

POLICE (ETHICS, CONDUCT AND SCRUTINY) (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. As required under Rule 9.3.3 of the Parliament’s Standing Orders, this Policy Memorandum is published to accompany the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill introduced in the Scottish Parliament on 6 June 2023.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 29–EN);
- a Financial Memorandum (SP Bill 29–FM);
- a Delegated Powers Memorandum (SP Bill 29–DPM);
- statements on legislative competence by the Presiding Officer and the Scottish Government (SP 29–LC).

3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government’s policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

BACKGROUND

4. In 2018 the Scottish Government and the Lord Advocate jointly commissioned Dame Elish Angiolini, a former Lord Advocate, now Lady Angiolini, to carry out an independent *Review of Complaints Handling, Investigations and Misconduct in Relation to Policing* (“the Review”)¹. The Review was commissioned five years after the creation of Police Scotland, the Scottish Police Authority (SPA) and the Police Investigations and Review Commissioner (PIRC). Its focus was to look at how the structures and processes for complaints handling, investigations and misconduct issues were working, at a time when the actions of the police saw intense parliamentary, media and public scrutiny. The Review sought to bring greater fairness, transparency, accountability and proportionality to policing, while protecting the human rights of everyone involved.

5. In undertaking the Review, Dame Elish took evidence from policing partners, current and former officers, and a broad range of stakeholders. Her Preliminary Report was published in June 2019 and made 30 recommendations. The Final Report, published in November 2020, outlined a further 81 recommendations, taking the total to 111; most of which were accepted by then Cabinet Secretary for Justice, Humza Yousaf, and then Lord Advocate James Wolffe KC. Most are

¹ [Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing: Final Report \(www.gov.scot\)](http://www.gov.scot)

intended to be implemented as specifically set out, but for some there was provision to explore options to achieve the desired outcome.

6. Since then, the Scottish Government and policing partners have delivered significant change and reform to the police complaints system. Extensive work has been undertaken to implement the recommendations which do not require legislative change, and to-date 58 non-legislative recommendations for improvement have been delivered, with progress set out in the thematic reports, the most recent of which was published in May 2023². These reports are prepared by the Scottish Government, overseen and approved by a three-tier governance framework³, which provides assurance on policing partners' progress towards implementation of recommendations.

7. The improvements made to-date bring greater transparency, fairness and accessibility to systems, policies and processes that underpin the police complaints and misconduct processes. These improvements are helping to make the police complaints system easier to navigate for members of the public, as well as increasing consistency, efficiency and swifter resolution for all those involved in complaints, investigations or misconduct procedures. They provide a firm foundation on which to deliver legislative improvements.

8. This Bill continues that process for improvement. It will provide the framework for, and help focus attention on, the cultural and behavioural changes that are necessary at all levels of policing. Subsequent secondary legislation and written guidance will support those changes.

CONSULTATION

9. It has been vital to hear from all those with an interest in the police complaints and misconduct processes, when developing the Scottish Government's legislative proposals. A public consultation, *Police Complaints, Investigations and Misconduct: A Consultation on Legislation*, ran between May and August 2022. The Scottish Government has also continued to engage with policing partners and stakeholders throughout the Bill development process, to understand the implications for policing organisations and stakeholders.

10. Policy development has taken place in a landscape of high-profile police conduct and complaints incidents. Furthermore, the evidence arising from reports published since Dame Elish's Review, including the Independent Review Group's interim report⁴ and HMICS thematic inspections,⁵ alongside the Chief Constable's recent acknowledgement⁶ that Police Scotland is institutionally racist and discriminatory, highlights the need for change. The Scottish Government has engaged with those with lived experience of the system and who have a strong desire to effect change based on their experiences.

11. The consultation received 55 responses, 33 from individuals and 22 on behalf of organisations. Three engagement events were also held with organisations representing victims of crime, justice groups, voluntary sector organisations and groups representing different

² [Complaints, investigations and misconduct in policing: implementation progress report - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/complaints-investigations-and-misconduct-in-policing-implementation-progress-report/pages/12.aspx)

³ [Complaints, investigations and misconduct - Police - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/complaints-investigations-and-misconduct-in-policing/pages/12.aspx)

⁴ <https://www.spa.police.uk/spa-media/ohkcuxfm/item-6-police-scotland-equality-diversity-and-inclusion-independent-r.pdf>

⁵ [HMICS | Thematic Inspection of Police Scotland Training and Development - Phase 1](https://www.hmics.gov.uk/thematic-inspection-of-police-scotland-training-and-development-phase-1)

⁶ [Police Scotland Chief Constable Sir Iain Livingstone addresses institutional discrimination. - Police Scotland](https://www.police.scot.nhs.uk/news/2023/06/police-scotland-chief-constable-sir-iain-livingstone-addresses-institutional-discrimination/)

communities. These responses were grouped together, anonymised and included as a single response. The consultation analysis report was completed by an independent social research organisation and was published⁷, along with all the responses (where permission was given) in November 2022.

12. The consultation responses were broadly supportive of the legislative proposals, and the Scottish Government has carefully considered all of these in developing the policies contained within the Bill, which will improve Scotland's system of police complaints and misconduct handling. The consultation responses, supplemented by ongoing dialogue with key policing partners and other interested parties, have informed the policy contents of the Bill. The key findings from the report were:

- Broad support for measures which seek to ensure and raise standards of behaviour within Police Scotland and amongst officers, including; a statutory requirement for the Code of Ethics and a duty to consult on its contents; and statutory duties of candour and co-operation for police officers.
- Individuals were more supportive than organisations of changes which promoted public transparency, visibility and impartiality of oversight processes.
- Many individuals emphasised the importance of an independent oversight organisation to maintain standards in policing and that this should not be the PIRC. We assess from context that this may indicate a lack of understanding of the PIRC's role.
- Support for recommendations relating to changes to the PIRC structure to enhance its powers and independence. This will need careful consideration to ensure that the distinct roles and responsibilities of the PIRC and His Majesty's Inspector of the Constabulary Scotland (HMICS) are made clear.
- Most respondents were supportive of recommendations which improve accountability, transparency, independence and the improvement of processes for handling misconduct issues in policing.
- A key theme running through the responses was independence in regard to assessing allegations of misconduct. Most respondents agreed that the PIRC should take on responsibility for key aspects of misconduct and gross misconduct proceedings for senior officers, including the preliminary assessment of misconduct allegations.
- There are, however, a range of views relating to gross misconduct hearings being held in public to promote transparency and public confidence, with individuals being more supportive than organisations.
- Most agreed that it should be possible to begin and continue gross misconduct proceedings against former officers of any rank after they have left the service. Although notably Police Scotland were not in favour of this, citing reservations around proportionality, resourcing and effectiveness of such an approach in delivering the desired outcome if the subject officer were to be absent.
- Broad agreement that the Scottish Government should adopt Barred and Advisory Lists.

⁷ [Police complaints, investigations and misconduct - legislation proposals: consultation analysis - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/consultations/2022/11/12/policing-ethics-conduct-scrutiny-scotland-bill-29-2023/consultation-analysis/consultation-analysis-gov.scot/consultation-analysis-gov.scot)

POLICY OBJECTIVES OF THE BILL

13. The overarching policy objective of this Bill is to ensure that there are robust, clear and transparent mechanisms in place for investigating complaints, allegations of misconduct, or other issues of concern in relation to the conduct of police officers in Scotland. The legislation will embed good practice, and underline the importance of maintaining the high standards expected of Scotland's police officers.

14. Police Scotland operates under the principle of policing by consent, where officers must act in a way that secures and maintains the respect and trust of the public and respects human rights, working to secure fairness and access to justice for all. Police officers and police staff work tirelessly to protect and support Scotland's communities. If the conduct of officers and staff falls short of expectations, it is essential that the public has trust in the processes in place to deal with complaints and allegations of misconduct. The Bill underlines the importance of police officers maintaining the high standards of behaviour and conduct expected of them.

15. The 20 sections of the Bill are organised under six cross-headings. The substantive provisions are contained within the second to fifth cross-headings, which are described in detail below.

Second cross-heading: Ethics of the Police

16. The **second cross-heading** concerns the *Ethics of the Police*. The provisions under this cross-heading put Police Scotland's existing Code of Ethics on a statutory footing and confer a duty on the Chief Constable of Police Scotland, with the assistance of the SPA, to prepare, consult widely on, and publish the Code. They also give power to the Chief Constable to revise the Code when necessary.

17. This portion of the Bill also gives legal recognition to a duty of candour on individual police constables. It adds to the policing principles a principle that the Police Service of Scotland should police in a way which is candid and co-operative in proceedings, including investigations against constables. This will engage the chief constable and the SPA in the training and leadership necessary to embed the change in ethos in a practical way. It also introduces an explicit duty of candour on individual constables in the Standards of Professional Behaviour by which the conduct of police officers is measured. Together, these provisions set an organisational expectation that officers will uphold the values of policing by consent, whilst maintaining the trust and faith of the public in the execution of their duties. This makes clear on a legislative basis the need for police officers to be open and transparent. Furthermore, the individual and organisational duties reinforce in statute the need for a culture where officers are expected and encouraged to co-operate fully with investigations and answer questions based on their honestly held recollection of events. Assisting in the establishment of facts and the pursuit of justice in any proceedings, even against fellow constables, is a corollary of the duty of candour as it applies to police because of the unique powers that they hold.

18. Whilst there is currently an expectation that constables will positively assist in such proceedings, the objective here is to make the position clear to police officers and the public - that the service as a whole will give every assistance after a serious incident involving or about the police, in a way which is candid and co-operative.

Third cross-heading: Police Conduct

19. The **third cross-heading** of the Bill is concerned with procedures for dealing with certain types of **Police Conduct**. It addresses a perceived gap in existing legislation by clarifying that liability for any unlawful conduct on the part of the Chief Constable sits with the SPA. In doing so it aligns the treatment of unlawful conduct by the Chief Constable with the existing treatment of unlawful conduct by other police officers.

20. The provisions under this third cross-heading of the Bill give the PIRC a greater role in relation to misconduct proceedings, which will subsequently be set out in secondary legislation. The intention is to clarify and ensure consistency in the statutory preliminary assessment function part of the process, enhance independent scrutiny, remove any perception of familiarity, as well as avoid any duplication of functions or associated delay. This differs from the current conduct regulations, which state that if the SPA receives a complaint alleging senior officer misconduct, it assesses whether there is a case to answer. If so, it will be referred to the PIRC for an assessment by the Commissioner, unless the assessment by the SPA determines the alleged actions may be criminal, in which case it is referred to COPFS.

21. The third cross-heading of the Bill also contains provision which ensure gross misconduct proceedings can continue or commence in respect of persons who have ceased to be constables. This is a change to the existing position, under which such proceedings must be discontinued if a constable resigns or otherwise ceases to be a constable. Ensuring proceedings reach a conclusion will improve public confidence in the police complaints and misconduct process, provide greater transparency and accountability, as well as strengthen public safety by ensuring former officers are placed on barred and advisory lists. The establishment of a Scottish police barred list and Scottish police advisory list are also set out within the Bill. The creation of these lists will enhance vetting procedures across Great Britain as a whole and stop those who do not meet the high standards expected of police officers from gaining employment in policing. This will bring Scotland in line with England and Wales and provide a consistent approach across jurisdictions in Great Britain.

