There should be an ability in exceptional circumstances for investigations to take place outwith that limit. In some circumstances, victims do not become aware of certain things until much further down the line. Allowing the period to be extended beyond the 12-month limit in exceptional circumstances would be beneficial.

Fulton MacGregor: What would those certain circumstances be? Would that perhaps be if gross misconduct was proved?

Kate Wallace: It is tricky, but, in our view, a more nuanced case-by-case approach is needed. The circumstances may not necessarily be to do with the behaviour but to do with the ability of the victim to take forward their complaint. It may be that they are just not able to or are prevented by health reasons, for example, from raising a complaint within that timescale. It may also be the case that, as I said, other circumstances mean that people are not aware of certain things until further down the line.

Fulton MacGregor: That is really helpful. Do the other two witnesses have any thoughts on that part of the bill? I will come to Stephanie Griffin first.

Stephanie Griffin: From a general perspective, anything that will ensure that access to justice for complainants is as encompassing as it can be can only be a positive thing.

One thought that I have had is that there are potentially parallel routes to redress, whether it is through criminal law provisions or, if a complaint relates to discrimination, victimisation and harassment, through the protections of the Equality Act 2010. Obviously not all complaints will fall within those categories.

The commission does not have a view on the specifics in relation to some of your questions about time limits and whether proceedings should be confined to gross misconduct, but I repeat the point that widening access to justice is a positive thing.

Dr Lennon: It would be useful to extend the 12 months to include all on-going investigations. As has already been mentioned, some of them can take a long time. If an on-going investigation had to be abandoned in the middle because somebody hit that 12-month period, that would be damaging for victims, complainants and the process more generally.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I want to ask about the culture in Police Scotland. The current chief constable and previous chief constables have made statements to the effect that they believe that the force is institutionally racist and discriminatory. What is your impression of the bill in relation to whether it goes far enough to counter that? Could more be done? I know that that is quite an ethereal question, but any comment would be welcome. Stephanie Griffin, do you want to come in?

Stephanie Griffin: The bill has the potential to be an important piece of the puzzle in terms of the overall legislative and policy landscape that contributes to tackling racist and discriminatory behaviours and procedures. We know from the thematic progress reports on the Angiolini review that recommendations are being delivered, but it is hard to tell what practical effect those are having at this time. It might be a case that the changes are taking time to embed or it might be that the EHRC is not close enough to the process to see what the changes are. However, we know that there continue to be concerning reports about equality issues in relation to police conduct and processes. There is no point in my rehearsing those to people who know very well what those are.

Another point is about enacting the non-legislative recommendations of the review. Some issues relating to equality have been exposed—I am thinking particularly about the PIRC and the Scottish Police Authority review of the police

complaints files and finding inconsistencies around training and access to reasonable adjustments.

Coming back to your question, I think that there is an opportunity here to improve things in respect of the code of ethics and putting it on a legislative footing. It is important to recognise that there is a wider policy and legislative landscape, including the existence of the public sector equality duty—PSED—for instance, which we know is not always very well met by lots of public bodies. I am not picking out any examples, but our experience as a regulator is that that is the case. In that context, over the coming year, the EHRC is taking forward a piece of work with uniformed services to do with their processes and embedding the requirements of the Scotland-specific duties, better equality-data collection and things like that. I am not sure whether that is helpful.

Rona Mackay: It is. That is a lot of interesting information. Dr Lennon, would you like to comment at all?

Dr Lennon: As I said before, were the code a disciplinary code as well as a code of ethics, that would considerably strengthen it. There are various ways in which that could be done. That would also lend itself to a slightly different type of code of ethics—one that is more explanatory for the officers and one that could be more useful as a toolkit for them, as well as demonstrating to the public the values that officers adhere to and that the public can expect in their day-to-day contact with them.

Rona Mackay: That is interesting—thank you. Kate Wallace, would you like to come in?

Kate Wallace: The bill is a tool, but it needs to be part of a much bigger piece of work around changing culture. Our perspective is that it is a step in the right direction, but it needs to be accompanied by very strong action at all levels. We are still seeing, in very recent experiences and cases, examples of really poor conduct and lengthy complaints processes that are at times putting victims at risk.

Rona Mackay: I will stay with you, Kate. Earlier, you spoke about transparency and independence. Some of the evidence that we have heard suggested to us that the police are perhaps marking their own homework in a lot of cases. Would independent scrutiny in misconduct cases be preferable?

Kate Wallace: Independent scrutiny would certainly be preferable for victims. In my saying that, that is not to take anything away from our response to the bill in which we agreed with the proposals to strengthen the PIRC's role.

Rona Mackay: Dr Lennon, you agree?

Dr Lennon: Yes, I agree. That would not remove some of the issues around delays, but I think that that would be preferable for a variety of reasons. It adheres better to international standards and it probably reflects better the public perception, which is that the PIRC is the independent complaints body, as opposed to being primarily a review body.

Interestingly, the Garda Síochána Ombudsman Commission in the Republic of Ireland will be renamed, I think, Fiosrú, and it is expanding its remit to cover all complaints. The Police Ombudsman for Northern Ireland has had that role since its inception, but the Republic of Ireland is more comparable to Scotland in terms of demographics, both for population and police numbers, so it suggests that it can be done.

Rona Mackay: It can be done. Stephanie Griffin, do you have any comment on independent scrutiny?

Stephanie Griffin: Not specifically. However, regarding the provisions for the PIRC in the bill that relate to the advisory board to the commissioner, it is very important to ensure that there is a range of diverse experiences on the board, and that might help Scottish ministers meet their PSED obligations, such as a need to foster good relations between groups with protected characteristics. The bill should reflect the need to ensure membership of the board reflects those diverse and intersectional experiences.

Sharon Dowe (South Scotland) (Con): The evidence so far has been very good, and a lot of my questions have been answered already.

Kate Wallace, on the proposed period of 12 months, you said that some victims do not become aware of things until further down the line. We have heard that, with cases being backdated in England and Wales, the time that it takes to investigate former officers has an impact on the investigation of current officers. You said to Russell Findlay that you would send details of previous cases. Perhaps you could also send us details of the impact on victims further down the line, because it would be good to get more evidence on why we need to investigate former officers, especially if that would go beyond the 12 months. I appreciate what you said about including on-going investigations. Current police officers go through a criminal procedure before there is an internal investigation, and I would expect that to continue. Could you send us more information on that?

In addition, what would justice for victims look like in relation to investigating former officers?

10:45

Kate Wallace: It would help if there was a commitment to a trauma-free complaints process, with clear communication, and a commitment to investigate as quickly as possible once an investigation has started. The duty of candour is really important, because that has not been our experience of how complaints are dealt with currently, and there should be reduced waiting times. We know of a number of people who have made multiple complaints about multiple issues, and we consistently see the PIRC upholding only one or two things, but, in some cases, decisions are overturned once further evidence has been submitted.

A trauma-informed complaints process is really important. The process should be far more victim centred, with victim or complainant care running through the system, because that is missing at the moment. Allowing officers to resign midway through proceedings, with the proceedings then not being taken forward, is a massive issue, because it causes more trauma.

We are not saying that every single complaint should be upheld, but a proper explanation should be provided so that a victim feels that their complaint has been investigated thoroughly, independently and impartially. They should be provided with information at each step of the process so that they can fully understand decisions, and there should be no massive time delays. What I am describing is the opposite of what happens now.

Sharon Dowey: There should be communication and explanation, and the process should be trauma informed and result in a timely conclusion. Does the bill cover all that?

Kate Wallace: It covers some of those aspects, but a lot will be down to implementation, how the process is delivered and the commitments behind it. The issues are partly about culture, partly about procedure and partly about the point that was made in relation to former and current officers. As far as I can see, there is an issue about how resources are prioritised, so we are talking about leadership, too.

Sharon Dowey: Dr Lennon, you think that the code of ethics should be put into disciplinary procedures.

Dr Lennon: Internationally, it is quite common for the code of ethics to also be a discipline code, so a breach of the code can give rise to disciplinary proceedings. Breaches range from very minor ones, which can be dealt with highly informally, through to more serious ones, which would be caught by the existing disciplinary code anyway.

As I said, that approach is quite common. It is used in Quebec, France, Northern Ireland and a number of other jurisdictions. It would be advantageous, as it would require some reworking of what is in the code at the moment. As I set out, it could be slightly problematic if it were to be simply converted. For instance, there are references to being courageous. How do we measure that? Do we want somebody to be in breach of the code by not being sufficiently courageous? Is that a conduct matter? I would say that it is not. However, were the code of ethics to be slightly reworked, it could be a positive platform that could aid trust and confidence in the police and could provide clarity. Those types of codes of ethics tend to be slightly more expansive and can be useful for officers. Instead of having the code just as an attestation of what they do, they can rely on it day to day.

Sharon Dowey: Thank you.

The Convener: I have a question about whistleblowers. In the past, the committee has done quite a bit of work on mental health and policing, in the context of both the growing demand on police officers from people with poor mental health and the toll that the job of policing takes on officers and staff. SIPR has been particularly active in that area. We know the toll that a misconduct or disciplinary process can take on everybody involved.

I am interested in the position for whistleblowers. Do the bill's provisions provide enough support for whistleblowers? If they do not, what else should be included in the bill to address the issue? For example, should there be an independent organisation for whistleblowers in Police Scotland and the SPA? If so, should that organisation potentially be the PIRC?

I will bring in Dr Lennon first and put her on the spot.

Dr Lennon: Unfortunately, I do not have any expertise in that area of the bill, so I cannot answer on SIPR's behalf. The only thing that I will say is that it would be advantageous to have an independent body, whether it sat within the PIRC or somewhere else. That is recognised as international best practice. I am afraid that I cannot comment on the mental health aspect.

