Justice Committee

Post-legislative scrutiny of the Police and Fire Reform (Scotland) Act 2012

Written submission from the Police Investigations and Review Commissioner (PIRC)

1. Introduction

This paper addresses the Committee’s call for consideration of “any further policy or legislative changes which are required to improve the effectiveness of the Act” as it applies to the PIRC.

The paper addresses the PIRC’s separate functions of (1) investigating incidents involving the police and (2) reviewing police complaint handling. It suggests legislative amendments to enhance existing arrangements for each.

2. Investigations

2.1 In terms of the current legislation (the Public Order and Criminal Justice (Scotland) Act 2006 (‘the 2006 Act’) as amended by the Police and Fire Reform (Scotland) 2012, (‘the 2012 Act’)) Section 33 (A) (b) provides that where directed to do so by the appropriate prosecutor, the PIRC must investigate any circumstances indicating criminality or certain death cases involving “a person serving with the police”.

There is a divergence of legal opinion on whether that section applies only to those currently serving with the police or to those who were serving with the police at the time of the alleged offence or when the death took place.

This ambiguity has led to the undesirable scenario in several investigations, where the COPFS has directed dual investigations, in which the PIRC has been directed to investigate criminal allegations against serving officers whilst Police Scotland (or in one instance, an English force) has been directed to undertake a parallel investigation into those who have resigned/retired.

This leads to the anomalous position that two agencies are involved in the same investigation – interviewing the same witnesses, pursuing the same lines of enquiry and attempting to secure the same productions.

A further potential consequence of this lack of clarity is that if a serving officer chooses to retire/resign whilst the PIRC is investigating criminal allegations about him/her, the powers of the PIRC to continue the investigation may end with the officer’s resignation/retiral. Whilst the COPFS can choose to direct another policing body to investigate the allegations about retired officers, it is suggested that the current situation is not satisfactory, represents an ineffective use of investigative resources and undermines an independent investigation of such matters. Accordingly, it is recommended that Section 33 be extended to cover those previously employed by a policing body operating in Scotland since 1 April 2013.
2.2 Section 33A (b) (i) provides the potential for a PIRC investigation into “any circumstances in which there is an indication that a person serving with the police may have committed an offence”.

There have been instances which have subsequently been identified as indicating that a person serving with the police may have committed an offence, which have not been referred to the COPFS in the first instance to allow consideration to be given to an independent PIRC investigation.

In these instances, the matters have either not been progressed by Police Scotland or alternatively have been dealt with by the traditional route of investigation by Police Scotland, before alerting COPFS to the allegation. This therefore deprives the COPFS of its opportunity to determine whether there should be an independent PIRC investigation.

Additionally, no distinction is drawn in Section 33A (b) (i) between on duty and off duty alleged criminality by police officers but notwithstanding this, allegations of off duty criminality, similarly tend to continue to be dealt with by Police Scotland, frequently before alerting the COPFS to the allegation.

It is suggested that the legislation be amended to provide the PIRC with the power to audit policing bodies’ systems and obtain information from those bodies, to ensure that all matters envisaged by the legislation are appropriately directed for consideration of an independent PIRC investigation at the outset.

2.3 Scottish Ministers introduced the Police Investigations & Review Commissioner (Investigations Procedure, Serious Incidents and Specified Weapons Regulations 2013 (the PIRC Regulations) in terms of Section 41D of the 2006 Act as amended by the 2012 Act. Regulation 5 enables the PIRC to require police officers and staff to cooperate with PIRC investigators and provide information, when undertaking an investigation under Section 33A (c) or (d) i.e. investigations at the request of the Scottish Police Authority, the Chief Constable or an investigation initiated by the Commissioner. Regulation 5 does not apply to COPFS investigations under Section 33A(b) relating to criminality or deaths.

In effect, this means that PIRC investigators are restricted in their enforcement powers when undertaking an investigation instructed by the COPFS.

It is recommended that Regulation 5 be amended to apply to COPFS directed investigations. It is also recommended that Regulation 5 be further strengthened by providing a defined timescale within which the required information must be provided.

2.4 The Police Service of Scotland currently retains sole responsibility for investigating concerns raised by whistleblowers within its organisation and with the exception of any engagement with the SPA, there appears to be no independent scrutiny of these matters.
The Justice Committee may wish to consider whether there would be benefit in moving whistleblowing and investigation of matters arising, out of Police Scotland to an independent body and adopting a system similar to that now vested in the IOPC in England and Wales.

3. Complaint Handling Reviews

3.1 In terms of the current legislation, the PIRC is enabled to review non-criminal complaints made about the police at the request of a member of the public or relevant policing body, once the complaint has passed through the policing body’s complaints process.

From 2016-17 data, it appears that the PIRC is asked to review the handling of less than 5% of all the complaints made about the police. Accordingly, most complaints made are not subject to any independent oversight. Of the 5% brought to the PIRC, several instances have been identified where Police Scotland has failed to refer criminal allegations against officers to the COPFS as required, or attempted to deal with serious and complex complaints via ‘frontline resolution’ (a process that should be used only for minor and straightforward complaints).

The Justice Committee may wish to consider whether these issues should be addressed by delegating the initial reception, recording and assessment of all complaints to an organisation which is independent of the police. The benefit of this would be to ensure the appropriate evaluation of complaints and a transparent system of referral to the relevant organisation to deal with the complaint, e.g. Police Scotland’s Professional Standards Department, local policing division, COPFS, etc.

3.2 Section 35 of the 2006 Act, as amended by the 2012 Act, provides that the PIRC is required to inform the complainer and anyone who is identified as the subject of the complaint, of the conclusions, reasons and actions flowing from the complaint handling review. However, the Scottish Parliament recognised that in certain circumstances detailed in Section 35 (5) and (6) it may be inappropriate to do so. To address this, the Scottish Parliament provided that Scottish Ministers could make exceptions to the general rule, by way of Regulations. To date, no such Regulations have been drafted and the PIRC suggests that this should be progressed in early course.

It is also suggested that Section 35 (3) be amended to clarify that the actions proposed by the PIRC may include recommendations as well as directions. In the interests of effective administration, it is further suggested that Section 35 be amended to provide defined timescales for policing bodies to implement actions detailed in complaint handling review reports.

3.3 Whilst the current legislation, provides the PIRC with authority to give and supervise reconsideration directions, it does not provide authority to instruct the relevant policing body to uphold a complaint, even in circumstances which overwhelmingly support that it should do so. It is suggested that the legislation be amended to enable the PIRC either to instruct the police to uphold complaints or to replace the policing body’s determination with the PIRC’s determination on whether or not the complaint should be upheld.
4. Conclusion

The above suggestions and proposed legislative amendments would strengthen the PIRC’s ability to provide effective scrutiny and oversight of policing in Scotland.

PIRC
24 May 2018