



OFFICIAL REPORT
AITHISG OIFIGEIL

DRAFT

Criminal Justice Committee

Wednesday 15 May 2024

Session 6



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CRIMINAL JUSTICE COMMITTEE

18th 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 Dowey (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:

Phillip Chapman (Police Investigations and Review Commissioner)
Sharon Clelland (Police Investigations and Review Commissioner)
Angela Constance (The Cabinet Secretary for Justice and Home Affairs)
Jackie Dunbar (Aberdeen Donside) (SNP) (Committee Substitute)
Justin Farrell (Crown Office and Procurator Fiscal Service)
Michelle Macleod (Police Investigations and Review Commissioner)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 15 May 2024

[The Convener opened the meeting at 09:30]

Criminal Justice Bill

The Convener (Audrey Nicoll): A very good morning, and welcome to the 18th meeting in 2024 of the Criminal Justice Committee. We have apologies from John Swinney. I welcome Jackie Dunbar to the meeting.

Our first item of business is an oral evidence-taking session on two legislative consent memoranda—LCM-S6-43 and LCM-S6-43a—that have been lodged by the Scottish Government in relation to the United Kingdom Criminal Justice Bill.

I welcome to the meeting the Cabinet Secretary for Justice and Home Affairs, Angela Constance, and Scottish Government officials. Ms Alison Morris is head of serious organised crime policy—divert and deter; Kristy Adams is a policy officer in the organised crime unit; and Ruth Swanson is a solicitor in the equalities and criminal justice division.

I refer members to paper 1. I intend to allow up to 20 minutes for this evidence session.

I invite the cabinet secretary to make some opening remarks on the legislative consent memoranda.

The Cabinet Secretary for Justice and Home Affairs (Angela Constance): Thank you, convener, and good morning.

The draft International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2024 is an order in council made by His Majesty under powers in the International Organisations Act 1968. The nature of the reserved-devolved divide means that, where privileges and immunities relate to devolved matters in Scotland, the function of advising His Majesty in relation to the order is devolved. The purpose of the instrument is to give effect to the obligations relating to immunities and privileges for those matters that are within the legislative competence of the Scottish Parliament for two international organisations: the European Space Agency and—[*Interruption.*]

Forgive me, convener. Is there a problem?

The Convener: Forgive me, cabinet secretary, but may I put you on hold for a second? There is a slight procedural query that I am going to clarify.

I think that we have slightly jumped ahead. We will let you get to the correct part.

Angela Constance: Just one moment.

The Convener: I confirm that we are looking at the LCMs.

Angela Constance: Right. My apologies, convener.

The Convener: Not at all. These things happen. Back to you, cabinet secretary.

Angela Constance: I very much welcome the opportunity to discuss the two legislative consent memoranda that have been lodged so far to give effect in Scotland to parts of the UK Government's Criminal Justice Bill, which is a large and complex bill that covers numerous different policy areas.

Although we support the overall purpose of the bill to keep communities safe, we have not accepted every measure offered. In some cases, we already have our own legislation in place; in other cases, we simply do not see the need to legislate in our very different legislative and delivery landscape. However, where we could see benefit to Scotland, we have brought forward an LCM and a supplementary LCM, and we have plans to bring forward a supplementary LCM in the next few days and a further supplementary LCM when the UK Government tables additional amendments at the House of Lords report stage.

The Scottish Government proposes legislative consent to clauses 1 to 4, 16 and 28 of the bill, in so far as it makes provision within the legislative competence of the Scottish Parliament.

The first LCM that we have lodged relates to the provisions covering the criminal liability of bodies corporate and the provisions around access to driver licence records. The identification doctrine is a long-standing element of criminal law that allows for corporate liability in situations where a person representing the directing mind and will of an organisation has committed an offence.

Last year, the Scottish Government and Scottish Parliament supported the codification of the doctrine for economic crimes under the Economic Crime and Corporate Transparency Act 2023 extending to Scotland. The limitation to economic crimes in the 2023 act related to the scope of the relevant legislation.

Clause 16 of the Criminal Justice Bill, as amended, does not make any changes to the substance of the codification. Rather, it extends it to all crimes rather than economic crimes only. Clause 27 clarifies which organisations—including Police Scotland—can access the driver data, and

it enables the making of regulations to provide access to driver information held by the Driver and Vehicle Licensing Agency for all policing or law enforcement purposes.

The first supplementary LCM covers the provisions in clauses 1 to 4 of the bill relating to articles used in organised crime and electronic devices for use in vehicle theft. Law enforcement agencies throughout the UK have raised concerns that there are limited legal options to address the rapidly evolving tools and technology exploited by serious criminals. They report that they are increasingly encountering individuals in possession of articles where there is a strong suspicion that they are being used for the purposes of serious crime.

The measures in the UK Government bill therefore seek to prohibit the possession of certain specific articles used in serious crime through the introduction of new criminal offences. Currently, the list of articles comprises vehicle concealments, templates for the three-dimensional—3D—printing of firearms and pill presses. I am particularly pleased to see the measure to control access to pill presses. The Scottish Government and many key stakeholders, including Police Scotland, have been calling for such measures for some time.

The Scottish Government recognises that, for the measures in the relevant clauses to be successful, they should be introduced consistently across the United Kingdom. Therefore, we support their introduction. The proposed list of articles will be amendable via secondary legislation to ensure that it keeps pace with the evolving threat. The bill therefore contains a statutory duty for the secretary of state to consult Scottish ministers before amending the list of articles, regardless of the reserved or devolved status of the article in question.

While I am here, let me tell you about the further supplementary LCM that will come forward very shortly. We had hoped that the relevant amendment would have been tabled in the House of Commons in sufficient time for us to lodge a second supplementary LCM in advance of this committee meeting. The amendment was finally tabled on 9 May, and we hope that a further supplementary LCM will be lodged in the next week. That further LCM is simply a minor technical amendment to add the new organised crime offences in the supplementary LCM mentioned above to the schedule for the proceeds of organised crime as being indicative of a criminal lifestyle. I am sure that the committee would wish to support that approach.

I am happy to take any questions.

The Convener: Thank you, cabinet secretary.

I think that Katy Clark would like to ask a question. No? That is fine. Do any other members have any questions?

Russell Findlay (West Scotland) (Con): Yes, I do—thank you, convener.

The LCMs relate to the UK Criminal Justice Bill. There is reference in the submission from the Scottish Government to a House of Commons debate on 11 January this year, and it says that the Scottish Government rejected clauses 11 and 12 of the UK bill, which relate to causing people to commit online self-harm. There have been tragic cases of young people harming themselves and even taking their own lives, having been coerced and manipulated by others to do so.

I see from *Hansard* that the application of the offence in Scotland was rejected by the Scottish Government. Given the importance of a consistent UK-wide approach to some of the other measures that have been adopted, as the Scottish Government's submission notes, can you explain the thinking behind that particular decision?

Angela Constance: Of course: I am more than happy to do so, Mr Findlay. That matter was considered very carefully by the Minister for Social Care, Mental Wellbeing and Sport, Ms Todd. You will appreciate the wide-ranging nature of the UK Government's Criminal Justice Bill. While many matters in the bill are considered by me, other specific matters covered by the bill are considered by other colleagues.

The matter was given very serious consideration by health colleagues. They will keep the particular issue under review, but they had considerable engagement on the matter with stakeholders, particularly those involved in implementing suicide prevention strategies. There were concerns about unintended consequences, such as potentially criminalising people who were merely trying to give support to people in distress. It is a complex and sensitive area, but I am advised that health ministers will keep the matter under review. They have concerns right now, but they will continue to consider the matter and see how issues evolve.

Russell Findlay: The only Scottish MP on the relevant committee did not say anything during the debate, as far as I can see from *Hansard*. The UK minister said that the Scottish Government was instead

"sticking with section 184 of the Online Safety Act for now."—[*Official Report, House of Commons*, 11 January 2024; Vol 743, c 163.]

Is it the case, then, that the protections in that legislation will be relied on instead?

Angela Constance: Yes: there is existing legislation that we would consider to be adequate.

The Convener: There are no other questions from members. Is the committee content to recommend to the Parliament that consent should be given for the relevant provisions covered by LCM-S6-43 and LCM-S6-43a?

Members indicated agreement.

The Convener: As the cabinet secretary noted, we are aware that there will be further LCMs, which the committee will consider.

Are members content to delegate responsibility to me and the clerks to approve a short factual report to the Parliament on the LCMs?

Members indicated agreement.

The Convener: We will now have a brief suspension to allow for a changeover of Government witnesses.

09:42

Meeting suspended.

09:44

On resuming—

Subordinate legislation

International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2024 (SSI 2024/Draft)

The Convener: The next item of business is consideration of oral evidence on an affirmative instrument.

We are joined by the Cabinet Secretary for Justice and Home Affairs, Angela Constance. From the Scottish Government, I welcome Susan Black, who is a senior policy officer in the civil law and legal system division, and Emma Thomson, who is a solicitor in the legal directorate.

I refer members to paper 2. I intend to allow up to 10 minutes for the evidence session. I invite the cabinet secretary to make an opening statement.

09:45

Angela Constance: Thank you, convener. I apologise in advance for any repetition. The draft International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2024 is an order in council made by His Majesty under powers in the International Organisations Act 1968. The nature of the reserved-devolved divide means that, where privileges and immunities relate to devolved matters in Scotland, the function of advising His Majesty on the relevant order is devolved.

The purpose of the instrument is to give effect to the obligations relating to immunities and privileges for those matters that are within the legislative competence of the Scottish Parliament for two international organisations. The first is the European Space Agency. The agreement between the United Kingdom and the European Union's space agency concerning the agency's sites and facilities in the UK was signed in 2013. It provides for the establishment and operation of an agency centre at the Harwell Science and Innovation Campus in Oxfordshire. The purpose of the order is to amend the International Organisations (Immunities and Privileges) (Scotland) Order 2009 to give full effect to the obligations relating to immunities and privileges under the agreement. The head of the Harwell campus and seven high-ranking officials who had previously not been protected by privileges and immunities are now covered, to the extent that is provided for under the agreement.

The second organisation that the order relates to is the European Organisation for Astronomical

Research in the Southern Hemisphere. The order retains schedule 15 of the 2009 order to reflect the provisions that are contained within the protocol for the privileges and immunities of the European Organisation for Astronomical Research in the Southern Hemisphere.

The privileges and immunities for the two organisations that I have mentioned are granted primarily on the basis of strict functional need. Importantly, the order contains an exemption to immunity in respect of road traffic accidents. The privileges and immunities are no greater than the extent of what is required to enable the two organisations and specified individuals who are connected with the organisations to function effectively.

Scotland's space industry and the work of Space Scotland is supported by a number of public sector bodies and agencies, including the European Space Agency. As the committee will be aware, the space industry makes an important contribution to Scotland's future economic growth. It contributes in excess of £4 billion to the Scottish economy. The European Space Agency is an important partner, providing support for research and significant funding. Orbex and Skyrora, companies that are based in Scotland, successfully secured a total of £8.5 million from the agency to develop world-leading small satellite technologies.

The order will ensure that we meet our international obligations, and it will help to support the future development of Scotland's space industry. A parallel order has been taken forward by the UK Government and is in force for the rest of the UK and for non-devolved Scots law. As a good global citizen, it is the responsibility of the Scottish Government to bring the order to the Parliament for consideration. I commend it to the committee.

The Convener: Thank you, cabinet secretary. I invite questions from members.

Russell Findlay: I will raise a small point. The meeting papers say that there has been some defective drafting of the order, which should be fixed. The papers say that the Scottish Government "intends to rectify" that at the "earliest opportunity".

Not so long ago—in fact, in March—the committee considered a Scottish statutory instrument that had the wrong date on it due to another Scottish Government error. The Delegated Powers and Law Reform Committee said that that date should have been corrected. That might or might not have been done—I do not expect you to know the answer to that, but I assume that it has been. I do not mean to sound too critical, but it is quite something that we have

had two fairly fundamental mistakes in papers that have come to the committee about orders and SSIs. What are your views on that?

Angela Constance: I appreciate Mr Findlay's irritation about the matter. The processes for the preparation of the orders are layered on layers of historical agreements and historical orders. The two errors that you have mentioned are either being addressed or they will be. My understanding is that the error related to this order is rooted in the original UK orders. Nonetheless, the errors will be addressed.

It is particularly complex that the order relates to the transfer of agreements over a period of a number of years into multiple orders that flow from the UK Government. However, I said that by way of context—I certainly ain't pointing the finger at anyone in that regard.

Russell Findlay: Does that refer to the error in this order?

Angela Constance: Yes.

The Convener: As there are no further questions, we move to consideration of the instrument. I am sure that I do not need to remind officials that only MSPs may speak in a debate on the motion. I invite the cabinet secretary to move motion S6M-12734.

Motion moved,

That the Criminal Justice Committee recommends that the International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2024 [draft] be approved.—
[Angela Constance]

Motion agreed to.

The Convener: Do members agree to delegate responsibility to me and the clerks to approve a short factual report to the Parliament on this affirmative SSI?

Members indicated agreement.

The Convener: I thank the cabinet secretary for joining us. I briefly suspend the meeting to allow for a change of witnesses.