Kate Wallace: We are supportive of the PIRC's role in handling complaints from whistleblowers. We have not considered whether an independent body should be established, but we could follow up on that in writing. We agree that it is really important that we treat whistleblowers right in the context of having a culture of transparency, trust and accountability, given that, as everybody on the committee knows, public trust and confidence in the police have decreased rapidly over recent

years. We will consider the point about an independent body and then get back to you.

Stephanie Griffin: I am not sure that I can speak on this subject with any authority, either. The only thing that I will say is that, in relation to the mental health aspects that have been mentioned, it is really important that we make the process as accessible as possible, but that might not be a matter for the bill because of the restrictions in legislating on areas of equality. My specific focus is on what already exists, such as the reasonable adjustment duty, but, beyond making reasonable adjustments for disabled people, it is very important that we make the process as accessible as possible for everyone who needs to access it.

Pauline McNeill: As an alternative model—an independent body—has been raised in the lines of questioning, I ask Dr Lennon what that would look like. Would there be police officers on the independent body? Most professions, rightly or wrongly, police themselves or have some representation. What would the independent body cover? Would it be misconduct or all complaints?

Dr Lennon: Are you talking about an independent complaints body rather than whistleblowing?

Pauline McNeill: What did you mean when you said that you favour an independent body? Did you mean for whistleblowing?

Dr Lennon: I favour an independent complaints body. I can perhaps speak more about that than about whistleblowing.

Pauline McNeill: It would be helpful for us to understand how that body would operate.

Dr Lennon: As is the case with the PIRC and all the other independent complaints bodies across the United Kingdom and as is the norm internationally, the police should be excluded from senior positions in the body. Otherwise, I do not think that we would have independence. There is also a continual debate on how far the police may be integrated in working within the body on inspections. My personal preference, to ensure independence, is for those members to be retired officers and not merely seconded.

As for what the body would look like, it could look quite like the PIRC. The issue is more about the functions. The PIRC is primarily, although not in all regards, a review body that looks at how the police have investigated complaints—leaving aside instances of serious injury and death, where the PIRC conducts the investigation itself.

I favour a truly independent complaints body that would be external to the police and would investigate all complaints. That is what the Police Ombudsman for Northern Ireland does and, as I

said, it is what GSOC—the Garda Síochána Ombudsman Commission—in the Republic of Ireland will start to do this year. There are obvious questions about the resourcing of such a body, but there are probably questions about the resourcing of the PIRC anyway. That would be the gold standard.

Pauline McNeill: You said that senior positions in an independent body should be taken by retired police officers and not by serving police officers. Do you accept that, as in all professions, particularly where there are complaints, people would need some expertise? Someone who has never served as a police officer would not understand what the job was. Surely an understanding of the role of a police officer in Scotland would have to be factored in when such a body was designed.

Dr Lennon: By law, none of the current complaints bodies across the UK—the Independent Office for Police Conduct in England or Wales, the Northern Ireland ombudsman or indeed the PIRC—can have serving officers in such roles. They have lists of people who are excluded from the most senior leadership, and they include senior officers. That is standard now.

I do not think that you need to have a former officer leading an independent body in order for them to understand police complaints. Comparable oversight bodies do not necessarily need to have somebody from the profession in those roles. If we look at the people who are or have been in leadership in the bodies across the UK jurisdictions, we can see that, in the PIRC, the last two have come from the Crown and that, in Northern Ireland, the current ombudsperson was previously the public ombudsperson. They certainly have lots of experience. I do not think that you could have an independent oversight body headed by the police.

Pauline McNeill: I was not asking about that. I was just asking whether you accept that there would need to be some representation from the police. Surely there needs to be some police expertise within such an independent body to understand the role of a police officer.

Dr Lennon: I do not think so. Relationships are built across the landscape with the police and the other accountability bodies. We have a tapestry of accountability. There are arguments for involving former officers in investigations. They can perhaps help in understanding the culture and probe better at that level, but they should not be in senior leadership.

The Convener: I have a question for Stephanie Griffin. I am interested in the public sector equality duty in the context of the bill. Do you have any concerns about how the public sector equality duty

is implemented, adhered to and complied with in the context of police conduct and complaints? I know that that is a very general question, but an example might be what happens in relation to protected characteristics. I am interested in knowing whether there is anything that you feel it would be appropriate to raise in the context of the provisions of the bill that we are discussing.

11:00

Stephanie Griffin: Without getting into the specifics of individual cases, which I am not at liberty to discuss here, I note that there have been some very public cases where the provisions of the Equality Act 2010 have come into play as there has been discrimination as regards different protected characteristics such as race or sex. Those have been well publicised and I think that it is clear that there is an issue in relation to compliance with the 2010 act within Police Scotland.

It is difficult to legislate in that area for reasons that are related to devolutionary competence. The current code of ethics refers heavily to human rights instruments. That is not part of the Equality and Human Rights Commission's mandate in Scotland. The Scottish Human Rights Commission could maybe tell you more about that. However, I think that there is something missing in the existing code of ethics around the requirements of the 2010 act and the public sector equality duty.

The Convener: Recommendation 6 in the "HMICS Thematic Inspection of Organisational Culture in Police Scotland", which was published in December last year, is:

"Police Scotland and the Scottish Police Authority should reinforce the human rights and ethics-based approach for all policing activity."

I think that Victim Support Scotland's submission refers to that. It seems that different areas of work are all coming back to the same conclusions. I open this question up to all members of the panel. Will the bill in its current form address that recommendation and what we have just heard regarding the public sector equality duty?

Stephanie Griffin: At the risk of repeating myself, I note that the bill certainly contains provisions that will help. Equality and human rights go hand in hand. They are not completely separate things. They complement each other and they overlap in certain areas. There are provisions in the bill that have potential to help to meet the requirements of the Equality Act 2010 and the public sector equality duty. I have touched on some of those, but they include the need for involvement and reviewing the code of ethics. There is certainly potential in the bill to assist in meeting the equality aspects that I have raised

and—I do not want to overstep my mandate—probably some of the human rights aspects as well.

Dr Lennon: As I state in my written submission, the Scottish Human Rights Commission and possibly the Equality and Human Rights Commission should be added to new schedule 2ZA to the 2012 act, which specifies the persons to be consulted in respect to the code of ethics.

The Convener: That is a helpful point.

Kate, this is a big question but, given that Victim Support Scotland is such a front-facing organisation, I am interested in hearing your views on your experience of engaging with the PIRC.

Kate Wallace: That is a big question. As others have pointed out, particularly Dr Lennon, there is an issue around the perception of the PIRC's role from a victim's perspective. That is a challenge.

We recognise some of the challenges that the PIRC faces. I forgot to say that one reason why we are not in favour of the 12-month time limit is that, in our experience, it can take Police Scotland quite a long time to respond to the PIRC, which can also extend timelines.

However, we continually see victims having a very negative experience in relation to a range of things that I have discussed, including the length of time that the process takes, the communication with victims, and a real lack of understanding as to how the PIRC came to a decision having reviewed the handling of a complaint. Sometimes, when further evidence has come to light, the PIRC has reviewed a decision. However, if we went out and asked people who have been supported by VSS about their experience of the PIRC, the responses would not be positive, if that answers your question. I am not aware of a single case where the victim felt that the way that they were dealt with by the PIRC was satisfactory.

Russell Findlay: Dr Lennon, you said that you support a Northern Irish-style police ombudsman to deal with every single complaint, no matter how minor or how serious it might be. SIPR is described in our papers as a collaborative body that comprises Police Scotland, the Scottish Police Authority and 15 Scottish universities. However, it seems that everybody, including Lady Angiolini, is opposed to what you are proposing. Do the universities in the collaborative body that you represent universally support a Northern Irish-style ombudsman?

Dr Lennon: I am sorry—I should have been clear on that. That is my personal view and not the view of SIPR.

Russell Findlay: Okay. It is not really the official view of the umbrella body that you represent.

Dr Lennon: It is not.

Kate Wallace: I note that VSS is in favour of that as well.

The Convener: Okay. I am going to pull the evidence session to a close. Thank you all for joining us and for your time. It has been a really interesting session.

We will have a short suspension to allow a changeover of witnesses.

11:06

Meeting suspended.

11:13

On resuming—

The Convener: I warmly welcome to the meeting Chief Superintendent Rob Hay from the Association of Scottish Police Superintendents; David Kennedy, who is general secretary of the Scottish Police Federation; and David Malcolm, who is branch secretary of the Unison police staff Scotland branch. Thank you for your written evidence and for joining us today.

I intend to allow around an hour and a half for this evidence session. I will start with Chief Superintendent Hay and move across the panel.

I have a couple of questions about the proposed duty of candour. Do you think that the duty of candour, as set out in the bill, is sufficient in respect of ensuring the timely co-operation of police officers and staff in investigations? Is more required, or do you have a different view on the duty of candour? For example, one issue that has come up is whether it should include a duty of co-operation. There are a few sub-questions in there.

11:15

Chief Superintendent Rob Hay (Association of Scottish Police Superintendents): Good morning to the committee, and thank you for the opportunity to speak to you this morning.

On the duty of candour, our membership has considered the specific issue that, as things stand, most police officers will engage with an investigation and approach matters from a candid position. Putting the duty of candour into law leads to consideration of the sort of police officer who would potentially not do that. What level of co-operation can we try to achieve through the imposition of the duty of candour? I think that what is in the bill will largely achieve that. However, one consideration from our membership is how the duty of candour interacts with an individual's right not to self-incriminate in criminal inquiries.

