

## **PIRC – POST-INCIDENT MANAGEMENT**

### **LAW & PRACTICE**

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## **Section A - Legal Framework**

### **(i) Constitutional structure of PIRC**

The Police Complaints Commissioner for Scotland (PCCS) was established by the Police, Public Order and Criminal Justice (Scotland) Act 2006.<sup>1</sup> On 1 April 2013, the PCCS was renamed the Police Investigations and Review Commissioner (PIRC), under the Police and Fire Reform (Scotland) Act 2012.<sup>2</sup> Reference to the PCCS within “any enactment or instrument” is to be read as a reference to the PIRC.<sup>3</sup>

The Police Investigations and Review Commissioner, as an individual, is appointed by the Scottish Ministers<sup>4</sup> for a fixed term of office.<sup>5</sup> Former police officers, amongst others, are precluded from being appointed as the Commissioner<sup>6</sup> and she is neither a servant nor an agent of the Crown.<sup>7</sup>

### **(ii) PIRC investigations directed by COPFS**

Under section 33A of the 2006 Act, at the time of the incident in May 2015 the “general functions” of the PIRC were stated to be:<sup>8</sup>

*(a) to maintain, and to secure the maintenance by the Authority and the chief constable of, suitable arrangements for—*

*(i) the handling of relevant complaints; and*

*(ii) the examination of the handling of relevant complaints and the reconsideration of such complaints in accordance with sections 34 to 41;*

*(b) Where directed to do so by the appropriate prosecutor—*

*(i) to investigate any circumstances in which there is an indication that a person serving with the police<sup>9</sup> may have committed an offence;*

*(ii) to investigate, on behalf of the relevant procurator fiscal, the circumstances of any death involving a person serving with the police which that procurator fiscal is required to investigate under section 1 of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976;<sup>10</sup>*

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<sup>1</sup> Police, Public Order and Criminal Justice (Scotland) Act 2006, section 33(1) (“2006 Act”)

<sup>2</sup> Police and Fire Reform (Scotland) Act 2012, section 61(1) (“2012 Act”)

<sup>3</sup> 2012 Act, section 61(3)

<sup>4</sup> 2006 Act, section 33(2)

<sup>5</sup> 2006 Act, Schedule 4, paragraph 3(2). A Commissioner’s initial appointment is for a period of five years (2006 Act, Schedule 4, paragraph 3(2)(a)). The term in the case of a “reappointment” is three years (2006 Act, Schedule 4, paragraph 3(2)(b))

<sup>6</sup> 2006 Act, Schedule 4, paragraph 2(1)(b) and (c)

<sup>7</sup> 2006 Act, Schedule 4, paragraph 1(1)(a)

<sup>8</sup> 2006 Act, section 33A

<sup>9</sup> Under section 47 of the 2006 Act, this includes police officers and staff, and members of staff at SPA. The Police and Fire Reform (Scotland) Act 2012 (Consequential Provisions and Modifications) Order 2013, includes additional details in relation to the definition of “a person serving with the police”.

<sup>10</sup> Section 33A(b)(ii) of the 2006 Act was amended to include reference to the Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 in place of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, following the repeal of the 1976 Act in June 2017.

*(c) where requested to do so by the Authority or the chief constable, to investigate and report on certain serious incidents involving the police (see section 41B); and*

*(d) to investigate other matters relating to the Authority or the Police Service where the Commissioner considers that it would be in the public interest to do so (see section 41C).*

Within the context of section 33A(b) of the 2006 Act, the “appropriate prosecutor” means the Lord Advocate or Procurator Fiscal.<sup>11</sup> The Crown Office and Procurator Fiscal Service (COPFS), accordingly, directs PIRC investigations under this provision of the 2006 Act.

### ***Investigations of deaths in custody by the PIRC***

As noted above, at the time of the incident involving Sheku Bayoh in May 2015 the PIRC could be directed to investigate the circumstances of any death involving a person serving with the police where an investigation of that death by the Procurator Fiscal was required under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976.<sup>12</sup> One circumstance where such an investigation by the Procurator Fiscal was required under the 1976 Act was where the deceased “was, at the time of his death, in legal custody”.<sup>13</sup>

According to the terms of a memorandum of understanding (MOU) between the PIRC and COPFS that was in place at the time of the incident involving Sheku Bayoh in May 2015, it is for COPFS to decide whether a death falls within the category of a “death in police custody”.<sup>14</sup> A distinction is made between a “death in police custody” and a “death following direct or indirect contact with the police”.<sup>15</sup> The MOU states that:<sup>16</sup>

*COPFS has the sole discretion for determining in any case whether there is sufficient evidence in a case and whether that evidence is of a quality which justifies further investigation or the institution of proceedings in respect of that matter.*

The “initial independent investigative function carried out by PIRC” within a death in custody investigation is directed by a specialist department within COPFS, known as the Scottish Fatalities Investigation Unit (SFIU).<sup>17</sup>

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<sup>11</sup> 2006 Act, section 47

<sup>12</sup> 2006 Act, section 33A(b)(ii).

<sup>13</sup> Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, s.1(1)(a)(ii). Section 1(4) of the 1976 Act outlined when a person was regarded as being in “legal custody” for the purposes of fatal accident inquiries. The 1976 Act was repealed and replaced by the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016. The 2016 Act introduced an amended definition of “legal custody”, at section 2(5). The concept of “legal custody” is covered in more detail within the *Hearing 1 – Law and Practice Note* (SBPI-00002), within section A(ii).