09:51

Meeting suspended.

09:54

On resuming—

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

The Convener: Our next item of business is consideration of evidence at stage 1 of the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill. I welcome to the meeting Michelle Macleod, the Police Investigations and Review Commissioner; Phillip Chapman, director of operations; and Sharon Clelland, head of legal services, and I thank them for their comprehensive written evidence.

I refer members to papers 3 and 4. I should say that I intend to allow up to 90 minutes for this evidence session.

I will kick off with a question for the commissioner. I was interested to note in your written submission your comments on the proposal for a duty of candour, specifically on the issue of officers timeously producing an operational statement to ensure that an investigation can continue without undue delay, or with as little delay as possible. We know that that can be challenging. You suggest:

“A legislative duty of co-operation for police officers—and police staff—would compel police officers to provide operational statements and attend within a reasonable timescale for interview.”

You then give an example of when that has been challenging. You go on to say:

“Taking into account a person’s right not to self-incriminate”—

which we have discussed in previous evidence sessions—

“the duty should apply only to officers and staff whose status has already been confirmed as that of a witness”.

All of that makes sense, but I am interested in hearing more about where that particular proposal comes from. What are the blockages that have created the timescale issue that you are dealing with? Do you think that compelling someone to produce a statement would work in practice?

There were a couple of questions in there, so I will now hand over to you.

Michelle Macleod (Police Investigations and Review Commissioner): First, we welcome the duty of candour in the bill. Our position, which you have alluded to, is that we would wish there to be a statutory duty to co-operate with interviews, including in any investigations being carried out in relation to constables and police staff. We want that to be on a statutory basis, instead of its being part of the policing principles. We welcome the

fact that, in the bill, it has been specifically included in the policing principles, but we would like it to be enshrined in statute so that there is no dubiety.

The issue is that, although it is a policing principle and there is therefore an obligation on officers to provide a statement, we do not know what the sanction would be if an officer chose not to do so in certain circumstances. You are entirely correct to say that we have recognised that it would apply only when we had confirmed an officer’s status as a witness and that it would not be appropriate if they were subject officers.

The committee might be aware of a case, currently the subject of a public inquiry, in which there was a delay in obtaining statements from the officers. Since that case, we have not really had any issues with obtaining statements from officers where we have clarified that they are witnesses. Procedures were put in place following that case, and a memorandum of understanding and guidance now set out that police officers should co-operate and that, if they do not, Police Scotland might look on that as a conduct issue. There has been a change since the case that I mentioned arose in 2015, but we would still prefer a statutory requirement. I should say, though, that, even if it were in statute, the issue of what the sanction would be would still have to be considered, and we have raised that issue with the bill team.

Our additional request is that the duty should also cover police staff, particularly police custody and security officers, who have direct responsibility for persons in custody. They play a significant role in looking after the welfare of vulnerable people in the care of the police, which means that they are therefore likely to be witnesses in deaths-in-custody investigations. For that reason, we take issue slightly with the policy memorandum’s comment that they do not have the same powers and responsibilities as police officers. Given their role in custody matters, we think that they, too, need to be considered by the bill team.

As I have said, we welcome the duty of candour and the inclusion in the policing principles of the duty to co-operate, which spells out in no uncertain terms what should happen. However, as I have said, we would prefer it to be a legislative duty. I can confirm that we have not had any major difficulties with obtaining statements once we have clarified that the officers are witnesses; however, that is not to say that the situation could not arise, and I have to wonder what our remedy would be in those circumstances.

10:00

The Convener: I am sure that there is a very small chance of it happening, but is there a risk that an officer's status could change from being a witness to a suspect? That might present a slight challenge in relation to the duty of candour and compliance with a co-operative approach.

Michelle Macleod: That can happen in any case that we are investigating. A person might start off as a witness and, as the case proceeds, evidence might come to light that suggests that their version of events is not accurate, or evidence might come forward that implicates them. Throughout an investigation, we keep under review the status of a person, and whether there is evidence that gives us concern that they might become a subject officer or a person that we look at from a different perspective. We keep that alive in all investigations. People can change from being witnesses to being suspects or accused persons; indeed, the same thing happens to members of the public, too.

At every stage of the investigation, as we gather more evidence, we have to be aware of that. When we get to court proceedings—if it comes to that—issues of admissibility and fairness are taken into account, because of the rights of the officer or members of the public under article 6 of the European convention on human rights.

The Convener: Thanks for the clarification. I see that Phillip Chapman or Sharon Clelland do not have anything to add, so I will move on. I should say that I am also interested in some of the comments in your submission about safeguarding, but I will come back to that later.

I call Russell Findlay.

Russell Findlay: Section 5 of the bill seeks to broaden the PIRC's functions. Your organisation has commented that that

"would significantly impact on PIRC's budget and ability to operate."

I note, too, that in respect of section 12, your organisation has commented that, as a result of the right to call in complaints, the PIRC might

"become overwhelmed"

and that there would be

"further resource implications".

We have heard from other witnesses, including the Scottish Police Federation, that the financial cost of the bill has already risen according to the financial memorandum, and that they believe that the cost will be higher still. What is the PIRC's latest official assessment of the cost?

Michelle Macleod: Through our sponsor team, the PIRC submitted to the bill team estimates for

various provisions in the bill. Our difficulty in relation to certain provisions is that they are enabling provisions, and the final outcome or the content of those provisions is far from clear. We are still in that position.

You have alluded to one area—section 5—where it is unclear what the breadth and scope of the provisions will be. That puts us in a difficult position when trying to estimate what the financial implications will be for us. As far as the section 5 misconduct provisions are concerned, we have sought clarity from the bill team that our role will remain in relation only to senior officers and not to rank-and-file officers.

One provision being considered—it is not yet in the bill, but it is causing us concern—is the idea that we would present the cases. I am relaxed about our taking on the preliminary assessment of the case; the Scottish Police Authority currently does that, but we probably duplicate the process to some extent. We are relaxed about that; we will do the investigation, so there is no change there, and then we will recommend whether the conduct reaches the threshold of gross misconduct. We are familiar with that process, and there is only a small body of senior officers, so we hope that we will not have lots of such cases.

However, although we are not concerned about that, the thing that gives me cause for concern relates to recommendation 40 of the Angiolini review, on the presenting of cases—and it concerns me for two reasons. First, we are an investigatory body, not a prosecutorial body. If we are doing the preliminary assessment, carrying out the investigation, making the decision about gross misconduct and presenting the case, I do not know where the checks and balances would be in that system.

Russell Findlay: Would you rather see that provision removed from the bill?

Michelle Macleod: Yes, I would. We think that the responsibility should rest, as it does at the moment, with the employer—that is, the SPA.

Russell Findlay: However, if that does happen, it will come with a price tag, and we do not know what that will be.

Michelle Macleod: We do not know that, but we do know that officers in those situations always instruct counsel and I presume that, for parity, we would have to do the same. We have said to the Scottish Government that we would need an undertaking that it would pay for counsel's fees. In those circumstances, we would outsource the work to counsel and then seek recompense for that. Fortunately, we do not have many such cases, so we cannot have somebody waiting about to see whether a misconduct case comes

up. We would probably always have to outsource it.

That is where we are, but the more fundamental point is the one about checks and balances. People have asked about the PIRC's accountability in other areas but because, in that scenario, we make all the decisions and present the case, there is an issue with regard to checks and balances.

Russell Findlay: One of the non-legislative recommendations of the Angiolini review was that the PIRC should investigate all on-duty allegations of assault made against police officers. That has been happening since October 2021 and it has had a significant impact on your workload. Can you quantify what that has meant for the organisation in typical numbers of cases or as a proportion of your workload?

Michelle Macleod: Yes, I can provide headline figures and find further details. In 2021, the PIRC had 544 referrals, 78 of which went to investigation. In 2023-24, we had 834 referrals, an increase of 53 per cent.

Russell Findlay: Are all of those assaults?

Michelle Macleod: Sorry—no. Those are all of our investigation referrals, but the bulk are assaults. Of those referrals, 151 went to investigation; in other words, the numbers going to investigation have risen from 78 to 151—a 93 per cent increase—in that period. Primarily, they are article 3 assault cases.

Russell Findlay: In 2018, your predecessor, Kate Frame, raised concerns about the case of an innocent man who had been wrongly locked up after the police failed to check his identity. Police Scotland recorded that as a quality-of-service complaint. In a letter to the committee before my time here, Ms Frame said that Police Scotland's handling of the case

“suggests an endeavour to keep matters hidden.”

Other witnesses have told us about Police Scotland keeping serious alleged crimes in-house and not sharing them with the Crown or the PIRC. Many of those same people—whose evidence I am sure that you will have heard—have absolutely no faith in the PIRC in respect of their complaints. Since those days, can Police Scotland now be trusted to fully disclose such cases as they should?

Michelle Macleod: That case came to light because of a PIRC complaint-handling review, which raised the concerns that led to the case turning into a criminal investigation and being reported to the Crown Office. The PIRC identified that through a complaint-handling review process.

There are more safeguards now than there were at that time, because the PIRC review and policy team now undertakes audits of Police Scotland's complaint handling. We had an audit of the triage system in 2022, which was reported; it looked at how Police Scotland had categorised cases, whether the categories were correct and whether there was sufficient quality of service and regularity in procedures. As part of our audit process, the PIRC carries out more checks on the category that Police Scotland has allocated to a particular case, and the police now have an obligation to report to the PIRC all allegations of assault and unlawful detention under articles 3 and 5. They do not have discretion in relation to that.

One mechanism that a person can use if they feel aggrieved is a complaint-handling review. Sometimes, we cannot look at something, because we deem it to be criminal, and we will go back to Police Scotland to ask that it be made into an allegation of criminality and then referred to us. There is more rigour in relation to ensuring that such matters are looked at.

Russell Findlay: There was another case subsequent to that one in which a female police officer from the Moray area made multiple internal allegations of an employment nature and a criminal nature, which were kept in-house and withheld from the relevant authorities. That officer has also been publicly critical of the PIRC. Although the PIRC unblocked that case by identifying and investigating those allegations, which, up until then, had not been done, the subsequent report into the entire case has not been published. Can you explain why that would be?

Michelle Macleod: I am aware of that case, and my understanding is that the PIRC investigated it as a criminal case. A number of allegations were made that were investigated from the investigations side of our house rather than the complaints side, and it was all reported to the Crown Office. The reason that it has not been published is that our reports to the Crown Office cannot be published—they are confidential to the Crown. The Crown will consider whether, in relation to any of the allegations, there is sufficient evidence and will then decide whether to instruct a prosecution.

We provide all the evidence to the Crown. We are not able to put that into the public domain, because, as with any other criminal investigation, it is confidential.

Russell Findlay: I do not want to put words in your mouth, but, as the PIRC, are you now confident that, if similar cases arose now or in the future, Police Scotland would treat them properly?

Michelle Macleod: I am more confident that it would. Since Dame Elish's original report, the levels of communication and liaison are now in a different sphere than they were before. All layers of ranks are involved, and the director of operations is in almost weekly dialogue with the head of the professional standards department. We find Police Scotland to be very accessible; it is probably much more open than it was previously, although that was prior to my time.

Therefore, I think that we are in a better place. Although I do not think that I will ever be in a position to say with 100 per cent certainty that we know everything, I still think that we are in a far better place than we have been previously.

Russell Findlay: Thank you very much.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning. My first question is for Phillip Chapman. Witnesses have raised with us the time taken to complete investigations and the lack of transparency in the system. One witness said that the system does not work for police officers or for members of the public. Do you think that the bill does enough to address the issue of lengthy timescales and the problems associated with that? Perhaps you could explain your thinking on that and say whether you think that things are going to improve, because we heard that that was definitely a problem.

Phillip Chapman (Police Investigations and Review Commissioner): Thank you for your question, which I will take in two parts. Internally within the organisation, on the back of Dame Elish's recommendations, we recognised that there was a need to categorise investigations and to give more precedence to investigations of cases in which there was a death, in relation to which families and next of kin expected to get an answer to their questions quickly. The resource that we have covers all the various aspects of categorisation, including criminal investigations and referrals from the police.

Two years ago, we carried out a performance data review, which allowed us to look at organisational functions and identify what the pinchpoints were. With regard to our category A cases, which invariably involve a death or a significant incident, we now have a system in place whereby, on receiving such a case, we assess it, put it to investigation and report within 90 working days.

Rona Mackay: Did you say 19 days?

Phillip Chapman: Nine zero working days. In the context of policing oversight across the UK, that is a hugely challenging deadline for us to meet. In the past year, we have reported all our category A cases to the Crown or back to the policing body that referred the case to us in that

period of time. We have 100 per cent compliance in that regard.

In relation to the other cases—category B cases, which are usually police referrals that involve serious incidents, and category C cases, which are higher volume less serious criminal allegation cases—we have timescales of 120 working days for those to be reported. In essence, again, we are meeting that target. We are sitting at about 85 per cent for reporting those cases to that timescale.