Police Scotland describes itself as a human rights-based organisation. That places certain obligations—both positive and negative—on it. We would not want to see police officers, who, like any other member of the public, are innocent until proven guilty, being investigated for a criminal offence, taking the opportunity, on the advice of a lawyer, for example, to not provide further information—to exercise their right to silence, in effect—and then potentially to not be found guilty of any criminal offence, but sanctioned for failing to adhere to a duty of candour. There needs to be consideration of how those two things interact, and we need to be sure that we are not imposing restrictions on article 6 of the ECHR, on the right to a fair trial, any more than we absolutely need to in those circumstances.

I absolutely agree with the principle of the duty of candour, but care needs to be taken with the details of how it is enacted so that we do not have a situation in which there are three bites of the cherry, as it has been described to me. There could potentially be a criminal investigation, a misconduct investigation on the basis of specific events, and adherence to a duty of candour can be looked at if an officer has exercised the right to silence. Care needs to be taken with that, and that needs to be mapped out. However, generally speaking, if those potential conflicts can be ironed out, the duty of candour is positively received.

The Convener: Thank you. That is very clear. Perhaps the wording of the bill has to allow for that interaction between the duty of candour and the points about self-incrimination that you have set out.

I go to David Malcolm to pick up the same question.

David Malcolm (Unison Police Staff Scotland Branch): Thank you for the opportunity to come to the meeting and give evidence on the bill. That is very important to Unison, as we can see some of the considerations for the police staff whom we represent in Scotland.

It is proposed to enter the duty of candour into the regulations for police officers. That would not have the same impact on staff. Staff are contractual employees of the Scottish Police Authority, so an amendment would be required to our contracts and our code of conduct, which are separate. There is a concern for Unison that we would need to look at where that infringes on our members' employment rights. We are currently undertaking that consideration.

The Convener: I have a follow-up question. Have you taken soundings on the views of staff on the duty of candour proposal and the implications that that would have for police staff as opposed to

officers? Do you sense how popular that might be?

David Malcolm: Yes—absolutely. Our members tell us that they are being treated like police officers, but they are not police officers. They do not swear an oath of office. Why should they be considered in the same way? We already have policies and procedures in place for when someone is disciplined or comes under a misconduct investigation—that is the wrong phrase to use; that is for police officers. We have policies in place for when someone is being looked at by the professional standards department or even our human resources department. People go to disciplinary hearings. There is no right to be silent on matters; people have to give their account of things. We feel that employment law and everything that we have just now covers that.

The Convener: Okay. Thank you. That is helpful.

I ask David Kennedy the same question.

David Kennedy (Scottish Police Federation): The Scottish Police Federation did not believe that a duty of candour was required because we have not been made aware of any relevant instances. I have defended police officers and their conduct for over 20 years, and I am not aware of an incident in which somebody has not given a statement when they were required to do so. For us, the duty of candour insinuates that officers have been unwilling and dishonest, and we have certainly found that that simply has not been the case.

Rob Hay has pointed to the fact that an officer must, under law, be given the same rights as anybody else under article 6. That is the case. We feel that the duty of candour is simply not required. If officers were not being frank in giving statements and it was required, I would understand why people would want to have it in the bill, but the reality is that that has simply not been the case.

The last advice that we received for police officers was from the Crown Office. That was when an officer was accused of a crime. At that point, the Crown Office and Procurator Fiscal Service was quite clear that officers should not be asked to provide a statement because they might self-incriminate.

Up until this point, when Lady Elish Angiolini has looked at it, we have never had an issue with officers not being forthcoming. On the contrary, they have probably been more forthcoming in giving statements without speaking to a lawyer. Somebody might have said, “You don’t have to give a statement at this time,” but 99.9 per cent of the time, they do. I know of only one case, which has been in the public eye and is still going

through an inquiry. An officer has to understand whether they are a suspect, an accused or a witness. Once they know their status, they will provide the necessary statement. When that status is clarified, that is exactly what happens.

That is our concern. If candour is going to be introduced in the proposed way, we have to ensure that the article 6 rights and officers’ rights not to self-incriminate are maintained.

When we put that into context, we ask why we would need that duty in the first place. We expect all officers to be forthcoming and honest when they are spoken to about these matters. That is our position.

The Convener: Thank you for that. I understand what you are saying—you have set things out very clearly. The evidence that we have had so far suggests that there is support for a duty of candour, and that it perhaps reflects a robust approach to dealing with complaints and conduct issues, and transparency. Given what you have said, would the establishment of a duty of candour necessarily change what you have described? You do not see that there is an issue. I want to be clear about why a duty of candour would necessarily change that.

David Kennedy: Police officers swear an oath. They are honest individuals. The insinuation in applying the duty of candour is that they are not honest. That is our view. When they are asked to provide a statement, they will do. In general, that is what police officers do. For me, the duty is a big hammer to crack a very small nut. That is our concern—it is that simple. We have not had any issues with officers not saying what had happened in going through misconduct processes. The processes were in place. Unfortunately or fortunately, that is our view, based on what we have gathered from the years in which we have dealt with police officers.

If a duty of candour is to be introduced, we have to ensure that officers do not self-incriminate, because every law-abiding citizen has the right not to self-incriminate. It does not matter what profession a person is in; they have that right. To take that right away from police officers would not be right and would go against their human rights.

The Convener: Okay. Thank you very much.

I open it up to questions from members. I will bring in Katy Clark and then Russell Findlay.

Katy Clark (West Scotland) (Lab): Some of the witnesses on the previous panel were supportive of a completely independent complaints process, which they referred to as the gold standard. There have been concerns about the resource implications of such an approach in the past, but one witness on the previous panel made

the point that the same resource issues exist with the current PIRC system. What is your response to the proposal for an independent complaints process, which operates in several other countries? We will start with Chief Superintendent Hay.

Chief Superintendent Hay: One of the key challenges is how the public perceive police misconduct. As a society, we have a natural distrust of authority, and that can be quite healthy. From a layperson's perspective, there is probably a view that the police are marking their own homework when they investigate complaints. However, in my 24 years in the police—between them, our members, who carry out roles as assessors and chairs of misconduct hearings, including for gross misconduct, have several thousand years of experience—my experience has been that the level of investigation by the police has at times been disproportionately high in terms of how stringent those investigations have been.

I wonder whether the issue is genuinely about the quality of investigations or whether it is to do with the public's perception of how the police look at things. I do not think that the evidence is there to justify setting up and financing a new organisation. I will give some examples. Police Scotland recently re-vetted all its employees—23,000 people—and only nine issues arose as a result, only one of which required further investigation for any level of potential criminality.

The quality of the people we have in the police and the level of scrutiny that they are willing to expose themselves to are very high. That does not mean that we do not make mistakes, nor does it mean that the processes cannot be improved or that that experience cannot sometimes be bruising for people who are involved in it. However, just because someone does not agree with an outcome or it has been a difficult process for them, that does not necessarily mean that it is inherently unfair. There are always things that we can do to improve, but the Association of Scottish Police Superintendents does not think that the case has been made for an entirely independent approach.

Katy Clark: If we can put the resource issue to one side, would you have a problem with such an approach? It is not a question of whether a case has been made in relation to the police; independent complaints processes are being considered across a range of institutions. Is there any reason why we should not go down that path if the resource implications were equivalent?

Chief Superintendent Hay: We would certainly have no fear of doing so. The issue that I would raise relates to the challenge of the public perception of the PIRC. We hear people say, "We didn't like the response from the police, so the

PIRC has now looked at it, but who's in the PIRC? Oh, it's ex-police officers!" The conversation then becomes about whether the PIRC is properly independent.

If we are talking about investigating, the challenge is where the best investigators are. The answer is that they are in the police—they are either police officers or ex-police officers. If another independent organisation wanted good-quality investigators, it would be likely to attract ex-police officers, in which case we would be back having the same discussion about whether they were truly independent.

Katy Clark: Could I go to David Kennedy to get the federation's perspective? Would you have any concerns?

David Kennedy: No. Any concerns that we had would be about how an independent process would be set up. Rob Hay has highlighted the issue of who would be doing the investigating. In addition, you asked us to put resourcing to one side, but resourcing is a big issue.

For me and the SPF, another issue is that of who watches the watchers. If we had a totally independent body that, because of the way that the bill was written, evolved from the PIRC to become like another police force, that would give rise to the question of who would deal with that new body if it were to get things wrong? That is the concern. At what point do the dominoes stop? We would then have to look at that.

11:30

Our members do not have concerns about the way that the police are doing things at the moment. As far as we are concerned, they are starting to get the process more right from a fairness point of view. I understand that anybody who is looking at the present system from the outside might ask, "How is it independent if people are investigating themselves?" I can say that, for the police officers who are investigated, the process is very thorough. The misconduct process is horrendous for them and is in itself a punishment for those individuals.

Whatever comes in, we want to make sure that it is fair and that it is done in the appropriate manner, but I do not think that we would have anything to fear if the Scottish Government or the committee thought that an independent process was the best way forward. However, I know that my colleagues in Northern Ireland have serious issues with the Police Ombudsman for Northern Ireland and that there are always problems with the investigators and how they treat the police officers, and that some of the inquiries seem to go on for years. If any kind of totally independent body were to be set up, all those issues would

have to be bottomed out before we went ahead with that.

Katy Clark: I would like to hear from Unison, if that would be okay with the convener.

Unison organises civilian staff rather than officers, although, increasingly, your members undertake many roles that would previously have been undertaken by police officers. How do you think that the issue relates to Unison? How does your complaints process operate? Would it be appropriate for civilian staff to be covered by an independent complaints process?