<sup>14</sup> *Memorandum of Understanding between Crown Office Procurator Fiscal Service and The Police Investigations and Review Commissioner*, dated 10<sup>th</sup> and 11<sup>th</sup> December 2013 (PIRC-04453), paragraph 6.1(a)

<sup>15</sup> *Ibid*, paragraphs 6.1(a) and (b)

<sup>16</sup> *Ibid*, paragraph 4.2

<sup>17</sup> *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, November 2020, Dame Elish Angiolini, ([Final Report](#)) paragraph 25.8

## ***Investigation of offences by persons serving with the police***

In addition to investigating deaths in custody, the PIRC can be instructed by COPFS to carry out an investigation where there is an indication that a person serving with the police may have committed an offence.<sup>18</sup>

It will turn on the specific facts of each case as to whether or not an offence has been committed by a police officer. If, on the facts of the case in question, an appropriate prosecutor decides that an offence *may have* been committed by a police officer the PIRC could be instructed to carry out an investigation on this basis in accordance with the 2006 Act.<sup>19</sup>

Within COPFS, on-duty allegations of criminality made against persons serving with the police are dealt with by the Criminal Allegations Against Police Division (CAAPD).<sup>20</sup>

### ***Potential offences***

It has been held that use of unwarranted or unreasonable force in effecting an arrest may constitute the offence of assault in Scots law.<sup>21</sup> Dame Elish is of the view that:<sup>22</sup>

*What actions constitute reasonable use of force in one circumstance might in other circumstances, where there is no threat or risk to the officer or the public, constitute an assault.*

Where such a use of force by a police officer results in the death of a suspect, there may be the possibility that the police officer has committed the offence of culpable homicide (or, in extreme cases, murder). There can be involuntary culpable homicide where a death takes place as a result of an unlawful act which is neither intended to kill nor shows wicked recklessness on the part of the accused.<sup>23</sup> Any death which results from an assault on the victim is at least culpable homicide.<sup>24</sup>

It is intended that offences of potential relevance to the incident involving Mr Bayoh will be covered within a future law and practice note.

### ***PIRC's obligation to comply with COPFS' direction***

When carrying out an investigation on the direction of COPFS under section 33A(b) of the 2006 Act, PIRC must comply with any lawful instruction given by the appropriate prosecutor, whether that be the Lord Advocate or Procurator Fiscal.<sup>25</sup>

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<sup>18</sup> 2006 Act, section 33A(b)(i)

<sup>19</sup> See discussion in relation to the interpretation of "reasonable suspicion" within the *Hearing 1 – Law and Practice Note* (SBPI-00002), section A(i).

<sup>20</sup> *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, November 2020, Dame Elish Angiolini, paragraph 4.7

<sup>21</sup> *Bonar v McLeod* 1983 SCCR 161 and *Marchbank v Annan* 1987 SCCR 718

<sup>22</sup> *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, November 2020, Dame Elish Angiolini, paragraph 14.75

<sup>23</sup> *Stair Memorial Encyclopaedia, Criminal Law* (2<sup>nd</sup> Reissue), paragraph 227

<sup>24</sup> *M'Dermott v HM Advocate* 1974 SLT 206

<sup>25</sup> 2006 Act, section 41A(a)

## **Other bases for investigations by the PIRC**

As noted above, further “general functions” of the PIRC are set out within section 33A of the 2006 Act, however, these will not be explored in detail within this note as they do not pertain directly to the PIRC investigation carried out in response to the incident involving Sheku Bayoh in May 2015.

Such additional functions of the PIRC include the investigation of certain “serious incidents involving the police”<sup>26</sup> upon the request of the Scottish Police Authority (SPA) or the chief constable;<sup>27</sup> the handling of complaints;<sup>28</sup> and the investigation of other matters that the PIRC considers to be in the public interest.<sup>29</sup> Under separate secondary legislation,<sup>30</sup> the PIRC has the authority to carry out misconduct investigations in relation to senior officers.<sup>31</sup>

The PIRC may only undertake investigations into a “serious incident involving the police”, such as the use of a firearm or incapacitant spray, if there is not an existing investigation that has been instructed by COPFS under section 33A(b) of the 2006 Act.<sup>32</sup>

## **Obstruction and contempt**

On petition by the Commissioner, the Court of Session may inquire into whether a person, without lawful excuse, is obstructing or has obstructed the Commissioner in the carrying out of a complaint handling review or in the carrying out of an investigation into a serious incident involving the police or in the public interest.<sup>33</sup> The Court of Session may also inquire into any act, or failure to act, in the course of such a review or investigation that would amount to contempt of court if it were proceeding in the Court of Session.<sup>34</sup> After completing such inquiries, the Court of Session may deal with the person as if he/she had committed a contempt of court.<sup>35</sup>

The 2006 Act does not contain provisions covering behaviour that is obstructive or that would constitute a contempt of court in the context of COPFS-directed investigations into potential offences committed by police officers, or deaths in custody.

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<sup>26</sup> A “serious incident involving the police” is defined within section 41B of the 2006 Act and includes circumstances where a person has died following contact with the police and there is an indication that the contact may have caused or contributed to the death (2006 Act, section 41B(1)(a)). Further provisions pertaining to the investigation of serious incidents can be found within The Police Investigations and Review Commissioner (Investigations Procedure, Serious Incidents and Specified Weapons) Regulations 2013. A more detailed discussion in relation to PIRC’s investigation of serious incidents involving the police, and the powers associated with those investigations, is contained within *Police Scotland – Post-incident Management – Law and Practice* (SBPI-00240), section B(ii).

<sup>27</sup> 2006 Act, section 33A(c)

<sup>28</sup> 2006 Act, section 33A(a)

<sup>29</sup> 2006 Act, section 33A(d). Section 41C(1) of the 2006 Act clarifies that the Commissioner may investigate any “relevant police matter” in this regard. Under section 41C(2), an incident is not a “relevant police matter” and able to be investigated in the public interest if it is already under investigation under section 33A(b) or section 33A(c) of the 2006 Act. Dame Elish Angiolini found that, as of November 2020, and as far as it could be established, the power of the PIRC to investigate matters in the public interest had never been used (*The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, November 2020, Dame Elish Angiolini, paragraph 14.85).

