

Police Complaints, Investigations and Misconduct: A Consultation on Legislation

Coalition for Racial Equality and Rights

August 2022

The Coalition for Racial Equality and Rights (CRER) is a Scottish strategic anti-racist organisation which works to eliminate racial discrimination and promote racial justice across Scotland.

We welcome the opportunity to respond to this consultation, and would be happy to discuss our response further if useful.

The following submission sets out a brief summary of our views on each part of the consultation. It does not answer every question in the consultation paper, instead focusing on the issues of greatest relevance to our work.

Section 1: Rights and Ethics

1.1 Code of Ethics

CRER would be in favour of a statutory Code of Ethics. However, experience has shown that professional standards of this nature quickly lose their power if not consistently implemented. Any Code of Ethics would need to be supported by strongly reinforced leadership messaging, appropriate continuing professional development to underpin compliance and robust enforcement in the event of breaches. The Code of Ethics should be developed following extensive consultation and particularly reflecting the views of people who have experienced / from communities at risk of experiencing negative impacts of policing as explored in Dame Elish Angiolini's report.

The Code of Ethics should explicitly address the responsibilities of police officers in regard to equality, including a commitment to anti-racism.

We agree that it should be possible to amend or update these, but this should be undertaken only where there is a strong argument for strengthening them, and changes should be subject to consultation.

Scottish Government should be responsible for preparing the Code of Ethics, in close partnership with the policing bodies set out in the consultation paper. As demonstrated in Dame Elish Angiolini's report, policing structures in Scotland are regarded as insufficiently accountable to the public, and allowing any of the suggested bodies to be responsible for this without Government oversight is likely to damage public trust.

The Code of Ethics should be developed following extensive consultation in line with normal Scottish Government practice, but with particular attention to the views of people who have experienced / from communities at risk of experiencing negative impacts of policing as explored in Dame Elish Angiolini's report. The consultation should therefore ensure that it gathers, and proactively embeds in the Code of Ethics, the views of Black and minority ethnic communities and those who represent their interests.

1.2 Duties of Candour

We strongly agree that there should be a statutory duty of candour on the police to co-operate fully with all investigations into allegations against its officers. The wording of such a duty should be subject to consultation, and whilst Dame Elish Angiolini's suggestion of a 'duty to assist' is appealingly simple, assistance does not necessarily indicate the rigorous level of openness and honesty that candour reflects. The purpose of such a duty must be to ensure that truthful information is provided by all, promptly, in the event of an investigation. It should therefore relate to both candour and co-operation with all investigations, inquiries and formal proceedings

The duty should apply to both Police Scotland as an organisation and to individual officers at all ranks, whether on or off duty, including former officers. Police staff and former police staff should also be included.

Any police complaints or investigations body should be able to compel those covered by the duty to comply, including compulsion to attend interviews.

1.3 Whistleblowing

CRER would be in favour of an oversight body to support whistleblowing. The form of this organisation should be subject to full public consultation. The independence and integrity of such an organisation would be key, and attention would need to be paid to the potential for whistleblowing against PIRC itself as well as Police Scotland. A whistleblowing body for the policing and criminal justice sector as a whole would be one possibility. We agree that there should be appropriate audit arrangements in place to ensure the body operates as intended.

1.4 Legal aid in Article 2 cases

CRER believes that legal aid should be free for all families of those who die during or following police contact, regardless of circumstance. We agree that there should be an opportunity in such cases, where appropriate, for family and common interest groups to receive civil legal aid funding on a group basis.

1.5 Death of a serving police officer (investigation)

We agree that the ambiguities raised by Dame Elish Angiolini should be clarified.

1.6 Definition of “person serving with the police” and “member of the public”

We agree that “person service with the police” should be clarified to include current and former officers, and that the term “member of the public” also requires clarification.

Section 2: Governance, Jurisdiction and Powers

2.1 PIRC governance

CRER is strongly in favour of reforming PIRC in order to address the issues set out in Dame Elish Angiolini’s report. We are particularly concerned that its governance should not be the responsibility of former police officers, as this

calls into question its independence and objectivity. Appointment and accountability matters would be best placed within the Scottish Parliament, in line with the opinion of the Council of Europe's Commissioner for Human Rights.