David Malcolm: There are a number of unanswered questions about an independent body investigating police staff. We are straying into the area of regulation. My members are all public sector workers, so we are looking at something that would be along the lines of the Scottish Social Services Council for the care staff we represent. How would such a process impact contracts and employment rights? What would it mean in terms of remuneration for staff who suddenly found their lives restricted in a way that the lives of other public sector workers are not? There are too many unanswered questions for me to have any confidence that that would be the right way to go.

Russell Findlay: Mr Kennedy, you represent the vast majority of police officers in Scotland, who act with the utmost integrity, professionalism and bravery. Just this week, we saw that bravery played out across the media in an incident in Paisley. However, we have also heard evidence from police whistleblowers—police witnesses—that the existing complaints system badly fails them when they have cause to raise concerns. Do you accept that the existing system falls short in that regard?

David Kennedy: Yes, I accept that it can fall short when a police officer complains about the police. That is where it falls short. When an officer wants to make a complaint, it can cause issues—we have had members come to us who have had various issues with that. I understand that.

Russell Findlay: Does that sometimes put the federation in a bit of a bind? If it is a blue-on-blue complaint, when an officer may be a whistleblower of some sort, the complaint will often be about other officers. Do you find that a bit of a conflict to deal with?

David Kennedy: Not really—no. We set it up so that different individuals look after each member. On our system, it is not possible for one officer to look at what the other officer is dealing with. That is all noted and recorded, if anybody were to look. I do not have an issue when we have an officer complaining about another officer.

Where it gets complicated is when legal issues arise. For instance, if we give one officer a lawyer and the other officer then wants a lawyer, at that point the federation would be funding two lawyers to represent two officers. More than anything, that is when it becomes an issue for us. There is no issue when we have to deal with two sides. That does not cause a conflict.

Russell Findlay: We have seen cases already in the public domain that have cost huge sums of money to settle and, according to the officers involved, that was needless. They wanted a resolution and it could have been happened much more quickly and efficiently. A report that HMICS produced in December 2023 says:

“Misconduct and grievance processes are perceived as lacking openness, transparency, fairness and pace of resolution. There was a general lack of trust in these processes, and we found they are having a direct and often damaging short and longer term impact on individuals and teams”.

That pretty much reflects what you have just acknowledged. Would any part of the bill support your members who find themselves in that position?

David Kennedy: A question was just asked about an independent process and that could support somebody who is making a complaint. The problem with the conduct regulations is that they have never been invoked as they should have been. The 1996 conduct regulations were adversarial, which meant that, at the end of a hearing, officers were fined. We had officers being fined for being in debt and it was just ridiculous to give them a fine and put them in a worse position than they were before the misconduct.

The 2014 conduct regulations came in on the back of the Taylor reforms in England and Wales. The problem is that they have never been enacted properly as they should have been. If misconduct regulations are to work, we must learn from them. That is so important. They are now seen as a punishment and there is no learning for the service from any of the misconduct outcomes. That would assist the processes when they get them in place.

As the current misconduct regulations are laid out at the moment, they would do the job properly. However, when the service looks at an issue with an officer, the problem that we have is that it investigates it as if it were a crime, which it should not do. It then investigates it at the top level and not at the bottom level. It should be looked at the lowest level first so that you get people around the table, you get a resolution, and you sort it out. That would be particularly beneficial for a lot of the cases you are talking to me about with officers who complain about officers. That is not how it is dealt with. The adaptation of the current

regulations causes the biggest issue in how they are processed.

Russell Findlay: One issue that is a bit of an elephant in the room is the potential cost of the legislation. The initial financial memorandum put the figure at £1.4 million or thereabouts. The latest figure from the Scottish Government is approximately £5.8 million, which is more than 300 per cent higher. Yesterday, the convener of the Finance and Public Administration Committee, who is a Scottish National Party MSP, said that the Scottish Government knowingly presented to the finance committee

“figures that it knew were completely inaccurate”—[*Official Report, Finance and Public Administration Committee, 7 May 2024; c 52.*]

The SNP justice secretary denied the charge but, clearly, it is of significant concern. Do any of you have any insight into whether that £5.8 million is realistic, whether it is likely to go higher and what it might mean for policing generally?

David Kennedy: I believe that it is unrealistic. I do not believe the figure has looked properly at the actual cost of an investigation from start to finish and how it affects the service. It has not taken cognisance of the salaries of the people who are investigating or of the time that is lost and the money that is wasted while officers are taken off the street and not allowed to be in the community or deal with the public. It has not taken cognisance of the legal costs that then come off the back of that investigation.

We have tried to look at the average costs and it is difficult to get that figure, but I have members whose legal bills have been anything between £20,000 and £70,000 for one individual. That is just the legal bill. If you take their wages and the investigation that takes place, the figure is probably at least five times what it would cost the service.

Russell Findlay: Based on that estimate, you are thinking of five times £5.8 million, potentially?

David Kennedy: Yes, absolutely.

Russell Findlay: Again, that is pretty speculative.

David Kennedy: Yes. It is totally speculative because you would have to look at each case to see how much it has cost and how much time was wasted. The public and the communities have lost officers. When we reported back on the financial memorandum, we said quite clearly that the numbers are made up and have no value.

Russell Findlay: Is that view shared by ASPs?

Chief Superintendent Hay: Yes, Mr Findlay, it is. I would hate to put a figure on it, but when you look at mapping out what David Kennedy has just

described about the true opportunity cost that is lost on top of the high likelihood of more legal representation, it is potentially likely to be far in excess of that £5.8 million.

Russell Findlay: David Malcolm, would you like to respond?

David Malcolm: Yes, I would like to respond to that. I certainly have not had any engagement with anyone on the figures but, in hearing David Kennedy say that, I consider how long investigations take when members of my union have been suspended for more than two years and the cost and the legal implications of that. It reflects what David Kennedy has said.

Police Scotland likes to measure capacity and talks about freeing up capacity, but it loses capacity by not moving and expediting the processes. The higher number sounds more likely to me.

Russell Findlay: Sticking with costs and specific to your evidence, Mr Malcolm, you said that the proposal for civilian employees to come under the duty of ethics and fundamentally change their employment status would interfere with their existing employment rights. They would become a regulated workforce in the same way as police officers. Your written submission made a useful comparison, saying that you would not treat non-medical National Health Service staff as you would treat doctors and nurses. The last line caught my eye. It says:

“Should any change of status be imposed, remedying such disparities would be a matter of urgency for Unison.”

Reading between the lines, that sounds expensive. It sounds as though Unison would bang down the door of the SPA saying, “Each and every one of our members who is subject to these new regulations deserves a pay rise.” Is that what that means?

David Malcolm: You have that correct. As I said earlier, we are looking at a regulated workforce and we would expect remuneration in comparison with other public sectors for that.

We are concerned and have spoken briefly about whether we need to take legal advice. Do we need to legally challenge that? The situation could lead to changes to contracts. Does that proposal infringe on employment rights? If it does, employment rights are a reserved matter for Westminster and that enters into section 35 territory.

Russell Findlay: Would an easy fix be to amend the bill to preclude civilian staff?

David Malcolm: It would be, yes.

Russell Findlay: Are you actively lobbying the Government on that?

David Malcolm: I would be, yes.

Russell Findlay: Was there a conversation about that between Unison and the Government prior to publication of the bill?

David Malcolm: No. I think that we had our first engagement on the issues earlier this year, because up to that point, the consideration was that it did not include staff. Then representations were made by people who felt that it should include staff.

Russell Findlay: I wonder whether the £5.8 million includes the potential for this dispute. I do not know if you would know that.

David Malcolm: I would not know that, but I suggest not.

Russell Findlay: Okay. Thank you.

Rona Mackay: Mr Kennedy, I was interested in your response to the convener's questions about duty of candour. I do not know whether you are aware of the evidence that we have heard in the past few weeks. I would like to turn the dial back to the experience of police under disciplinary procedures and the public. Quite honestly, that evidence was pretty shocking.

You are on record as saying that you do not think that there is a need for the bill. How does that square with what we have heard? I appreciate that it is a minority of officers who were involved in some of the things that we have heard, but are there no aspects of the bill that could be used to improve the experience of victims and witnesses?

David Kennedy: Various aspects of the bill will help victims and witnesses but I look after the police officers, whom the bill will mostly affect.

11:45

Rona Mackay: Some of the evidence that we heard was from police officers.

David Kennedy: Yes. I cannot disagree that a lot of those police officers will have their own experiences. However, I have also dealt with a lot of them and, although some issues were bottomed out, some were never bottomed out for some of those officers.

My point is that the current regulations are not used as they should be. That is why we say that the bill is not needed if they are used properly. When the misconduct regulations were released, we also had the performance regulations. They have never been used.

Rona Mackay: Whose responsibility is it to use them?

David Kennedy: Police Scotland is responsible for that and they do not use them. When the 2014

regulations were laid in Parliament, the performance regulations were also laid. In the past 11 years to date, only three officers fully went through those performance regulations and only for their capability, never for their performance.

The whole point of the new regulations was to look at how to change behaviour. Are we using them to punish people or are we using them to change their behaviour? That has never been done correctly. That, for me, is the most disappointing fact. The whole purpose of the 2014 regulations was to make sure that things were done correctly and to make sure that it was fixed at the point at which somebody made a complaint. That has never happened. They have never done that. They have set the bar far too high in the misconduct regulations.

To be frank, they are not even looking at the performance regulations. They were set out to be fair and also have an incentive so that, if people do not perform they could ultimately lose their job. Those regulations are not getting used. Those who wrote the regulations said that, when they came into play, 85 to 90 per cent of the issues that we would see would be performance issues, not conduct issues. It has never happened.