22. This portion of the Bill also seeks to amend legislation around the misconduct procedures for senior officers to ensure the process is open and transparent, and provide the public with confidence that senior officer misconduct cases are taken forward through an impartial process. In effect, this means it will be possible to have a newly structured misconduct panel consisting of a mix of police, and non-police legally qualified and lay members, which would hear evidence of misconduct and determine whether the conduct forming the allegation is related to that of a senior officer and whether that conduct constitutes misconduct, gross misconduct or neither.

23. This portion of the Bill also allows senior officers a right of appeal to a Police Appeals Tribunal (PAT), in conduct cases only, in relation to any finding of disciplinary action against them. This is additional to the right of appeal that all constables currently have to appeal a decision to demote or dismiss to the PAT. Whilst these rights of appeal to the PAT are subject to the exhaustion of any available process of review or appeal provided for in regulations made under section 48 of the Police and Fire Reform (Scotland) Act 2012 (“the 2012 Act”), it is not intended that there will be any such internal process in respect of senior officers in the new regulatory regime. The reason these changes is that, if an independent panel has been the first instance tribunal then it is not effective or appropriate for the appeal tribunal to be less independent and legally

qualified. Accordingly, all appeals in all senior officer conduct matters should proceed straight to the police appeals tribunal, regardless of what the outcome has been. It is envisaged that, given there are only a small number of senior officers, this will not result in a substantial number of additional appeals to the police appeals tribunal.

Fourth cross-heading: Functions of the PIRC

24. The **fourth cross-heading** of the Bill concerns the *Functions of the PIRC*. It seeks to clarify that the PIRC's investigatory powers into criminal offending (as distinct from complaint handling, investigations into serious incidents or senior officer misconduct functions) apply to those who were constables or police staff at the time of the act being investigated but who have since resigned or retired or those who were not constables or police staff at the time of the relevant act but have since become so, or those who were off-duty at the time the incident occurred. It also clarifies the PIRC's investigatory powers into deaths involving a person serving with the police to make clear that they apply to off-duty police.

25. This portion of the Bill also makes clear that police officers and staff who experience poor service, which affects them in their personal capacity (as opposed to their capacity as a constable or member of staff) are able to make a complaint about the police to the PIRC.

26. Whilst the PIRC currently has the ability to make recommendations to Police Scotland regarding the handling of individual complaints, the Bill seeks to put into statute this function alongside requirements that the outcomes are published and that the SPA or the Chief Constable (depending on who the recommendations are directed towards) respond to any recommendations.

27. Furthermore, in order to support Police Scotland to improve, the PIRC will have a specific new power, similar to that of the Police Ombudsman for Northern Ireland (PONI), to review a policy or practice of the SPA, the Chief Constable or Police Scotland, where the PIRC considers that it would be in the public interest.

28. The provisions under the fourth cross-heading of the Bill also seek to provide the PIRC with a power to take over consideration of (or call in) complaints being dealt with by the Chief Constable or the SPA. The criteria applied to calling in is to vary dependent on the circumstances. By placing this in statute, this will strengthen the role of the PIRC and enable greater scrutiny of Police Scotland. This will build public confidence in policing by providing reassurance that there is an independent oversight body, the PIRC, who can conduct an independent investigation in the most serious non-criminal complaints at any time, if the complaint in question has not been properly considered by Police Scotland.

29. This portion of the Bill also provides the PIRC with the ability to audit the handling of whistleblowing complaints dealt with in the first instance by Police Scotland and the Scottish Police Authority. It has no impact on the rights of whistleblowers but seeks to improve the transparency of processes around how public interest matters are investigated. This, in turn, will encourage people to speak up when they see wrong-doing. It also provides an opportunity for Police Scotland and the SPA to take on board learning and address issues arising from concerns raised.

30. The provisions under this fourth cross-heading also require, in certain circumstances, the PIRC to investigate serious incidents or allegations of criminality involving police officers from territorial forces other than Police Scotland, when undertaking a policing function in Scotland, and to put in place reciprocal powers for other UK jurisdictions.

31. Finally, this portion of the Bill enables the PIRC to have direct access to Police Scotland's complaints database – Centurion – to audit and review files necessary to their function. Ensuring the PIRC can meet their statutory functions to carry out contemporaneous audit of the police case management system independently and remotely will improve efficiency, transparency, independence and public confidence in the police complaints process.

Fifth cross-heading: Governance of the PIRC

32. The **fifth cross-heading of the Bill** seeks to add to the *Governance of the PIRC*, via the requirement to have a statutory advisory board. This will improve scrutiny, accountability and transparency within the PIRC and allow a greater degree of confidence in the PIRC's decision-making.

ALTERNATIVE APPROACHES

33. As part of the Bill development process, alternative approaches to those adopted in the Bill were considered.

Do nothing

34. In commissioning Dame Elish Angiolini to carry out her Review, the Scottish Government recognised the need for change and sought to bring greater fairness, transparency and accountability to the police complaints and misconduct system. The Scottish Government and the COPFS jointly agreed to accept the majority of the recommendations arising from that Review, which outlined ways in which the system could be improved. Responses to the public consultation, and wider engagement sessions, also demonstrated a strong appetite for action amongst stakeholders. As a result of all of these factors, doing nothing was not considered to be a viable option to improve on the current situation, nor one that stakeholders or the public would agree with.

Non-legislative actions only

35. This legislation, while necessary and proportionate, is only one part of actions being taken. It will build on the transformative changes to the police complaints system that have already been delivered following the recommendations made by Dame Elish which do not require legislation to implement. These improvements include the development of a new operating model for complaint handling, including how to make criminal allegations to COPFS directly; the establishment of a Memorandum of Understanding between the SPA Chair and the Chief Constable setting out a framework for the development of ethics and human rights focused decision making for new strategies, policies and practices in Scottish Policing; the rollout of Police Scotland's Investigative Wellbeing and Safeguarding Process and Guidance and importantly the launch of the Policing Together Strategy which brings together multiple strands of work to improve equality, diversity and inclusion, bolstered by the Chief Constable's commitment to

ensure there is no tolerance for misogyny, racism and discrimination in the ranks or across wider society.

36. This extensive work has so far resulted in 58 non-legislative recommendations for improvement being delivered, with progress set out in the thematic reports, the most recent of which was published in May 2023⁸. Legislation is still required to deliver policy objectives to empower the public to hold the police to account by providing greater clarity around the police complaints and misconduct processes and protect and promote the fundamental human rights of everyone involved.

Alternative legislative solutions

37. In developing policy to improve the police complaints and conduct system, it was established that legislation was the only, or most appropriate, avenue to achieve meaningful change for some of the recommendations arising from Dame Elish’s report. In some instances, more than one legislative solution was available and, in each case, the options were carefully considered before a decision was made. This work into identifying those areas where primary legislation is required to achieve the recommended change has continued throughout the drafting of the Bill.

38. Further details regarding the alternative legislative solutions considered for specific provisions are included under the broad themes set out below. A number of recommendations will also be taken forward in secondary legislation. In respect of a number of those, changes have been required to primary legislation to allow for that to happen.

SECOND CROSS-HEADING OF THE BILL (SECTIONS 2-3): ETHICS OF THE POLICE

Section 2 - Code of ethics

Key background and policy context

39. According to Police Scotland, the purpose of the Code of Ethics for Policing in Scotland, is “to set out the standards of those who contribute to policing in Scotland.” In the introduction to the Code, Police Scotland states: *“This is not a discipline code. It is what we aspire to be. This code is a practical set of measures. It reflects the values of the Police Service of Scotland. We are all responsible for delivering a professional policing service to all people across the country. This code sets out what the public can expect from us and what we should expect from one another.”* The Code sits alongside the Standards of Professional Behaviour and outlines the expectations of on and off duty police officers, e.g., so as to behave in a manner which does not discredit Police Scotland or undermine public confidence in it, and an expectation that improper conduct can be reported, challenged and acted upon.

40. Police officers and staff are currently held to account against misconduct and discipline rules which focus on conduct and carry a range of available sanctions where they have been breached. One of the purposes of the Code of Ethics is to prevent officers and staff from reaching

⁸ [Complaints, investigations and misconduct in policing: implementation progress report - gov.scot \(www.gov.scot\)](https://www.gov.scot/resources/documents/2023/05/Complaints_investigations_and_misconduct_in_policing_implementation_progress_report.pdf)

misconduct by codifying those aspirational standards. Police Scotland's current Code of Ethics was created in 2012 and is published on their website.

41. The Code of Ethics has been endorsed as an important set of principles for the Police Service of Scotland. In order for the Police to be transparent in setting out what the public can expect from the service, and officers accountable in seeking to attain aspirational standards, Dame Elish recommended the Code of Ethics be given statutory significance.

42. Responses to our public consultation on putting Police Scotland's Code of Ethics on a statutory basis were supportive⁹. Out of 44 respondents, 36 agreed that there should be a statutory requirement for Police Scotland to have a Code of Ethics. Furthermore, most respondents (35 out of 42) agreed that it should be possible to amend and/or update such a code when required. Of the respondents that provided further information, some reasoned that this would ensure that an ethical standard of behaviour is upheld, emphasising the importance of these values within Police Scotland, and that it would also remove ambiguity regarding the standard of conduct expected.

43. Several different arguments were provided by respondents who disagreed with the recommendation, with some reasoning that current policies are sufficient, that the Code of Ethics would increase bureaucracy and that the police should not need a statutory obligation to behave ethically. The benefits of transparency and setting expectations outweighed these arguments.

Bill provisions

44. The provision in the Bill creates a duty on the Chief Constable of Police Scotland, with the involvement of the SPA, to prepare (and later review) a Code of Ethics. It also creates a duty to consult on the content with stakeholders including Scottish Ministers, HM Inspectorate of Constabulary in Scotland, the Lord Advocate, trade unions, staff associations and any other parties deemed appropriate. Having a range of key stakeholders as statutory consultees helps ensure that the code of ethics is of a high quality. As the Code of Ethics relates to mostly operational matters, the Chief Constable will bear ultimate responsibility for it.

45. The Bill provides that the Code of Ethics is a code which sets out the values of the Police Service of Scotland and expectations relating to the conduct and practice of its constables and of Police staff. In preparing the Code, the Chief Constable has to have regard to certain sources, including the policing principles, and rights contained in the European Convention on Human Rights. The Bill also includes a duty on the Chief Constable to publish the Code of Ethics and to bring it to the attention of constables and staff, ensuring that it is read and understood.

46. The Code is also embedded by stating that the chief constable is required to seek to ensure that the policing of Scotland is done with due regard to the Code (subsection (4)(b) of section 2 of the Bill). That ties in with the duty on the chief constable to ensure that the Code is read and understood by every constable. Finally, constables will also make reference to the Code of Ethics in the Constable's Declaration, such that each constable must make a commitment to follow the

⁹ [Police complaints, investigations and misconduct: a consultation on legislation - Scottish Government - Citizen Space](#)

Code. These measures will further embed the Code, helping to enhance transparency in policing and allow for more officer accountability.

Section 3 - Duty of candour

Key background and policy context

47. A constable's general duties are set out section 20 of the 2012 Act. Police Scotland's Code of Ethics and the Statutory Standards of Professional Behaviour (which are set out in regulations)¹⁰ set out the detail as to how constables are required to conduct themselves. All of these, to some extent, express or imply a statutory, ethical or procedural duty on that person to assist in proceedings and uphold Convention Rights.