2.2 Increased investigative and audit powers for PIRC

We agree that it is necessary for the police complaints body to have direct access to Police Scotland complaints and conduct information, with appropriate safeguards in place. The police complaints body should have the power to take over investigations into complaints against Police Scotland where failures have occurred. This power should, as suggested, extend to investigating practices and policies. In creating such a power, there must be cognisance of the rights of people with protected characteristics under the Equality Act 2010. It is essential to ensure clear recognition of discriminatory conduct, policies or practices arising within investigations in order to proactively address these issues.

The resulting recommendations should be enforceable, with a statutory requirement to comply with these, respond to them and report on compliance.

2.3 Cross-jurisdictional issues

Any gaps in justice caused by cross-jurisdictional issues should be addressed.

Section 3: Conduct and Standards

3.1 Misconduct and gross misconduct proceedings

CRER strongly agrees that police officer gross misconduct hearings (for all ranks) should be held in public. Careful consideration of the rationale for Chairs to employ discretion in the matter of attendance is needed.

Measures to protect vulnerable witnesses are essential, however there should be robust criteria as to when an officer subject to proceedings can be considered 'vulnerable' in order to ensure this is not exploited as a loophole to avoid a public hearing.

The outcomes of all hearings should be made public through a full published account of allegations and findings in regard to each allegation. Likewise, the suggested publicly available list of matters likely to be considered by a gross misconduct hearing would be useful. These should be published through an accessible online database and should be available permanently in order to aid transparency and assist future research into these matters.

CRER does not have access to sufficient information about existing gross misconduct criteria to judge whether it should always result in dismissal. However, it appears likely that dismissal should be the outcome of any conduct that is harmful or otherwise inimical to the role of a police officer.

We broadly agree with Dame Elish Angiolini's proposals for an independent, legally chaired panel to undertake gross misconduct proceedings. The panel should have the ability to recruit specialist lay persons for specific cases where expertise is needed. CRER would specifically recommend this in cases where the misconduct allegations include potential racism and/or other forms of discrimination (whether direct or indirect).

3.2 Continuation of gross misconduct proceedings

CRER is highly concerned by the gap in justice regarding former police officers, and would therefore support all measures to address this. The ability to undertake or continue gross misconduct proceedings in such cases should include instances where more than 12 months have passed. We agree with the suggestion regarding barred or advisory lists.

3.3 Appeals against determinations of gross misconduct

We are broadly in agreement with Dame Elish Angiolini's recommendations on appeals.

3.4 Accelerated misconduct hearings

There may be arguments in favour of accelerated misconduct hearings in very specific circumstances, such as where a criminal conviction is involved, but caution should be adopted in regard to these proposals. Hasty decisions as to whether evidence is incontrovertible would be highly likely to disadvantage

Black and minority ethnic officers, who are disproportionately and often unfairly impacted by misconduct allegations. Racial discrimination and stereotyping may affect decision making, particularly where insufficient time is allowed for the subject of allegations to robustly state their case.

3.5 Senior officer misconduct cases

CRER is in favour of measures to improve the transparency and integrity of senior officer misconduct cases, including those which enable suspension of senior officers.

In relation to whether cases are vexatious or malicious, this can only be determined through investigation. We would urge caution in regard to these proposals, as false allegations that a complaint is vexatious or malicious are often used to avoid accountability (and frequently made against complainers who have experienced racism or discrimination).

3.6 Vexatious complainers

As noted previously, false claims that a complaint is vexatious often impact people from Black and minority ethnic backgrounds. Any reform therefore needs to ensure a robust mechanism for evidencing whether a complaint is vexatious.

It is noted that Dame Elish Angiolini's inquiry found only two cases of 'wasting police time' in recent years relating to vexatious, frivolous or malicious allegations. More investigation may be needed into the nature and extent of genuine cases, and the nature and extent to which false claims are made in order to avoid accountability, in order to identify whether changes are required.