10:15

Internally, we have taken cognisance of Dame Elish's recommendations on the non-legislative aspect in trying to reshape how we progress matters. We understand victims' distress. We have systems and practices in place in terms of family liaison officers, when there are families and next of kin who need to be kept up to date. We recognise that, ultimately, the Crown Office and Procurator Fiscal Service directs our investigations, particularly in relation to deaths, but we have very good liaison, which the commissioner spoke about, in the form of monthly meetings between us, the Scottish fatalities unit and the head of the criminal allegations against the police division, all of which are within the Crown Office.

If there are specific cases where families feel that there are contentious issues or they wish to make representations, we can discuss those earlier so we can get a swifter remedy to ultimately get answers to their questions.

Rona Mackay: Therefore, your workload has increased considerably since the Angiolini review. Did you take on more staff to deal with that?

Phillip Chapman: Yes. Overall, since we took on the responsibility for article 3 matters in October 2021, we have taken on nine full-time equivalent staff to take on that challenge. As of 1 April this year, the Crown has issued a statutory instruction to the police to refer all article 5 matters—article 5 relates to unlawful detention—so those cases will start to come to us as well. It is likely that we will not see such a significant increase from that because those incidents are very few and far between. However, that is there and we need to keep a weather eye on that to ensure that that does not have a disproportionate effect on the workload.

Rona Mackay: Thank you for that.

Sharon Clelland, are non-disclosure agreements routinely used in your work?

Sharon Clelland (Police Investigations and Review Commissioner): With regard to the PIRC, we have not had a case where we have had to use a non-disclosure agreement. Whether any

are used between a policing body and its staff is a private matter with regard to the resolution of a civil claim in the employment tribunal, so that is not something that we would have any input to.

Rona Mackay: That is fine. His Majesty's Inspectorate of Constabulary in Scotland already has responsibility for reviewing the policies and practice of Police Scotland and the Scottish Police Authority and to co-ordinate that with the PIRC. Do you think that that whole arrangement is working well? Does anything need to be done legislatively to improve that?

Michelle Macleod: We have regular meetings with all the inspectorate bodies, including HMICS, and I have regular contact with the chief inspector. With regard to policies and practices, we agree with the provision in the bill, but I recognise that, with regard to thematic reviews, inspections and audits, HMICS has primacy.

On where we could add some value, HMICS is a relatively small team with limited capacity. It has quite a full programme and, sometimes, it is asked to do work at short notice by the cabinet secretary if something is high profile. HMICS tends to be very strategic, so it will look at culture, diversity and other organisational issues, such as vetting, on which it has done a recent inspection.

Mainly through the complaint handling side, we will see repeat complaints about certain areas—they tend to be operational areas. At the moment, we can do two things. We can raise the matter with Police Scotland and say, "We are seeing a lot of complaints about this particular area. Can you look at your policies to see whether they need to be updated, revised et cetera?" We can and do do that, and Police Scotland is receptive to feedback from us. Alternatively, we can say to HMICS, "There is something here that you may wish to look at." I have done so with the previous chief inspector. However, capacity sometimes means that it is not able to address the issue. Without that power, I cannot do anything in a thematic or holistic way, which would probably be more beneficial than considering and making recommendations about one complaint only.

In the past, there were some cases that involved the execution of warrants and the system around that. If I had had the power then, I would have probably said, "Let's have a look at how the police are categorising their warrants and at what their policies and procedures are and have a review of that."

Another area, which is sensitive and difficult, is what happens when police officers have to break devastating news to families. Quite a few of our complaints arise because people feel that that was done insensitively or that the initial interaction was poor. Again, we have had quite a number of those.

Category A complaints are the most serious—they are mainly about deaths. That is an area where you think, "Is the training right? Have they got the right people doing it?"

Those are the areas in which we could add some value. We would not have the resource to do many of those things, but the reviews team has now built up skills by doing audits into the complaints handling, so there is scope there. In addition, our Centurion system has been upgraded to allow us to put in keywords and identify common complaints. If we see something come up over and over, we can look at what the issues are and at whether they can be solved easily by speaking with the police, or whether we could add a bit of benefit and learning around the issues by doing the review.

I appreciate that that is HMICS's territory, and that it is an expert in it. We would always go to it first and ask whether it wants and has the capacity to look at an issue. If not, the legislation suggests that we would speak to the chief constable and say that we would like to do something in that area. We are supplementing HMICS.

Rona Mackay: What is the SPA's role in that? Do you interact much with it? Where does it fit into the picture?

Michelle Macleod: We do interact with the SPA. In fact, I will ask Phillip Chapman to speak about the CCC.

Phillip Chapman: The Scottish Police Authority has the complaints and conduct committee, which holds the police to account around how it deals with complaints. We have now been invited on to that committee to present to it and provide dialogue around the recommendations and the thematic topics that we are identifying. That is a quarterly meeting, which the head of reviews and the head of investigations for the PIRC both attend and at which they give presentations.

That gives us the ability to feed into the committee any topics that keep coming up in relation to complaints handling or investigations, which then allows it to drill into the detail with the seniors in PSD to ensure that it has a clear oversight of everything that is on-going. That is because, although the complaint comes to the PIRC, the police will have handled it originally. Our saying how many complaints are—and are not—reasonably handled, and what the recommendations and thematic topics are, allows the committee to scrutinise how the police are responding to the recommendations.

The Convener: I have a supplementary question about policy, practice and procedures. In one of the evidence sessions with witnesses with lived experience, we heard from a witness in relation to the provision of family liaison officers.

We heard that her family had not been given support by a family liaison officer in the circumstances of an unexplained death—you are probably aware of the case. I found it quite distressing to hear that.

You have spoken about highlighting to Police Scotland issues that you are seeing emerge around good practice. Would the onus be on the PIRC to flag issues of the type that I have just set out, or would it perhaps be more on HMICS?

Michelle Macleod: If the provision is implemented, it could be either. As I said, I would always give primacy to HMICS. However, if there were issues about FLOs generally—if a lot of correspondence from complainers came in about a FLO not being appointed at the right time or, as in some cases that we have had, about the relationship between the FLO and the person not working out well—we might be able to use the provision to look at that in more detail.

One issue that relates to the complaint-handling review is that people sometimes have unrealistic expectations of what it can do. The purpose of a review is to determine whether the complaint was handled to a reasonable standard. In doing that, the team will look at whether the police response addressed the crux of the complaint, whether the rationale to uphold or not uphold it was based on evidence and whether that took account of practices and policies, and, in some cases, whether the right test was applied. We will then decide whether we felt that the complaint was dealt with to a reasonable standard. If we believe that it was not, we can make recommendations to the police. We can say, “Can you reassess this complaint? Can you interview these officers? There are parts of the complaint that are deficient. Can you address that?”

The bill would provide us with some more teeth in relation to those recommendations. Currently, we have no sanction if the police choose not to implement recommendations. I would say that, in most cases, we work well with the police, they do that, and they identify learning points. However, I think that people who come to us sometimes expect that we can investigate the substance of the complaint and maybe direct the police to make further investigations. However, we cannot do that in the complaints-handling sphere.

Sometimes, even when we find in favour of an applicant and say that the matter was not handled reasonably and make recommendations, they are still disappointed because the expectation—the form asks what they expect—was that the investigation would be recommenced. We have no powers to do that. We have to try to manage those expectations at the very outset.

Some of the provisions in the bill would give us more scope to look at identifying common themes from the complaints, and maybe to provide more reassurance to a person that it is not just about their complaint, but we would look at it and see whether we could change procedures in a policy that applies to more complainers.

We had a case recently in which the police changed their domestic abuse protocol in response to a complaint that we had in which risk factors were not taken account of. I will not go into the details of that; it came through our investigation side. The police have now changed that and added in something.

We can do that on an ad hoc basis but, obviously, having a power to look at things more systematically and holistically would be preferable.

Sharon Dowe (South Scotland) (Con): Good morning. From your comments so far and the evidence, it seems that communication with the police has improved a wee bit. Sections 9 to 16 of the bill relate to functions of the PIRC. The Scottish Parliament information centre briefing says that those sections

“provide the PIRC with additional powers, including extra functions in the complaint handling review process; being able to call in complaints, review practices and policies”

of Police Scotland and the SPA.

Last week, we heard evidence from the Scottish Police Federation. David Kennedy said:

“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.”—[*Official Report, Criminal Justice Committee*, 8 May 2024; c 31.]

Are you finding that in your communication with Police Scotland when you do your investigations? Are there regulations or policies and procedures that are not being used? Have you come across that?

Michelle Macleod: On the conduct regulations, we deal only with the conduct of senior officers; we do not deal with rank-and-file conduct issues. I am not sighted on the issues that arise at that level, because we deal only with the misconduct of senior officers. I do not deal day to day with the conduct regulations, so I would not be able to comment informatively on those questions. I do not know whether anybody has anything to add to that.

Phillip Chapman: In essence, if something is a criminal matter, we come at the start of the investigation, and we report the circumstances to the Crown. If the Crown decides not to proceed, the case will go back to the PSD to commence its misconduct investigation. We do not communicate

directly with the police on those matters, because we have to report them to the Crown.

The Crown quite regularly writes to the police and expresses a view. It will disclose cases when it is asked to in order to allow the police to carry on, in the public interest, with their misconduct handling. However, as the commissioner said, we do not get involved in rank-and-file matters and with the members whom David Kennedy represents.

Sharon Dowey: So you have not come across anything like that when you have done investigations.

In an earlier session, we heard evidence that Police Scotland's professional standards department should not carry out preliminary assessments of complaints against officers, because it is not independent. Would the PIRC, if it was given sufficient resources, be in a better place to carry out those assessments to avoid any perceived or actual bias?

10:30

Michelle Macleod: I am comfortable with the PIRC dealing with conduct matters relating to senior officers, but our role is to look at the criminality aspect and to drive up standards in complaints handling. We do not have a general role in relation to conduct proceedings for rank-and-file officers—that is a matter for the Scottish Police Authority and Police Scotland, and it is for them to decide how to improve the situation.

Sharon Dowey: On sections 4 to 8 of the bill, which cover aspects of police conduct, the bill allows for the functions that will be conferred on the PIRC to be amended. That is an enabling power only, and details of the functions are not provided in the bill. The bill provides a power to allow gross misconduct procedures to be applied to former police officers and to amend the misconduct procedures for senior police officers—again, further details would be provided in secondary legislation. Does it concern you that more details are not provided in the bill? Do you have any concerns about that?

Michelle Macleod: Yes. As I alluded to when I was asked about financial implications, greater clarity on the provisions would enable us to better estimate the impact on finances and resources.

In relation to misconduct by senior officers, I understand the rationale behind allowing conduct matters to continue after someone has retired, in the same way as the bill will allow us to look at criminality after a person has retired. I understand the public concern about that matter and the rationale behind the measure, and I am happy that safeguards are in place in relation to senior

officers, in that the PIRC would look at proportionality in that situation and would take that into account before we carried on with a gross misconduct investigation into an officer who had left the service.

On criminality, one of the frustrations for the Crown—I think that Mr Farrell from CAAPD is due to give evidence—and, to an extent, the PIRC is that, currently, if an officer retires or resigns while we are investigating an allegation of criminality, we can no longer investigate that. The Crown Office then has to ask Police Scotland to investigate that officer's conduct, while, in parallel, we could be investigating other officers who are still in the force in connection with the same set of circumstances. That is clearly undesirable, as it is almost a duplication of resources.

I know that the Crown has been supportive of clarifying the position and allowing the PIRC to carry on with investigations into criminal allegations even if a person retires or resigns. That will remove a bit of the difficulty that exists at the moment when the circumstances of officers change. When some cases come to us, the officer has already left, so we do not start an investigation, but some cases are started and we then have to pass them back, which is a difficult process.

We support the measure, because it gives clarity and is simpler and more straightforward, but it will result in more investigations for us and require more resources. However, we are unable to quantify that, because we cannot work out who will resign and how many investigations there will be. We have certainly had several cases in which we have had to say to the Crown, "Sorry, we can't look at this any more, because the officer has left." The measure will make the system more streamlined. I suspect that Mr Farrell supports it, because it is frustrating for the Crown to have reports from two bodies into the same incident.

Sharon Dowey: Will there be a substantial increase in the resources that are required from you, or will the finances just move from one body to another?

Michelle Macleod: At the moment, as I say, the cases that are on-going when people leave probably do not really have an impact, because we are already investigating the situation. The issue is when there is a criminal allegation and the Crown cannot refer it to us, because the person has left. At the moment, we do not see those cases at all, but we know that they are there. We do not know how many of them there are and how many we are likely to get.

It is a bit unquantifiable but, if those provisions are introduced, we will start to quantify it. We can, and regularly do, discuss with our sponsor team if

our workload goes up and we need more resources. We would speak to our sponsor team, provide a business case and so on, as we did in relation to article 3 and successive increases in our responsibilities. However, it is difficult because we do not know how many cases there are until they come to us.

Sharon Dowey: A previous witness told the committee that Police Scotland took one year to investigate a complaint and that the PIRC then took the best part of a year to review it. Is there a target that the PIRC aims to meet when reviewing complaints made against officers from members of the public?

Michelle Macleod: Yes. Mr Chapman referred to our performance targets in relation to investigations, and we also have targets for reviews. That was part of the review that we completed last year. For category A cases, the target is 90 days. Those are the most serious cases, which involve a death or serious criminality.