48. Dame Elish considered whether the current position is sufficiently clear to police officers, and to the public, who have a legitimate expectation that police officers will give every assistance after a serious incident. She contends that although there is an assumption of co-operation, it needs to be put beyond doubt in legislation.

49. Dame Elish believes that those who hold the office of constable, and the powers of that office, have a higher duty than others to account for their actions and record what they did or saw in the execution of their duties, and that is also her starting point regarding the duty of candour. Dame Elish sought legal advice on the extent to which obligations under Articles 2 and 3 of the European Convention on Human Rights, where there has been a death at the hands of the state, or where there has been inhuman or degrading treatment or torture imposed by an agent of the state, are affected by the fundamental right to silence to protect against self-incrimination; and whether and to what extent a constable's obligation to assist in an investigation of a death, or other serious incident, could or should be outlined in legislation in a specific duty to assist, and/or in the constable's declaration.

50. Dame Elish confirms her belief that Article 6 (right to a fair trial, which includes the right of a suspect to remain silent and not be forced to incriminate themselves) outweighs the Article 2 obligation of the state to provide an effective investigation in the event of a death at the hands of the state or in an investigation of an alleged breach of Article 3 (prohibition of torture – inhuman or degrading treatment or punishment) or Article 5 (unlawful detention). She concludes that *“other than in very restrictive circumstances, any officer who is a witness to a serious incident should be under an obligation to assist”*.

51. The majority of respondents to our public consultation¹¹ agreed that there should be an explicit statutory duty of candour on the police to co-operate fully with all investigations into allegations against its officers (out of 42 respondents, 29 agreed strongly while 7 agreed). It was also suggested that police officers should be required to participate 'openly' and 'promptly' by most respondents. There was also agreement among most respondents that this duty should be placed on both Police Scotland as an organisation as well as on individual officers. Furthermore, most respondents disagreed that the duty should relate only to incidents involving on-duty officers.

¹⁰ [The Police Service of Scotland \(Conduct\) Regulations 2014 \(legislation.gov.uk\)](https://legislation.gov.uk)

¹¹ [Published responses for Police complaints, investigations and misconduct: a consultation on legislation - Scottish Government - Citizen Space](#)

52. Some stakeholders have questioned the need or value of putting the duty of candour in statute. Dame Elish stated that this duty can be inferred from current legislation, but that it would be prudent to put this duty beyond doubt. The Scottish Government agrees with Dame Elish's view that the powers afforded to police mean they are under a greater degree of scrutiny and accountability. A statutory duty would help to guard against collusion and cover-up, and counter any pressure from others to withhold statements or evidence, but would not override an officer's right to silence if they are considered a suspect.

53. While feedback to the consultation suggested that this duty should also extend to police staff, those staff are not afforded the same powers and responsibilities as officers, and so it could be argued that they should not be subject to the same degree of scrutiny. However, in applying an organisational duty of candour through the Policing Principles, police staff can be covered under this wider umbrella.

Bill Provisions

54. The Bill introduces a duty of candour on individual constables by amending the conduct regulations for both Senior¹² and Non-Senior¹³ constables to add a duty of candour into the Standards of Professional Behaviour. By embodying the duty of candour in a separate standard, it emphasises that the requirement to assist in investigations is not only the same as following any other duty or order, but is of a different, more serious and more fundamental nature. It also allows for the possibility that a body of learning and law will develop specifically around the standard of candour, which is more likely to engender the sort of organisational change that is intended than if the duty was subsumed within another pre-existing standard. It also allows the development of an approach which treats a breach of the standard of candour as automatically a more serious sort of misconduct than a breach of the other standards, as has happened with the standard of honesty and integrity.

55. The Bill introduces an organisational duty of candour. The policy aim of introducing an organisational duty of candour is to create a culture where constables are expected and encouraged to co-operate fully with investigations and answer questions based on their honestly held recollection of events. In doing so constables will uphold the values of policing by consent, maintaining the trust and faith of the public in the execution of their duties, and act at all times with fairness and integrity. The 2012 Act in section 32 sets out Policing Principles. The Bill adds an additional policing principle: that the Police Service of Scotland should be candid and co-operative in proceedings, including investigations against constables. This is considered to be the best mechanism to achieve the policy aim of an organisational duty. Creating an organisational duty through adding to the Policing Principles will engage the chief constable and the SPA in the training and leadership necessary to embed the change in ethos in a practical way.

56. The Bill also amends the 2012 Act to include reference to candour in the constable's declaration, which makes clear to any constable upon joining Police Scotland the central importance of the duty of candour.

¹² [The Police Service of Scotland \(Senior Officers\) \(Conduct\) Regulations 2013 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

¹³ [The Police Service of Scotland \(Conduct\) Regulations 2014 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

Alternative legislative solutions

57. A number of alternative solutions were considered for recommendations made by Dame Elish under the Ethics of the police theme. Providing the PIRC with an explicit power to compel an officer to attend for interview was considered. It was concluded that there may be issues around how this was enforced in practice. Ultimately, it was considered the expectations on constables arising from the duty of candour, that they would co-operate fully in all investigations, would extend to attending for interview promptly. Therefore, an explicit power for the PIRC to compel officers to attend is not considered necessary or proportionate at this time.

58. Similarly, introducing an individual duty of co-operation was considered, in addition to an organisational duty of candour, when assessing the best way to achieve the policy aim. Dame Elish contends that it should be clear to the public, and the officers themselves, that they are expected to give every assistance during an investigation. The Scottish Government when analysing the recommendations concluded that, while the Bill would set out what was required by way of co-operation, it is a facet of the duty of candour and not a freestanding duty.

THIRD CROSS-HEADING OF THE BILL (SECTIONS 4-8): POLICE CONDUCT

Section 4: Liability of the Scottish Police Authority for unlawful conduct of the chief constable

Key background and policy context

59. At present, whilst the law is clear that the Chief Constable is liable in respect of any unlawful conduct on the part of constables under their direction, with a requirement for damages to be paid out by the SPA, there is currently no provision by which the SPA is obliged to pay out damages in the case of the Chief Constable acting unlawfully in the carrying out or purported carrying out of functions. The Bill seeks to clarify that liability for any unlawful conduct on the part of the Chief Constable sits with the SPA. This is done by amending the 2012 Act to ensure that the SPA has the same liability for the Chief Constable as the Chief Constable has for constables. This amendment protects the victims of unlawful conduct by the Chief Constable.

60. This change is not explicitly recommended by Dame Elish in her Review, but it is considered that amending the 2012 Act in the way proposed marries well with the Review's wider principles.

61. The vast majority of respondents to the consultation, 30 out of 34, agreed that liability for unlawful conduct should be extended to cover the rank of Chief Constable. Respondents provided several arguments, including that this would ensure victims are protected and that all ranks of police officer are treated equally. Some respondents disagreed that the liability should be extended, arguing that those holding the rank of Chief Constable should never need this protection.

Bill Provisions

62. The Bill provides that the SPA is liable in respect of any unlawful conduct on the part of the Chief Constable in the carrying out (or purported carrying out) of his functions in the same

manner as an employer is liable in respect of any unlawful conduct on the part of an employee in the course of employment.

Section 5: Misconduct procedures: functions of the Police Investigations and Review Commissioner

Key background and policy context

63. The PIRC was originally set up by section 33 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 (“the 2006 Act”) as the Police Complaints Commissioner for Scotland and was renamed by section 61 of the 2012 Act as the Police Investigations and Review Commissioner; at the same time, it was given independent investigatory functions. The PIRC is required to ensure that the SPA and the Chief Constable make and maintain suitable arrangements for the handling and examination of complaints about police constables and staff.

64. The PIRC also investigates, when directed by a prosecutor to do so, any circumstances in which there is an indication that a person serving with the police may have committed a criminal offence. The PIRC can also investigate the circumstances of any death involving a person serving with the police which the COPFS is asked to investigate. The PIRC are also required to investigate and report on deaths, serious injuries or firearms incidents where constables and police staff are involved; and investigate other matters relating to the Police Service of Scotland or SPA that are in the public interest.

65. The PIRC is a key element of the policing landscape in Scotland, providing independent and impartial oversight into investigations. The PIRC is independent from the police and reviews the way in which police organisations in Scotland deal with complaints made by members of the public, as well as undertaking independent investigations of serious matters involving the police in Scotland. Dame Elish’s review recommended the transfer of certain functions from SPA to the PIRC in respect of misconduct procedures with a view to enhancing independent scrutiny, removing any perception of familiarity, and avoiding any duplication of functions or associated delay.

66. Specifically, the Bill will allow the conferral of further functions on the PIRC in regard to procedures for misconduct. At present, the PIRC’s function in relation to misconduct processes is limited to investigations of whether a constable has been engaged in misconduct. The Bill widens the functions that can be conferred on the PIRC in secondary legislation, such as the statutory preliminary assessment function. Removing this function from the SPA and transferring it to the PIRC will enhance independent scrutiny and remove any perception of familiarity. The preliminary assessment function is contained in two sets of conduct Regulations, one pertaining to senior officers only and one pertaining to constables below the rank of assistant chief constable. The preliminary assessment function under these regulations is a duty to assess whether the conduct which is the subject matter of the misconduct allegation would, if that conduct were proved, amount to misconduct, gross misconduct or neither. This duty currently lies with the SPA for senior officer conduct¹⁴ and with the deputy chief constable for all other ranks. There is a further assessment function contained in the conduct regulations for senior officers which comes

¹⁴ [SPA Complaints Process - Scottish Police Authority](#)

into play where the SPA, after its preliminary assessment, refers the allegation to the PIRC so that the PIRC can carry out its own assessment¹⁵.

67. There is the sense that given the small number of senior officers in Scotland, prior professional contact between the senior officer subject to a misconduct allegation and the SPA board members is likely, giving rise to concern of whether SPA could run a fair and transparent misconduct process. The provisions in the Bill seek to address this point. It is intended that, as part of the regulatory changes enabled by the Bill in relation to senior officer conduct, the PIRC is to have responsibility for the key stages of senior officer misconduct proceedings, with the SPA only having the power to implement a disciplinary action in relation to senior officers, with the assessment, investigation and presentation of cases to sit with the PIRC who is independent of the SPA and the Police Service of Scotland.

68. Changes will enable the preliminary assessment function in the conduct regulations for senior officers¹⁶ to be amended so that the assessor takes into account whether the allegation is made anonymously, is specific in time and location, or whether it appears, on the face of the allegation, to be either vexatious or malicious. Such changes would also include a duty on the SPA to refer any misconduct allegations to the PIRC for assessment.

69. Further changes will allow the PIRC to be able to handle key stages of senior officer misconduct proceedings, provide for a statutory function to present cases at a senior officer misconduct hearing and give the PIRC the power to recommend suspension of a senior officer.