<sup>30</sup> Made in exercise of powers under the Police and Fire Reform (Scotland) Act 2012, ss.15(3), 48 and 125(1)

<sup>31</sup> Under The Police Service of Scotland (Senior Officers) (Conduct) Regulations 2013

<sup>32</sup> 2006 Act, section 41B(2)

<sup>33</sup> 2006 Act, section 41F(1)(a)

<sup>34</sup> 2006 Act, section 41F(1)(b)

<sup>35</sup> 2006 Act, section 41F(2)

### (iii) Equality Act 2010

#### **Public sector equality duty**

The Equality Act 2010 includes provision for a “public sector equality duty”. This requires that:<sup>36</sup>

*A public authority must, in the exercise of its functions, have due regard to the need to—*

*(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*

*(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*

*(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.*

The broad purpose of the public sector equality duty is to “integrate consideration of the advancement of equality into the day-to-day business of all bodies subject to the duty”.<sup>37</sup> A body subject to the duty should “actively examine its current and proposed policies and practices to ensure that they are not discriminatory or otherwise unlawful” under the 2010 Act.<sup>38</sup>

PIRC is subject to the public sector equality duty.<sup>39</sup>

The public sector equality duty applies to the performance of any function of a public authority, not just the exercise of a statutory function under specific legislation.<sup>40</sup> This means that the general equality duty will apply to decisions made by the employees or agents of bodies subject to the duty in their day-to-day activities. Bodies subject to the duty need to decide how they enable those working for them to be aware of their responsibilities under the general equality duty.<sup>41</sup>

#### **Specific duties**

In addition to the general public sector equality duty noted above, the 2010 Act permits the imposition of “specific duties” on public authorities for the better performance of the general duty.<sup>42</sup> Specific duties have been imposed on public authorities in Scotland under The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012. The

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<sup>36</sup> Equality Act 2010, section 149(1) (“2010 Act”)

<sup>37</sup> [Technical guidance on the Public Sector Equality Duty: Scotland](#), paragraph 2.25. This technical guidance provides detailed information in relation to the public sector equality duty within a Scottish context.

<sup>38</sup> *Ibid*, paragraph 3.5

<sup>39</sup> 2010 Act, Schedule 19, Part 3, as amended by the Police and Fire Reform (Scotland) Act 2012, section 61(3)

<sup>40</sup> *Barnsley MBC v Norton* [2011] EWCA Civ 834, Lloyd LJ at para 15. *Technical guidance on the Public Sector Equality Duty: Scotland*, paragraph 2.15

<sup>41</sup> *Technical guidance on the Public Sector Equality Duty: Scotland*, paragraph 2.16

<sup>42</sup> 2010 Act, section 153(3)

specific duties imposed on public bodies in Scotland are wide-ranging and include the requirement to undertake impact assessments and to act on their findings.<sup>43</sup>

The specific duties apply to “listed authorities” in terms of the 2012 Regulations.<sup>44</sup> Neither the PIRC, nor its predecessor the PCCS, are named as a “listed authority” and, accordingly, the PIRC is not subject to the specific duties contained within the 2012 Regulations. The PIRC is only subject to the general public sector equality duty referred to above.<sup>45</sup>

### **Further information**

Further information on the Equality Act 2010, including information in relation to the public sector equality duty and the provision of services and the exercise of public functions, can be found within the law and practice note for Hearing 1.<sup>46</sup>

It is also intended that the Equality Act 2010, and public sector equality duty set out therein, will be covered in more detail within a future law and practice note.

### **(iv) European Convention on Human Rights (ECHR)**

Article 2 of the ECHR states:

*1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*

*2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*

*(a) in defence of any person from unlawful violence;*

*(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*

*(c) in action lawfully taken for the purpose of quelling a riot or insurrection*

### **Article 2: Procedural Obligation<sup>47</sup>**

Article 2 contains two substantive obligations: the general obligation to protect by law the right to life, and the prohibition of intentional deprivation of life (subject to exceptions).<sup>48</sup>

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<sup>43</sup> The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, regulation 5 (“2012 Regulations”

<sup>44</sup> *Ibid*, Regulation 2. The “listed authorities” are set out within the Schedule to the 2012 Regulations.

<sup>45</sup> The Scottish Ministers are a listed authority in terms of the 2012 Regulations. The Lord Advocate, being a Scottish Minister, is therefore subject to the specific duties, along with her subordinate Procurators Fiscal at COPFS.

<sup>46</sup> *Hearing 1 – Law and Practice Note* (SBPI-00002), Section D

<sup>47</sup> A comprehensive guide to the Procedural Obligation under Article 2, together with the relevant case law, can be found here: [Guide on Article 2 - Right to life \(coe.int\)](#), within section IV

<sup>48</sup> See, for example, [TEKIN AND ARSLAN v. BELGIUM \(coe.int\)](#)



Article 2 also contains a Procedural Obligation to carry out an effective investigation into alleged breaches of its substantive limb. The Procedural Obligation under Article 2 is regarded as being distinct to the right to an effective remedy that is protected under Article 13 of the ECHR.<sup>49</sup> Dame Elish Angiolini notes that, whilst the duty on the State is not contained in the wording of Article 2, it has been developed in an “extensive body of case law of the European Court of Human Rights”.<sup>50</sup>

The Procedural Obligation of the State under Article 2 was first formulated in the context of the use of lethal force by State agents where the European Court of Human Rights (the Court) held in the case of *McCann v United Kingdom* that:<sup>51</sup>

*... a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State's general duty under Article 1 (art. 2+1) of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.*

Since the case of *McCann*, the Court has accepted that the Procedural Obligation arises in a variety of situations where an individual has sustained life-threatening injuries, died or has disappeared in violent or suspicious circumstances, irrespective of whether those allegedly responsible are State agents or private persons, or if the causes are unknown or self-inflicted.<sup>52</sup> The obligation extends to cover cases where lives have been lost in circumstances potentially engaging the responsibility of the State due to alleged negligence.<sup>53</sup>

The essential purpose of an investigation under Article 2 is to secure the effective implementation of domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.<sup>54</sup>