I will be completely candid: when I took up my post, there was a backlog on the review side, and it has taken some time to erode it, but I am pleased to say that we are now in a good position on that—we met the target this year, probably for the first time since I have been in post.

We have stability in the team. The team has gone through a period of flux in the time that I have been in post, and additional resource was needed when I came in, as was identified in Dame Elish Angiolini's original report. Covid had quite a big impact on the backlog on the complaints side, but I am pleased to say that things have moved on. We are now meeting the timescales, and that is the target that we aim for.

Some complaints have numerous heads. There are 78 to 80 complaints that involve getting copious documentation from Police Scotland. Those documents take a long time to read and understand, so those cases will take longer. For what we call category A-plus cases, we now have provision, both in investigations and in reviews, to manage people's expectations and tell them, "We're not going to be able to do this in this period of time, but we will keep you updated and come back to you regularly or whenever you want to let you know how we're doing." That applies particularly to historical cases that involve serious criminality or murder.

In general, we are in a better place, but I accept that that has not always been the case.

Sharon Dowey: There were suggestions that the police were reluctant to give information, but, based on what you said earlier, it seems that the relationship has improved. The bill intends to give the PIRC access to the police's electronic

database relating to complaints. Will that help to speed things up?

Michelle Macleod: Yes. Police Scotland has always accepted that recommendation; it has never opposed or disagreed with it. The difficulty is that the Centurion technology that the PIRC uses is not at the same level as that used by Police Scotland. We have made upgrades, and Police Scotland is currently doing the same. Once we are at the same level, the technical issue can be resolved.

In the background, we are working on information sharing protocols, because, obviously, we should get access only to what we are legally entitled to have access to. We understand that, and we understand people's data protection concerns.

Having improved our system through Egress, we have had a much slicker transfer of information from Police Scotland during the past 12 months. Once we say that we would like the police to give us information to deal with a complaint, we give them 15 days to get it to us, but, if we had access to such information, we could get it straight away, which would take 15 days off the process. Once we have that system up and running, it will help considerably with timescales.

Sharon Dowey: Can I ask another quick question, convener?

The Convener: I will bring in other members and then come back to you.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Good morning. I was going to ask questions on the same area as Sharon Dowey, but she has covered quite a lot and received good responses, so I will ask questions on another area.

I have a general question, which is probably for Michelle Macleod. Do you feel that provisions are in place to ensure that there are adequate and timely responses from organisations when the PIRC makes recommendations?

Michelle Macleod: As I have alluded to, our recommendations do not have any statutory basis if the organisation—Police Scotland or any of the policing bodies over which we have oversight—chooses not to respond. However, we monitor the progress of recommendations. The reviews team has a record of the timeliness of responses. The police have a time period to get back to us, and we chase them up quite regularly if they do not come back to us within that period. We have more information on that than we have ever had.

It is important to show where the PIRC adds value to the process. One of those areas is in identifying the learning and ensuring that it is cascaded and implemented. Therefore, the

recommendations are very important, which is why we have put greater focus in the past 18 months on ensuring that we record what the police have done, when they have done it and what is outstanding. We have that record.

Obviously, the provisions would put an obligation on the police to respond, unless there were operational reasons not to do so, which they would have to explain. That would give us a bit of teeth. People sometimes say, “If you don’t have the power to enforce your recommendations, what is the point?” My experience is that, in general, the police are very co-operative and are willing to take recommendations on board. If they do not accept them for any reason, we are happy to have a discussion and say, “We have identified this problem. If you are not going to sort it in this way, how are you going to do it?”. We just want the problem sorted, so we have that sort of discussion with them. If those provisions are part of the bill, it would give us more teeth.

Fulton MacGregor: That is what I was going to ask you about. Do you think that you need those teeth or that extra clout—whatever way you want to put it?

Michelle Macleod: It is partly about public perception. Complainers sometimes ask what has happened with a recommendation, and we have to write to say that we have chased up the police but that we do not have any power to enforce it on a particular timescale. We probably do not put it in those exact terms to the complainer. We have to explain that we are kind of at the behest of Police Scotland as to when it might happen but that we will continue to chase it. Complainers, unsurprisingly, get frustrated and say, “Well, where is your power? You said you were going to get the police to do this, and you have not done anything.” It would be helpful if there was a mechanism to say to the police, “Look, this is an important recommendation. I would like to have an explanation of why you have not implemented or addressed it.”

I think that the provisions would be helpful, but I am not saying that we do not have a good relationship with the police. In most cases—in particular, if we have identified a serious deficiency—we find that they are receptive to taking on board our comments and recommendations.

Fulton MacGregor: My final question is about support for whistleblowers. You have said that you do not feel that it is necessary for the PIRC to be added to the list of prescribed organisations in the Public Interest Disclosure (Prescribed Persons) Order 2014, as recommended by the Angiolini review. Will you expand a wee bit on your thinking on that?

Sharon Clelland: I will take that question. In her report, Lady Elish recommended two things on whistleblowing: one was that the PIRC should be added to the prescribed persons list and the other was about the audit function. In our response, we said that we are supportive of the audit function and its ability to review, report on and make recommendations about how Police Scotland is putting in place steps to handle whistleblowers and such complaints, to ensure that they are triaged, handled and responded to appropriately.

In the report, Lady Elish said that, when people do not feel that they can make a protected disclosure to their employer, they should be able to make it to a prescribed person. She noted that, for policing, there was no prescribed person in Scotland, which we do not necessarily agree with. There is already a list of prescribed persons, which include the Lord Advocate, the Scottish Information Commissioner, the Information Commissioner’s Office and the Investigatory Powers Commissioner’s Office.

10:45

The current guidance and the current code of practice for whistleblowing in the UK say that, if you make a protected disclosure to a prescribed person—not to your employer—it has to be to the relevant prescribed person. In our view, for the matters on which whistleblowers might come to us to make protected disclosures, there are already a number of prescribed persons on that list who are the relevant and correct people. Therefore, they come to the PIRC, and we act as a post box and put in the protected disclosures.

We have a concern about providing employment protection to officers or staff who make protected disclosures. We are not in a position to do that, so if people are looking to not suffer detriment for making a protected disclosure—for example, officers who do not want to be moved post—we do not necessarily have the ability to ensure that those protections are provided.

The point of the recommendations is to build the trust and confidence of people who make protected disclosures. In our view, the best way to do that is to have the audit function, in the same way that we do for complaints handling processes, to be able to assess how they are being dealt with by Police Scotland, as the employer, and to build confidence in how the disclosure is being dealt with.

In our view, the audit function does what is needed and, as the commissioner said, it provides the value in that space.

Fulton MacGregor: That is helpful. Thank you.

Pauline McNeill (Glasgow) (Lab): Good morning. I confess that I am still trying to get my head around how it all works, so forgive me if I get some things wrong. My first question is about your role in relation to allegations of criminality by police officers. I am familiar with a number of cases that have taken two years or longer. In some cases, officers have been found not guilty and then faced further proceedings from Police Scotland in relation to the conduct aspect of it. It seems grossly unfair, either way, that it takes that length of time. You will find that many organisations will say the same. The police officers are suspended during that period, so Police Scotland does not get the benefit of having those officers until the case is completed. I want to understand the role of the PIRC in relation to, for example, assaults against prisoners, which I think is a more common one. Could you help me to understand that?

Michelle Macleod: Yes, indeed. We alluded to it earlier. The Crown can ask us to investigate any criminality of police officers but, as we have discussed, the main cases that come to us involve assaults. As we have explained, we aim to report to the Crown Office within 90 days in the most serious cases, and we are meeting that target. Thereafter, it is a matter for the Crown to determine whether there is sufficient evidence and whether it is in the public interest to prosecute or whether it is more in the public interest to deal with the matter by conduct rather than proceeding to a prosecution. That decision falls to the Crown—once the matter is out of our hands, it is with the Crown.

In the past couple of years, we have had a number of significant investigations in which the Crown has come back and asked us to carry out further inquiries, as it would with a police force. With any investigation, the Crown can come back and ask us to do further work on it. Some cases relate to very serious offences and we do a lot of work in the background for the Crown. It will eventually make a decision on whether there is sufficient evidence to prosecute and whether it is in the public interest to do so.

I have read the submission from Mr Farrell, the head of CAAPD, who will be giving evidence later. I was a prosecutor for 21 years before I came to previous posts and my current post, so I know about dealing with allegations of criminality from the Crown aspect, and I am aware of the concerns about the length of time that policing sometimes takes. From my recollection, the report by His Majesty's Inspectorate of Prosecution in Scotland from about 18 months ago showed that there was a change and that cases were being dealt with more quickly. The submission that the committee received from CAAPD suggests that it is meeting its target of making decisions within six months—I

hope that I have not got this wrong—in 95 per cent of cases. Cases were taking a long time—I am aware of that—but things have changed and there has been a more rapid turnaround.

I know from speaking to police officers that the issue is not as prevalent as it was when I took up my post. I totally understand that, when an allegation is hanging over someone, the decision about whether they go on restricted duties or are suspended is entirely for Police Scotland, as their employer. I can imagine the frustration, but we aim to get those cases to the Crown as quickly as possible and to assist the Crown in making decisions if it needs further work from us. It is my understanding that there have been improvements in that area. I hope that Mr Farrell will be able to confirm the timescales.

We appreciate the knock-on effect for the public of not having those officers available and the impact on the officers themselves, who are affected as any member of the public would be if they had an allegation hanging over them. We are conscious of that.

We have had a number of very extensive investigations. There were four different investigations into an incident in Skye, which required a lot of follow-up work by the Crown. Some investigations just take a lot of time to get right, but we try to ensure that they are expedited and completed as quickly as possible.

Pauline McNeill: It is good to know that you are meeting the 90-day target. Is it fair to say that the PIRC does a lot of the work in preparing reports for the Crown?

Michelle Macleod: Yes. I agree with that.

Pauline McNeill: I expect that we will hear from the next panel about what happens after the 90 days. I note that you say in your submission that a distinction should be drawn between

“allegations made while an officer still holds the office of constable”

and

“allegations made subsequent to the officer holding the office of constable”—

in other words, where the allegation comes once they are no longer with the police. Does that mean that you think that there should be some adjustment to the bill?

Michelle Macleod: That goes back to my previous comments about the inefficiency that is involved in our being unable to carry on a criminal investigation if someone leaves the force. In that situation, it is for Police Scotland to carry on the investigation even though we might be carrying on an investigation into the same incident with people who have not left the force. The provision would

rectify that inefficiency in the system and allow the PIRC to continue an investigation and report to the Crown even if the officer leaves. It would also help to reduce the timescales. If we are halfway through an investigation and it then has to go to Police Scotland and be started again, that adds a delay.

Pauline McNeill: You say that, except in exceptional circumstances, the allegation should be dealt with within 12 months if it is “proportionate” to do so. Is that right?

Michelle Macleod: I think that that might be for gross misconduct cases.

Phillip Chapman: That is for misconduct.

Michelle Macleod: That time period is for misconduct. As I understand it, there are some safeguards for senior officers if the allegations come to light after a certain period. We want to look at proportionality and public interest. A substantial amount of public money will be involved in taking an investigation to a hearing after the officer has left so, to some extent, you need to consider the outcome. That is all new territory that we will have to test and feel our way through. However, I agree that we need some sort of safeguard for all officers regarding how far we can continue investigating matters of conduct.

Pauline McNeill: I agree. It seems unfair that an officer could reach their natural retirement date, rather than taking early retirement, and that, a year later, an allegation that they were not aware of could come along. Do you agree that there has to be quite a high test?

Michelle Macleod: The bill frames that as quite a high test. We deal with senior officers and there is a high threshold. We would take account of many aspects of the circumstances, such as how serious the allegation is, whether it involves vulnerable witnesses and whether it falls into a sphere of real public concern, all of which would make us more likely to go ahead. If the allegation is less serious, we would take that into account. We would assess that when we are weighing up the public interest.

Pauline McNeill: Thank you—that is helpful. You say in your submission that the Angiolini report is silent on the question of who should decide whether an allegation amounts to gross misconduct. Under the current regulations, that is done by the deputy chief constable designate. Can you speak to that point?

Michelle Macleod: As I alluded to, we do not have any involvement with rank-and-file conduct matters or those regulations. I think that they are within the remit of the deputy chief constable. Our remit is restricted to senior officers, and the

referral in that regard comes from the SPA. I therefore cannot assist you on that point.

Pauline McNeill: If I understand the submission correctly, it says that there should be no change to the current arrangements. Is that correct? It says that

“It would ... be incongruous to suggest that in order to allow proceedings to continue in respect of an officer who resigns or retires in advance of any gross misconduct hearing”,

additional assessment and determination by the PIRC would be required, because that would

“usurp the powers”

of the deputy chief constable. My understanding is that Elish Angiolini does not say anything about that.

Michelle Macleod: I am happy to be corrected if I am wrong but, when the bill was introduced, we were concerned that there was just reference to constables and it did not clarify that our role was in relation only to senior officers. Our submission therefore included commentary about that. Our anxiety was that we were suddenly going to be involved in rank-and-file conduct issues. Since then, however, the bill team has clarified to us that only senior officers will be involved. I think that our response has been overtaken and superseded. I apologise; I had forgotten that we had put that in.

