I refer to ACC Speirs’ supplementary written submission of 8 November 2018 and to my letter of 7 November 2018, in which I clarified that the complaint categorised as ‘incivility’ by Police Scotland related to a matter, which following the PIRC’s intervention, was reported as an attempt to pervert the course of justice by a serving police officer in connection with a rape case.

Having read the supplementary submission from ACC Speirs, I consider it necessary to address a number of the matters raised.

As you know, earlier this week I described at least three areas where Police Scotland continues to exercise discretion in dealing with matters which, in the interests of transparency, could more appropriately be directed to an independent organisation for investigation, rather than for Police Scotland to continue investigating its own actions.

Those areas are:

(i) at the recording stage
(ii) in interpretation of ‘serious incidents’ stage
(iii) the assessment stage for both on and off duty criminal allegations to enable the Lord Advocate to consider whether an independent investigation is required.

(i) RECORDING STAGE

Significant discretion is afforded to the police at the recording stage. How a complaint is initially recorded by the police will generally determine the route that the complaint takes.

I provided three examples of cases which provide evidence of Police Scotland recording serious criminal allegations inappropriately.

(a) Unlawful detention/arrest recorded as a ‘Quality of Service’ complaint.

In the first example provided, Police Scotland chose to record this complaint as a ‘Quality of Service’ matter which prevented an independent PIRC criminal investigation taking place at the point the complaint was made. Over the ensuing months, Police Scotland explored the ‘quality of service’ aspect before advising the complainer that his complaint was not upheld.

It was only on account of the complainer’s resolve, that he sought a complaint handling review from this organisation and only then, that the real core of the complaint was identified as an extremely concerning and disturbing matter which
required an independent criminal investigation. Our investigation resulted in a number of officers being arrested by PIRC investigators and the matter has been reported to COPFS.

The circumstances of this case resulted in a member of the public being unlawfully detained for a number of days and adequately exemplifies, both inappropriate recording of a complaint and significant inadequacies by Police Scotland in how the complaint was dealt with.

Far from this case being in ACC Speirs’ view ‘indicative of the transparency of a process which has facilitated further enquiry’ it is in fact an illustration of Police Scotland’s unwillingness to recognise serious failings, when presented with an opportunity, by the complainer, to address matters and suggests an endeavour to keep those matters hidden.

(b) **Attempt to pervert the course of justice complaint recorded as ‘Incivility’**.

As I have already clarified to you, the allegation was not made against a serving police officer but rather about his actions, relative to the investigation.

The complaint was categorised by Police Scotland as ‘Incivility’, however, following the complainer’s application to this organisation for a complaint handling review and our intervention, Police Scotland eventually reported allegations of criminality about the police officer to COPFS as ‘an attempt to pervert the course of justice’.

Once more, had it not been for the fact that the complainer brought this matter to the PIRC, Police Scotland’s discretion in choosing to record the complaint as ‘incivility’ could potentially have circumvented any criminal investigation and certainly delayed its investigation.

ACC Speirs describes the ‘matter of incivility’ arising ‘as a consequence of the victim’s mother interacting with a local officer, which was separate from the crime under investigation’. I consider that that representation of the facts is misleading, as the alleged criminality of attempting to pervert the course of justice arose from the police officer’s proactive contact with the complainer, which was directly related to the alleged crime.

(c) **Allegation of assault recorded by Police Scotland as ‘Excessive Force’**

The third example I provided, referred to an allegation by someone who complained that he had been struck twice in the face by a police officer. Police Scotland recorded the matter as a complaint of ‘excessive force’ rather than as a criminal allegation of assault.

Again, the complainer who considered that he had indeed been assaulted, sought a complaint handling review by this organisation and on assessing the matter, we directed the applicant to COPFS.
In each of the examples provided, I regret that ACC Speirs has endeavoured to ‘downplay’ the gravity of the alleged criminality.

Contrary to what ACC Speirs suggests, these examples do not indicate a ‘transparency of process’ but quite the reverse as all of the examples only came to light as a consequence of Complaint Handling Reviews requested by complainers.