The form of investigation and degree of scrutiny required to achieve the purposes of Article 2 will vary according to the particular facts of each case, however, where a suspicious death has been inflicted at the hands of a State agent, particularly stringent scrutiny must be applied by the relevant domestic authorities to the ensuing investigation.<sup>55</sup>

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<sup>49</sup> [ILHAN v. TURKEY \(coe.int\)](#)

<sup>50</sup> *Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, November 2020, Dame Elish Angiolini, paragraph 7.113

<sup>51</sup> [McCANN AND OTHERS v. THE UNITED KINGDOM \(coe.int\)](#), paragraph 161

<sup>52</sup> See, for example, the cases of [PAUL AND AUDREY EDWARDS v. THE UNITED KINGDOM \(coe.int\)](#) and [IORGA v. MOLDOVA \(coe.int\)](#)

<sup>53</sup> [LOPES DE SOUSA FERNANDES v. PORTUGAL \(coe.int\)](#) and [ANNA TODOROVA v. BULGARIA \(coe.int\)](#)

<sup>54</sup> [HUGH JORDAN v. THE UNITED KINGDOM \(coe.int\)](#) and [NACHOVA AND OTHERS v. BULGARIA \(coe.int\)](#)

<sup>55</sup> [ENUKIDZE AND GIRGVLIANI v. GEORGIA \(coe.int\)](#) and [ARMANI DA SILVA v. THE UNITED KINGDOM \(coe.int\)](#)



Authorities must act on their own initiative to carry out an investigation and it cannot be left to the next-of-kin to either lodge a formal complaint or to take responsibility for the conduct of the investigation.<sup>56</sup> Similarly, civil proceedings undertaken by the next-of-kin which do not involve the identification or punishment of any alleged perpetrator cannot be taken into account in the assessment of the State's compliance with the Procedural Obligation.<sup>57</sup>

### ***The standards of the investigation***

Within the Court's jurisprudence, it has been established that there are five standards (or principles) with which investigations require to comply: independence, adequacy, promptness and reasonable expedition, public scrutiny, and the participation of next-of-kin.<sup>58</sup> It is identified within the MOU between the PIRC and COPFS that PIRC investigations are intended to comply with these five principles.<sup>59</sup>

#### ***Independence***

An effective investigation requires that the persons responsible for carrying out the investigation be independent from those implicated in the events. This means "not only a lack of hierarchical or institutional connection but also a practical independence".<sup>60</sup> Absolute independence is not essential, however, and the adequacy of the degree of independence will be assessed on the specific facts of each case.<sup>61</sup>

Where the independence of an investigation is called into question, it will be for the Court to decide whether and to what extent the disputed circumstance has compromised the investigation's effectiveness.<sup>62</sup> The Court has found that independence was lacking in investigations that failed to carry out certain measures which would elucidate the circumstances of the case;<sup>63</sup> gave excessive weight to the suspects' statements;<sup>64</sup> failed to explore certain obvious and necessary lines of inquiry;<sup>65</sup> or where the investigators were direct colleagues of the persons subject to investigation, or likely to be so.<sup>66</sup>

In a Scottish context, the principle of independence was the "crux"<sup>67</sup> of the Court of Session judgement in the case of *Ruddy v Chief Constable, Strathclyde Police*, albeit with regard to Article 3, not Article 2, as the case related to the investigation of an alleged assault by police officers.<sup>68</sup>

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<sup>56</sup> [AL-SKEINI AND OTHERS v. THE UNITED KINGDOM \(coe.int\)](#)

<sup>57</sup> [HUGH JORDAN v. THE UNITED KINGDOM \(coe.int\)](#)

<sup>58</sup> [Opinion of the Commissioner for Human Rights, Concerning independent and effective determination of complaints against the police](#), March 2009. With reference to complaints, the Commissioner identifies that "Best practice is served by the operation of an Independent Police Complaints Body working in partnership with the police" (at page 3).

<sup>59</sup> *Memorandum of Understanding between Crown Office Procurator Fiscal Service and The Police Investigations and Review Commissioner*, dated 10<sup>th</sup> and 11<sup>th</sup> December 2013 (PIRC-04453), paragraph 5.5

<sup>60</sup> [ARMANI DA SILVA v. THE UNITED KINGDOM \(coe.int\)](#), paragraph 232

<sup>61</sup> [MUSTAFA TUNÇ AND FEÇİRE TUNÇ v. TURKEY \(coe.int\)](#)

<sup>62</sup> *Ibid.*

<sup>63</sup> [SERGEY SHEVCHENKO v. UKRAINE \(coe.int\)](#)

<sup>64</sup> [KAYA v. TURKEY \(coe.int\)](#)

<sup>65</sup> [OĞUR v. TURKEY \(coe.int\)](#)

<sup>66</sup> [RAMSAHAI AND OTHERS v. THE NETHERLANDS \(coe.int\)](#) and [EMARS v. LATVIA \(coe.int\)](#)

<sup>67</sup> *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, November 2020, Dame Elish Angiolini, paragraph 7.62

<sup>68</sup> [2013] CSIH 73

Broadly, with reference to deaths in custody, Dame Elish Angiolini is of the view that:<sup>69</sup>

*The independence of the initial investigation into deaths in police custody in Scotland is provided for by the PIRC (Police Investigations and Review Commissioner) under the direction of the Procurator Fiscal.*

Within the same review, however, Dame Elish acknowledged that, despite the benefits of employing persons with significant experience of handling investigations, the employment of former police officers by the PIRC could be perceived as diminishing the independence of the investigation because it has the “appearance of the police investigating their former colleagues in the police”.<sup>70</sup>

### *Adequacy*

In cases where there has been a use of force, for investigations to be adequate they must be capable of leading to a determination of whether the force used was or was not justified in the circumstances and of identifying and – if appropriate – punishing those responsible.<sup>71</sup> Reasonable steps must be taken to secure the evidence related to the incident, which may include eyewitness testimony, forensic evidence and, where appropriate, an autopsy,<sup>72</sup> and the investigation’s conclusions must be based on a thorough, objective and impartial analysis of all relevant elements.<sup>73</sup>