Pauline McNeill: That is helpful.

I am interested in a specific area in relation to public complaints against the police, which was mentioned in a previous evidence session. The issue concerns instances of poor investigatory processes within a police investigation—as were evident in the Emma Caldwell case, for example, where, 20 years later, we can see that the police followed lines of inquiry that do not seem to stand up. In such instances, are there processes currently, or are processes proposed in the bill, that will allow a family to complain about the quality of an investigation?

Michelle Macleod: One provision that might address that is the call-in provision in section 12. I think that Elish Angiolini envisaged that that could be used in cases where, whether through a complaint-handling review or another route, the PIRC identified that something had been handled so inadequately or badly that it should take over the complaint. That is an important distinction to make—it is the complaint, rather than the investigation, that is taken over; I do not want to raise expectations.

Section 12 relates to non-criminal complaints. The reason for that, clearly, is that the Lord Advocate is accountable for issues around criminality, and the PIRC cannot really review a case that is a matter for the Lord Advocate. The complaint is a non-criminal matter, so, if a

complaint had been dealt with really badly, I would be able to say to the chief constable that it was in the public interest for me to take it over and investigate it right from the start. As I said earlier, with regard to a complaints handling review, we cannot instruct the police to investigate and we cannot investigate the substance, but a call-in complaint would allow us to investigate the substance. That would give a family or other complainer the opportunity to say that a complaint process had been hopeless and ask us to take it over.

This is the issue in relation to which there has been a reference to us being overwhelmed. There are many aggrieved people who are unhappy with the outcomes of various cases, and we are concerned that we are going to spend a lot of time doing assessments of all of those to see whether they fit into the public interest criteria. We have said to the Scottish Government bill team that that could cost us a substantial amount of time and resourcing, and we have said that we would probably have to have a stand-alone team that would look into those issues, because of the number of people who we suspect will ask us to take over a complaint.

There are a couple of issues. First, I urge caution around the fact that the issue cannot concern criminality—we are in the non-criminal area. However, there may be some areas in which, for reasons of public interest, we can take over the investigation of the complaint, which may give more reassurance to family members. Of course, that would be new work, and that could involve a lot of assessments of whether an issue fitted into the criteria. It is a new provision and one that we would have to feel our way through. Our taking over those complaints would probably be quite different from what we do at the moment.

Pauline McNeill: I can see how tricky that might be. Do you think that there might be other checks and balances in the system now that would prevent an investigation from going down completely the wrong path for so long?

11:00

Michelle Macleod: I can only speak to investigations dealing with police officers. One option that is open to the Crown is for the PIRC to consider all of those kinds of allegations. However, in relation to general criminality, that would probably be something that Police Scotland and the Crown would be more able to assist you with.

Pauline McNeill: Perhaps it is more of a whistleblowing issue. I am just interested in the issue because, when we are thinking about a big piece of legislation, we want to make sure that the actual problems are captured by it. The issue does

not arise often but, in the Emma Caldwell case, we can see that a series of internal decisions were made, compounding one after the other, over a long period, and the lines of investigation were not questioned by anyone until 20 years on. I realise that those cases are rare, and I would like to think that there are now more checks and balances in the system.

Michelle Macleod: The Angiolini report was particularly interested in complaints and allegations. She looked at criminality, but it is probably other areas that will address the criminal side. I hope that more solutions will be proposed in that way.

The Convener: I have a couple of questions. The first is about the governance of the PIRC and the second is a more general question around the existence of commissioners, which I will explain in a moment.

On governance, I note that the Angiolini review stated:

“the Commissioner has confirmed that she is planning to transform the Audit and Accountability Committee into a more formal Board structure with non-executive members being appointed through a transparent public appointments process”.

Do you have an update on that recommendation? Have those changes been made? If so, are they sufficient? Are they working?

Michelle Macleod: Those changes were made, and we had an appointment process that included Scottish Government personnel on the recruitment panel. The audit and accountability committee has a chair in the form of the Crown Agent, Catherine Dyer, and a number of non-executive directors who have a wide range of experience. We had the sponsor team at the most recent quarterly meeting of our audit and accountability committee, and I think that its members could confirm that we are challenged in relation to governance areas such as risk and budgets. Generally, all sorts of areas of governance are dealt with at that meeting.

Our position in relation to the recommendation was to ask whether we are an organisation of the size that needs a statutory board, given that we are an organisation of 97 people? Neither the Crown Office and Procurator Fiscal Service nor the Scottish Prison Service has one. It was always our position that the audit and accountability committee could perform that function, as it has been doing, and we follow the public processes in relation to our terms of reference and remuneration. However, I fully accept that the respondents to the consultation were of the view that it is appropriate to have a statutory advisory board, and that is what is in the bill. We will certainly work with the bill team and the Scottish Government, and we will ultimately transform or

transition the audit and accountability committee into a statutory advisory board. We have that position, and it has been in operation since 2022.

The Convener: Thank you. That leads on quite nicely to another piece of work—I am stepping outside the bill for a moment, but I suppose that it is indirectly relevant.

You will be aware that the Scottish Parliament Finance and Public Administration Committee is doing a piece of work on the commissioner landscape in Scotland, and is taking evidence on the effectiveness of commissioners and their role.

A number of new commissioner posts have been proposed. However, one of the things that the finance committee has been looking at is why we need commissioners in the first place. What is happening or not happening that means that we need them? Are public bodies not fulfilling some of their duties around the conduct of staff or is there perhaps a wider societal issue, such as the cost of living crisis, that is having an impact on the public generally?

That is a really big question but I am interested in your perspective. You have a very demanding commissioner role—there are no doubts about that. Do you have any comment on that wider analysis or the question around the role of commissioners? Do we need them? [*Laughter.*] I know that you will say yes, and that is absolutely fine.

Michelle Macleod: It is odd to have an organisation in your name. I am the Police Investigations and Review Commissioner, which is a mouthful for anybody, so it is good that it is abbreviated to the PIRC. It is an odd concept. I know that the report looked at transforming the organisation into a commission—which I was supportive of—and having deputy commissioners. The organisation was set up in a certain way, and although consideration was given to not having a permanent person at the head of it, I am not sure what the rationale for that was. However, I have just accepted the position and I have worked with that.

Reference was made to deputy commissioners, and one of the matters that was highlighted was a lack of resilience in the management team at the PIRC. I totally agreed that there was an absence of legal capacity. We now have Sharon Clelland as head of legal services and we still probably have a need for more legal input. Therefore, we strengthened the team.

The title of deputy commissioner is fine but under the model that was suggested to me, the deputy commissioners would be appointed for a contracted period, which I do not think fits: it would destabilise the management team to bring people in who then move on every three to five years.

Once I had come in to the post and understood it more, and once we had strengthened the team, I realised that that model would be a destabilising factor. If the posts were permanent and had titles—accountable officer or director of operations, for example—that would not be destabilising and I could understand that. However, the reality is that the model that was suggested did not really fit with the PIRC in that context. I persuaded the Scottish Government that that model would not be helpful for the PIRC in the future and that is why it is not in the bill.

I am probably not the best person to talk about commissioners and policy on commissioners generally.

The Convener: That is an interesting response, which speaks to or is relevant to the potential for your role to expand and the resource requirement around that. The finance committee will look at the issue of models of commissioners.

I will go back to a question on the bill before I bring Sharon Dowe back in, if she still wants to ask a follow-up question.

In evidence, a lived experience witness spoke about the “weaponisation” of the system against those who are making complaints—perhaps through intimidation or obstruction. Is that something that you recognise? Is that a fair characterisation? That was commentary in evidence to us from a person who had been the subject of an investigation.

Michelle Macleod: Just to be clear, was that an investigation by the PIRC or by Police Scotland?

The Convener: Both.

Michelle Macleod: Was it a criminal investigation?

The Convener: It was criminal.

Michelle Macleod: I am sorry; would you mind repeating the question?

The Convener: The committee heard evidence from a witness, a former police officer, who had been the subject of a criminal investigation in relation to an incident that had happened while he was on duty. He subsequently left the service. During his evidence he spoke about what he described as the “weaponisation” of the system against people who make complaints. That is quite a big claim to make. I am interested in whether you have seen any evidence of that. Do you recognise that characterisation?

Michelle Macleod: No. If an allegation of criminality is made against a police officer, that is obviously very serious. One of our core responsibilities is to investigate such allegations. As we have discussed, the number of those has

increased. The bulk of our current workload involves investigating areas of alleged criminality.

Just as members of the public would expect if there were to be an allegation about one of them, there has to be a process for that. I understand that if someone is the subject of a claim, it will be distressing for them, but there has to be such a process. When complaints come to us from members of the public—or, more rarely, from other police officers—we have an obligation to investigate them. Following the new statutory instruction in 2021, we set up an assessment unit within the investigation team. In the first instance, the unit will do a triage of the allegation. In some cases there might be closed-circuit television that shows immediately that there is no veracity to the claim, and that will be the end of the case; it will be reported back that there is no evidence, and the case will not proceed further.

I add that the roll-out of body-worn cameras will be a game changer for us and for police officers against whom allegations are made. In many cases, we will be able to look at the body-worn camera footage and make a much more rapid decision than we can currently if no such footage exists. That is just an aside.

If the unit's assessment shows that there is potential corroboration of an allegation, the case will go forward to full investigation by an investigator. Once that has been done, it will go through the deputy senior investigator. Cases in which we think that there is sufficient evidence or there is public interest will always come through the director of operations and, finally, me before they go to the Crown.

Recently, we have employed what we call a report checker, which is a person with a legal background who assists by providing more robust analysis of the evidence, because we now have so many more such cases. We have done a lot of training with investigators. Last year, we provided them all with training on better report writing, evidential considerations, and the use of Moorov factors in proving cases. We have done a lot of work on that and, as I mentioned, we now have someone who is specifically tasked with examining that area.

The final aspects of quality assurance will come to me. I have the benefit of being a former prosecutor. Although the decision is not mine, we can then say that we think that there is sufficient evidence and allude to where the corroboration comes from, after which the case will go to the Crown. There is therefore a robust process at the beginning of a case. If there really is no substance to it, it will not proceed. If there is substance, I do not have a choice: I have an obligation to investigate the case and report it to the Crown. That is what we are here to do, in order to give the

public confidence. Some of those cases will go on to prosecution. Currently, several prosecutions are on-going from cases that we have reported to the Crown.

The Convener: Thanks very much for that comprehensive answer. I will now bring in Sharon Dowey, after which we will draw our session to a close.

Sharon Dowey: Ms Macleod has just answered one of my questions. I was going to ask whether having body-worn camera footage would make a big difference to investigations.

I have two further questions, though. First, in your submission you say that

“there needs to be a lawful gateway for information sharing”,

which you mentioned in the context of the proposal to establish the police barred and advisory lists. Could you expand on the point?

My second question is for Phillip Chapman. Police Scotland has an obligation to notify COPFS of allegations against police officers where

“it can be reasonably inferred that a criminal offence has been committed by a police officer.”

That differs from the test for allegations against members of the public, where there must also be a sufficiency of evidence. Last week, we heard from the Scottish Police Federation that investigations about police officers start high up, rather than at the lowest level. Could you explain what “reasonably inferred” means?

Michelle Macleod: I will ask Sharon Clelland to pick up the point about the gateway, if you do not mind.

Sharon Clelland: On your point about the barred and advisory list, we would hold information relevant to that. If the list is to sit with the police authority, we feel that the legislation should make clear the lawful basis for sharing that information.

We are now finding that people have worked out that the PIRC is a large information holder. Formerly, that might have been only information that was previously held by Police Scotland. However, now that we have taken on allegations of conduct that breaches article 3 or article 5 of the European convention on human rights, we hold a lot more information. People come to us to seek to recover that information by whatever means might be available: for example, simply asking for it; raising proceedings by way of petitions for recovery of documents; or seeking to obtain it through freedom of information or subject access requests. There are a number of ways in which people can come to us for information. We do not have a particular difficulty with that.

However, we have a duty to ensure that we keep information appropriately secure, depending on what it is, and that, when we share it, there is a lawful basis for doing so. If we are to be expected to share information to facilitate the barred and advisory list, we will need to be able to look to the route for that. If the bill comes into law, its provisions will be the basis on which we will share that information. That approach protects the commissioner's position by ensuring that what we do is lawful.

Sharon Dowe: Should access to the list be limited?

Sharon Clelland: We would only share information with people who have to see the list in any event, so I can see that being a relevant consideration.

Phillip Chapman: On your question about the meaning of "reasonably inferred", in her report Dame Elish referred to the high standards that the public expect from the police service and police officers in general. An inference that a crime has been committed by a police officer is a completely different concept to an allegation against a member of the public. CAAPD has a role in that, and I am sure that the next witness you will hear from can speak from the Crown's position.

My understanding is that, when the PSD receives a criminal allegation of any nature it must be reported to the head of CAAPD, unless it is an article 3 or article 5 case that is now triaged under statutory instruction and comes to the PIRC for us to continue. I think that CAAPD has a period of 48 hours to form an awareness of what the allegation might be and to provide such instruction and parameters as it deems appropriate. It is entirely up to the head of CAAPD to direct any investigation to the PIRC or back to Police Scotland for it to conduct the investigation or, if it feels that there are wider implications, it could instruct an external force to come in. However, that is entirely a matter for the Crown and we have no locus in that.

