CHAPTER 10: POLICE INVESTIGATION AND REVIEW COMMISSIONER

Introduction

This additional submission arises from our concerns over the detail of Chapter 10 of the Police and Fire Reform (Scotland) Bill SP8 (as introduced) and the timing of its implementation in relation to capability and capacity of the new Police Investigation and Review Commissioner (PIRC).

Independent Investigation and Review

ASPS fully understand and support the public interest requirement for an independent body to be able to investigate and review police conduct. Effective action by the PIRC is essential to maintain confidence in policing as well as in the new Independent Investigation and Review Service.

Capability, Capacity and Timing

While the most serious of incidents that the PIRC will be involved in are very rare in Scotland, the PIRC will need to have full capability and capacity to fulfil its statutory function from the same date that the Police Service of Scotland (PSOS) becomes operational. In order to meet this statutory duty the PIRC is likely to require sufficient appropriately qualified, skilled and experienced resources. Some of the particularly sensitive and specialised capability that may be required to conduct investigations into the most serious cases is currently only available within law enforcement organisations across the UK.

Recent events involving the Independent Police Complaints Commission (IPCC) and the Metropolitan Police in the case of Mark Duggan indicate that when dealing with the most serious of complaints, issues do arise. We are keen that the detail of how PSOS and PIRC interact, are established and understood in time for both organisations becoming operational. This requires guidance and protocols to be agreed, produced, staff trained and arrangements implemented. We are concerned that unless the PSOS Chief Constable and the Chief Officer Team are in place as early as possible, the detail will not be agreed and suitable arrangements will not be in place in time. We would urge the Justice Committee to satisfy itself that not only is the Chief Constable and the Chief Officer Team in place as early as possible but that the PIRC is also in place and operationally effective for Day1.

Primacy – Lord Advocate and PIRC

Some clarity may be required in the Bill as to primacy in relation to authorising the instigation of investigation into “serious incidents involving the police”. The wording of the Bill could be clearer to confirm that the PIRC may only conduct such investigations when directed to do so under Section 33A (1), (b). The current structure of the Bill is such that it is unclear if such investigations can only be carried out when directed by the “appropriate prosecutor under the 2006 Act under Section 33A (1), (b) (I) (person serving may have committed a serious offence) or (II) (death of person serving with the police) or if the PIRC can unilaterally decide to investigate “serious incidents involving the police”, under Section 41B of the 2006 Act.

These “serious incidents” under Section 41B, may include circumstances that might be a matter for consideration by the Procurator Fiscal in the first instance as there may well be a need to consider and eliminate that a “person serving with the police may have committed a serious offence” under Section 33A (1), (b) (II) (death of person serving with the police).

Section 41B appears to cover situations whereby a person may have died following contact with police. This may include circumstances that might amount to a person serving with the police who may have committed a serious criminal offence and as such the “appropriate prosecutor” may wish to direct the PIRC in such circumstances.

Defining Public Interest and Decisions to Initiate Public Interest Investigations

Section 63 of the Bill amends the Police, Public Order and Criminal Justice Act 2006 Section 33, by inserting Section 33A regarding the general functions of the Commissioner. Section 33A, (d) empowers the PIRC to investigate “other matters” relating to the Authority or the Police Service where the Commissioner considers that it would be in the public interest to do so.

Section 66 of the Bill (Investigations of other matters in the public interest) empowers the Commissioner to investigate “any relevant matter”. The term “any relevant police matter” can be interpreted very widely and there is a risk that it may be so interpreted by the PIRC. We are concerned that the wording of this section empowers the PIRC to conduct investigations without limit. Consequently significant time, resource and cost is likely to be devoted to investigations arising as a result of a wide interpretation of “public interest”. This may have an unintended consequence for effective and efficient operational policing both in terms of disruption to operations, the effort required and in changing police culture to be increasingly risk averse.

The probability of the police service becoming increasingly risk averse is very real when considering the implications for individuals at Sections 11 (add, remove, demote rank), 12 (hold and vacate office), 14 (senior officer retirement for efficiency and effectiveness) 23 (4) (a) (5 years imprisonment for failure to perform duty) and 49 (introduction of any regulation).

When taken as a whole the working environment proposed under the Bill for police officers is being radically changed. With the potential of a wide interpretation of
“public interest” by PIRC this will place an additional factor on police decision-making and may impact adversely through greater risk aversion in working practices.

We do understand the need for public interest investigations but would encourage the Justice Committee to question whether it is appropriate to invest such significant power to commence such investigations in one person. We would encourage the exploration of alternative models to ensure that democratic and ECHR compliant principles are included when determining public interest investigations.

We would also encourage the Justice Committee to satisfy itself that the PIRC will be sufficiently open, transparent, proportionate and accountable in its operations and as such progressed through the legislative processes of the Bill.

We do note the constraints on investigations available to the Scottish Ministers by Regulations they might make in relation to section 33A, (1), (c) or (d) under Section 67 of the Bill by inserting Section 41 D in the 2006 Act, which enables intervention by the Scottish Ministers. While we hope that the circumstances that would require Scottish Ministers to make such Regulations to intervene in these matters would be rare, we believe that the probability of such a requirement for Ministerial intervention could be reduced, by considering alternative arrangements for making decisions on “public interest” investigations by perhaps a “Public Interest Investigation Panel” or other such arrangements.