The Court has found investigations to be inadequate in circumstances where (in addition to other failings) the officers involved in an incident were not separated before their questioning<sup>74</sup> and where the investigating authorities placed heavy reliance on the report prepared by the accused State agents.<sup>75</sup>

The Council of Europe’s Human Rights Commissioner has identified that the requirements of a thorough and comprehensive police complaints investigation include:<sup>76</sup>

*...investigating complaints of police discrimination or police misconduct on grounds of race,<sup>77</sup> ethnicity, religion, belief, gender, gender identity, sexual orientation, disability, age or any other grounds; and in recognition of the difficulties involved in proving discrimination investigators have an additional duty to thoroughly examine all of the facts to uncover any possible discriminatory motives.*

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<sup>69</sup> *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, November 2020, Dame Elish Angiolini, paragraph 25.6

<sup>70</sup> *Ibid*, paragraph 14.99

<sup>71</sup> [ARMANI DA SILVA v. THE UNITED KINGDOM \(coe.int\)](#)

<sup>72</sup> *Ibid*.

<sup>73</sup> [MUSTAFA TUNÇ AND FECİRE TUNÇ v. TURKEY \(coe.int\)](#)

<sup>74</sup> [RAMSAHAI AND OTHERS v. THE NETHERLANDS \(coe.int\)](#)

<sup>75</sup> [JKINCISOY v. TURKEY \(coe.int\)](#)

<sup>76</sup> [Opinion of the Commissioner for Human Rights, Concerning independent and effective determination of complaints against the police](#), March 2009, paragraph 69

<sup>77</sup> The Opinion refers to the case of [NACHOVA AND OTHERS v. BULGARIA \(coe.int\)](#), 162-168, and the recommendation by the European Commission Against Racism and Intolerance concerning complaints alleging racial discrimination, *General Policy Recommendation No. 11, On Combating Racism and Racial Discrimination in Policing*, paragraph 51 in this context.

### *Promptness and reasonable expedition*

Article 2 requires investigations to be prompt<sup>78</sup> and to proceed with reasonable expedition<sup>79</sup> in order to maintain confidence in the rule of law.

The Court has found that domestic authorities have failed to investigate with sufficient promptness and reasonable expedition where inquest proceedings into the killing of the applicants' relatives by security forces commenced eight years after the deaths<sup>80</sup> and where criminal proceedings instituted with a view to investigating a death in police custody were pending for almost fifteen years.<sup>81</sup>

### *Public scrutiny*

Procedures and decision-making should be open and transparent to ensure accountability.<sup>82</sup>

There must be a sufficient element of public scrutiny of an investigation or its results to secure accountability, however, this is not an automatic requirement under Article 2. The appropriate level of such scrutiny will vary from case to case and must be balanced against the potential impact of the publication of sensitive evidence, such as police reports and investigative materials.<sup>83</sup>

The lack of public scrutiny of police investigations may be compensated by providing the requisite access of the public or the victim's relatives during other stages of the procedure.<sup>84</sup>

### *Participation of next-of-kin*

In all Article 2 cases, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.<sup>85</sup> Whilst investigating authorities do not require to satisfy every request for a particular investigative measure made by a relative,<sup>86</sup> the Court has found that an investigation was not accessible to next-of-kin in cases where the family of the victim had no access to the investigation or the court documents;<sup>87</sup> the victim's family was not informed of significant developments in the investigation;<sup>88</sup> the father of a victim was not informed of the decision not to prosecute;<sup>89</sup> and the father of the deceased did not have access to investigation documentation and was only informed of his son's death after an autopsy had taken place, even though the body had been identified earlier.<sup>90</sup>

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<sup>78</sup> [ARMANI DA SILVA v. THE UNITED KINGDOM \(coe.int\)](#)

<sup>79</sup> [GIULIANI AND GAGGIO v. ITALY \(coe.int\)](#)

<sup>80</sup> [KELLY AND OTHERS v. THE UNITED KINGDOM \(coe.int\)](#)

<sup>81</sup> [NAFIYE ÇETİN AND OTHERS v. TURKEY \(coe.int\)](#)

<sup>82</sup> *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, November 2020, Dame Elish Angiolini, paragraph 7.61

<sup>83</sup> [RAMSAHAI AND OTHERS v. THE NETHERLANDS \(coe.int\)](#)

<sup>84</sup> [HUGH JORDAN v. THE UNITED KINGDOM \(coe.int\)](#)

<sup>85</sup> [AL-SKEINI AND OTHERS v. THE UNITED KINGDOM \(coe.int\)](#)

<sup>86</sup> [GIULIANI AND GAGGIO v. ITALY \(coe.int\)](#)

<sup>87</sup> [OĞUR v. TURKEY \(coe.int\)](#)

<sup>88</sup> [BETAYEV AND BETAYEVA v. RUSSIA \(coe.int\)](#)

<sup>89</sup> [GÜLEÇ v. TURKEY \(coe.int\)](#)

<sup>90</sup> [FOUNTAS v. GREECE \(coe.int\)](#)

Within a Scottish context, Dame Elish Angiolini has recommended that:<sup>91</sup>

*In Article 2 cases, in order to facilitate their effective participation in the whole process, there should be access for the immediate family of the deceased to free, non-means tested legal advice, assistance and representation from the earliest point following the death and throughout the Fatal Accident Inquiry.<sup>92</sup>*

## **PIRC Guidance**

### *Operational guidance*

The PIRC has, and had in May 2015, an operational guidance document that sets out its responsibilities in carrying out investigations that are compliant with the terms of Article 2.<sup>93</sup> The Article 2 principles of independence and adequacy are highlighted as being of particular importance to PIRC investigations.<sup>94</sup>