The Convener: We are a bit ahead of time, but I am going to draw this session to a close.

I thank our witnesses for coming along this morning. Your evidence has been very helpful, and we appreciate your time.

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

11:19

Meeting suspended.

11:24

On resuming—

The Convener: I welcome to the meeting Mr Justin Farrell, who is head of the criminal allegations against the police division of the Crown Office and Procurator Fiscal Service. I thank Mr Farrell for providing written evidence. We are looking to spend an hour or so on this evidence session.

I will kick things off by following up on Sharon Dowe's line of questioning with the PIRC a short time ago. This relates to criminal allegations against police officers. We are aware that a criminal allegation against a police officer would be reported to the Crown Office based on "a reasonable inference" that they have committed an offence—that is different from what happens with ordinary members of the public. How do you identify potentially malicious or vexatious complaints within the system, and how is it ensured that that identification takes place as early as possible in the process, so that officers are not subjected to lengthy and unnecessary investigations?

Justin Farrell (Crown Office and Procurator Fiscal Service): Good morning, and thank you for inviting me along to provide evidence this morning.

Obviously, it is important that, in society, there is confidence in the police. It is therefore accepted that any allegation of criminality has to be seriously considered and, where appropriate, thoroughly and robustly investigated.

The standard that is employed is a lesser standard than we would expect in a report of crime against an individual. Usually, a standard prosecution report would be submitted by the police when there is sufficiency of evidence. That lesser standard, which the convener referred to, is the test for a referral of a criminal allegation to the Crown by the police. That is done when there is a reasonable inference of criminality rather than a sufficiency of evidence. It is a lesser standard, and that is reflected in conduct regulations. That is backed by a statutory requirement for the police to provide such a referral to the Crown.

Where there is a lesser standard, we need to have some way of assessing it. It is accepted that it is a low test; it is meant to be a reasonably low test. There must be more than just an allegation, but not actually a great deal more, before there is an obligation on the Crown to investigate. For instance, someone might make an allegation that might be demonstrably false, and it might be quickly confirmed as being demonstrably false

because closed-circuit television footage exists, or the person who is the subject of the allegation was clearly and obviously elsewhere at the time when what is alleged is said to have occurred. Such cases are reasonably simple to remove from the system. The police might advise me of the existence of the complaint and, at the same time, provide me with information that allows me to assess it as being not credible, thereby effectively bring the matter to an end without further investigation.

As I said, “reasonable inference” of criminality is a low standard. I will use another example. Someone who was the subject of an arrest makes an allegation that they were handled roughly by the police during the arrest and were assaulted. It would be very difficult to set that aside without doing some further investigation into the circumstances. It can be established that the person was arrested, that the police effected the arrest and were present at the location, and that their account is that they were assaulted, but there might be evidence to suggest the contrary in accounts from other witnesses. An assessment of that evidence has to be made, and that is done by instructing further investigation at that early stage. In due course, a fuller report is made available to the Crown.

The Convener: That is helpful. I must admit that I was unaware of the difference in the threshold in respect of police officers being reported to the Crown. It is helpful to understand that better.

Are you saying that, where more evidence obviously emerges in respect of an individual who has been reported to the Crown in relation to an incident, that would be passed to you for further consideration?

11:30

Justin Farrell: Yes. There will be further investigation—instructed by me—either by the police through the professional standards department or by PIRC, when I make a referral to it. The fuller report will then be submitted to me. On receipt of that report, I will review the content and instruct any further work that is required.

We will also look at the source material—the statements and the productions, whether those are documentary or physical productions—and we make an assessment of all that evidence. As I said, we might instruct further inquiries if something is obviously missing, or we might then prepare our own report to submit to Crown counsel with our recommendation on whether there should be a prosecution.

The Convener: Thank you. Can I just go back to why we have the different threshold? You set out some information at the beginning of your

earlier response, and I think that I am right to interpret that as meaning that there is, with police officers, perhaps a higher expectation of adherence to discipline and good conduct. In itself, that brings us to the point where we have a lower reporting threshold. I am struggling slightly to set that against the safeguarding issues that we touched on in the last evidence session and compliance around human rights. Do you have a comment on that?

Justin Farrell: As you know, in Scotland the whole concept of policing is that it is policing by consent. For that to work, there has to be a sizeable majority in society who trust and have confidence that the police will not abuse the exceptional powers that are vested in them. That is the serious principle that underlies the more robust test, if you like, for referral of an allegation to the procurator fiscal. As I say, I have no difficulty with that, because it allows us early sight of allegations, and it allows me to instruct the investigating authorities—the police or the PIRC—with regard to any other inquiries that I think should be made in order to test the allegation.

In terms of where that leaves officers with regard to their rights, I do not think that there is necessarily inconsistency with any of their rights in that regard, because it is a robust process and it is as effective at rooting out incredible and baseless complaints as it is at capturing complaints that have substance and quite properly should be investigated robustly.

The Convener: I presume that, once you have a report and have had time to consider it, the Crown Office processes the report in the same way as it processes any other report in terms of the threshold for evidence that is required in Scots law.

Justin Farrell: Yes. Ultimately, the same test is applied to the final decision as to prosecutorial action. It is the test that is contained in the Crown’s “Prosecution Code”. Therefore, although there is a lesser entry point, if you like, we still have to bring it up to the evidential requirements for prosecution, which are that there is

“sufficient admissible, reliable and credible evidence”

and that it is in the public interest to prosecute. That is exactly the same test, at the prosecutorial decision-making point in the process, as there is for any other criminal case.

The Convener: That is really helpful clarification. I am going to open up the discussion and bring in Rona Mackay.

Rona Mackay: Good morning, Mr Farrell. My question, which follows on from what you have been discussing with the convener, relates to the timescale for deciding whether to prosecute.

Witnesses have advised the committee that the length of time that has taken has, in their eyes, been unacceptable, and that there was a shadow hanging over them for a long time.

Also the report by His Majesty's Chief Inspector of Prisons for Scotland said that the 12-week target for decision making

"is based on flawed data"

and that

"there is a lack of robust and accurate management information about CAAP-D's work."

I know that you will be aware of that report. Could you address that and the timescales involved, please?

Justin Farrell: Yes. First, I think that any delays in the process are unfortunate. There are various parts of the process at which delays can occur; sometimes those combine to have a very negative impact, over the course of an investigation. For instance, the investigative stage itself can be delayed by complexity or by difficulty in engagement on the part of individuals and that sort of thing.

There is then the part of the process in which we have the information that we require to make the decision and we look to progress with that and analyse it. Ultimately, if there are to be proceedings, we are exposed to the general delays in the court process as the case is prosecuted. Everything might work efficiently in that respect and, if that is the case, the delays should not be too bad. However, a delay in any one part of the process can, in effect, compound the situation and delay the other parts.

The middle part of the process is the part that is within my gift—namely, preparing the case for that decision to be made, following investigation and delivery of all the information that we need to reach a prosecutorial decision. That is the work of my unit.

When I came into the role in 2000, I was aware of some delays in progression of cases and was not satisfied that the available management information was particularly accurate. That was generally because there were flaws in the way that we were tracking the cases at the time. There was a very tight target to meet—12 weeks, as, I think, you mentioned—and it was nigh on impossible to meet that target as a linear target. A report would come in and the unit would instruct further work, but it never got a return on that work before the target had expired, because we had to give investigators time to do their job.

That meant that the CAAPD developed a technique of freezing the target whenever further work was asked for, then unfreezing it when that

product became available for that part of the process. That just provides inaccurate information, because a report could meet the target in terms of comparison against the timescale, although it had actually been in the unit for more than a year, so the process did not give accurate or good data in respect of the actual delay.

Therefore, I did away with that and brought in a new target that was more generous in terms of the time that was given to progress the work. However, it was a linear target against which we could easily assess the length of time, in the unit. The target is that we progress and conclude 75 per cent of the cases that are reported to us within six months. We have been comfortably meeting that target since it was introduced in 2021.

I think that, last year, during the whole year, our performance against that target was 95 per cent. That tells you that a huge proportion of our work is being delivered and concluded within that six-month period, which is a lot faster than it had been happening in the past. As I said, to some extent the fact that you do not need to worry about that middle part means that the effects of the other two parts do not so much compound the situation and increase the overall journey of a case. In general, there has been a much-improved position since 2021 and we are progressing work a lot more quickly.

However, I concede that there are complicated and complex cases that take a lot of time to investigate, and I concede that, on occasion, the criminal justice process generally is not going through business as efficiently as it could. However, there are a lot of factors—adjournments and witness availability, for example—that fall outwith the control of any one organisation or person.

Rona Mackay: That was helpful. It seems to me that there are a lot of players; there are various organisations doing different things. Would not it be better for you to have all the investigatory work done when you are presented with a case, before you make the decision whether to prosecute? It seems to me that some has been done, but it is not completed, so then you do it. That is a bit cumbersome, is it not?

Justin Farrell: Yes. Ultimately, our job is to make a legal assessment on a case because, as lawyers we are qualified to do that. Ultimately, we have the investigators—PIRC—and the police gathering information, compiling it and conducting inquiries that have been instructed and which will provide an evidential basis on which to make a decision.

When the source material comes to us, we have to review all of it, including what was seized early in the investigation and what was seized after our

further instructions. We then assess that source material. It can include information from statements and in documents, as well as physical evidence including closed-circuit television footage, transcripts from phone calls and so on.

We draw all that together as an evidential package and make an assessment on sufficiency of evidence. That takes time and is a separate process from in-gathering of information.

Rona Mackay: I understand what you are saying. Is there a way that the process could be streamlined? That is what I am trying to get at. Is there any one thing that could happen that would be helpful to you, to witnesses and to complainers?

Justin Farrell: I always concede that improvements can be made in any process. We can identify parts of the process that could be improved, but my honest assessment is that there is no magic bullet that would make significant differences to how each part of the process is pursued and concluded.

Sharon Dowe: My question follows on from the questions that you have already been asked. I am interested in timescales. You said that there is sometimes, when an allegation about police officers comes to you, already evidence that the allegation might be malicious, so they are put to you straight away. What is the timescale for, for example, getting evidence on a complaint from somebody who has been arrested and said that excessive force has been used? Such complaints come straight to you, but what is the timescale for getting evidence?

Justin Farrell: We are notified within 48 hours of an allegation having been made. The police will have identified it as a criminal allegation and will then tell us about it. The police do that to allow me to make an assessment as to whether to leave the matter to the police professional standards department to investigate or refer it to the PIRC for investigation.

Sharon Dowe: If you do not have any evidence, how do you know what to do?

Justin Farrell: We know the nature of the allegation that has been made, so if it is a serious allegation, I generally elect to refer it to PIRC. I also do that if there is something about the circumstances that suggest that an additional layer of independence or impartiality is required. However, you are right that quite often we do not, at the initial stage, have a great deal of information.

Sharon Dowe: One of the committee's witnesses said that he was put on restricted duties and told that he was a danger to the public, and the case ended up going all the way through to

prosecution. There were 900 days between the day it started and the day it finished.

Justin Farrell: Yes.

Sharon Dowe: He was not informed why he was put on restricted duties. Is that normal, and is it acceptable?

Justin Farrell: That would be an internal matter for the police. What Police Scotland decides to do with employees who are the subject of criminal allegations is a matter for it. However, we would have been told about that and we would have instructed a report. I cannot speak about individual cases, obviously, but the usual target timescale for the police to provide a full report to us is 56 days.

11:45

Once a report is delivered to us, our target becomes the six-month linear target to report it to Crown counsel for a decision on prosecution or no prosecution. Thereafter, if a case is to be prosecuted, it would be proceeded in the court process.

Sharon Dowe: Fifty-six days is quite a long time. When you get the initial report, would you not expect to get a statement from the person that has been accused of the crime so that you can get their version of events?

Justin Farrell: At that stage, we have the statement and we are aware of the allegation, but we do not have any witness statements or other productions that might be relevant to the allegation, because we need to give the police some time to carry out that investigation.

The cases that we can make a quick decision on are the ones that are demonstrably false. If someone claims that a police officer is at point A and has done something to them, and they are quite clear about the identity of that officer, but we can establish that the officer was not at point A at the time, that is not a credible allegation. We can often discount those cases very quickly.

However, as I said, there are others that we cannot discount. If we have a statement from the person making the complaint or at least a heads of complaint form from them, so we know the nature of the allegation, we then have to give the police or the PIRC some time to investigate it to bring some evidence to bear on the matter.

Sharon Dowe: Is it right that less than 10 per cent of complaints are prosecuted?

Justin Farrell: That is accurate, yes.

Sharon Dowe: Right. I know that we have got to hold the police to a higher standard, but do you think that the police being obliged to report to your department once a complaint of criminality is

made, regardless of whether there is sufficient evidence, is an effective system?

Justin Farrell: I do not have any issue with that system. Whether the lesser test is acceptable is a matter for the police. As a public prosecutor, I do not have any difficulty with the current process.

Sharon Dowe: Is the communication with the police officer that has been accused more to do with police procedure?

Justin Farrell: Yes.

