Justice Committee

Police and Fire Reform (Scotland) Bill

Written submission from the Police Complaints Commissioner for Scotland

1. The Police Complaints Commissioner for Scotland (“the PCCS”) welcomes this opportunity to provide written evidence to the Justice Committee on the Police and Fire Reform (Scotland) Bill. The evidence is restricted mainly to Chapter 10 of the Bill which contains proposals for additional, investigative functions to be given to the PCCS (to be re-named the Police Investigations and Review Commissioner (“PIRC”)).

2. In general, the PCCS views the terms of Chapter 10 positively and as going some way to satisfying the requirements of articles 2 and 3 of the European Convention of Human Rights (“ECHR”) now that a single police force is to be established. There are, however, a number of aspects which are unclear, and questions as to how the proposed arrangements might work in practice.

PIRC investigations into serious incidents involving the police

3. Section 63 envisages PIRC investigating “serious incidents involving the police”. These are defined as including incidents in which there is an indication that the police may have caused or contributed to the death or serious injury of an individual; cases in which a person in police custody has sustained serious injury; and cases in which the police have used a firearm.

4. The Bill does not, however, contain any provision as to how such investigations will be triggered. Unlike those cases in which there is an indication of criminality, investigations into “serious incidents involving the police” are not dependent upon a direction from the prosecutor. The Bill appears to envisage the Chief Constable notifying PIRC of such incidents as there is reference in section 67 to the possibility of regulations requiring the Chief Constable or Scottish Police Authority (“the Authority”) to refer particular cases to PIRC. The prompt referral of such cases will be of critical importance to the exercise of PIRC’s functions and the integrity of its investigations. The PCCS therefore considers that the notification arrangements ought to be specified in the Bill, rather than within regulations which may (or may not) be made.

5. All other police oversight bodies in the UK and Ireland operate on the basis of mandatory referrals by the police of cases involving death or serious injury (see e.g. section 102(1) of the Garda Siochana Act 2005 (Ireland); and section 14C of the Police Reform Act 2002 (England and Wales)). In the absence of a similar provision, it is unclear how PIRC might be alerted to a serious incident of the kind it is expected to investigate. At best, the police service will decide voluntarily to refer incidents to PIRC which itself might give rise to uncertainty and inconsistency. At worst, the police service may decide to investigate the matter itself, thereby undermining the very purpose of this part of the Bill, namely to ensure an independent investigation of such incidents.
6. The PCCS also considers that the distinction between investigations of “serious incidents involving the police” and those commenced only on the direction of the prosecutor may in practice become blurred, or disappear altogether. For example, while investigating an incident in which a suspect in police custody has suffered serious injury, PIRC may obtain evidence of a police assault. In such a case, it appears that PIRC would require to cease its investigation, alert the prosecutor and then await a direction as to whether to proceed. If issues such as this are to be resolved quickly and without confusion as to which body is to investigate the incident, there will require to be clear lines of communication between PIRC and the prosecutor. A comprehensive protocol between PIRC and the Crown Office will also be required.

The obligation upon PIRC to publish reports of investigations

7. Section 68 provides that PIRC must prepare and publish reports of its investigations into serious incidents involving the police, as well as those it undertakes in the public interest. In general, the publication of reports will serve to enhance public confidence in the way such incidents are dealt with. However, cases investigated under this part of the Bill will involve serious issues, and alleged victims, their relatives etc will rightly expect PIRC’s findings to be capable of effecting change where appropriate. As it stands, the Bill makes no provision as to how this might be done and by whom. For example, is it envisaged that PIRC will merely detail its findings, or will it be expected to make directions to the police service with a view to avoiding a similar incident occurring in future? If the latter, PIRC will require to be empowered to make such directions and the police service subject to a corresponding duty to implement these.

8. The PCCS is also concerned that the obligation upon PIRC to publish reports of its findings is not subject to any exception. There may, for example, be circumstances in which the publication of a report will not be in the public interest. This could be the case where publication, even in anonymised form, might result in harm to an individual, or prejudice legal proceedings. Section 68 allows PIRC to identify individuals in reports where this is considered to be in the public interest. The PCCS considers that a similar provision should be inserted to permit PIRC not to publish at all, publish only partially, or delay publication where this is considered necessary in the public interest.

Duties in respect of PIRC investigations

9. Section 67 provides that the Scottish Ministers may, by regulations, make provision requiring the Chief Constable, the Authority or other persons to assist and co-operate with PIRC when carrying out an investigation. It is unclear whether such regulations will in fact be made and, if so, whether this will be done prior to PIRC becoming operational. Again, the PCCS considers that such provisions are critical to the effective performance of PIRC’s functions and the integrity of its investigations. In the PCCS’s view, they should therefore feature in the Bill itself.