Reference is made within the operational guidance to conferral,<sup>95</sup> and the case of *R (Saunders and Tucker) v the IPCC and others*.<sup>96</sup> Here, the court found that a police force, as a public authority, may not be acting in a manner compliant with Article 2 if it permits principal officers to confer before individually making their initial note of the matter.<sup>97</sup> Quoting guidance published by the Association of Chief Police Officers (ACPO), PIRC's guidance identifies that, "in order to ensure transparency and maintain public confidence", if a need to confer did arise and some discussion took place, officers were to document the fact that conferral took place, recording the time, date and place where conferral took place; the issues discussed; with whom; and the reasons for the discussion.<sup>98</sup>

If police officers did confer, they were to be asked to record the information noted above and pass same to a senior member of PIRC staff for the purposes of obtaining best evidence and demonstrating independence and accountability.<sup>99</sup> The operational guidance states, however, that:<sup>100</sup>

*We must be clear that we are not seeking for officers to be separated and we understand that they are entitled to legal advice.*

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<sup>91</sup> *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, November 2020, Dame Elish Angiolini, recommendation 74 (page 468 of report). The implementation of this recommendation remained in progress as of May 2023, with legislation required to fully implement the recommendation (*Complaints, Investigations & Misconduct in Policing: Implementation of Recommendations, Thematic Progress Report*, May 2023, page 19).

<sup>92</sup> Whilst Dame Angiolini's recommendation only refers to a fatal accident inquiries, elsewhere within the Review it is suggested that this legal assistance should also be available in the context of public inquiries (Executive Summary, paragraph 9, pages 23 – 24).

<sup>93</sup> *Police Investigations and Review Commissioner Operational Model: Response to Article 2 Investigations*, 12 November 2012 (PIRC-04446)

<sup>94</sup> *Ibid*, page 2

<sup>95</sup> *Ibid*, page 5

<sup>96</sup> [2009] 1 All E.R. 379

<sup>97</sup> Per Mr Justice Underhill, paragraph 39: "It seems to me necessarily to follow from the decision in *Ramsahai* that the Court would be very chary of a general practice under which officers who are key witnesses in an art. 2 investigation are expressly permitted to collaborate in the production of their statements".

<sup>98</sup> *Police Investigations and Review Commissioner Operational Model: Response to Article 2 Investigations* (PIRC-04446), page 5

<sup>99</sup> *Ibid*, page 6. The operational guidance provides a form of words that can be used in this scenario, at page 8.

<sup>100</sup> *Ibid*, page 8

## *Investigations following the use of firearms*<sup>101</sup>

Within separate PIRC guidance, that was also available in May 2015, it is stated that in Article 2 investigations the responsibility for securing evidence and taking appropriate action remains with Police Scotland until such time as the PIRC has taken over conduct of the investigation.<sup>102</sup>

## **Prosecutions and convictions**

There is no right to obtain a prosecution or conviction or indeed a particular sentence and the fact that an investigation ends without concrete, or with only limited, results is not indicative of any failings as such.<sup>103</sup> The Court has not faulted a prosecutorial decision which flowed from an investigation which was in all other respects Article 2 compliant nor required the competent domestic court to order a prosecution if that court had taken the considered view that application of the appropriate criminal legislation to the known facts would not result in a conviction.<sup>104</sup>

## **Article 14**<sup>105</sup>

Authorities must take all reasonable steps to identify possible discriminatory motives when investigating violent attacks or in cases where an individual has died. In cases where there is an allegation of racially motivated violence, it is particularly important that an investigation is pursued with vigour and impartiality in order to reassert society's condemnation of racism and maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence.<sup>106</sup>

The obligation on the authorities to seek out possible links between racist attitudes and acts of violence is not only an aspect of the Procedural Obligation within Article 2, but also the responsibility incumbent on States under Article 14.<sup>107</sup>

Article 14 of the ECHR states:

*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

The European Court of Human Rights has found Article 14 to be applicable to many areas, including the right to an effective investigation.<sup>108</sup>

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<sup>101</sup> "Use of a firearm" includes discharge of CS gas, in this context. *PIRC independent investigative processes following police use of firearms*, 17 June 2014 (PIRC-04438), page 1

<sup>102</sup> *PIRC independent investigative processes following police use of firearms*, 17 June 2014 (PIRC-04438), page 1

<sup>103</sup> [GIULIANI AND GAGGIO v. ITALY \(coe.int\)](#)

<sup>104</sup> [HANAN v. GERMANY \(coe.int\)](#)

<sup>105</sup> A comprehensive guide to Article 14, together with the relevant case law, can be found here: [Guide on Article 14 - Prohibition of Discrimination](#)

<sup>106</sup> *Guide on Article 2 – Right to Life, supra*, paragraph 192, with reference to [MENSON v. THE UNITED KINGDOM \(coe.int\)](#) and [GJIKONDI ET AUTRES c. GRÈCE \(coe.int\)](#)

<sup>107</sup> [NACHOVA AND OTHERS v. BULGARIA \(coe.int\)](#)

<sup>108</sup> [NACHOVA AND OTHERS v. BULGARIA \(coe.int\)](#), [OPUZ v. TURKEY \(coe.int\)](#) and [B.S. v. SPAIN \(coe.int\)](#)

In cases concerning discrimination through violence emanating either from State agents or private individuals, State authorities have been required to conduct an effective and adequate investigation by ascertaining whether there were discriminatory motives and whether feelings of hatred or prejudice based on an individual's personal characteristic played a role in the events.<sup>109</sup>

The case of *Nachova and Others v Bulgaria* concerned the shooting of two Roma fugitives by military police during an attempted arrest.<sup>110</sup> Ultimately, the Court concluded that it had not been established that racist attitudes played a role in the fugitives' deaths. However, on the violation of Article 14 taken together with the procedural aspect of Article 2, the Court concluded that the authorities had failed in their duty to take all possible steps to investigate whether or not discrimination may have played a role in the events.<sup>111</sup>

### **Further information**

It is intended that the Convention rights, and other law and practice relevant to issues of race, will be covered within a future law and practice note.