Sharon Dowe: Does that mean that the person who I spoke about who was not told why he was being put on restricted duties should really have been told why at the time and a statement should have been taken?

Justin Farrell: Yes. Police Scotland have put a welfare package in place for police officers who have had criminal allegations made against them. The terms of that package will differ from case to case, but it is a matter for Police Scotland and I do not have a remit over that or detailed knowledge of it.

Sharon Dowe: Okay. How do you decide who should investigate between the PSD, the PIRC or another police force, and why would it be necessary for a case to go to another police force and not just stay with the PIRC?

Justin Farrell: Your first question was about how I usually decide. I accept that all complaints are serious for the individuals who make them, but if an allegation is objectively simple and reasonably minor, I might elect to leave it with the professional standards department, rather referring it to the PIRC, because I know that the PIRC has limited capacity to investigate all complaints; it could not take all complaints.

In addition to that, if the complaint relates to a minor road traffic matter, for instance, I would be more inclined to leave it with the PSD to investigate, because by referring it to the PIRC, we build a slight delay into the system, because the PIRC then has to liaise with the police to gather information, whereas Police Scotland already has a lot of the information—such as who attended an incident and who was driving towards that incident—in its system, so it can immediately carry out the investigation. Minor road traffic matters have a time bar on them. I have to make a prosecutorial decision and, if it is to proceed, it has to proceed within six months, so we look to reduce delay.

There is low risk in leaving such things with the professional standards department, because there is no suggestion that they will not do a thorough investigative job on any such allegation. That is the sort of thing that I leave routinely with Police Scotland. However, if it is a serious matter

involving death or serious injury, my presumption is that I will refer it to the PIRC. I would then have to carefully analyse and provide reasoning—in effect, an audit of my decision making—if I decided to leave an allegation such as that with Police Scotland rather than to refer it to the PIRC.

There is no simple answer to the question. It is, to some extent, left to my discretion or the discretion of those working with me in the CAAPD, but we are a specialist unit and we have experience and a sense of all the factors that should be considered when deciding whether to refer a matter to the PIRC rather than to the police.

As I am sure you have heard from Michelle Macleod this morning, in October 2021 I issued a standing instruction for all assault allegations to automatically go to the PIRC from the police, so we never leave them with the police. I do not know whether that assists you.

Sharon Dowe: That is fine. Why would it go to another police force?

Justin Farrell: That would happen only in an exceptional circumstance. To my knowledge, it has only happened twice since the creation of CAAPD, and there were very particular complexities around those investigations.

There were other such investigations in the past, but questions nevertheless remained. Those previous investigations had been conducted with Police Scotland, and the PIRC had already been involved in some of them, so we wanted a fresh perspective, which is why an exceptional arrangement was made for Merseyside Police to come in and do a completely independent investigation.

Sharon Dowe: One of the biggest complaints that we have heard is about the time it takes to do many of those things. HM chief inspector of constabulary said that it

“takes far too long for the Criminal Justice organisations to investigate criminal complaints”

and that

“There is a general lack of pace applied to the investigation.”

He also said that there was a

“Lack of communication between the three parties involved (Police Scotland, PIRC and COPFS)”.

Do you think that the bill will reduce those timescales?

Justin Farrell: I am not sure that any one provision in the bill addresses that, but I refer you back to the evidence that I gave earlier about the reduction in timescales generally. I very much take responsibility for COPFS as part of that.

I can add that there is now very good liaison between the PIRC, PSD and me on behalf of the Crown. I do not know for sure what level of liaison existed before, but it is regular now, so I do not recognise that critique.

Sharon Dowey: It sounded in the earlier evidence as if there had been better communication, so thank you.

Russell Findlay: I would like to return to the point that was raised by Rona Mackay on the HM Inspectorate of Prosecution in Scotland report from 2021, which talked about CAAPD freezing cases, and you have already referred to that. The detail of that report is actually quite shocking. It said that cases were frozen while you were gathering or requesting additional work to be done. In some cases, I think that it reset the clock rather than just paused it.

Justin Farrell: I think that that occurred in a couple of cases. That was obviously a factor that I took into account when deciding that that situation could not persist following my arrival.

Russell Findlay: The language used by the inspector was that freezing cases was “open to abuse” and was being used inappropriately “for no discernible reason”. The report also states that CAAPD

“had developed an unhealthy and misguided approach to managing its targets”,

and that it

“masked the reality of what was happening”

and misled everyone from the general public right through to the Lord Advocate.

I understand that you have put that right. Given that report, and the fact that we have heard so much evidence from witnesses about a lack of trust, do you believe that the public can trust the data that is coming from CAAPD?

Justin Farrell: The public can absolutely trust the data that is now coming from CAAPD, yes.

Russell Findlay: As my colleague Sharon Dowey said, delays cause huge problems for complainers and, indeed, police officers. We heard from one officer whose case took 900 days from start to finish before he was cleared, and he also spoke of colleagues taking their own lives while they were the subject of complaints. When CAAPD has become aware of cases in which officers have died of suicide, have you liaised and shared that information with Crown Office colleagues?

Justin Farrell: I was aware of allegations that suicides had been linked with criminal inquiries when I first started way back in 2020-21, but when I looked at the cases, only one that involved the

death of an officer was being investigated at CAAPD. Nevertheless, there had been a delay in that particular case. I keep officer welfare at the front of my mind when progressing work through the department.

Russell Findlay: In that case, you would have shared your information with someone else in the Crown Office.

Justin Farrell: The then head of the Scottish fatalities investigation unit and I shared information about that inquiry. The inquiry itself arose from a comment made by a senior officer, and we assessed that commentary to see whether what had been said was accurate. The officer had, I think, made reference to five officers, but, as I have said, only one had been subject to a criminal investigation; the other four were subject to non-criminal misconduct processes in the police.

Russell Findlay: That is interesting.

Justin Farrell: My recollection is that, when we did some careful analysis of the case that we had, we discovered that the delay was due to non-engagement with the victim. They had made the initial complaint, but thereafter they had been difficult to trace so that other questions could be pursued.

Russell Findlay: The Crown Office website has, I think, been updated fairly recently to acknowledge the fact that some people might have a fundamental lack of trust—or confidence—in their complaint being properly advanced by Police Scotland. It is great that that is out there, but the fact is that you would ordinarily direct the same people back to Police Scotland.

Justin Farrell: Yes, but again the reason for doing that is that I do not have the information that I need to contextualise an allegation. I do not have access to police systems that would allow me to check whether police officers are on duty, are attending an incident and so on, whereas Police Scotland does. Moreover, I do not have powers of a constable, which means that I cannot attend on individuals and take a statement that can be relied on in court. Therefore, I refer the matter back to those who are qualified to do such things, and they come back to me with further information that allows me to decide how to progress it thereafter.

Russell Findlay: And that decision is based entirely on the information that you get back being accurate.

Justin Farrell: Yes. Some of the difficulty arises from the fact that, when we take a complaint directly from a member of the public, that complaint will involve misconduct as well as criminal allegations. Therefore, we must have a way of referring the matter back to the police.

In response to your last point, I always rely on the police to provide the information that they are statutorily bound to provide to me. I have to rely on them for that.

Russell Findlay: That leads me on to my next question. We have heard evidence of cases in which complainers, whether members of the public or police officers, believed that what they had imparted had subsequently been shared with CAAPD—as is right and proper—but that had not been the case. Are you confident that the situation has improved, now that a lot more scrutiny is being applied to those particular cases and the wider issues, or can the legislation itself be improved to ensure that that does happen?

12:00

Justin Farrell: My sense is that the situation has improved. I say that because I have no evidential basis on which to conclude that I am not being told about every allegation that I should be told about.

The process has checks and balances. One check and balance is that, if a complainer is not satisfied that the police have categorised as non-criminal something that the complainer considers to be criminal, they can come direct to CAAPD and they often do. My team and I then review the handling.

Similarly, when a complainer is not really satisfied that something has gone through the process as non-criminal but is not challenging that, and the matter goes to the PIRC for a case-handling review, if the PIRC finds anything criminal, it will refer it to CAAPD under a memorandum of understanding with CAAPD. There are various ways for something to come back to CAAPD.

Russell Findlay: That answer illustrates neatly how complicated the landscape is for a member of the public. If that were represented as a flow chart, it would be quite confusing.

Communication with complainers—whether they are police officers or members of the public—is vital. To go back to the HMIPS report, it said that communication from CAAPD was unsatisfactory in four in 10 of the 80 cases that were looked at. The report contains quite detailed accounts, some of which are pretty shocking, to be frank.

You came into your post when that report was produced. What can you say about the quality of communication from CAAPD now?

Justin Farrell: Following the assessment in the inspectorate's report, we completely revised our communication strategy. We have more direct communication with complainers and more communication at every part of the process.

To give a small example, we did not use to advise a complainer when we received a substantive investigative report, but we now do that. We did not always tell a complainer that there would be a delay and that we would go beyond the six-month target; we now do that. A whole new communication strategy has been put in place.

Russell Findlay: I presume that you tell complainers when a final decision has been made. Is that a matter of routine?

Justin Farrell: It is now. When the inspector did her investigation, she found that we did not always tell complainers the outcome of their complaints. That was really a misdirection on CAAPD's part; CAAPD had previously aligned itself with the processes for all other criminal reports. For those reports, when a prosecutorial decision is made, not everyone is necessarily told what the decision is. We had folded in with that process, but CAAPD is a specialist unit, so it should take a specialist approach. That approach was lacking, and we have addressed it.

Russell Findlay: Am I allowed to ask one more question, convener?

The Convener: I will come in quickly before Russell Findlay asks his final question. On access to police information, we spoke with the PIRC about access to Police Scotland's Centurion system. I take it that you have no access to that.

Justin Farrell: I do not have access to Centurion and I do not consider that I need it. Centurion focuses on all complaints against the police, but I have no remit for access to non-criminal complaints, which make up the majority of the data that is on that database.

The Convener: That answer is helpful.

Russell Findlay can ask his final question on the bill.

Russell Findlay: So, cases can be prosecuted or not prosecuted, but you also presumably have the same alternative disposals, such as diversion from prosecution. Are they utilised for police officers?

Justin Farrell: They could be. They are not regularly used as an outcome against police officers but, if that was seen to be an appropriate outcome, it will be utilised.

Russell Findlay: Do you have any data that you could share with us on that? It would be quite interesting to see.

Justin Farrell: As has already been said, most of the cases that are reported in a year do not end up in a prosecution—less than 10 per cent do. I do not have data on the outcomes through the courts. To some extent, that is because, once we have made a prosecutorial decision, we pass the case

on to our local court colleagues, who prosecute it locally across the country, and we do not always get information back about the outcomes—at least, we do not record that anywhere once we get that information.

Russell Findlay: Can those court colleagues make a decision to divert from prosecution?

Justin Farrell: No, the prosecutorial decision on how the case is to be dealt with will have been made by the time it goes to them. Effectively, at the point at which that decision would be made, the matter would be in the hands of Crown counsel. They would usually make the decision in a CAAPD case, because there would be a sufficiency of evidence—the case would be reported to Crown counsel because we report every case to Crown counsel where there is a sufficiency of evidence.

If Crown counsel believe that there should be proceedings and that the appropriate prosecutorial action is the use of a diversion, that will be their recommendation, which will then go to the one of the law officers—either the Lord Advocate or the Solicitor General—who will endorse that decision, and that will happen at that stage.

If it is decided that there will be a diversion, it will come back to us and we will action that diversion at that stage, and it will not go to the local prosecutor. If there is to be a prosecution, it will go to the local prosecutor.

What I am saying about statistics is that, to be perfectly honest, we do not have enough cases to make anything statistically relevant. We would be talking about numbers in the tens over a course of years.

Russell Findlay: I would just be interested to know whether, given the increased use of diversion from prosecution within the broader criminal justice system, we are seeing that mirrored in the cases that you deal with.

Justin Farrell: There is no reason why that option would not be used, and I am confident that the prosecution code is applied uniformly by all prosecutors, so, if that is the right outcome, that is the outcome that will be reached.

Pauline McNeill: Good morning. I want to begin by asking you about the lower standard that you mentioned—I think that this is the first time that I have heard about that. Is that contained in law or guidance? Where does that come from?

Justin Farrell: It was contained in statute when I arrived in CAAPD, so I had to deal with it. It is in section 9 of the Police Service of Scotland (Conduct) Regulations 2014, which put an obligation on the deputy chief constable to refer any matters implying criminality to “the appropriate prosecutor”—that is the language that is used—for

an assessment. That is in statute, and we have to incorporate that within our system.

Pauline McNeill: So, in all other cases, there is a certain standard of sufficiency that is applied, but, when it comes to police officers, you have to do something completely different. Is that not quite an odd approach for a prosecutor to deal with?

Justin Farrell: Yes. It is an element that, as a prosecutor of 24 years’ standing, I had to become aware of when I moved to dealing with criminal allegations against the police. However, to some extent, that is the rationale behind the national specialist unit.

The approach is slightly different. You are applying the same prosecutorial principles to the work but the processes are different—there is no doubt about that. That is why it benefits from specialism and people being allowed to build up a bit of experience and become familiar with those peculiarities.