**Front Line Resolution**

ACC Speirs refers to Police Scotland’s use of Front Line Resolution (FLR) which I entirely agree is an appropriate route to address minor and straightforward complaints. However, we have received applications for complaint handling reviews in cases where Police Scotland has attempted or suggested FLR with a victim who alleged historical sexual abuse; a victim who complained that she had been dragged down the stairs and left with significant bruising; a complaint about Police Scotland’s investigation of an alleged assault of an autistic child at nursery. The application of the FLR process in these circumstances appears to indicate inappropriate application of the FLR process which again lies within Police Scotland’s discretion.

ACC Speirs suggests that as only 5% of persons who have made a complaint about the police, subsequently request that the PIRC conduct a Complaint Handling Review then consequently the remaining 95% are sufficiently satisfied with the manner in which their complaint has been handled. The Complaint Handling Reviews conducted by the PIRC have found that on average 50% of the complaints are not handled to a reasonable standard. This includes complaints that have been upheld by Police Scotland. As there is no independent scrutiny of the 95% of complaints which are not subject to Complaint Handling Reviews we have no way of knowing if the findings in relation to the 5% would be replicated in the 95%.

(ii) **SERIOUS INCIDENTS**

The second area of discretion relates to Police Scotland’s interpretation of what is a serious incident.

Section 33A (c) enables me to carry out an independent investigation where requested to do by the Chief Constable or the SPA into certain serious incidents involving the police.

Regulation 3 of the PIRC Regulations imposes a duty on the Chief Constable to refer certain serious incidents to me. The reality is that Police Scotland still retains discretion around the interpretation of whether the matter is a ‘serious incident’.

Section 41B of the 2006 Act as amended defines ‘serious incident’ as a death or serious injury following police contact where that contact may have caused or contributed to that death or serious injury; a serious injury in police custody; police use of firearms and other circumstances specified in Regulations.

Whilst I am satisfied that deaths following police contact are appropriately referred to me (largely due to the involvement of COPFS) a significant amount of discretion still remains with Police Scotland, for example to determine whether the level of injury
sustained amounts to a ‘serious injury’ and some further discretion surrounds Police Scotland’s consideration and interpretation of whether firearms have been used.

The assessment of injuries may in some instances, take some time before they are fully evident or are diagnosed. We have seen examples of where police, despite suggesting a complainer go to hospital, have considered that their injury is not a ‘serious injury’ and chosen not to refer it to me for investigation. Once the injury has been fully diagnosed, the complainer has made a complaint and then subsequently applied for a complaint handling review, but due to the lapse of time between then and the original incident, (as a result of them being channelled by Police Scotland through the complaints process) evidence such as CCTV footage of the original incident has been lost. In the interests of transparency, it would have been preferable for the incident to be referred to me for investigation at the outset.

As highlighted by the Scottish Human Rights Commission, Regulation 6 also introduces discretion to Police Scotland in referring matters to me. It provides that the Chief Constable may refer to me, circumstances where a police officer acting in the course of its duties has used an item to

(a) attempt to cause someone a serious injury or
(b) cause or attempt to cause someone an injury which is not serious or used their baton

Therefore, an independent investigation can only take place into these matters if the police choose to refer them to me, regardless of whether or not someone has been injured.

ACC Spiers refers to an incident where an injury sustained by a person during an arrest did not in Police Scotland’s view meet the threshold of a serious injury as it was an effusion injury and not broken bone. The case referred to by ACC Spiers is one in which there was a doubt as to whether or not a person’s elbow had been broken. Police Scotland chose not to refer this matter to the PIRC considering that it did not fall within the definition of a ‘serious injury’ notwithstanding the fact that the person was incapacitated for 4 weeks. The only way PIRC became aware of this case was that the complainer requested a CHR by which time any potential CCTV evidence which could have proven or refuted the allegation of excessive force had been lost.

ACC Spiers states that in the period April 2017 to March 2018, ‘421 matters were referred to the PIRC, as a result of which PIRC fully investigated 36 of those referrals. Thus 92% of matters referred were not subject to investigation’

I require to point out that of the 421 referrals, 272 of them related to the use of CS or PAVA spray to effect an arrest. Since use of CS/PAVA is frequently a necessary and proportionate tactic used by police officers when confronted by violent or aggressive persons, and officers are given specific training in the proper use of these techniques, it is extremely rare for the PIRC to investigate such matters.