3.7 Additional statutory provisions relating to conduct

CRER would be in favour of statutory guidance on conduct with an associated due regard duty. This should be subject to full public consultation. It should provide clarity on matters which relate to conduct, to performance or to grievance. It is important that development of this be aligned with development of a Code of Ethics.

We also agree with the proposal to introduce a Reflective Practice Review Process. This may assist in addressing problems before they amount to misconduct; for example conduct which could arguably, but not necessarily clearly, be construed as racist. These forms of conduct are often not addressed due to reluctance to take formal action against the perpetrator and, left unchecked, may later escalate into clearly racist actions.

However, it is important to guard against any potential for incidents of racism or discrimination which should be subject to a conduct procedure to be 'downgraded' due to the availability of this mechanism. Means of doing so should be built into the system with very clear guidance, reflected within the statutory guidance on conduct.

A Reflective Practice Review Process could also potentially benefit Black and minority ethnic officers who may be unfairly disproportionately impacted by discipline and grievance processes by reducing the degree of resort to formal conduct proceedings (recognising, of course, that where the allegations are fair and evidence based, such processes are entirely appropriate). Depending on the nature and impact of the current regulations, greater alignment with the ACAS code of practice may also be beneficial. The proposed review aimed at establishing this should robustly gather and address any evidence of racial disparities.

In line with the requirements of the Public Sector Equality Duty, any new or revised mechanisms on conduct and practice should be subject to EQIA and include robust evaluation and monitoring in order to identify and address any racial disparities in their operation.

In regard to the possibility of joint proceedings against any number of officers, provided there is strong evidence that this would assist in the pursuit of justice, it would appear to be a sensible recommendation. Care would need to be taken, however, to ensure that Black and minority ethnic officers involved in such proceedings are not subject to overt or covert forms of racism, for example scapegoating by fellow officers.

We are strongly in favour of the proposal to amend the Police Service of Scotland Regulations 2013 in order to allow Police Scotland to consider an officer's suitability to serve as a police officer in light of their conduct during the probation period. Discriminatory conduct or attitudes should explicitly be considered as part of this. Specific allegations of misconduct during this period

should be considered as promptly as possible but without compromising the integrity or rigour of the process.

CRER does not have enough information about scenarios in which temporary alternative duties or redeployment might be used as an alternative to suspension to make a robust judgement on this issue. However, we would note that it is difficult to envision a situation where the two existing conditions for suspension (not suspending the officer may prejudice a misconduct or criminal investigation and/or that it is in the public interest for the officer to be suspended) are met and it would be acceptable to allow the officer to continue working, even in an alternative role or place.

3.8 Special constables conduct regulations

CRER is in agreement with proposals to revise conduct regulations for special constables in order to bring them in line with those for regular police officers.

Section 4: Liability for unlawful conduct

4.1 Clarifying the liability for unlawful conduct, in relation to the Chief Constable

We agree that liability for unlawful conduct should be extended to cover the rank of Chief Constable.

Concluding comments

In conclusion, in relation to all of the proposed reforms, CRER would expect to see a clear and integral focus on equality for Black and minority ethnic people.

In particular, the following elements should be key to the reform process:

- Evidence-based policy, including high quality Equality Impact Assessments as required by the Public Sector Equality Duties
- Reviewing the operation of the current processes and practices in order to establish any racial disparities which need to be addressed, or opportunities to embed anti-racism

- Consultation on any major aspects of reform, ensuring meaningful and impactful participation of Black and minority ethnic people and organisations who represent their interests
- Evaluation and monitoring processes which are actively used to identify and address equality impacts built into any new or revised systems, processes and practices

We recommend that those involved in developing the reforms follow the guidelines for anti-racist policy making set out in Section 2 of the publication [Anti-Racist Policy Making: Learning from the first 20 years of devolution](#) (developed by CRER on commission for Scottish Government).

To discuss this consultation response, please contact:

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