10. As the commencement of a PIRC investigation will be dependent upon prior notification by the prosecutor and/or police, its investigators are unlikely ever to be first at the scene. PIRC will require to attend incidents as quickly as possible, but the
time taken to do so will obviously increase in the event that the incident occurs in a remote area or a location some distance away from the central belt. In light of this, the PCCS considers it essential that the Bill contains a provision obliging the police service to preserve the scene of an incident, and any evidence, pending the arrival of PIRC investigators. In the PCCS’s view, the Bill must also contain a provision requiring the Chief Constable to co-operate with PIRC in its investigations and to comply with any reasonable direction given by PIRC in this connection. Obligations of this kind will be essential if PIRC is to secure the assistance of the police during the course of an investigation, where this is necessary. Although such obligations could be imposed by statutory instrument, again it is unclear whether regulations will in fact be made and, if so, whether the intention is to do so before PIRC becomes fully operational.

11. A notable feature of Chapter 10 is that there are few obligations imposed upon PIRC, the Chief Constable or the Crown. For example, under the current provisions the decision to direct an investigation by PIRC in serious criminal cases and deaths in custody is a matter entirely for the discretion of the prosecutor. Likewise, as noted above there is no obligation upon the Chief Constable to refer serious incidents to PIRC, and no obligation upon PIRC to carry out investigations into such incidents.

12. Although section 67 provides that regulations may be passed about the circumstances in which PIRC “must, must not or need not carry out an investigation”, again the PCCS considers this issue to be too important to be left in a state of uncertainty. The case law of the European Court of Human Rights under articles 2 and 3 is at times inconsistent as to precisely what an independent and effective investigation comprises, and in what circumstances such an investigation is required. However, there appears to be sufficient clarity to allow the Bill to prescribe the types of cases which require to be referred to PIRC. In any event, there is nothing to prevent the legislation going beyond the minimum standards set by the ECHR. The extent of investigation actually required is a matter which can be determined by PIRC, subject to any instructions given by the prosecutor.

13. A lack of clarity regarding those cases which must be referred to PIRC may give rise to uncertainty and inconsistency. It may also increase the scope for legal challenges by alleged victims based on a failure to adhere to the positive obligations under articles 2 and 3. The IPCC in England and Wales frequently faces such challenges in connection with decisions not to conduct independent investigations into serious incidents.

The provision of forensic services to PIRC

14. Section 31 of the Bill provides that the Authority must provide forensic services to the police service, the Lord Advocate and procurators fiscal, and may provide such services to other persons as it sees fit. Section 84(5) permits the Authority to charge for services it provides to public bodies and office-holders, but provides that no such charges will be made for forensic services it provides to the Lord Advocate or procurators fiscal.

15. Presumably PIRC would not be charged for any forensic services provided by the Authority in respect of an investigation undertaken on the direction of the prosecutor;
however, the PCCS considers that this should be made explicit in the legislation. More importantly, there is nothing in the Bill to prevent PIRC incurring significant costs for forensic services in respect of those investigations which are not directed by a prosecutor (i.e. section 41B investigations and those carried out in the public interest).

16. In light of these concerns, the PCCS considers that section 31 requires to be amended to make clear that, as well as the police service and the Crown, the Authority must also provide PIRC with forensic services. The PCCS also considers that an amendment to section 84(7)(a) is necessary, making clear that the Authority may not charge for the provision of such services to PIRC.

Local policing

17. Section 46 of the Bill provides that the local authority may monitor and provide feedback to the local commander, in particular regarding its views on any matter in relation to the policing of its area. The local authority may also make recommendations for improving the policing of the area. As the local commander is specifically tasked with providing the local authority with statistical information on complaints made about the police in relation to the area, the PCCS considers that this places a duty on the local authority to hold the local commander to account in this respect. The PCCS would welcome this. The Bill is, however, silent as to how local authorities should implement their arrangements for the scrutiny of local policing. In the PCCS’s view, it is important that scrutiny is exercised consistently and takes account of guidance from PIRC in respect of complaints about the police. While the Authority and the Chief Constable will be obliged under statute to have regard to PIRC guidance, there is a deficit in terms of the local authorities when they come to exercise that scrutiny.

Co-operation, Exchange of Information etc

18. Section 82 of the Bill obliges Audit Scotland, PIRC and HMICS to co-operate and co-ordinate activity with each other with a view to improving the carrying out of their respective functions. The PCCS supports this provision entirely, but it is important to emphasise that the duty to secure efficient and effective complaints handling currently lies with PCCS. Based on the current proposals, the same function will in the future be exercised by PIRC. This arrangement ensures that the oversight landscape does not become cluttered or confused and also that the arrangements for handling complaints by policing bodies is subject to independent scrutiny. The PCCS has to date undertaken a number of intelligence-led audits of complaints handling arrangements within various policing bodies, the results of which it has shared widely.

PCCS
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