70. Most respondents to the consultation agreed with the legislative proposals to give the PIRC more power and authority in relation to misconduct proceedings. Specifically, the most frequently selected option (chosen by 24 respondents) was that the PIRC should take on responsibility for the receipt of complaints and allegations as well as referral to an independent legally chaired panel, where appropriate. The second most common suggestion (chosen by 19 respondents) was that the PIRC should be responsible for referral to an independent legally chaired panel if there is a disciplinary hearing after referral to the Crown Office and Procurator Fiscal Service (COPFS). Furthermore, most of the remaining respondents were almost evenly split between respondents suggesting that the PIRC should take on the responsibility for preliminary assessments (chosen by 15 respondents) and for referral to COPFS for criminal allegations (chosen by 16 respondents). Most agreed with the recommendation that the preliminary assessment of misconduct allegations made against senior police officers should be made by the PIRC (19 agreed strongly and 5 agreed, while 6 disagreed strongly). Consultation respondents also argued that such investigations need to be overseen by the PIRC because they are an independent organisation and this would ensure transparency of the process.

Bill Provisions

71. The Bill amends section 52(2)(d) of the 2012 Act to remove the qualifications as to what functions can be conferred on the PIRC. This transforms what was previously a narrow power, only exercisable in relation to misconduct investigations, into a much broader power. While this alone does not meet the policy aim to enhance independent scrutiny and remove any perception of

¹⁵ [The Police Service of Scotland \(Senior Officers\) \(Conduct\) Regulations 2013 \(legislation.gov.uk\)](https://legislation.gov.uk)

¹⁶ [The Police Service of Scotland \(Senior Officers\) \(Conduct\) Regulations 2013 \(legislation.gov.uk\)](https://legislation.gov.uk)

familiarity in the conduct process, it will allow Scottish Ministers to confer functions on the PIRC in relation to procedures for misconduct, which should in turn lead to a fairer and more transparent process.

Section 6: Misconduct procedures: former constables

Key background and policy context

72. At present, where there is an allegation of misconduct and the subject officer resigns or retires in the course of the investigation or proceedings, proceedings come to a halt. This means justice cannot be secured for complainers, which can be damaging to public trust. Where a case of gross misconduct is upheld, whilst an officer is in post the sanction would be dismissal but, for obvious reasons, this sanction is not available once the officer has left the service. Ensuring that disciplinary proceedings can commence or continue to reach a conclusion even after a constable retires or resigns means officers cannot evade disciplinary proceedings.

73. Compelling evidence was gathered by Dame Elish through interviews that showed a common perception that officers who are guilty of serious wrongdoing could escape justice by retiring or resigning before, during or after an investigation. This demonstrates that there is strong public interest in dealing with gross misconduct claims even after officers leave the service.

74. 26 out of 36 respondents to the consultation exercise agreed that it should be possible to begin and continue gross misconduct proceedings against former officers of any rank. Some respondents suggested that this should only occur in specific circumstances, such as (i) when in the public interest, (ii) if allegations related to on-duty misconduct, (iii) where there is strong evidence and (iv) where the matter is serious enough for the officer to be dismissed. However, most respondents (27 out of 36 respondents) agreed that it should be possible for gross misconduct proceedings to be taken forward where allegations came to the attention of the relevant authority more than 12 months after the person ceased to be an officer and the following conditions are met:

- the case is serious and exceptional,
- the case is likely to damage public confidence in policing, and
- the PIRC has determined disciplinary proceedings reasonable and proportionate.

75. A minority of respondents (although notably Police Scotland) were not in favour of the recommendation and highlighted the absence of such powers for employees in other areas of society. Police Scotland have publicly noted their reservations about the effectiveness of such an approach in delivering the desired outcome.

Bill Provisions

76. Enabling powers will allow disciplinary procedures set out in regulations made under section 48 of the 2012 Act to apply to persons who have ceased to be constables in certain circumstances where gross misconduct allegations are concerned.

77. The procedures would apply where a preliminary assessment of the misconduct allegation made by the PIRC finds that the conduct of the person while the person was a constable would, if proved, amount to gross misconduct.

78. In order to avoid stale allegations from being pursued against former constables, the Bill includes a power to state a period of time from the date of resignation after which no steps or only certain steps in the procedures can be applied unless additional criteria are met. The Scottish Government intends that regulations will set this period at 12 months and that the criteria will include a proportionality test carried out by the PIRC, having regard to a number of factors, including to the seriousness of the allegation, the impact of the allegation on public confidence in the police and the public interest. The expectation that this period will be set at 12 months is based on Dame Elish's recommendation which drew on the system in place in England and Wales, which is set at 12 months.

Section 7: Scottish police advisory list and Scottish police barred list

Key background and policy context

79. In England and Wales, where an officer ceases to be a member of a police force due to having been dismissed as a result of misconduct proceedings, the officer's name will be added to the police barred list which prevents them from being appointed by another police service, force or other policing body in England and Wales. At present, no such sanction exists in Scotland because we do not have a police barred list and are not party to the England and Wales list. Moreover, currently in Scotland where there is an allegation of misconduct and the subject officer resigns or retires in the course of the investigation or proceedings, those proceedings come to a halt.

80. Police Scotland currently uses 'intelligence' systems as part of their vetting processes and matters which would prevent someone becoming an officer in Scotland would also come out through Disclosure Scotland checks. The use of barred and advisory lists would strengthen those vetting processes and would make it possible to ensure English and Welsh policing bodies are made aware of the Scottish officer's gross misconduct and thereby effectively preventing those who do not meet the high standards required of the police service from being able to continue to work in policing throughout Great Britain (GB). Currently there is nothing to stop a constable in Scotland from resigning or retiring during an investigation into a matter that could have resulted in their dismissal and then seeking employment in a policing body in England and Wales or Northern Ireland. As such, the use of a barred and advisory lists should include cross-border and GB-wide application to avoid those on the list going to another GB jurisdiction to work in policing. This will continue to be a potential issue for so long as either all the UK jurisdictions are not party to barred and advisory lists or those lists do not "join up". Establishing Scottish police barred and advisory lists will allow the joining up of lists with other jurisdictions.

81. It is the College of Policing in England and Wales that has responsibility to manage the lists for England and Wales. The Police Service of Northern Ireland, as well as the States of Jersey Police, the British Transport Police, the Civil Nuclear Constabulary, the Ministry of Defence Police and Border Force already have information sharing agreements with the College of Policing in relation to the England and Wales Barred and Advisory lists, which can be utilised as part of each service's vetting procedures.

82. Police Scotland does not have an equivalent of the barred list or advisory list but they can access the publicly searchable elements of the England and Wales barred list and routinely check this as part of their vetting process. They do not have access to the advisory list. This means that currently, Police Scotland is unable to access the full barred list or the advisory list, and UK legislation governing the lists does not currently allow for any dismissals from Police Scotland to be added to them. The Bill seeks to bridge this gap by providing the SPA with responsibility for establishing and maintaining a police barred list and a police advisory list for Scotland. The Scottish Government has engaged with the UK Government and the College of Policing and there is a common desire for barred and advisory lists to be shared whilst meeting data protection requirements.

83. The intention is to use the power in subsection (5)(g) to allow information included in the lists to be shared (or published) with policing bodies in England and Wales. Currently there is nothing stopping a police officer in Scotland from resigning or retiring during an investigation into a matter that could have resulted in their dismissal and then seeking employment in a policing body in England and Wales. Scottish barred and advisory lists address this issue as policing bodies in England and Wales will be able to check the Scottish lists and ensure that a person is not barred from employment or appointment, with reciprocal agreements in place.

84. The most favoured option by consultees was that the Scottish Government should work with the UK Government to adopt the barred and advisory lists model.

Bill Provisions

85. The Bill requires the SPA to establish and maintain a Scottish police barred list and a Scottish police advisory list, with wide enabling powers allowing the Scottish Ministers to make provision in regulations in respect of those lists.

86. The framework around these lists will be set up in regulations and the Bill gives Scottish Ministers broad regulation-making powers to make the necessary provision. It is intended that the regulations will include preventing the employment or other appointment of a person on the barred list to other policing roles in Scotland, as well as provision requiring policing bodies in Scotland to consult the lists before appointing or employing a person to a policing role in Scotland.

87. The Bill sets out the criteria for entry into each of the lists. In relation to the advisory list, the SPA must enter a person on the list (1) if disciplinary proceedings have been brought against the person for gross misconduct, and the person ceases to be a constable (whether through resignation, retirement or dismissal for performance) before those proceedings are concluded, or (2) after the person has ceased to be a constable, disciplinary proceedings are brought against the person for gross misconduct. The definition of disciplinary proceedings used in the Bill means that such proceedings include any investigation in respect of alleged misconduct under regulations and a reference to proceedings being brought is a reference to the person being notified of proceedings.

88. Accordingly, a constable who resigns immediately before the allegation has been assessed, will not be placed on the advisory list. This will guard against persons being placed on the advisory list where the misconduct alleged is trivial. Only once a decision is made to investigate the allegation, will the person be added to the advisory list. If the constable resigns after the

allegation is assessed, if it's not gross misconduct, they won't be added to the advisory list. If it has been assessed as gross misconduct and an investigation has commenced and they resign, they will be added to the advisory list. However, if the conduct is assessed as gross misconduct but a decision has not yet been made whether to investigate, the person will not be added to the advisory list until such a time as an investigation is started.

89. In relation to the barred list, the SPA must enter a person on the list if the person is dismissed as a constable for gross misconduct, or a finding is made in disciplinary proceedings for gross misconduct against the former constable that the former constable would have been dismissed if still a constable at that time.

Section 8: Misconduct procedures: senior officers

Key background and policy context

90. Dame Elish's report sets out that, due to the small cadre of senior officers in Scotland, and their close links to the SPA, through close working with SPA members and regular contact through the SPA's Board and committees, the current senior officer misconduct processes could lead to actual or perceived partiality, or antipathy, when it comes to disciplinary matters in which senior officers might be involved.

91. She states that: gross misconduct hearings for all ranks should have 1) an independent legally qualified chair appointed by the Lord President, 2) an independent lay member appointed by the Lord President and 3) a policing member. This means in senior officer cases the role of chair should transfer from the SPA to the independent legally qualified person. The policing member in senior officer cases should be appointed by the Lord President; in all other cases the policing member should be appointed by the Chief Constable. This new panel would determine whether the senior officer had committed gross misconduct; misconduct; or neither.

92. Removal of the SPA from the determining role in senior officer misconduct will ensure that Scottish Ministers can make regulations to have a misconduct panel that does not have SPA representation and therefore the SPA does not determine whether a senior officer had committed conduct that amounts to gross misconduct; misconduct; or neither. The SPA will still have a role to play, and the intention is that the SPA will notify the senior officer of any sanction, and their rights of appeal.

93. Consultees were asked detailed questions regarding the composition of gross misconduct panels for hearings involving senior officers, Chief Superintendents, non-senior officers below the rank of Chief Superintendent as well as the role of the Lord President in appointing panel members. Overall, respondents suggested that the Chair of these hearings should be an independent legally qualified person while the hearing panel should include an independent legally qualified person¹⁷ and an independent lay person. One prominent view expressed by respondents was the importance of transparency and impartiality of the process. A further prominent view was that panel members should have a good understanding of legal processes and the nature of policing.

¹⁷ Which could be the chair of the hearing.

Bill Provisions

94. The Bill includes provision to replace the requirement in section 52(3) of the 2012 Act, which currently provides that the SPA must determine senior officer conduct cases, with a requirement for a panel independent of the SPA to determine senior officer conduct cases. In so far as performance is concerned, the status quo is maintained so that the SPA will continue to decide cases relating to senior officer performance. This will address any concerns around perceived proximity with officers and strengthen the independence of proceedings. The rationale for the decision for this to apply to senior officers only is outlined in the *Alternative Legislative Solutions* section at paragraph 105.