Why has it never happened? It has possibly never happened because Police Scotland does not have a performance department; it has a conduct department. The regulations have not been pushed enough. The legislation that was passed all those years ago has failed and has not been used properly.

Our biggest concern is that the bill is coming in but it is—correctly—based on the evidence of what people have had and felt. If the performance regulations had been used as they were originally set out to be used, I do not believe that we would be here now.

Rona Mackay: Chief Superintendent Hay, I am sure you want to respond to that.

Chief Superintendent Hay: Yes. That quote from HMICS probably highlights some of the issues. The service is excellent at attributing personal responsibility but, without the ability to reflect on organisational responsibility, we see a lack of progress under the performance regulations. That is quite stark given that, although we have had low numbers of misconduct issues, the number of performance issues in the same period is vanishingly small—almost zero. We are saying that all those police officers were bad and it was all their fault, but that there was no wider organisational responsibility about how we trained and equipped them to do the job that we asked them to do.

I will give an example. I know that the committee will have heard about and discussed the Rhona

Malone case. The supervisory officer involved in that clearly made sexist comments but, until 2021, Police Scotland had no equality, diversity and inclusion training. The organisation needs to be able to reflect on its responsibilities. Rather than being incredibly good at identifying individual officers who have done wrong, we need to be able to ask, “How are we equipping people to do right?”

Process and procedure are one side of misconduct. The other part is culture. It is difficult for a legislature to legislate for culture, but that is at least 50 per cent of the challenge that we have here.

Rona Mackay: Did I hear you correctly when you said that there was no equality and diversity training before 2021?

Chief Superintendent Hay: Yes.

Rona Mackay: I am surprised by that. I sat on the previous Justice Committee when the issue was being talked about and I understood that that was being done, but you have said that it is not. Who is ultimately responsible for the process being carried out properly? David Kennedy has pointed out that it is not.

Chief Superintendent Hay: Ultimately, the chief constable is responsible, but it is the leadership’s responsibility to make sure that the fundamentals are in place so that police officers can rise to the challenge of the very challenging role that we ask them to do and are supported to do it right. When they do not get that right, it is about looking candidly at whether we have not equipped them properly or whether there is something fundamentally wrong with that police officer.

I know about the E, D and I training, because I am a former head of training at the Scottish Police College and I introduced it in 2021. I also oversaw the largest influx of probationers into the service since 2007. When we have a course of 200 or 300 passing off the square, not one of those officers wants to go to their work and do a bad job; they all want to go out there and serve the public to the absolute best of their ability. What happens to them afterwards? How do they end up misconducting themselves or not performing at the required level?

We need a much franker examination of the organisational circumstances. If we are to succeed in what we want to do, that responsibility needs to be as apparent as the individual responsibility that rests with officers.

Rona Mackay: David Malcolm, do you want to comment on this?

David Malcolm: If I am correct, your question is whether any aspects of the bill would work for police staff in terms of discipline. I feel that, in

Police Scotland, we have highly trained, knowledgeable human resources professionals, whom I represent. They deal with police staff. They should be allowed to deal with the discipline matters correctly, but they tell me that they feel overridden quite a lot by senior police officers and the professional standards department. The system should work already. A code of ethics would not make any change to that. We need to focus and make representations to the SPA in its scrutiny that HR should have that power and lead with it.

Rona Mackay: We have heard in evidence about use of non-disclosure agreements. What do you know of that? Is that taking place?

David Kennedy: It absolutely takes place. Non-disclosure agreements are written regularly for any case that goes to an employment tribunal—it is called a COT3 agreement. That takes place. Anybody who comes here and says that non-disclosure agreements are not taking place is not telling the truth.

Rona Mackay: Do you have a view on that?

David Kennedy: Our view has always been that people should not have to write non-disclosure agreements. Certainly, the federation’s point of view is that it is down to the individual officer—we have told them that. If they do not want to sign a non-disclosure agreement, they should not need to sign it. Unfortunately, however, Police Scotland will not necessarily agree to go to a full employment tribunal unless the officer signs an agreement.

Chief Superintendent Hay: Similarly, we believe that non-disclosure agreements preclude organisational learning. Ultimately, taking aside the individual circumstances of any case, the goal must be embedding organisational learning to learn from our mistakes. Policing is a human endeavour and mistakes will occur. However, we should take those mistakes and use them to make a better and more effective service. If we cannot discuss the circumstances that have given rise to any particular aspect of misconduct, how can we learn from that and embed that learning?

Rona Mackay: I presume that a non-disclosure agreement means that certain people cannot discuss the case.

Chief Superintendent Hay: Exactly—that is what I am saying. That is why we are unsupportive of non-disclosure agreements.

Rona Mackay: You are unsupportive.

Chief Superintendent Hay: Of non-disclosure agreements, yes. They should not be used.

Rona Mackay: But they are happening.

Chief Superintendent Hay: They should not be.

Rona Mackay: Whose responsibility is it to ensure that they do not happen?

David Kennedy: It is Police Scotland's. Police Scotland's legal department is responsible for that activity. Right now, in 99 per cent of legal cases that are settled, the officer will sign a non-disclosure agreement, and that officer will not be able to speak about what happened with that employment issue. Otherwise, they will not receive anything. Some officers sign it because they just want to put a close to the process. That does not prevent us from speaking about it, which we have pointed out to officers, but those agreements are there and are real and are happening right now.

Rona Mackay: David Malcolm, does it affect staff?

David Malcolm: Yes. I have knowledge that staff have signed non-disclosure agreements or COT3 agreements, as Mr Kennedy referred to. That precludes us from being able to discuss issues that we see of discrimination within the organisation.

Rona Mackay: Thank you.

The Convener: Before I bring in Sharon Dowey, I will come back to the point about training and performance. I was interested in your exchange with Rona Mackay on that. I get quite exercised about the issues around training and how that links to performance, and the link to some of the issues about the bill that we are looking at today.

We referred earlier to HMICS's inspection of organisational culture. The chief inspector's report on that came out last year and made some recommendations. This is possibly putting you on the spot a little, but recommendation 3 said:

"Police Scotland should ensure that the probationer training syllabus is more reflective of actual frontline demand".

Recommendation 4 said that

"Police Scotland should prioritise the completion of an organisational maturity assessment of continuous improvement"

and organisational learning, which we have spoken about. What is the process for those recommendations being actioned by Police Scotland? I am interested in anything that you can share with the committee on that report.

Chief Superintendent Hay: Typically, in response to any HMICS report, an improvement plan would be put in place and the actions within the recommendations would be assigned to specific departments to carry them out and discharge them fully. For example, the one about probationer training would go to our learning,

training and development department. My colleague Chief Superintendent Alan Gibson is in charge of that. I know that probationer training is a key element that the department is looking at.

Because probationer training for us is a 92-week journey, people tend to focus on the first part, when the probationers are at the Scottish Police College. In fact, the HMICS report describes that as a really good environment for people coming into the service. We need to make sure that, in the subsequent weeks, when they go back to the division, they receive appropriate support and training and that the quality of the training and experience and of embedding people into the service is commensurate with what we would hope for. Right now, our challenge in ensuring that that happens is to do with the challenge around police officer resources on the street.

The Convener: I have one final point. The first recommendation in the report relates to improving "leadership behaviours across the organisation".

I was interested in your comments on equality and diversity training being resumed in 2021. Was the change in the delivery of equality and diversity training anything to do with the amalgamation of the eight forces into one? As I understand it—and from Rona Mackay's reaction, this is her understanding, too—that is a key part of probationer training in particular.

Chief Superintendent Hay: Probationers have always received that equality and diversity training as part of the initial training course. When we amalgamated in 2013, there were more than 10,000 different course descriptors for training products. The first part of the Police Scotland journey was about consolidation and standardisation, and a number of training things fell in priority.

ASPS has pushed the service for some years in that space of equality, diversity and inclusion. The previous president of ASPS before me was a former chair of the Scottish Women's Development Forum within Police Scotland. We pushed heavily into the sexism and misogyny piece. I am a former chair of the force's network for LGBTI allies. We have challenged the service on support to LGBTI officers in the service. We have always seen this as an area that the service has needed to develop.

I am pleased to say that, although there was certainly a gap and a huge strategic risk while that annual refresher training was not offered, the service has now picked up that baton and has started to move forward at pace in the area. That is encouraging and is definitely a positive development.

The Convener: Does what you have helpfully set out have a bearing on misconduct, performance and complaints, so that there is a direct link to the provisions of the bill?

12:00

Chief Superintendent Hay: Yes. All those things help to set the culture in the organisation. I highlight the point that David Kennedy made at the start that we have seen improvements in PSD and in the organisation's internal culture. The service has had to react to some of the cases that I know the committee will have heard about. The level of reaction is probably more genuine and authentic than I have seen in the past, when the response was perhaps more defensive.

There is a greater level of examination of how we can change the culture of the organisation and move on by, for example, making that code of ethics come to life within the organisation and highlighting the standards of professional behaviour. In terms of things in the bill that are broadly supported by our membership, putting the code of ethics on a statutory footing is a good thing and would be well supported.

The Convener: David Malcolm, do you want to comment on that before I bring in Sharon Dowe?

David Malcolm: For police staff, training on equality, diversity and inclusion is probably quite lacking. Staff no longer receive in-person inductions. Any new members of staff who come in will receive an online presentation, whereas that used to happen in person. I used to attend that myself. That in-person talk and engagement about why the role is important is lacking. Instead, people simply do something online. On some occasions, I have heard of people doing the induction nine or 10 months after joining the organisation. Equality and diversity feeds into that.