Pauline McNeill: I am trying to get my head around all the different categories of complaints and criminality that police officers might be accused of. You might have alluded to that earlier in response to one of my colleagues. I suppose that a typical example of a complaint might be when a member of the public says that excessive force was used in the middle of an arrest and that, in effect, they have been assaulted. Given that low test, is there not quite a fine line in those cases?

Justin Farrell: There can be, but that is why any investigation needs to be thorough and robust. All the witness statements that might be relevant are taken and assessed as best we can for credibility and reliability by testing it against the other evidence that is available to see whether any particular person’s account is consistent with the weight of that other evidence.

Pauline McNeill: Does a member of the public report that to the PIRC first? Is that how it works?

Justin Farrell: Usually, someone will make a complaint against the police to the police, whether the complaint is non-criminal or criminal. That works well, because the police then have a record of the complaint and can put it on Centurion and track it through the process.

If it is a criminal allegation, the police have a statutory obligation to report it to us. If it is a non-criminal allegation, they have an obligation to address it themselves. That is the basis of the system.

When a criminal allegation comes to me, I make a decision at that stage about whether it remains with Police Scotland or whether the PIRC should conduct a substantive investigation.

Pauline McNeill: Right, I see. In the first instance, it will come to you, having been reported to the police—

Justin Farrell: I will be notified, yes.

Pauline McNeill: You can then make a decision at that point about whether there is sufficiency of evidence, and, if you think that there might be—

Justin Farrell: Sorry, let me clarify that. I do not make a decision on sufficiency at that point. At that point, I assess whether there is a reasonable inference of criminality.

Pauline McNeill: And, if you think there is a reasonable inference of criminality, that is where the PIRC—

Justin Farrell: We move it forward.

Pauline McNeill: Right. I also want to ask you about the timescales for these circumstances. The PIRC then investigates the criminal case, and that can take up to three months.

Justin Farrell: Yes.

Pauline McNeill: The PIRC has said that it is largely meeting those targets but that you can take up to six months.

Justin Farrell: Yes.

Pauline McNeill: We have the figures that show that you are doing better than was previously the case, but my colleagues have mentioned some long cases. It is still quite a long time, is it not? It is nine months before a case can even get to court.

Justin Farrell: It is, but, again, that is a consequence of the thoroughness and robustness of the process. Compared with cases of any other criminality, it does not take so long to make a decision, but, in those cases, there is not so much analysis of the evidence. The evidence in those cases is not tested to the same extent that it is tested when a criminal allegation is made against a police officer for offending on duty.

Part of the rationale behind testing the evidence is that, when a police officer is deployed on duty, they are often deployed in contentious circumstances, and people have very different perspectives of what is happening or whether any particular action is appropriate. It is therefore worth doing the investigation up front to test veracity, because we do not want to prosecute officers who should not be prosecuted because the allegation has no credibility or no basis in fact, or when there might even be an insufficiency of evidence.

Pauline McNeill: As a layperson, I just wonder why we need both the PIRC and the Crown Office; I do not fully understand that. When I asked the PIRC, she said to me that they prepare quite

thorough reports for the Crown Office in investigations. Could not the Crown Office do it all, if you are doing it anyway? Is there not a duplication?

Justin Farrell: We are not detectives—we cannot detect in the same way that trained investigators can and we do not have the powers of constables. In effect, we are lawyers or civil servants who are trained to do precognition for those cases—to interview witnesses and put together a report—and deliver a legal product.

Pauline McNeill: What is the difference, really? What is the PIRC doing? I understand that point, but, when there is an allegation, are you saying that the PIRC will ask to see all the people concerned, take statements from them and draw up a report?

12:15

Justin Farrell: Yes. The police deploy their resource and go and carry out investigations. In the simplest terms, officers get into a car, drive to where they have to drive to, look at locus and investigate, in the wider sense. They will seize CCTV, documents and other productions because they have the powers of a constable, which allow them to do that. We cannot do that, because we are lawyers, and we make the legal assessment. The police do the investigation—they are the experts in that—as is the PSD. I should say that my assessment is that I get a good-quality report from both the PIRC and the PSD because they are trained investigators.

When a case comes to me, we try to identify what other evidence might be available and useful, and we then instruct further inquiry. That does not mean that we can do the inquiry; we can instruct the investigators to do it on our behalf.

Pauline McNeill: I understand. That is helpful.

Justin Farrell: They go out with the powers that they have, do that and feed that back in.

Pauline McNeill: In the case of an accusation of assault—I thought that a typical accusation might be, “When you handcuffed me, you actually assaulted me” or something like that—why would it take six months for the Crown to duly decide on sufficiency of evidence in what is quite a simple case?

Justin Farrell: The short answer is that it does not usually take that long. We usually report those cases well within the targets—at least, I would hope that we are doing that. We do not have a particularly nuanced management information system that would allow me to track how long each type of case is taking. Some of that is because of the way that the cases have to be reported to us for confidentiality and legal

reasons—we get a hard copy report, which is different from the electronic reports in all other areas of COPFS business. Setting that aside, that just means that I have less management information than other areas of COPFS business. However, generally, if it is a simple case, we report it quickly; if it is less simple, it will take longer to report; and we are meeting our target.

Pauline McNeill: Thank you. Can you clarify something that you said to Sharon Dowey? This matter came up in previous evidence. In a particular case that the committee looked at, the police officer was, I think, suspended or put on restricted duties, and he was not allowed to know what the allegations against him were. The suggestion in that evidence session was that there might be legal reasons for that. What is the position on that?

Justin Farrell: He is entitled to know what the allegation against him is.

Pauline McNeill: Right.

Justin Farrell: I am surprised that they would not have known that. I cannot speak to the case, but, when providing welfare to an officer who is under investigation, the police should provide the individual with the information to allow them to know, in general terms, what the allegation is. Of course, they cannot share any of the evidential product, but they can let the person know what they are being investigated for.

Pauline McNeill: That is really interesting and helpful, because we thought that there might be a legal reason for that. Now that we know that there is not, we can pursue that.

I want to keep using an example—a simple example. On the face of it, if a police officer is accused of assault, that is a criminal case that may go to court, and the court may find the officer not guilty.

Justin Farrell: Yes.

Pauline McNeill: How can that still be a misconduct issue? Perhaps you cannot answer that. I am struggling to understand why Police Scotland still pursues the officer for misconduct on something that a court has dealt with. I can understand if there were other separate issues involved, because those would then have to be dealt with. However, if it is a simple case of an assault, surely the matter is dealt with at court—I am talking about cases in which the officer is found not guilty.

Justin Farrell: I think that the answer comes down to the standard of proof that is required. Obviously, in a criminal trial, that is beyond reasonable doubt, which is a high standard of proof. Sometimes, if there is an acquittal, the rationale that is provided by the court is that the

standard of evidence did not meet that high test. That does not mean that whatever was alleged did not happen. There might still be substance to the allegation, which the police wish to address as a misconduct matter.

Pauline McNeill: Thank you. Recommendation 46 of the review is:

“The ability to report directly to the Criminal Allegations Against Police Division of COPFS a complaint of a crime by a police officer should be much better publicised and made more accessible to the public by COPFS”.

I wonder why you thought that that was the case—that a complaint should be widely publicised? Why is that or, rather, what was meant by that?

Justin Farrell: I think that, when Dame Elish was conducting her review, there was some commentary about the fact that some individuals were not aware that they could come directly to the Crown to make a complaint. It has always been the case that any individual can make any allegation of criminality directly to the Crown. However, that is not the most efficient way to report a crime, because we cannot attend to that crime.

That is similar for criminal allegations against police. An individual can come directly to CAAPD, but that is not the most efficient way to make an allegation, because that does not fold it into the usual processes. Therefore, we have to come up with an exceptional arrangement to move that forward. I have no difficulty with someone who has completely lost confidence or trust in the police coming to me, but the trade-off is that the investigation might take longer and be less efficient and have to be run on an almost exceptional basis rather than through the routine processes that we have in place.

Pauline McNeill: Right—I understand.

Justin Farrell: Nevertheless, following Dame Elish’s review, we did more to publicise that direct route, with the caveat that the most efficient and best way of doing it is still to go through the usual process.

Pauline McNeill: That makes sense. Thank you very much.

The Convener: I have a couple of questions, the first of which relates to the functions of the PIRC, particularly in relation to police officers who have left the service. The bill clarifies the definition of the phrase

“persons serving with the police”

to allow the PIRC to investigate allegations of criminality against officers who have left the service, where the behaviour took place prior to their joining or while they were off duty. In your submission, you provide some evidence that the

impact of such a provision could be that you would no longer have to run parallel investigations in certain circumstances. Do you envisage it impacting on any other aspects of CAAPD's work or its role, given that it currently deals only with on-duty criminality?

Justin Farrell: No. That particular provision will be of assistance to CAAPD and the investigative process. At the moment, I occasionally have to instruct parallel investigations; it does not happen often but, if you have an allegation involving more than one officer, and some of the officers have retired, have resigned or have otherwise left the police force while some are still in employment, the PIRC can carry out the investigation of those who are still employed, but it must be Police Scotland that carries out the investigation of those who have left. That is because the PIRC does not have a statutory power to investigate non-police officers.

That situation is not ideal because, in effect, I have two different investigative agencies investigating the same incident. There are practical issues in respect of when the reports come in and how you pull all the information together. In a case where I have decided that the PIRC is the appropriate investigative agency—because I have already referred part of it to the PIRC—it is much simpler and better if the PIRC can do all the work. Therefore, this provision will be very helpful, and it will mean a huge improvement in efficiencies with regard to how we deal with these things.

I do not know whether you will come on to this, but I would highlight the need for a similar provision to deal with the fact that we currently do not have a remit to investigate officers from other parts of the United Kingdom who are on deployment in Scotland. Similar issues can arise there. For the scoping for COP27—or maybe it was 28; it was so long ago—we tried to come up with a process for what would happen if a significant number of issues arose involving officers from other parts of the United Kingdom, and that scoping led us to conclude that there would have to be parallel investigations, which is not ideal. If the PIRC had the statutory power to investigate officers deployed on mutual aid or whatever the policing basis might be, that would be helpful, because it could do so against officers from elsewhere as well as Scottish officers at the same time, and we would have one investigation instead of more than one.

The Convener: That is interesting. Perhaps we underestimate the number of occasions when officers from outside the Police Scotland area are on duty in Scotland for a variety of reasons.

My final question relates to the duty of candour, which we discussed with the witnesses from the

PIRC. You have responded to some questions on the delays experienced with investigations, and the PIRC has suggested incorporating a duty to co-operate into the duty of candour, under which officers would be required to provide operational statements timeously where their status is clearly that of a witness.

In relation to the introduction of a statutory duty of candour, can you advise whether CAAPD currently experiences issues arising from delayed statements—I think that the answer to that will probably be yes—or other information from Police Scotland, and whether the PIRC's proposal on incorporating a requirement to produce operational statements would be helpful for CAAPD?

Justin Farrell: In general terms, I do not routinely experience delays in the ingathering of statements from police officers. They routinely engage with the investigative process. In the past, where there have been issues, there has been an obviously serious incident, followed by a post-incident management process involving the taking of statements of the officers involved. I think that officers have been confused as to the extent and purpose of engaging and of those statements being taken; they might have had conflicting advice from the federation, for instance, as to whether they should engage.

The duty of candour proposed in the bill will address that to an extent. The expectation is that officers will engage in investigations where there is a good reason for them to do so. They will be expected to do so, and a professional standard will be linked to that. If they do not do it, there might be consequences. All of that is helpful.

On a duty of co-operation, I think that, in general, it would be great if that could be achieved, but there are real difficulties in achieving it in a way that is article 6 compliant. Once you get into compelling someone to attend for an interview and attach potentially punitive consequences for not doing so, you could get into difficulties, if they incriminate themselves, in using that product in any event. If such a duty could be drafted, that is great, but I think that when it was looked at in the process of putting the bill together, the parliamentary draftspeople could not come up with a way of squaring that circle and therefore decided to leave it aside in the meantime.

The Convener: That is very helpful.

The other point that I was thinking about relates to those probably very infrequent circumstances when an officer's status might change from witness to suspect. How does that work?

Justin Farrell: The duty of candour does not impact on that because, effectively, they are not being compelled to attend. There is an expectation that they will engage but, if suspicion has not

crystallised upon them as a potential suspect, they are engaging with the process voluntarily, as a witness. If they provide information that is contrary to their own interests, they have not been compelled to provide it, so potentially the courts, in applying article 6 principles, will allow that evidence to be led. I am not convinced that the court would allow the evidence to be led if a compulsion were attached to that information.

At the start of an inquiry, you might not have enough information for suspicion to crystallise, so you might interview someone as a witness at an early stage of an investigation who then becomes a suspect. However, at the point at which they become a suspect, they should be cautioned, and they should be told that anything that they say will be noted and may be used in evidence, but they do not need to say anything.

It is about squaring that circle. I can understand why the PIRC would find a duty of co-operation very attractive—it could compel an officer to come along and meet it when it directs that that should happen—but the difficulty is that the approach has to be article 6 compliant.

The Convener: That is the tricky bit.

That brings us up to time. Thank you for joining us, Mr Farrell—the evidence has been very helpful.

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

12:31

Meeting continued in private until 13:08.

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