The role of the Police Appeals Tribunal

Key Background and Policy Context

95. The Advisory, Conciliation and Arbitration Service (ACAS) Code of Practice on disciplinary and grievance procedures¹⁸ sets out that ‘Employers should allow an employee to appeal against any formal decision made’ and the current regulations allow a constable to appeal against any disciplinary action.

96. Currently the Police Appeals Tribunal (PAT) can only hear an appeal as set out under section 56(1) of the 2012 Act:

56(1) A constable may appeal to a police appeals tribunal against any decision to dismiss the constable, or to demote the constable in rank, taken in pursuance of regulations made under section 48.

97. In her Review, Dame Elish sets out that following a misconduct hearing, chaired by a legally qualified chair (“LQC”), the route of appeal should be to the PAT (which has a panel of 3 legally qualified persons). The policy rationale is that it would be difficult to hold an internal appeal, against a finding of the legally qualified chair, after considering whether a new body was required. It follows that any appeal panel would require a legally qualified chair, and the PAT is the obvious route of appeal. A new body would complicate the landscape.

98. Dame Elish also sets out that a panel chaired by a LQC should hear any allegation of misconduct made against a senior officer. The panel’s decision may cover disciplinary action in relation to both misconduct or gross misconduct proceedings and the appeal would be to the PAT.

99. Currently the PAT can only consider an appeal for dismissal or demotion of a constable. Therefore the 2012 Act is amended to allow for all disciplinary action against a senior officer to be appealable to the PAT but in relation to misconduct cases only.

100. The range of disciplinary actions potentially available is currently set out under regulation 22 of the Police Service of Scotland (Conduct) Regulations 2014 and regulation 23 of the Police Service of Scotland (Senior Officers) (Conduct) Regulations 2013.

¹⁸ [Code of Practice on disciplinary and grievance procedures | Acas](#)

101. Given the planned transfer of the PAT to the Scottish Tribunals following implementation of the Tribunals (Scotland) Act 2014, most respondents (25 out of 31) agreed that senior officer misconduct regulations should be revised to ensure that there is only one route of appeal (i.e., the PAT for senior officer misconduct hearings where there has been a finding of gross misconduct). Respondents were more balanced in terms of who should be the responsible body for managing appeals against determinations of misconduct, whether it be the PAT or an independent legally chaired panel. The majority of responses from organisations (7 out of 8) favoured the former.

102. In additional comments provided in the consultation¹⁹, many respondents also favoured a simple and consistent approach to the processes for misconduct appeals and some highlighted the importance of consistent treatment of officers across all ranks for the purposes of equality and fairness.

Bill Provisions

103. The legislation will continue to have the appeal rights in section 56 of the 2012 Act for senior officers and non-senior officers in terms of appealing a decision to dismiss or demote to the PAT. However, the Bill makes some change as a result of the policy position to have an independent panel determine senior officer conduct cases: it gives an additional right to senior officers to appeal to a PAT against any decision to take disciplinary action short of dismissal or demotion against them in pursuance of conduct regulations made under section 48. An amendment to section 58(2) is also made so that it effectively provides that any decision overturning the original decision is effective from the date of the original decision.

104. This will provide for a clear process that is independent from the SPA and Police Scotland and will also allow constables to appeal a PAT finding (as a first-tier tribunal for Scotland) to an Upper Tribunal, in certain circumstances.

Alternative legislative solutions

105. Policy officials questioned whether there should be a time limit for starting investigations relating to former officers but considered it best to review these on an individual basis and subject to the public interest test.

106. Policy officials investigated an alternative solution with Home Office officials to collaborate on a UK wide barred and advisory list solution. The possibility of introducing a power via provisions in a Westminster Bill was investigated. However, whilst official level discussions with the Home Office and Ministerial letters were supportive of agreeing a solution, there could be difficulties if legislation changes in either jurisdiction and therefore a decision was made to introduce powers for a Scottish barred and advisory list, and to work with other stakeholders to collaborate on sharing information to ensure a UK wide solution. A fundamental principle of the barred and advisory lists is cross-border access, and our counterparts across the wider UK have committed to ensuring information sharing agreements are in place.

¹⁹ [1 Executive summary - Police complaints, investigations and misconduct - legislation proposals: consultation analysis - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/consultations/analysis/2022/01/10/1-executive-summary-police-complaints-investigations-and-misconduct-legislation-proposals-consultation-analysis-gov.scot/analysis-gov.scot/)

107. In implementing the recommendation for a legally qualified chair (“LQC”) the Scottish Government considered whether it was proportionate to have LQCs in both senior and non-senior cases. It is felt that the proportionate response is that a LQC of a hearing could properly hold a senior officer to account and also not leave the process open to perceptions of proximity bias between senior officers and SPA (who would currently chair senior officer hearings). This was not the case with non-senior officers. There is also a significant difference in the number of non-senior officer cases which would potentially be delayed and incur large costs.

108. In her Review, Dame Elish also recommended that Scottish Ministers should be given a power to issue statutory guidance in respect of conduct and be required consult on any such guidance, while a duty should be placed on policing bodies to have regard to any such guidance. Dame Elish intended for this new power to be used to issue guidance in respect of a new ‘Reflective Practice Review Process’ (RPRP). However, Scottish Ministers already have powers to issue guidance on any matter they wish, and so a specific power within this Bill to issue guidance on conduct is not required. A decision has been made that the most prudent way to implement the RPRP is by way of secondary legislation, namely in regulations, given that cognate processes are currently set out in regulations. This negates the need for a specific duty in the Bill on Scottish Ministers to consult, and a duty on policing partners to have regard to the guidance. Relevant policing stakeholders can be consulted when the regulations are being drafted, and those who are bound by them will have regard to guidance issued without a specific duty on them to do so. Therefore there is no requirement for any provision in this Bill to meet the policy aim.

FOURTH CROSS-HEADING OF THE BILL (SECTIONS 9-16): FUNCTIONS OF THE POLICE INVESTIGATIONS AND REVIEW COMMISSIONER

Section 9: Investigations into possible offences by persons serving with the police

Key background and policy context

109. Both the preliminary and final Dame Elish Review reports highlight the uncertainty caused by the phrase “person serving with the police” not being clearly defined in legislation. While there is a definition of a person serving with the police in relation to the Police Service of Scotland, the Dame Elish Review concluded that the use of the phrase “person serving with the police” has caused ambiguity, particularly in relation to determining if a person’s actions can be investigated depending on when an incident took place and under what circumstances. Her Review specifically notes that as a result of the current definition being unclear it is ambiguous whether a person serving with the police includes; firstly, officers who have retired or resigned from the service since the time of the act or omission; and, secondly, officers who were off duty at the time of the act or omission. Dame Elish highlighted that this resulted in there being varying views about whether the PIRC could investigate the pre-retirement actions or omissions of retired officers which might constitute criminal offences. The Dame Elish Review recommends putting beyond doubt the definition of a “person serving with the police” to be clear that it includes a person who, at the time of an act or omission, was serving with the police.

110. Dame Elish states that she heard evidence that ambiguity over the term “person serving with the police” can also lead to differential treatment of on-duty and off-duty officers, for example:

- If an officer is alleged to have committed a criminal offence while off-duty, they will invariably be reported to the local Procurator Fiscal and then investigated by their local police colleagues (instead of being referred at the outset to COPFS/PIRC for potential independent investigation).
- If a mixed group of on-duty and off-duty officers are alleged to have been involved in wrongdoing, it may be that investigations into the former can be conducted by the PIRC while a separate investigation into the latter has to take place in parallel.

37 out of 43 consultation respondents agreed that the term “person serving with the police” should be more clearly defined. There was consensus among respondents that the definition should clarify whether the PIRC has powers to investigate officers who have since retired or resigned from the service and those who were off duty at the time of an incident. Where additional comments were provided, most responses reiterated their agreement with the recommendation and specified that the definition should be extended to include these categories of officers.

Bill Provisions

111. The Bill clarifies that the PIRC investigations into criminal conduct can continue and occur when the police officer concerned has since left the service, did not become an officer until subsequent to the conduct or was not on duty at the time of the relevant incident, by stating that the PIRC can be directed to investigate where a person “who is, or had been, a person serving with the police may have committed an offence (regardless of when those circumstances occurred).” This will put beyond doubt the definition of a “person serving with the police” and will clarify the PIRC’s investigatory powers.

Section 10: Investigations of complaints made by persons serving with the police

Key background and policy context

112. The preliminary Dame Elish Review report calls on the Scottish Government to consider the case for putting beyond doubt the definition of a member of the public who may make a relevant complaint, in particular to clarify whether a police officer can make such a complaint. While there is a definition of a “relevant complaint”, there is no definition of “member of the public” relating to those who can make a complaint. The Dame Elish Review concludes that defining this term would give clarity to officers and all involved in the police complaints process on who can make a complaint.

113. Out of 42 respondents, 31 agreed that the term “a member of the public” should be defined to make it clear who is able to make a complaint and that the definition should make clear that it includes a serving police officer who is off duty at the time of an incident. Where additional comments were provided, most suggested that the definition should include off-duty police officers and reasoned they should have the same rights as other individuals to make complaints. Some respondents suggested that the treatment of such police officers depends on the complaint circumstances, such as how the complaint is made. We assess that off duty officers are well placed to realise when the service they receive falls short of expectations and by explicitly demonstrating that they can complain, will help improve the service received by other members of the public.

Bill Provisions

114. The Bill amends the relevant provisions in the 2006 Act which specify who may make a relevant complaint to the PIRC, to clarify that constables can make a complaint about an act or omission that adversely affected them in their personal capacity (as opposed to their capacity as a person serving with the police). In particular, this would mean that those who can complain include police constables who were off-duty when the act or omission complained of occurred. A relevant complaint does not include matters which amount to a criminal offence, an act or omission witnessed by a person serving with the police, and complaints about police constables' terms and conditions. The amendments to the 2006 Act also make it clear that members of Police Scotland or SPA staff will be able to make complaints about acts or omissions that occurred during their working hours or outside of their working hours. Similarly to constables, staff will not be able to complain about their terms and conditions.

Section 11: Complaint handling reviews

Key background and policy context

115. In her preliminary report, Dame Elish referenced the PIRC's power to carry out a complaint handling review, and to direct the SPA or Chief Constable to reconsider a complaint. Dame Elish noted that the PIRC does not have the power to overturn a decision on a complaint or to instruct the Chief Constable or the SPA to do so, though the PIRC complaint handling reviews often include recommendations that are relevant to the specific complaint and may also include generic recommendations relevant to the Chief Constable or SPA's complaints handling practices. The PIRC also regularly issues guidance to the Chief Constable and SPA.

116. Whilst the PIRC does make recommendations as set out above, there is no statutory basis for the making of these recommendations. Dame Elish stated that the PIRC has raised concerns that too many of these non-statutory recommendations were not being implemented, therefore the PIRC was increasing the use of reconsideration directions to attempt to encourage compliance. This, in turn, has resource implications for Police Scotland. To combat this, Dame Elish supported suggestions by the previous PIRC that the PIRC should have a statutory recommendation making power, with supporting obligations upon the Chief Constable.