You asked about how recommendations are implemented. I often comment to my colleagues that Police Scotland will set up a meeting to have a meeting. That is the culture. There is inaction because of a large number of on-going meetings to discuss how we will do things. I think that Police Scotland has seized on the idea of the code of ethics because it solves a lot of issues for the organisation, as it will not need to decide how to implement certain things that it is failing to do. David Kennedy has referred to the performance measures. Police Scotland can deal with the issues and improve in other ways without needing the bill.

The Convener: I will bring in Sharon Dowe and then Pauline McNeill.

Sharon Dowe: I return to the financial memorandum. Russell Findlay has already

commented that the costs have gone from £1.4 million to £5.8 million, which is a huge cost. We have heard comments about whether legislation is required. Earlier on, David Kennedy said that officers are investigated at top level instead of at bottom level. From some evidence that we have heard, it sounds as though, if investigations took place at bottom level first, cases could perhaps be dealt with through misconduct or a disciplinary procedure without becoming criminal cases. We have also heard about officers going through a criminal case, being acquitted and then coming back to misconduct proceedings.

Do we need to go back and look at the current policies, procedures and processes in Police Scotland, perhaps update them and implement them properly? David Kennedy also said that current regulations are not used in the way that they should be. Do we need legislation, or do we need to go back and look at the processes and procedures that are already there, implement them properly and possibly update them?

David Kennedy: Yes, absolutely—that is the case. The legislation and regulations that are currently in place must be adopted properly.

There are issues in the police service when, for example, an officer swears at a colleague. A supervisor can say, "Is that a breach of the peace?", and investigate it as a crime, with it going all the way to the Crown or fiscals to consider whether it is a breach of the peace crime. It then comes all the way back, with the Crown saying, "No, it is not. Deal with it as misconduct." In any other employment situation, somebody would just deal with it. It would not go to the Crown to confirm whether it is a crime. We see that with a lot of low-level issues in the police service. They are not dealt with at an appropriate level. The police service will say, "If it is deemed to be a crime, it will have to go to the Crown and we will have to come back to it." That is the way it is.

Changing that would allow managers to deal with it at that level and just say to people, "Can we please have an apology there? Do not speak to a member of staff like that." The matter could be perhaps dealt with. With misconduct, everything is looked at as gross misconduct. The whole point of the new regulations was to deal with a situation at the lowest level, deal with it at source and fix it. Then, if somebody had a performance issue, you could move to the performance regulations and say, "Your performance is not correct here. A process is in place for you to make sure you fix your performance and make sure it does not happen again." We would save a lot of money. We would sort it for both individuals: the victim would get satisfaction because it would be resolved at an early stage, and the individual who caused it would get fixed. If the individual did it again, it

might be different. Managers might look at it and say, “You have already been through performance, but you are not improving. We will now look at misconduct or gross misconduct.”

However, we do not do it like that. It is top level first and bottom level last. Sharon Dowey is right. If we sat down and looked at what we have in place, we could fix a lot of these issues.

The case with Rhona Malone was solely down to one thing: the non-disclosure agreement. If the service had not forced that on her, it would have been resolved at the very beginning. That is another example of the amount of money that this has cost the service and the public purse; it also costs people’s health, which is one of the biggest things but with no obvious cost on it. Many police officers now go through the misconduct process and through the criminal process and then have to leave the service not because they have been found guilty of misconduct but because what the system puts them through absolutely destroys them. That cost has never been flagged up in any of this.

I absolutely agree with Sharon Dowey. If that was the decision of the committee and the Government, it would be extremely good.

Chief Superintendent Hay: The question needs to be framed in terms of objectives. I broadly agree with David Kennedy about whether new legislation is functionally necessary. We represent a range of superintendents, including those in senior management positions in the PSD. My colleagues do not come to me and say, “We definitely need new legislation to deal with the issues of gross misconduct in the service.”

Colleagues recently undertook an extensive campaign on standards of professional behaviour, seeking to embed that in the day-to-day life of the service to make expectations apparent and explicit to officers. They have started to publish the anonymised outcomes of gross misconduct on the force intranet so that officers are clearly aware of the sorts of things that could cost them their jobs. They are leaning in to improve things within the current framework.

The challenge that exists for us, as a service that is based on policing by consent, is the damage that has been done to the reputation of policing by previous scandals and, often, things that have happened outwith Scotland. There is a question about what is sufficient to satisfy the Parliament and our oversight bodies that we are taking the necessary steps and about what is sufficient to embed public trust and confidence. Functionally, if the current regulations were applied better, if we were able to better identify issues of performance, if we were more open about where the organisation has contributed

towards failings and if we were more open to organisational learning, we could absolutely improve in that context.

Sharon Dowey: David Kennedy mentioned the case of Rhona Malone. We heard from a witness who was put on restricted duties and told that he was a danger to the public but was not informed why. He went all the way through a criminal case and was acquitted, by which point he had already taken early retirement.

Why do you do the criminal case first and not do a misconduct or an internal disciplinary investigation? It probably goes back to your procedures but, if that had been done at the time for him, it would have been found that there was no evidence, it would have been dealt with internally and court time would have been saved.

David Kennedy: Unfortunately, the law is quite clear. With police officers, you always have to see first whether a crime has been committed. The advice from the Crown Office to Police Scotland is that it should not do any misconduct investigation until that is known. It can run a parallel investigation, but it will be asked to stop prior to the case going to court. I can understand that.

If you look at conduct in general at low level, you can see officers going through court for things that, if they worked in any other line of work, they would not be going through court for. It is just because they are police officers. They go through a process and they end up in court. It might be for a breach of the peace or whatever, but, in any other profession, it would not go to court and would be dealt with as misconduct. If the police service could get to that point, we would save so much time and money.

Another issue is that the Crown will sit on a case for so long, with the police waiting for a decision to be made, which causes an issue for the officer who is sitting and waiting. Under the current misconduct regulations, the timeline is supposed to be 35 days from start to finish. That is how long it should take from somebody being told that they are being investigated to being at a hearing. The 35 days allows for that. It depends on the circumstances, but that is not a long time. However, let us be honest—we know that it is not taking 35 days. The vast majority are probably 365 days or more. That is how long it takes. We could do a lot of things within the current regulations that would fix a lot of the issues that have come to this committee.

Sharon Dowey: You talked about trust, openness and transparency. Why would somebody not be told straight away why they have been put on restricted duties?

David Kennedy: We have raised that concern in the past. Officers in the past have been told,

“We know you have done something wrong but we will not tell you what it is. You know what it is.” Ten years later, they still do not know what they have done wrong. Perhaps the issue came through intelligence and the service does not want to reveal a source. However, we have found that to be a common issue.

We have found the same issue with drug testing. Officers are asked to provide a sample, but they are not told who is accusing them or where the evidence has come from to say that they have taken drugs. That is one of the questions that officers always have, and if it was answered, somebody might be able to say, for instance, “I was not even there. That is not true.” It is a big concern. The service hides behind the current regulations, which state that, on certain occasions, the deputy chief constable does not have to give certain information out. I believe that they hide behind that when saying that they will not give that information.

There could be a legitimate reason at times. Perhaps somebody close to the individual has passed on the information, and the service does not want to divulge that source. However, it is alarming that somebody can sit in that position, go through a trial, be found not guilty and then go to misconduct. There is no misconduct. Serious questions must be asked about why they were ever there in the first place.

Chief Superintendent Hay: The criminal investigation usually takes precedence because, exactly as David Kennedy has said, going to misconduct first could potentially prejudice a further criminal investigation thereafter. There is capacity to run parallel investigations up to a certain point. We acknowledge that.

Having to go through the investigation, and the time that it takes, is a punishing process. Sometimes, it seems to take an inexplicably long time to get responses back from the Crown about what appear to be relatively minor matters before they can remit to the misconduct procedures themselves, which then start for the officers involved in that as well. There are areas of practice that could be improved, and that is certainly one.

For someone to be told that they are subject to misconduct but not to be told what and why should be the absolute exception. Perhaps source protection, as David Kennedy mentioned, is necessary in some circumstances, but I expect that to be the absolute exception with serious judgment on the proportionality of doing that, given the impact on individuals through that process.

David Malcolm: On behalf of staff, I note that I recognise a lot of what David Kennedy has said from the federation’s point of view. Police officers

investigate staff as though it is a criminal investigation. They are trained to do that. We would prefer that investigations into staff are carried out by staff, and we are leaning into that now. A review of the policies and procedures would be welcome, and we are trying to get that in place.

12:15

The first line of the code of ethics that is currently in place says that it is not a discipline policy. That was fought and won by Unison on behalf of staff because we could not see it coming in. However, last week, I asked someone to remove that from a letter because the letter said, “You have breached the code of ethics and that is why you are being investigated.”

My view as a representative, having gone into many cases with members who do not know the allegations that they face, despite making the best attempt to get the allegations from HR and the investigating officer, is that it is conducted like an investigation. The service wants to see the reaction as a member comes in and is told what they have done. By reviewing those policies, as we have suggested, we could get rid of that and run it better.

Sharon Dowey: Will the introduction of body-worn cameras take away a lot of the complaints, because you will have the video evidence?

David Kennedy: Absolutely. Across Europe and around the rest of the world, body-worn cameras are used and they take away the issue. Officers change their behaviour because they are recorded on video. It prevents a lot of malicious complaints from coming in. You can see what has happened; it is real and it is there. We welcome body-worn cameras for that, and we believe that that will save the organisation a lot of money.

Chief Superintendent Hay: We support the introduction of body-worn video. We are, clearly, a late adopter in the UK context, being the last force to roll it out. It will be a welcome addition to policing in Scotland once it is available to officers.

Sharon Dowey: Good. Convener, can I—

The Convener: I am going to bring in Pauline McNeill and then Fulton MacGregor, Sharon, but I will come back to you if there is time at the end.