### **(v) Powers of a PIRC investigator**

PIRC may appoint such staff as she considers appropriate<sup>112</sup> and may make arrangements for police constables to be appointed to serve as members of her staff.<sup>113</sup> Constables so appointed have "all the powers and privileges of a constable throughout Scotland".<sup>114</sup> The MOU between the PIRC and COPFS notes that any decision to second specialists to participate in an investigation requires careful consideration about independence in accordance with Articles 2 and 3 of the ECHR.<sup>115</sup>

A member of staff who is not a police officer but is designated by the PIRC to take charge of an investigation on her behalf also has all the powers and privileges of a constable throughout Scotland.<sup>116</sup> Where the PIRC designates a member of staff to take charge of an investigation, she can appoint other members of staff to assist the member in charge.<sup>117</sup> Members of staff appointed to provide such assistance also

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<sup>109</sup> *Guide on Article 14 - Prohibition of Discrimination*, paragraph 17, with reference to [ABDU v. BULGARIA \[Extracts\] \(coe.int\)](#) and [MEMBERS OF THE GLDANI CONGREGATION OF JEHOVAH'S WITNESSES AND OTHERS v. GEORGIA \(coe.int\)](#)

<sup>110</sup> [NACHOVA AND OTHERS v. BULGARIA \(coe.int\)](#)

<sup>111</sup> *Guide on Article 14 – Prohibition of Discrimination*, paragraphs 86 and 249. Paragraph 245 of the *Guide on Article 14 – Prohibition of Discrimination* identifies further cases where the Court has found violations of the procedural aspect of Article 2 read in conjunction with Article 14, due to the failure of authorities to carry out an effective investigation of the discriminatory motives at the origin of a death of a victim of discriminatory violence.

<sup>112</sup> 2006 Act, Schedule 4, paragraph 7(1)

<sup>113</sup> 2006 Act, Schedule 4, paragraph 7A(1). A memorandum of understanding entered into by PIRC, Police Scotland and Scottish Police Authority in 2013 contains a protocol relating to the secondment of police officers and police staff to PIRC (*Memorandum of Understanding between The Police Investigations and Review Commissioner, The Police Service of Scotland and The Scottish Police Authority*, 2013 (PS06953), pages 21 – 24).

<sup>114</sup> 2006 Act, Schedule 4, paragraph 7A(6)(a)

<sup>115</sup> *Memorandum of Understanding between Crown Office Procurator Fiscal Service and The Police Investigations and Review Commissioner*, dated 10<sup>th</sup> and 11<sup>th</sup> December 2013 (PIRC-04453), paragraph 5.4

<sup>116</sup> 2006 Act, Schedule 4, para 7B(3)(a)

<sup>117</sup> 2006 Act, Schedule 4, para 7B(1)(b)



have the powers and privileges of a constable throughout Scotland while conducting investigations.<sup>118</sup>

### ***Powers and privileges of a constable***

A MOU entered into by PIRC, Police Scotland and the Scottish Police Authority (SPA) in 2013 provides a (non-exhaustive) list of the powers and privileges of a constable.<sup>119</sup> This refers to the entry and search of premises under warrant; the seizure of police vehicles and equipment; the detention and questioning of a person; and the arrest, with or without warrant, of a person, amongst other powers.

## **Section B – Post-incident management**

### **(i) On-call system and initial response to incidents**

From the information held by the Inquiry, PIRC's on-call arrangements in May 2015 appear to be outlined within a policy published in May 2014.<sup>120</sup> The policy notes that, at this time, PIRC maintained a "call out response to urgent incidents on a 24/7/365 basis", with the response to out-of-hours incidents directed by the on-call PIRC Deputy Senior Investigator (DSI) or Senior Investigator (SI).<sup>121</sup> The Head of Investigations maintained and oversaw the on-call arrangements.<sup>122</sup>

The initial operational response of COPFS, PIRC and Police Scotland to a death investigation is set out within a flowchart contained within an appendix to the policy.<sup>123</sup> This identifies that, where a PIRC investigation was instructed by COPFS, there would be "police cooperation in preserving and managing scene in consultation with PIRC to meet requirements of PIRC in conducting an investigation".<sup>124</sup>

In response to an instruction from COPFS to investigate a death in police custody, the PIRC DSI was to ascertain, as far as possible, information about the incident from COPFS, including a "concise" account of the incident, the parties involved, and any actions taken by the police to preserve the scene or collect evidence.<sup>125</sup> The DSI was thereafter to contact Police Scotland's Senior Investigating Officer (SIO) or Police Incident Officer at the scene to confirm the information received and to require the police to undertake "certain actions" pending the deployment of PIRC's team, including calling out specialist or forensic resources.<sup>126</sup> PIRC would thereafter deploy to the scene "as soon as is reasonably practicable".<sup>127</sup>

The policy states that:<sup>128</sup>

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<sup>118</sup> 2006 Act, Schedule 4, para 7B(3)(a)

<sup>119</sup> *Memorandum of Understanding between The Police Investigations and Review Commissioner, The Police Service of Scotland and The Scottish Police Authority*, 2013, (PS06953), General Protocol, paragraph 11

<sup>120</sup> *Policy and Procedures: Interfacing with Police Scotland (PS) Contact, Command & Control*, 27 May 2014 (PIRC-03875). Whilst the "date for review" associated with this document is 27 October 2014, the Inquiry has not received an updated or amended version of this policy document.