117. Dame Elish considered that these obligations on the Chief Constable should be in the form of a statutory duty, subject to a public interest test, on the Chief Constable to comply with recommendations unless there are sound overriding operational or practical reasons for not complying with a PIRC recommendation which the Chief Constable must intimate to the PIRC. Where the Chief Constable implements the recommendation there should be an obligation on Police Scotland's Professional Standards Department (PSD) to report progress back to the PIRC on its implementation.

118. In summary 19 out of 38 respondents to the consultation agreed that recommendations from the PIRC should be put on a statutory footing similar to current reconsideration directions following both a review and an audit. The remaining respondents were almost equally split between agreeing that it should follow a review, disagreeing that it should be put on a statutory footing and being unsure. Most respondents agreed that Police Scotland or other policing bodies should be required to act on recommendations following a complaint handling review or audit. For

example, of the 38 respondents, 17 respondents suggested that this should be without restriction, while 15 respondents believed that Police Scotland or other policing bodies should be required to act on the recommendations unless there is an overriding practical or operational reason not to do so.

119. Most respondents agreed that Police Scotland should have to respond to such recommendations following a review of police complaints handling (out of 38 respondents, 34 agreed while 3 disagreed). Similarly, the vast majority agreed that Police Scotland should have to respond to such recommendations following an audit of police complaints handling (out of 38 respondents, 33 agreed while 4 disagreed).

Bill Provisions

120. The Bill amends the 2006 Act to include a provision to enable PIRC to carry out a complaint handling review in the absence of a request made by the complainer or the appropriate authority, if it is in the public interest to do so. It also enables the PIRC to make recommendations in relation to the complaint in its report of the review, and requires the authority to respond within the timescales set out in the report, setting out the action taken or planned in response to the recommendations, or explaining why nothing has been done. The PIRC may publish the response if it is considered appropriate to do so.

Section 12: Call-in of relevant complaints

Key background and policy context

121. The PIRC can currently review the way in which Police Scotland (or the SPA) have handled non-criminal complaints made about them by members of the public through a complaint handling review. In practice, a complaint handling review will only be undertaken once the complaint has been dealt with through the complaints handling process of the policing body, and a final response has been issued from them to the complainer.

122. In reviewing the complaint, the PIRC will look at the evidence used by the police to assess the complaint and form a view on whether they handled the complaint to a reasonable standard. In doing so, the PIRC can make recommendations for improvements, issue learning points and, through a statutory power, issue a reconsideration direction which requires the policing body to look at the complaint again in full. A reconsideration direction would require the policing body to appoint a person with no prior involvement to reconsider the complaint. The direction may also be subject to supervision of the PIRC, depending on the seriousness of the case and public interest considerations. Ultimately, the decision on whether a complaint is upheld lies with the policing body.

123. Dame Elish recommends that the PIRC should have the power to take over an investigation of a complaint if there is sufficient evidence that Police Scotland has not dealt with the complaint properly, but that this should only happen in the most serious non-criminal cases, providing there is compelling evidence. The report recommends that this should be able to happen at any point, including after the conclusion of the police process. By providing reassurance that there is an independent oversight body, the PIRC, who can conduct an independent investigation in the most serious non-criminal complaints at any time, this strengthens the process.

Consideration was given to whether the PIRC should wait until the outcome of the investigation, but it was assessed that the PIRC should have the power to call in the investigation at any point to mitigate against unnecessary delays. It was also assessed that the PIRC were the right body to call in an investigation, having the organisational knowledge and skills, and another body would complicate the landscape.

124. 30 out of 32 consultees agreed that the PIRC should be given a statutory power to call in an investigation of a complaint. The Scottish Government considers it necessary for there to be express provision for this because, while there is some suggestion that the Commissioner might be able to investigate some incidents under section 41C of the 2006 Act that could be the subject of a complaint, this is not the same as calling in a complaint. The intention, as laid out in the Review, is not to interfere with the constitutional position of the Chief Constable, but to enhance public confidence.

Bill Provisions

125. The Bill provides the PIRC with a power to take over consideration of (or call in) complaints being dealt with by the Chief Constable or the SPA under the following circumstances:

- where the PIRC determines, following a complaint handling review (CHR) that the complaint is to be considered by the PIRC,
- when requested to do so by the authority to which the complaint was made, or
- of the PIRC's own volition, and following consultation with the authority which dealt with the complaint initially, if the Commissioner has reasonable grounds to believe that the appropriate authority is not handling, or has not handled, the complaint properly and it is in the public interest for the Commissioner to consider the complaint.

126. The Bill clarifies that PIRC can call in a complaint at any stage in the CHR, or reconsideration, and provides the Commissioner with the ability to review the complaint handling following a request from the complainer before deciding whether to call it in. This aims to address any concerns from the complainer around a lack of progress in the handling of their complaint and ultimately improve the efficiency of the process.

127. Placing all of the above in statute will strengthen the role of the PIRC and enable greater scrutiny of the way Police Scotland handles complaints.

Section 13: Review of investigation of whistleblowing complaints

Key background and policy context

128. Both Police Scotland and the Scottish Police Authority have procedures in place for police constables and/or staff to report concerns internally. Police Scotland produced an initial whistleblowing guidance document in June 2017, which set out Police Scotland's responsibilities and provided details of the reporting mechanism for submitting concerns. The guidance was updated in 2019 and is available to all officers and staff on the Police Scotland intranet. In the same year, a contract was awarded to a whistleblowing charity (Protect) to provide an independent advice line delivering confidential, expert advice to officers, staff and managers.

129. The original whistleblowing procedures covered both Police Scotland and the SPA, however a new policy, specifically for the SPA, was approved in March 2020. One SPA member has also been appointed as a Whistleblowing Champion on behalf of the SPA Board with responsibility to oversee the independence and effectiveness of the whistleblowing policy.

130. Under the current policies, officers and staff within Police Scotland and the SPA can disclose relevant concerns to external organisations, provided these are prescribed bodies under law, for example to the Information Commissioner's Office (ICO) in relation to data breaches.

131. However, Dame Elish states in her review that there was merit in the suggestion by the previous PIRC that it is necessary to provide the public with a greater degree of assurance that whistleblowing complaints are being handled appropriately. The Scottish Government supports the view that this should be in the form of a statutory right for the PIRC to be able to audit all whistleblowing reports made to Police Scotland to enable them to have oversight of referrals under the whistleblowing policy.

132. In summary, 39 out of 43 consultees agreed that people working in Police Scotland and the SPA should be able to raise their concerns with an independent third-party police oversight organisation. Similarly, most respondents agreed that concerns which have been raised about wrongdoing within policing in Scotland should be audited by an independent organisation (35 out of 41 respondents agreed and 6 disagreed or were unsure).

Bill Provisions

133. The Bill includes an obligation on the PIRC to keep under review all arrangements maintained by the SPA and the Chief Constable for the investigation of information provided in a whistleblowing complaint, and a power for the PIRC to make recommendations or give advice to them on the arrangements for the handling of whistleblowing complaints. The PIRC will be able to do so in a report. Such a report must be published.

134. It should be noted that there is no impact on the rights of whistle-blowers, which is dealt with under reserved UK Parliament legislation, but it should improve transparency of processes around how public interest matters are investigated. This, in turn, will encourage people to speak up when they see wrong-doing. It also provides an opportunity for Police Scotland and the SPA to take on board learning and to address issues arising from concerns raised.

Section 14: Investigations involving constables from outwith Scotland

Key background and policy context

135. Dame Elish considered that the current legislative framework does not provide appropriate statutory powers for the PIRC to investigate serious, but non-criminal, incidents, involving officers from other territorial forces operating in Scotland; this is also the case for the Independent Office for Police Conduct (IOPC) and Police Ombudsman for Northern Ireland (PONI) in respect of Police Scotland officers involved in cross-border operations or mutual aid deployment in England, Wales or Northern Ireland respectively.

136. Currently when an incident has taken place that involves an officer from another jurisdiction who was operating in Scotland at the time of the incident, and it relates to a criminal matter, it could be investigated by Police Scotland, but not the PIRC. There is no statutory provision in place for anyone to carry out an investigation of a serious incident, as envisaged under the 2006 Act, in relation to non-criminal matters. The PIRC have no power to investigate any person serving with Police Service of Northern Ireland (PSNI) or an English or Welsh force or service, unless that person is under arrangements to provide temporary service to Police Scotland. These constables, could, however, be in Scotland under different arrangements or to carry out duties on behalf of their home force. Under the current definition of a “person serving with the police”, the PIRC only has the power to investigate Police Scotland’s officers, or officers who are on temporary service in Police Scotland. Therefore there is a gap that needs to be addressed.

137. In addition, Dame Elish was concerned about what would happen if there was an allegation of criminal conduct where an officer from PSNI, or an English or Welsh force acted together with an officer of Police Scotland. The PIRC could be directed by the Scottish prosecution service, the COPFS, (the appropriate prosecutor) to investigate criminal conduct of the Police Scotland Officer, but Police Scotland would have to investigate the actions of the officer from England, Wales or Northern Ireland, resulting in two parallel investigations.

138. Among the consultation respondents that provided views in relation to cross-jurisdictional issues, most agreed with the recommendation to address the existing gap in cross-jurisdictional investigations²⁰. Respondents suggested that the PIRC should be able to investigate all officers involved in incidents that occur in Scotland and emphasised the importance of cross-jurisdictional support and communication between nations. Policy officials considered PIRC would be the most appropriate body to carry out the investigations, as they already investigate incidents involving the police in Scotland. The alternative, that the IOPC or a newly established body would investigate, would add further complication to an already crowded policing landscape.

Bill Provisions

139. Provision in the Bill will ensure that the PIRC can investigate potential criminal offending of English, Welsh and Northern Irish police officers of territorial forces operating in Scotland, where directed to do so by the appropriate prosecutor. The PIRC will be able to investigate serious incidents, and some deaths involving these constables (that have to be investigated by COPFS under legislation on fatal accidents and sudden deaths, etc.). Depending on the circumstances this could happen if the chief officer or constable of the English or Welsh force or the PSNI makes the request, or if the Chief Constable of Police Scotland requests it.

140. Introducing a legislative solution to these cross-jurisdictional issues will help to ensure the integrity of independent investigation in line with the European Court of Human Rights (ECHR) obligations and avoid the potential for double-handling.

²⁰ Executive summary - Police complaints, investigations and misconduct - legislation proposals: consultation analysis - gov.scot (www.gov.scot)

Section 15: Review of, and recommendations about, practices and policies of the police

Key background and policy context

141. In her preliminary report, Dame Elish referenced the PIRC's power to carry out a CHR, and to direct the SPA or Chief Constable to reconsider a complaint. Dame Elish noted that the PIRC does not have the power to overturn a decision on a complaint or to instruct the Chief Constable or the SPA to do so, though the PIRC complaint handling reviews often include recommendations that are relevant to the specific complaint and may also include generic recommendations relevant to the Chief Constable or SPA's complaints handling practices. The PIRC also regularly issues guidance to the Chief Constable and SPA.

142. Whilst the PIRC does make recommendations as set out above, there is no statutory basis for the making of these recommendations. Dame Elish stated that the PIRC has raised concerns that too many of these non-statutory recommendations were not being implemented, therefore the PIRC was increasing the use of reconsideration directions to attempt to encourage compliance. This, in turn, has resource implications for Police Scotland. To combat this, Dame Elish supported suggestions by the previous PIRC that the PIRC should have a statutory recommendation making power, with supporting obligations upon the Chief Constable.