Pauline McNeill: Good afternoon. I find the responses from David Kennedy and, in fact, David Malcolm about not being told what you have been accused of very interesting, given the previous panel’s remarks about the importance of human rights. It is a fundamental right, even under Scots law, to know what you are being accused of and who your accusers are, but that does not seem to apply here either to staff or to police officers.

David Kennedy: Police Scotland will say that it happens, because it is the beginning of a criminal investigation. I suppose that the officer is being told, “You are being investigated for a crime, but at this time we cannot tell you what it is or who has made the allegations.” If they were working in another environment, they would not be told anything at all. Because they work for Police Scotland, they have to be told so that they can be removed and put in a restricted post, because of the risk. In general, that is where the approach comes from.

An issue that we see—and it is not as bad as it used to be—is when officers are told that they are not being investigated for a crime but, because of information that somebody has given about them and which cannot be divulged to them, they still have to be moved. It is so alarming for officers to get that information, because they do not know why they are being moved or who has made the allegation against them. That affects their mental health; they become paranoid that every single person they work with and every single person around them might be saying X, Y or Z about them. I can understand why Police Scotland has to do that at times, but it is concerning.

Pauline McNeill: In my line of questioning, I am trying to understand what good this bill might do, what the gaps are and whether, if we were not doing what was in the bill, there is anything else that would need to be resolved. Would you be able to provide the committee with any details about the length of time that officers have been waiting for their court trials and so on?

David Kennedy: Certainly. We know that officers have been waiting for years, and we will have the details of how many.

Pauline McNeill: It would be helpful to have that information.

David Kennedy: We can certainly get that for the committee.

Pauline McNeill: David Malcolm, what range of staff do you represent? Do you represent public-facing staff, too?

David Malcolm: Yes. Our front-counter staff are public facing, and I would say that our call centres are public facing, too. They might not see people, but they speak to them and are the first line of contact. We have a whole range of staff all the way across the force; we have, for instance, members in forensic services who go out and meet members of the public. We have a lot of public-facing staff.

Pauline McNeill: I am just aware of your answers to the questions about the standards to which staff are held compared with police officers—what you have said about that is loud

and clear. Do the public make the same distinction when they phone Police Scotland, get a staff member and are not happy about it?

David Malcolm: I am not sure. The language that is used can become interesting when it comes to police staff. Even in this committee, we refer quite a lot to civilians, but that is a misnomer. Police officers are civilians, too; after all, the police are not a military organisation.

The distinction between officers and staff is a bit blurred. My Scottish Police Federation colleagues do a good job of including us all as one, and obviously I have to represent police staff, too. The distinction can be blurred, and members of the public are not always clear about it.

Pauline McNeill: David Kennedy and Chief Superintendent Hay, is there anything in this bill that you fully support and which you think is useful?

David Kennedy: The independence part is useful, as long as it does not interfere with the chief constable’s operational independence in investigations. Generally, though, as far as the bill is concerned, we feel that what we currently have is not used properly and we are throwing the baby out with the bathwater.

Chief Superintendent Hay: As I have said, putting the code of ethics on a statutory footing would do the service no harm at all.

Pauline McNeill: Oh, yes, you did say that.

Chief Superintendent Hay: It would place the on-going commitment to standards at the heart of how we go about things. Similarly, we would not fall out about the view of independence that David Kennedy has just outlined, again with the constraint that the chief needs to remain operationally independent.

We have discussed the issue of the barred list with colleagues. Although Police Scotland is, in the main, the only police force within Scotland, we recognise that the British Transport Police, the Ministry of Defence Police and the Civil Nuclear Constabulary have a footprint here, too, and understanding whether the barred list is the right thing to do has been the subject of discussion. We feel that the same thing could be achieved with a better and more exhaustive use of references, but if we are to go down the route of a barred list, it should not be accessible to the public as it is in England and Wales, given its purpose of ensuring that policing does not take on anybody who is unsuitable for the role.

In the broader policy context within which we operate, we have the Rehabilitation of Offenders Act 1974 as well as the sentencing guidelines, which talk about persons under the age of 26. The average age of a police officer is 24. Indeed, with

new recruits, it skews much younger than that; we tend to have a lot who are much younger and then one or two much older recruits. If one of those officers were to be subject to misconduct proceedings and then have their name on a public barred list for ever, that would not be conducive to their welfare. Because they would no longer be suitable for policing, they would have to exit the service and then lead a life outside it. The distinction between what is the public interest and what is interesting to the public will need to be clear when it comes to a barred list.

Pauline McNeill: In cases where police officers go before the court and are not convicted, should any other misconduct issues related to those cases automatically be dropped? I hear what you are saying: you do not want to do things the other way round, as Sharon Dowey has suggested, because it might prejudice a court case. Obviously, we would be talking about a higher court here. If there is no conviction, why should the police continue with a misconduct disciplinary procedure against that police officer? After all, the court has already determined the matter.

Chief Superintendent Hay: Because there might still be a breach of the professional behaviour standards. That is what the misconduct procedure looks at. If you are convicted of a crime—

Pauline McNeill: But does it prejudice the court case, then?

Chief Superintendent Hay: If the case had been looked at in its entirety, if witness statements had been elicited and so on, that is the argument that would likely be advanced.

Pauline McNeill: I see, but it just seems grossly unfair to be tried for the same offence by the court and by the police. It might be fair enough, if it were not for the issue of timescales. We have heard loud and clear really alarming evidence from Craig Naylor about the level of distress and mental ill health among the officers concerned. Everyone is prepared to defend themselves and deal with the charge against them, but it is the duration that they have to wait. Should there be clear timescales in legislation that Police Scotland has to abide by?

Chief Superintendent Hay: Timescales would be welcome, and they should be extended to the Crown Office with regard to charging decisions. The key challenge is that things sit with the criminal allegations against the police division for an extended period, and that is in no one's interests.

Pauline McNeill: That was helpful.

I am trying to get my head around the range of complaints and misconduct that could be covered by the bill; indeed, I asked the previous panel the

same question. I am trying to understand this by highlighting the example of a case from a long time ago—the Emma Caldwell case—and asking whether, in your view, it would happen today. In that case, the police investigation has been exposed as being thin and as having gone down the wrong lines of inquiry; indeed, the family themselves could clearly see that the police were investigating the wrong people. Would this bill help in any way, or would other provisions prevent that happening today?

It is all very well talking about hypothetical situations, but we have examples of cases where the police have failed. I know that you cannot account for what happened all that time ago, but I am just trying to understand this. To me, as a legislator, there does not seem to be much point in passing this bill unless it can fix what has gone wrong.

David Kennedy: You are absolutely right—it will not change that.

Pauline McNeill: It will not change it.

David Kennedy: That is right. Family members would need to have another way into an investigation in order to ask the questions that might need to be asked at that time. That is really difficult, but, in relation to the example that you have highlighted, I do not think that the bill would change things.

Chief Superintendent Hay: The Emma Caldwell case is hugely complex. Obviously, I am cognisant of the fact that a public inquiry has been announced into it, so I will reserve detailed comment.

However, I think that the experience of similar circumstances would be different today, because the service—and, indeed, society—has moved on from some of the predominant issues involved. That said, as far as offering a route to a grieving family that is not satisfied with police conduct is concerned, there is a light here that we should shine on ourselves to see if we can improve, and it is not clear to me that the bill offers that.

Pauline McNeill: Lastly, on the question whether an independent body is the answer, this is my concern in that respect—and I have to say that I do not have a view on this, myself. An example suggested in our papers relates to someone making a complaint because a police officer has used too much restraint. That must be a difficult judgment for anyone but, if you have no experience of restraint, how can you make a judgment on that sort of complaint against a police officer? That is the question that I have with regard to whether a completely independent body is the answer.

12:30

David Kennedy: I do not disagree. Independence came up in Scotland, because we moved from eight police forces to one. Before that, another police force would come in and investigate the police service in question. That approach worked; in fact, our experience of police officers being investigated by their peers is that they probably get a harder time. Indeed, it is interesting to see what has happened in England and Wales, where a lot of Dame—now Lady—Elish Angiolini's recommendations are getting turned back. They are now reversing what she recommended, because they have realised that a lot of it does not work.

Given that we have not passed this bill and given that the regulations have not been changed, we have a good opportunity to see whether what is proposed is necessary and whether it will achieve what we are trying to achieve. It is all about public perception. Are the public satisfied with how the police are being investigated? Have things been transformed to the nth degree when the result comes out? Those questions must be asked. What are we trying to achieve by this?

We certainly feel that, in that respect, a lot of the influences came from outside Scotland. Some of the changes that we are looking at and the scrutiny that the police have come under did not arise from cases that happened in Scotland. After all, 99.9 per cent of police officers are just doing their job—and they are doing a great job. We therefore welcome your comments.

Pauline McNeill: Just to mention another example, I note that Wayne Couzens had a prior record. Chief Superintendent Hay, you said that Police Scotland already vetted officers. Would that approach root out something like that?

Chief Superintendent Hay: There was a UK national revetting of every police officer in Scotland, and our portion of that was the 23,000 police officers within Scotland. I would absolutely say yes to your question, and that kind of revetting needs to be carried out routinely to make sure that that continues.

Again, as far as my membership is concerned, the number of police superintendents and chief superintendents who are subject to misconduct and gross misconduct investigations is vanishingly small. Gross misconduct numbers, in particular, are proportionally much smaller than the number for the rest of the UK and are of an extent that you might expect.

The Convener: Before I bring in Fulton MacGregor to ask some final questions, I will pick up on the exchange around the barred list, which we have heard some comments on. I would like to get panel members' views on the benefit of a

barred list and on the proposals around an advisory list.