Costs

Given the extensive function of the PIRC, we would also suggest the Justice Committee may wish to examine closely the financial assumptions made for establishing the PIRC. The 2011/12 budget for the Police Complaints Commissioner Scotland was £930K and the cost of the new arrangements is estimated at £2m to £4m. As these costs are currently being incurred by police forces in Scotland, it is assumed that introducing the PIRC will be cost neutral, with transition costs of circa £80 to £122K and £50K to £76.5K.² While we lack access to the detailed costings associated with current investigations, for the scope of investigations that the PIRC will be undertaking in the future, intuitively, the estimates do seem somewhat low.

Complaints Against the PIRC

As police officers we fully understand that our role in society will frequently place us in conflict with individuals and groups as we execute our duty. It is quite right that complaints can be made, investigations undertaken and reviewed. However, we feel that the vague nature of Section 70 of the Bill does a disservice to those people that are required to uphold and enforce the law and who, by their action or inaction can be subject of complaint, investigation and face severe sanctions.

We need clarity on how complaints against the PIRC can be addressed not only in relation to complaints by a member of the public but as a point of fairness where a serving member of PSOS has legitimate concerns regarding the conduct of the PIRC or a member of the PIRC staff. While the Police Appeals Tribunal may consider

² Police and Fire Reform (Scotland) Bill, Explanatory Notes, Pages 17-18
appeals against the findings of the PIRC, there does not appear to be any complaint process available to a person subject of a complaint investigation by the PIRC. In our view the role of the Public Service Complaints Ombudsman must be clearly stipulated within this section.

**Intrusive Surveillance**

We note the provision under Schedule 6, Part 1 to enable the PIRC to authorise and conduct intrusive surveillance operations under the Regulation of Investigatory Powers (Scotland) Act 2000. The Police Service uses this power carefully and has checks and balances in place to ensure it is proportionate and minimises collateral intrusion. Given our concerns over capability, capacity and timing we would encourage the Justice Committee to satisfy itself that appropriate safeguards are in place for the PIRC from April 2013 and that it has access to appropriately trained and qualified resources to implement and handle intrusive surveillance.

**Workplace Accountability and Criminal Accountability**

We would encourage the Justice Committee to consider the Bill and the provisions relating to the PIRC in a broad policing context. We are of the view that there is a risk of the PIRC taking too strong an interest in workplace accountability. We understand the need for the PIRC to address issues where the public have expressed a concern at police action and are dissatisfied with the outcome of complaint investigations; however a balance needs to be struck to enable the police service to function effectively and maintain internal discipline on a daily basis.

The role of the Deputy Chief Constable in relation to efficiency and misconduct is appropriate to deal with matters that do not amount to serious criminality or serious misconduct requiring external involvement.

Policing is complex at the best of times. When dealing with members of the public who are non-compliant, under the influence of drink or drugs, mentally ill or having experienced a sudden bereavement or are in crisis, it can be particularly difficult. As a Service we expect and demand high standards of conduct. At the same time it is recognised that officers face a range of challenging incidents, some of which can have a major effect on their health and welfare. For these reasons Forces provide training, support and occupational welfare arrangements.

As police officers we exercise our professional judgment constantly. We do this by applying our training, knowledge, experience and our values. We also exercise discretion. This can mean that sometimes we take action and sometimes we do not. This can be a cause for complaints against police particularly when individuals misconstrue the reasons for an officer’s action or inaction. Policing accountability has to take a range of factors into consideration as is shown in this example and for this reason, we are disappointed and somewhat confused at the penalty of 5 years imprisonment for “failure to perform duty” introduced at Section 22, (4), (a). Indeed this seems extremely harsh treatment for an officer subject to misconduct proceedings. The Policy Memorandum indicates that the policy intention³ is to make

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³ Policy Memorandum, Section 151, Page 29
prosecutions easier. We are very disappointed at the inference that the Scottish Government is of the view that there is a need to make prosecution of police constables easier and would ask for clarification of the problem that this legislative change is trying to address.

The Bill appears to seek to erode the status of the office of constable whilst at the same time increasing the penalty for “violating” the office of constable by increasing from summary proceeding levels under the 1967 Act, to 5 years imprisonment in this Bill. We struggle to understand the validity for seeking this extreme change.

We are particularly concerned that the independence of police constables to act impartially, without fear or favour in the discharge of their office, will be compromised by this Section of the Bill

In Conclusion

ASPS does not dispute the requirement for a PIRC however we do have concerns that:

- the reach of the PIRC may be too far;
- it may result in increasingly risk averse policing and increased costs; and
- it may ultimately be unable to function effectively within the set timescales unless the Chief Constable and the senior management team as well as the PIRC and their staff are in place with key protocols agreed and implemented by April 2013.

We have real concerns about “public interest investigations” and their affect on operational policing and feel strongly that with the introduction of these measures there is potential for instilling a risk-averse culture in the PSOS.

Finally, we are concerned about the fairness of the proposed method of dealing with complaints against the PIRC. There must be included within its terms of reference and Policy Memorandum a clearly defined procedure to address this shortfall in the current Bill including a role for the Public Service Complaints Ombudsman.

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