143. Dame Elish considered that these obligations on the Chief Constable should be that there would be a statutory duty, subject to a public interest test, on the Chief Constable to comply with recommendations unless there are sound overriding operational or practical reasons for not complying with a PIRC recommendation which the Chief Constable must intimate to the PIRC. Where the Chief Constable implements the recommendation there should be an obligation on Police Scotland's Professional Standards Department (PSD) to report progress back to the PIRC on its implementation.

144. 19 out of 38 consultation respondents agreed that recommendations from the PIRC should be put on a statutory footing similar to current reconsideration directions following both a review and an audit. Most respondents agreed that Police Scotland or other policing bodies should be required to act on recommendations following a CHR or audit. Some respondents expressed concern that this is not currently the case and that there should be a requirement on Police Scotland to comply with the recommendations within a specified time. Furthermore, some suggested that the recommendations should be made publicly available.

145. Currently, under section 33A(d) of 2006 Act, the PIRC has the power "to investigate other matters relating to the Authority or the Police Service of Scotland where the PIRC considers that it would be in the public interest to do so". Section 41C defines relevant police matter as being "any incident in relation to which there is an indication that the Authority, the Police Service of Scotland or a person serving with the police has been involved". The new power would be used, at the PIRC's discretion, when the PIRC becomes aware of a trend, theme or practice emerging in the discharge of its other functions under section 33A and the PIRC considers it in the public interest to review such a policy or practice of the SPA or the Chief Constable.

146. Once the new function of the PIRC is in force the PIRC and HMICS will need to collaborate to consider who the most appropriate body is to review any practice or policy to avoid

unnecessary duplication, (e.g. if a theme is not part of the HMICS scrutiny plan for the year then the PIRC may decide they will review).

147. Out of 38 respondents, 27 agreed that the PIRC should be able to investigate current practices and policies of Police Scotland if the Commissioner believes it would be in the public interest. Overall, the most favoured response option selected by respondents was to disagree that this additional power should be limited in any way (out of 38 respondents, 19 disagreed and 13 agreed). However, responses from organisations were more likely to agree that these powers should be limited (out of 12 responses, 7 agreed while 3 disagreed). Where respondents provided further comments, some respondents suggested that this power should be subject to certain caveats, including that it should not lead to an abundance of unnecessary investigations and that there needs to be regular communication between the bodies.

Bill Provisions

148. Provisions in the Bill will add a power to the 2006 Act for the PIRC to make recommendations to the SPA and the Chief Constable in relation to individual complaints, as well as a power to allow the PIRC to review a practice or policy of the SPA or the Chief Constable.

149. There will be a duty on the Chief Constable and the SPA to provide a written response to any recommendations directed at them within a set time frame, and, where not relating to an individual complaint, but to a review or arrangements for complaints handling more generally, a duty to provide an update on progress in implementing recommendations. There will also be a duty on the PIRC to publish the responses to their recommendations.

150. This will reduce the previous PIRC practice of issuing statutory reconsideration directions to increase compliance, and the significant resource implications on Police Scotland to implement them.

Section 16: Provision of information to the Commissioner

Key background and policy context

151. As part of their statutory functions, set out in the 2006 Act, the PIRC has responsibility for reviewing how Police Scotland have dealt with a complaint and for undertaking audits to ensure suitable arrangements are in place, including the efficiency and effectiveness and independence of the approaches, throughout the decision-making process.

152. Police Scotland records complaints on its conduct and complaints database, and the system currently in use is called Centurion.

153. The PIRC currently accesses the database under Police Scotland supervision at a designated police office in order to meet their statutory functions. Dame Elish recommends introducing a specific legislative power that would enable the PIRC staff to have remote access to the Police Scotland complaints and conduct database from their own office or place of work in order to carry out their statutory responsibilities.

154. Along with information on police complaints, the database links to information for which the PIRC currently has no responsibilities. Police Scotland has previously raised concerns about providing the PIRC with remote access to the whole database in its current format. To resolve this concern, Police Scotland has been investigating solutions with the system provider and expect an upgrade to the system during summer 2023 which will allow the PIRC to access the database remotely to meet their statutory functions in a way that complies with GDPR.

155. Providing the PIRC with a power to have direct and supervisory access to the complaints database, as recommended in Dame Elish's Review, will allow the investigation process to be truly independent, with the intention of improving transparency and public confidence in the system. It will improve timeliness and efficiency as it will allow the PIRC staff instant access to the database at their own place of work, saving travel time and delays that are currently experienced to co-ordinate access in its current format.

156. Our consultation responses showed strong support for this measure, with 32 out of 37 respondents agreeing that the PIRC should be able to access Police Scotland's complaints and conduct database remotely. Of the respondents that provided further comment, many reasoned that the PIRC needs access to complete information and that this would improve the accuracy and efficiency of its investigations. Some respondents stated that, while access should be granted, it is important that data protection concerns are addressed.

157. Of the respondents that expressed views on potential safeguards and limits in relation to the PIRC accessing Police Scotland's complaints and conduct database, most suggested that such safeguards and limits need to be put in place before access can be granted. Respondents argued that there should be restrictions on who is granted such access and that they need to be appropriately vetted. Furthermore, respondents provided suggestions regarding what information the PIRC should have access to, including that they should only be able to view information that is relevant to an ongoing investigation.

Bill Provisions

158. The Bill sets out an enabling power to Scottish Ministers for them to make provision allowing the PIRC to have remote access to Police Scotland's complaints management database which holds information and documents that the PIRC must review in order to meet their statutory functions. It will require the Chief Constable to allow remote access to the system. The regulation making power would also allow regulations to be made in relation to accessing the SPA's systems, should this be deemed necessary in the future.

Alternative Legislative Solutions

159. Policy officials investigated a range of possibilities with Home Office officials regarding cross-jurisdictional issues in relation to the investigation of serious incidents, both criminal and non-criminal, involving officers from other territorial forces when undertaking a policing function in Scotland. The possibility of introducing a power via provisions in a Westminster Bill was investigated to allow the PIRC to investigate the actions of officers from other jurisdictions when undertaking a policing function in Scotland, with reciprocal agreements in place for the Independent Office of Police Conduct (IOPC) in England and Wales for Police Scotland constables. However, whilst Official level discussions with the Home Office and Ministerial letters

were supportive of agreeing a solution, the alternative approach taken will achieve a similar outcome, with the Bill introducing powers for the PIRC to investigate English and Welsh officers when operating in Scotland, which will be followed by a subsequent associated section 104 order of the Scotland Act 1998.

160. In assessing the additional powers for the PIRC, we considered which organisation was best to take forward the scrutiny including whether a new body was needed. It was assessed that a new body would confuse and complicate the landscape and that the PIRC should have more powers.

161. When considering the circumstances by which the PIRC would access Police Scotland's electronic complaints database, including whether it was appropriate for the PIRC to only access files when Police Scotland allowed it. Policy officials considered that this would not meet the policy intention of the recommendation to ensure the PIRC could carry out contemporaneous audit and reviews without intervention to strengthen public confidence that the Police complaints review process is independent and transparent.

FIFTH CROSS-HEADING OF THE BILL (SECTION 17) – GOVERNANCE OF THE POLICE INVESTIGATIONS AND REVIEW COMMISSIONER

Section 17: Advisory board to the Commissioner

162. The PIRC is a key element of the policing landscape in Scotland, providing independent and impartial oversight into investigations. The PIRC, as an organisation, is independent from the police and reviews the way in which police organisations in Scotland deal with complaints made by members of the public, as well as undertaking independent investigations of serious matters involving the police in Scotland.

163. The PIRC is an Executive non-departmental public body (NDPB) consisting of an Executive Team, comprised of the Commissioner, Director of Operations, and a Heads of Department Group. The role of the Executive Team and Heads of Department Group is to provide leadership, direction, support and guidance to ensure the PIRC is committed to delivering its functions effectively, efficiently and independently whilst recognising the aims, policies and priorities of Scottish Ministers.

164. The PIRC established an Accountability and Audit Committee (AAC) in July 2010 to provide the PIRC with challenge, scrutiny and support. The AAC brings an external perspective to the consideration of corporate management issues such as budget monitoring, training and development, relations with stakeholders and planning. Following the publication of Dame Elish's Review, the PIRC responded swiftly, recognising the importance of a transparent appointments process for the AAC. The AAC was transitioned to a more formal board structure with Committee Members being appointed through an open and transparent appointment process. This includes having a representative from the Scottish Government on the appointments panel. The AAC has

already established Terms of Reference and a Code of Conduct in line with the standards outlined for Statutory Boards through Scottish Government guidance²¹.

165. Provision for a range of amended and new powers for the PIRC is included in the Bill, and it is therefore appropriate that the governance and accountability framework is updated to ensure suitable advice and expertise is available to support the decision-making process, and to provide a suitable level of challenge in light of the organisation's new responsibilities.

166. Within her Review, Dame Elish states that the PIRC should be re-designated as a Commission, recommending a model that has a Commissioner and two Deputy Commissioners.

167. The intent of this recommendation is understood to require a focus on establishing a greater degree of expert and balanced support through a Statutory Board that has relevant expertise.

168. In response to our public consultation, 29 out of 39 respondents agreed that the PIRC should be re-designated as a Commission. If it is re-designated as a Commission, most respondents agreed that two Deputy Commissioners should be appointed. Of the respondents that provided further explanation, many claimed that this would improve the PIRC, firstly by spreading the responsibilities of one individual across multiple individuals, and secondly by increasing the impartiality and status of the organisation.

169. Most respondents agreed that a Statutory Board should be created, with 25 respondents agreeing with this recommendation while 7 disagreed. Responses provided by organisations were almost equally split between agreeing and disagreeing with this recommendation. Of the respondents that provided further information, some argued the recommendation would increase the PIRC's integrity, accountability and status as well as instil public confidence in the organisation.

Bill Provisions

170. This portion of the Bill provides for the PIRC to establish and maintain an Advisory Board that will provide advice to the Commissioner on matters relating to the governance and administration of the PIRC. Members of the Advisory Board are to be appointed by Scottish Ministers.

Alternative Legislative Solutions

171. In considering strengthening the governance structure of the PIRC, the possibility of re-designating the PIRC as a Commission was pursued. A Commission would generally allow for a multi-headed body, each of whom would hold the same level of authority; however this may lead to confusion over who has the ultimate authority. Policy officials determined that the policy intention to ensure a greater degree of expert and balanced support for the Commissioner would be better met through the appointment of a Statutory Board that has relevant expertise, in particular legal expertise, to assist the decision-making process and provide a greater degree of scrutiny.

²¹ [On Board: a guide for members of statutory boards - gov.scot \(www.gov.scot\)](https://www.gov.scot/resources/consultation-papers/collections/documents/OnBoard-a-guide-for-members-of-statutory-boards.pdf)

172. Consideration was also given to the appointment of two statutory Deputy Commissioners. Following the publication of the Review's Preliminary report in 2019, the PIRC took steps to strengthen the organisation's governance structure by appointing new permanent staff members with relevant expertise, including legal expertise, to fulfil deputy functions, and to support the work of the Commissioner. It is therefore not considered necessary at this time to create additional statutory positions. Through extensive engagement with the Commissioner Scottish Government officials are content that the changes the PIRC has made to date in her senior management teams have strengthened overall governance without creating a further layer of bureaucracy. The Scottish Government will continue to monitor the governance structure of the Commissioner and if there is a requirement to consider further changes in the future then this can be secured through the Public Services Reform (Scotland) Act 2010.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT AND SUSTAINABLE DEVELOPMENT

Equal opportunities

173. An Equality Impact Assessment (EQIA) has been carried out and the results are published on the Scottish Government website.