Chief Superintendent Hay, I invite you to start, and then I will take the other panel members in turn. Do you have other comments to make on ASPS's position on the proposals for a barred list or an advisory list?

Chief Superintendent Hay: We do not necessarily disagree with the proposal, but we think that the aims could be achieved through other means, such as better provision of employment references.

I am aware of a desire on the part of the force to match the broader UK position on this, but there needs to be a wider consideration of the impact on individual officers. I cannot understand the proportionality and the rationale for allowing any member of the public to go in and look at the College of Policing lists. The tool is meant to be for policing to ensure that people do not get a job in policing, but, if people are going in and looking at those lists, it could have an impact that means that someone does not get a job at all. As someone who has served as a chair on misconduct panels, I know that, even when people are dismissed from the service, there is often significant mitigation and sometimes quite tragic circumstances are associated with that. You do not see that within a barred list—that is not expressed; all you see is that the person has left the service.

The interests of balance in this are about the overall objective, which is to make sure that we protect the public and that people who should not work in policing are not working in policing. It is not simply a list of potentially salacious details about people who may then find their lives being probed for more information.

The Convener: Thanks. That was helpful.

David Malcolm: I will be quite succinct, because, as far as I am aware, a banning list for staff is not being considered. Certainly, no one has engaged with us on that. However, if that was to become a consideration, I would certainly have a view on it. I will go back to what I raised earlier, which is that the proposal would create a regulated workforce with different provisions, and we would have to challenge that.

David Kennedy: We do not agree with a barred list, particularly if the public is able to view it, which Rob Hay has noted is the case in England and Wales. I am not aware of any police officer who has resigned from Police Scotland and has then gone on to have a job in another police service.

There have been issues in England and Wales because, sometimes, people live, work and socialise in three or four different police areas that do not talk to each other. Clearly, they allow

officers to leave to get rid of them, and the officers then transfer to other police services.

Scotland is robust in that regard. In recent months, the police have begun to give proper references. They used to say only that a person joined the police and left the police—that was the whole reference. Now, we are seeing references that describe what the individual has gone through in the service, and they publicise that.

As Rob Hay pointed out, the barred list paints a picture but does not give the whole story. It is not needed in Scotland. I am genuinely unaware of any officer who has been given another job and it has transpired that they should not be in that job because of what has happened within the police service. That should come down to proper vetting taking place.

If a barred list was introduced, we would be totally against it being an advisory list. If an allegation is made about someone before they retire, they could end up on an advisory list without going through any process. If a barred list is to be introduced, it must be solely for police purposes, with a potential employer having to ask the service if someone is on the barred list. We would not want it to be something that is in the public domain. As David Malcolm said, there would be an outcry if that were done in relation to a police staff member.

Russell Findlay: Convener, may I ask Mr Kennedy a brief question?

The Convener: Okay, and then I will bring in Fulton MacGregor.

Russell Findlay: Mr Kennedy, so that I understand correctly, did you say that you were not aware of any cases of officers leaving Police Scotland and getting jobs elsewhere when they were subject to outstanding complaints?

David Kennedy: No, I said that I was not aware of them getting a job in another police service. I am aware of officers who have attempted to join other police services, having left Police Scotland prior to the misconduct being finalised, but they have not been appointed, because that other service has written to Police Scotland to ask whether the officer has been through the misconduct process.

Russell Findlay: There have been quite high-profile cases in which what we are talking about has happened. It is a matter of public record that two Police Scotland chief constables left while subject to quite serious complaints that were unresolved, and ended up getting jobs in policing elsewhere in the UK.

David Kennedy: The police services elsewhere in the UK should not have employed them. They should have asked the correct questions—that is

the point that I am making. When police officers leave the service, their potential new employer would have to write and get a reference from Police Scotland. That is what happens with police officers.

If other employers know that someone they are thinking of employing is subject to an on-going complaint process, there is a question for them to answer. If that is publicly known—

Russell Findlay: Does that not bring us back to the point about complaints going unresolved? The person presumably cannot be penalised by a new employer, because the complaint dies upon their exit from service.

David Kennedy: Absolutely. They cannot be, but that new employer can certainly ask what has happened with their previous employer. In the cases of some officers whose misconduct has been proven, the Scottish Police Federation has had to write to their prospective employers to explain the circumstances around that, and those officers have been given jobs, because the reasons behind their misconduct have been understood.

Having a barred list would be unfair to an individual who was on it because they left before the complaint process had been finalised, and, therefore, even though they had not been found guilty of misconduct and no crime had been proved, there were automatically barred.

Russell Findlay: Is that what is proposed, though?

The Convener: Sorry, I know this is an interesting point, but I am going to have to bring in Fulton MacGregor.

Fulton MacGregor: You said that almost reluctantly, convener—you have to bring me in?

Good afternoon. I have a couple of quick questions to give you an opportunity to give your views on parts of the bill. First, what are your views on the provision that introduces the ability to commence or continue gross misconduct proceedings against former officers?

David Kennedy: I can understand people's reasons for wanting to do that. However, it is a waste of time. It will cost a lot of money, as we have seen down in England and Wales. Ultimately, a lot of officers resign prior to the end of misconduct proceedings because of the process. In some cases, because of how the pension works, they retire, if they have attained sufficient years' service.

I do not know of any other profession that would continue misconduct proceedings against somebody who had left their employment. We are not a regulated profession. Regulations govern us,

but we are not like doctors or nurses; we do not have a licence to police—it does not work like that for police officers. The amount of money and time that would be wasted in the proposed process would far outweigh the result that it is trying to achieve.

David Malcolm: Obviously, I cannot comment with regard to police officers because I do not represent officers. However, with regard to staff, as I have said before, if you want to pursue someone, there are other means. If the matter involved a criminal act, a court would pursue it. If it concerned an employment matter, employment rights mean that, if you have left the job, that should be the end of it.

Chief Superintendent Hay: The issue seems rather academic, given that the ultimate sanction for gross misconduct is to lose your job. If somebody is already out of the job, what does putting them through that process achieve?

People wrongly equate the misconduct process with the criminal justice process. Someone being subject to criminal proceedings is justice having its go. However, we are talking about a professional misconduct process and, as I said, the ultimate sanction would be that you lose your job. If you have already left the job, what are we trying to achieve?

There are unanswered questions about timescales. How long could we go back? As I have said already, things change in society and in organisations. Do we risk applying today's lens to things that happened a decade ago and beyond that? We would raise some real challenges about that.

Fulton MacGregor: What are your thoughts on Lady Elish Angiolini's recommendations? These include, for example, introducing accelerated hearings when the evidence is not disputed or when the subject officer admits the misconduct, and holding those misconduct hearings in public. I know that there are a few points to address in there.

David Kennedy: Hearings are 35 days from start to finish under the current misconduct regulations, if someone admits misconduct. I think that that is quite speedy. If somebody admits misconduct, the current regulations are meant to take them to that nth degree quickly.

I do not agree with an accelerated process for probationers. That risks targeting individuals who have just come into the job and, perhaps through no fault of their own, have had an allegation made against them and sacking them because they are a probationer. I do not agree with that. Everybody should go through the same process. It is fair and transparent and meets the ends of natural justice.

What was the last point that you asked about?

Fulton MacGregor: It was about hearings in public.

David Kennedy: We would not want the hearings to be in public. For me, that would be like a public flogging of an individual. The information that we get from England and Wales suggests that that has not helped. Actually, it probably catapults the issues surrounding that individual into the public domain, and I do not see the purpose of doing that.

Ultimately, under the current regulations, if a complainant wishes to be at a misconduct hearing, they can ask to be there and the chair can allow them to be there. They can be there right until the point that the officer receives the finding and the disciplinary outcome. Also, police appeal tribunals are in public—ones that are coming up are now being advertised—so, if the process goes to that nth degree, people have the opportunity to attend.

Under the current proposals, with the high bar that is set for gross misconduct, I am concerned that we will have a circus for the media and a circus for lawyers to make a lot of money and people will not get the justice that people think that that will achieve.

12:45

Fulton MacGregor: That is helpful. David Malcolm, do you want to come in?

David Malcolm: The proposal is not applicable to staff. Misconduct of staff is an employment matter and a contract matter. You would infringe on the right to privacy, which is a fundamental human right, if any of that were to be held in public.

Fulton MacGregor: Thanks. Again, that is helpful. Rob Hay?

Chief Superintendent Hay: I welcome anything that expedites the process. However, as David Kennedy said, the existing regulations provide for that. We need to understand better why that has not been successful and try to fix that first.

On the holding of hearings in public, I have served as a chair and as an assessor on misconduct panels. That process often requires the disclosure of personal information by officers—sometimes quite tragic information, sometimes medical information. It would be fundamentally wrong to force officers to recount that in public. It feels more like a desire to put them in the stocks rather than to have a balanced process that is ultimately about ensuring the standards of the service and protecting the public. I do not see anything to be gained from that and, in fact, potentially quite a lot to be lost.

The Convener: I would like to pick up on one point. Is Police Scotland able to comply with the 35-day timeframe for hearings? Is that manageable?

David Kennedy: It can comply with that timeframe. The investigation is the part that would probably make it longer. If somebody is given a form that tells them that there is an allegation of misconduct against them, they are more than likely to accept that, and, if they accept it at that point, the process would take 35 days. Of course, if the allegation involves gross misconduct, and they face losing their job, they might have to think about it.

The Convener: That is a helpful clarification.

This has been an interesting session, and we have covered quite a lot. Thank you for coming along today; we appreciate your time.

That concludes the public part of our meeting, and we will now move into private session.

12:47

Meeting continued in private until 13:13.

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