Of the remaining 149 non firearm referrals PIRC did indeed undertake 36 (ie 24%) investigations.
(iii) ALLEGATIONS OF CRIMINALITY (both on and off duty)

The final area of concern relates to the discretion that the police retain in dealing with criminal allegations.

ACC Spiers states that all criminal complaints are reported to the Complaints Allegations Against the Police Division (CAAPD) within Crown Office. It is worth clarifying that ACC Spiers is referring to allegations which after PSD assessment are categorised as criminal complaints, not all allegations of criminality that have been made.

The figures available from Police Scotland’s website show that in 2016-17 Police Scotland closed 8693 on duty allegations. Without independent scrutiny we have no way of knowing how many of these complaints relate to criminal allegations.

Nor is there any indication of how many of the allegations referred to COPFS were forwarded at an early enough stage to afford COPFS the opportunity to determine at the outset whether an independent investigation was required. By virtue of the police continuing to investigate these matters themselves, they deprive Crown Office of the opportunity to instruct an independent investigation.

Currently the Police have the discretion to decide if there is evidence of criminality and only if they assess that there is do they report to CAAPD despite the clear assertion by the complainer that they have been the victim of a crime at the hands of the police.

In those cases where for example a person alleges that they were assaulted by the police, if the Police assess that the ‘assault’ was in the course of an arrest and was in fact potentially excessive force then the allegation is not categorised as a criminal complaint. In those circumstances it is not forwarded to CAAPD and the Police are not required to notify PIRC unless the injury sustained by the complainer is serious. This means that there is no independent scrutiny of the allegation, decision making or investigation which all lies with the organisation whose officers are being accused of wrongdoing.

This fails to meet the requirements of the European Court of Human Rights first principle of independence for the effective investigation of complaints against the police that engage Article 2 or 3. That principle states that:

‘there should not be institutional or hierarchical connections between the investigators and the officer complained against and there should be practical independence’

Again, in relation to off duty criminality, whilst the legislation (Section 33A (b) (i)) makes no distinction between on duty and off duty criminality, the Lord Advocate’s historical guidelines imposes a distinction in how they are progressed.
Those guidelines have not been amended since the introduction of the single police force and continue to reflect the situation where the former eight police forces existed. They provide that off duty criminality should be reported to the District Procurator Fiscal in the same way as any member of the public. Accordingly, they are usually investigated by the police themselves and later reported to COPFS once that investigation is complete, with few instances of COPFS being provided with an opportunity to instruct an independent investigation.

That process for investigating off duty matters may be reflective of ‘a long standing agreement’ with COPFS but it frequently deprives complainers of an independent investigation and consideration should be given to adjusting that.

There have been several examples of cases where allegations have been made about off duty criminal behaviour about police officers in which Police Scotland have undertaken the investigations either without recourse to the COPFS or at a late stage, thereby maintaining control of the investigation without any opportunity for an independent investigation.

ACC Speirs’ submission refers to some sexual offence cases which he advises have been referred to COPFS and which COPFS has chosen to instruct Police Scotland to continue to investigate.

That course of action, in transparently referring those cases at an early stage, is to be welcomed but is not reflective of the several cases which have subsequently come to light where Police Scotland did not exercise that approach but exercised its discretion to investigate the actions of its officers.

It is worth pointing out that the fact that PIRC investigates a matter does not infer wrongdoing by an officer. Many matters are investigated because there is a positive obligation to independently examine the matter, e.g. death following police contact. Frequently, the PIRC may find that officers acted appropriately. It is the need for independent examination of these matters, in accord with the principles set out by the European Commissioner for Human Rights, which is central to the issue.

Despite all of the above, I remain confident that the majority of police officers carry out their duty with integrity, in highly challenging circumstances but that a number of cases have now come to light which calls into question Police Scotland’s willingness to exercise its discretion in a transparent and open manner.

It is notable that in some incidents, the officers involved in events have themselves, self-referred to PSD and suggested that the incidents be referred for a PIRC investigation but PSD has deemed that to be unnecessary.

The question of police discretion in the above areas, requires to be addressed to secure a level of reassurance and public confidence in the process. The evident resistance to that is disappointing.

I trust that this provides further clarification of the issues raised.

PIRC