174. The EQIA concluded on the basis of Dame Elish Angiolini's Review and the evidence available, that the provisions contained within the Bill will appear to provide a positive, albeit indirect, impact to the majority of protected characteristics. These are: age, sex, race, gender reassignment, pregnancy and maternity, disability, religion or belief and sexual orientation. This is because the measures contained within the Bill aim to improve the processes around police complaints and misconduct handling to make it easier to understand who to complain to, thereby leading to positive change. For example, whilst the Bill will not directly impact on different sexes or people of different races, it will help root out misogyny and racism by helping officers and the general public understand who to contact to call out inappropriate behaviour. Through increasing transparency and accountability in this process we are seeking to increase public confidence that complaints will be responded to and those who have harmed others through their actions are appropriately held to account.

175. Furthermore, a range of non-legislative work in response to Dame Elish's Review is being progressed, led by Police Scotland, which will aid the future ongoing monitoring of the equality impacts of this legislation. This includes work to improve the collation, analysis and publication of equalities and diversity data. In turn this will provide richer equality and diversity data to help ensure policing bodies can better meet all three needs of the Public Service Equality Duty to eliminate discrimination, harassment, and victimisation, advance equality of opportunity and to foster good relations between persons who share a relevant protected characteristic and persons who do not share it. A substantial programme of work has been established by Police Scotland aimed at transforming its culture and enhancing recruitment, leadership and training to develop a culture which reflects its values of integrity, fairness, respect and commitment to upholding human rights. However, this activity is not within the scope of the EQIA as it is not part of the legislative work being taken forward through the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill.

Human rights

176. In developing policy positions for the Bill, we considered human rights impacts and screened what areas are likely to have an impact, positive or negative, on human rights. This included consideration of the human rights of officers, staff, those who raise complaints or are involved in investigations or misconduct processes and those who raise whistleblowing complaints.

177. Human rights are crucial to the policing by consent model demonstrated by policing in Scotland and are integral in terms of ensuring we treat everyone with dignity and respect. The European Convention on Human Rights (the “Convention”) has been considered against the provisions contained in the Bill and, where appropriate, mitigations and safeguards have been built into the drafting to ensure the provisions do not breach Convention Rights.

178. During the consultation period the Scottish Government communicated with a number of organisations and individuals including the Scottish Human Rights Commission and the Equality and Human Rights Commission. These organisations had previously engaged with Dame Elish’s review.

179. When developing our policy position and considering human rights, the following articles of the Convention were assessed by policy officials to be most relevant. Where it is considered that there may be a risk of potential impacts under these articles, safeguards have been built into the provisions:

- Article 2: Right to life
- Article 3: Freedom from torture and inhuman or degrading treatment
- Article 6: Right to a Fair Trial

180. The Bill’s provisions may impact on article 2 and 3 obligations in a number of different circumstances but in particular where there has been a death at the hands of the police, or where the police have been involved in a person being subjected to torture, or to inhuman or degrading treatment. Where the state has potentially been involved in a breach of article 2 or 3 of the Convention, there is a positive obligation on the state to ensure that there is an effective investigation into this breach. For example, the duty of candour is intended to help ensure that an effective investigation in compliance with articles 2 and 3 of the Convention is undertaken. Setting this out in legislation will put beyond doubt and make the position clear to police officers and the public, that officers will give every assistance after a serious incident.

181. However, article 6 is also relevant here. There is to be a duty on the constable under the Duty of Candour to cooperate with investigations, including criminal investigations, providing that the constable has been confirmed as a witness and not the subject of the investigation. Where an officer is the “accused” they are entitled to the right to silence and the right to not incriminate themselves during the investigation. Where the status changes from witness to accused, an appropriate safeguard will be placed on the interviewers (who will be employees or officeholders of a public authority) to ensure that the now accused person is made aware of their rights to silence and against self-incrimination, the interviewers must conduct any further interviewing in a human rights compatible manner.

182. This Bill makes a number of important changes to the current statutory provisions which govern processes around police complaints and misconduct, the PIRC investigations into the police and police ethics. The following provisions were considered as having impacts of any kind on these human rights articles:

- Code of Ethics should be given a basis in statute.
- Statutory duty of candour.
- Clarifying the scope of investigations into possible offences by persons serving with the police.
- Clarify the scope of investigations of complaints by persons serving with the police.
- PIRC powers to call-in an investigation of a relevant complaint.
- PIRC powers to review practices or policies of Police Scotland
- Investigations involving constables from outwith Scotland.
- Gross misconduct proceedings to continue even if/after officer leaves.
- For gross misconduct cases for all ranks, the PIRC to consider continuation of disciplinary proceedings for former officers beyond 12 months.
- Scottish police barred and advisory lists.

183. Where the Bill may impact on Convention rights, consideration has been given as to whether the impact is proportionate and necessary and whether the Bill is clearly providing a legal basis for the policies. The Bill, along with subsequent regulations and guidance, will ensure there is a legal basis for policies, such as the PIRC pursuing gross misconduct proceedings against former constables in certain circumstances, meaning there will be a clear basis in law for any potential interference with Convention rights. We consider making certain provisions which may impact on Convention rights, such as holding former constables to account, a necessity considering the aim of the Bill, which includes fostering public confidence in the police, and are of the view that where there is interference with human rights, such interference will be lawful, justified and proportionate to achieve a legitimate aim to benefit democratic society.

184. The aim of some provisions in the Bill is to ensure that constables (including former constables) who may be guilty of serious wrongdoing cannot avoid justice and evade disciplinary proceedings by retiring or resigning. The Bill lays the foundations for this policy by widening existing enabling powers contained in the 2012 Act to allow regulations on conduct to cover former constables. At present, such regulations only apply to serving constables.

185. The Scottish Government considers that Police Scotland must be accountable and must continuously improve public confidence in policing, focusing on being transparent, accountable and acting with integrity, fairness and respect. In order to meet these priorities and maintain public confidence, the Scottish Government believes that these provisions address the pressing social need to ensure that the public can have confidence in the police and understand that any behaviour that falls short of standards expected of police constables is investigated and dealt with appropriately. This is particularly true given recent negative publicity around policing which has damaged public trust. Police Scotland police by consent and it is therefore vital that the public have the utmost confidence in the integrity of officers. The provisions therefore pursue a legitimate

aim in terms of public safety, and we are of the view that where human rights may be engaged, these are not breached as any interference would be justified and proportionate.

186. The Bill includes a power in section 6 which allows regulations to provide a time bar, running from the date on which a person ceased to be a constable, after which misconduct procedures cannot be applied, unless certain criteria set out in regulations are met. As noted above, we expect this time bar to be set at 12 months. It will be a discretionary decision as to whether or not to pursue gross misconduct proceedings where 12 months have passed, taking into account whether to do so would be reasonable and proportionate having regard to factors set out in regulations. The policy intention is that the PIRC will be that discretionary decision maker and regulations will provide that the PIRC is to have regard to matters such as the seriousness of the allegation, the impact of the allegation on public confidence in the police, and the public interest when making its decision. The provisions are therefore not a blanket approach to pursue all kinds of alleged misconduct of former officers but will only apply to cases where gross misconduct is concerned, within a 12 month period (unless reasonable and proportionate to pursue conduct beyond a 12 month period) and the provisions do not have retrospective effect.

187. We assess that the SPA, Police Scotland and the PIRC will undertake the functions or will be provided powers by the provisions in this Bill that interact with human rights, and therefore will be ultimately responsible for implementation of the Bill when passed in a manner which is compliant with Convention rights. This will include delivering on their positive responsibilities for assessing and mitigating against any negative impacts on human rights.

Island communities

188. The Bill has no significant impacts on island communities that differs from other communities. Small impacts were noted in certain circumstances for a small number of individuals, and mitigations are possible if necessary.

189. Section 3 of the Bill which implements a duty of candour includes a requirement on officers to attend interviews and assist and participate in proceedings (including investigations against constables) openly, promptly and professionally. This may incur additional travel costs for officers. Additionally, section 8 of the Bill contains provision which amends existing enabling powers to pave the way for regulations to provide for a panel independent of the Scottish Police Authority to determine senior officer misconduct cases. This may affect island communities as there will be travel expectations for subject officers and witnesses to attend the hearings in person. However, given the small number of senior officers in Scotland and the rarity of such misconduct proceedings, the impact is expected to be minimal. Paying travel expenses for individuals from Islands that are required to attend hearings as witnesses are being explored. But whether travel expenses are provided or not, there would still be no impact that is significantly different between island and other communities. However, mitigations are being considered for online attendance.

Local government

190. The Bill has no significant impacts on local government. The Bill makes changes impacting on Police Scotland, the PIRC, the SPA, and not on local government. The governance structure is such that the SPA is responsible for the governance, oversight and administration of Police Scotland. The SPA is accountable to Scottish Ministers who are in turn accountable to the

Scottish Parliament for the activities of the authority and its use of resources. The Bill therefore does not impose any additional responsibilities or obligations on local government.

Sustainable development

191. The Bill has no significant impacts on sustainable development. Screening was undertaken to consider the impacts of the Bill provisions against the environmental principles in European law (Schedule 2 of the Environmental Assessment (Scotland) Act 2005).

192. Through this screening it is clear that despite several provisions requiring new tasks of policing bodies, there are no significant impacts on the environment. Small impacts were noted in certain instances for a small number of provisions however mitigations are possible if necessary. The majority of policies will adjust procedures and processes for Police Scotland and other policing partners which they already undertake. Where there is a new task being created there will not be any significant environmental impact caused, and mitigations are possible in terms of new responsibilities or hearings to be held.

193. Whilst not a provision of the Bill there will be provisions made in Regulations for gross misconduct hearings to take place in public and for officers to attend interviews when requested to do so as part of investigations. Therefore there might be small environmental impacts caused by officers and officials being required to travel. However mitigations such as online hearings are possible and will be considered by relevant policing partners to mitigate against these small environmental impacts. Also given the data available, the Scottish Government are assured that incidents are infrequent and therefore would not incur an additional environmental impact.

CROWN CONSENT

194. It is the Scottish Government's view that the Bill as introduced does not require Crown consent. Crown consent is required, and must be signified during a Bill's passage, where the Bill impacts the Royal prerogative, the hereditary revenues of the Crown or the personal property or interests of the Sovereign, the Prince and Steward of Scotland or the Duke of Cornwall. The Scottish Government's view is that this Bill does none of those things.

195. For the source of the requirement for Crown consent, see [paragraph 7 of schedule 3 of the Scotland Act 1998](#), and [rule 9.11 of the Parliament's Standing Orders](#). For further information about the considerations that go into determining whether Crown consent is required for a Bill see [Erskine May](#), the guide to procedure in the UK Parliament.

*This document relates to the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill (SP Bill 29)
as introduced in the Scottish Parliament on 6 June 2023*

POLICE (ETHICS, CONDUCT AND SCRUTINY) (SCOTLAND) BILL

POLICY MEMORANDUM

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