<sup>121</sup> *Ibid*, paragraphs 4.1 – 4.2

<sup>122</sup> *Ibid*, paragraph 4.6

<sup>123</sup> *Ibid*, Appendix 2

<sup>124</sup> *Ibid*,

<sup>125</sup> *Ibid*, paragraph 5.3

<sup>126</sup> *Ibid*, paragraph 5.4

<sup>127</sup> *Ibid*, paragraph 5.7

<sup>128</sup> *Ibid*, paragraph 5.6



*For the purpose of independence of investigation the Police Incident Officer/Senior Investigating Officer will undertake to perform the actions requested by the PIRC Duty Senior Investigator.*

Similar provisions to those set out above in relation to the initial liaison between PIRC and Police Scotland in response to deaths in police custody are set out within the MOU between PIRC, Police Scotland and SPA that was in place in May 2015.<sup>129</sup>

## **(ii) Liaison with Police Scotland**

A MOU between Police Scotland, the PIRC and SPA in place in May 2015 outlined a “framework for collaborative working” and annexed various protocols agreed between the three organisations.<sup>130</sup>

The Police Scotland Post-Incident Management Law and Practice Note contains a summary of the provisions contained within the MOU and its protocols relevant to liaison between PIRC, Police Scotland and SPA, including in relation to the initial operational response and handling of shared scenes following a death in custody.<sup>131</sup>

## **(iii) Suspect or witness**

A summary of PIRC’s role in determining the status of an officer as a witness or suspect is contained within the Police Scotland Post-Incident Management Law and Practice Note.<sup>132</sup>

The MOU entered into by the PIRC, Police Scotland and the SPA in 2020, and accordingly not in place at the time of the incident involving Mr Bayoh in May 2015, contains some details about the procedures to be followed by PIRC and Police Scotland where officers are to be interviewed as suspects.<sup>133</sup>

## **(iv) Obtaining statements from officers**

The Inquiry has not identified any SOP or guidance in relation to PIRC’s approach in May 2015 to requesting operational statements from officers following a death in custody or PIRC investigation more generally, including whether such approaches should be made via a single point of contact (SPOC) at Police Scotland.

The MOU entered into by the PIRC, Police Scotland and the SPA in 2020 identifies that where Police Scotland instigate Post Incident Procedures (PIP) following a death or serious injury, PIRC will be notified immediately and “afforded the opportunity to

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<sup>129</sup> *Memorandum of Understanding between The Police Investigations and Review Commissioner, The Police Service of Scotland and The Scottish Police Authority, 2013 (PS06953 )*, Call out procedures for serious incidents, paragraphs 7 – 11

<sup>130</sup> *Memorandum of Understanding between The Police Investigations and Review Commissioner, The Police Service of Scotland and The Scottish Police Authority, 2013 (PS06953 )*

<sup>131</sup> *Police Scotland – Post-incident Management – Law and Practice (SBPI-00240)*, Section F(ii)

<sup>132</sup> *Police Scotland – Post-incident Management – Law and Practice (SBPI-00240)*, page 20. This makes reference to the position outlined in *Sheku Bayoh Public Inquiry, Written Submissions for Police Investigations and Review Commissioner, Re: Position Statement 5*, 1 April 2022 (SBPI-00265)

<sup>133</sup> *Memorandum of Understanding between The Police Investigations and Review Commissioner, Police Scotland and The Scottish Police Authority, 2020 (Version 1.0) (PIRC-04436)*, paragraph 14

attend the incident and PIP suite”.<sup>134</sup> The MOU also identifies that a SPOC will be appointed by Police Scotland for every PIRC investigation to “facilitate the acquisition and provision of any document, record and other information to the PIRC”.<sup>135</sup>

## **(v) Scene Management**

PIRC had a Scene Management Standard Operating Procedure (SOP) in place at the time of the incident involving Sheku Bayoh in May 2015.<sup>136</sup>

The SOP contains information around the development and implementation of a “scene strategy” by PIRC. A “scene” included places where police made contact with members of the public, weapons, and home addresses, workplaces and vehicles.<sup>137</sup>

Whilst it is envisaged that a scene would normally have been attended by police officers prior to the arrival of PIRC staff, the PIRC Scene Manager, upon their arrival, was to review decisions that had been taken and give clear instructions to Police Scotland regarding any alterations he or she wanted made to earlier decisions.<sup>138</sup> The SI or DSI, in consultation with Police Scotland’s SIO, was to identify any additional resources necessary for the management of each scene (for example, cordon officers, photographers and SPA forensics).<sup>139</sup>

Following the implementation of a cordon at a scene, the SI / DSI and Scene Manager was to ensure that a contemporaneous scene log was commenced detailing the movement of individuals in and out.<sup>140</sup> It was not, however, necessary for Police Scotland to await the arrival of PIRC before starting a scene log.<sup>141</sup>

The SOP also covers the preservation of scenes to avoid cross-contamination,<sup>142</sup> and searching, examination and recording of those scenes.<sup>143</sup> Scenes were not to be released until, having taken expert advice into account, the SI / DSI was satisfied that it had been “fully exploited”.<sup>144</sup>

An appendix to the SOP outlines the procedures that were to be used by the PIRC and Police Scotland to handle shared scenes.<sup>145</sup> This identifies that, where the PIRC had primary interest in a scene, Police Scotland would ensure that primary control of the scene, in whole or in part, was passed to PIRC as soon as was practicable.<sup>146</sup> In

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<sup>134</sup> *Memorandum of Understanding between The Police Investigations and Review Commissioner, Police Scotland and The Scottish Police Authority*, 2020 (Version 1.0) (PIRC-04436), paragraph 5.9

<sup>135</sup> *Memorandum of Understanding between The Police Investigations and Review Commissioner, Police Scotland and The Scottish Police Authority*, 2020 (Version 1.0) (PIRC-04436), paragraph 10.7

<sup>136</sup> *Scene Management*, 1 April 2013 (PIRC-03873)

<sup>137</sup> *Ibid*, paragraph 1.1.1

<sup>138</sup> *Ibid*, paragraph 1.3.1

<sup>139</sup> *Ibid*, paragraph 1.3.3

<sup>140</sup> *Ibid*, paragraph 1.4.1

<sup>141</sup> *Ibid*, paragraph 1.4.1

<sup>142</sup> *Ibid*, paragraph 1.4.2

<sup>143</sup> *Ibid*, paragraphs 1.4.3 – 1.4.5

<sup>144</sup> *Ibid*, paragraph 1.4.6

<sup>145</sup> *Ibid*, Appendix A, *Handling of Shared Scenes by Police Service of Scotland and the Police Investigations and Review Commissioner*. Similar provisions are contained within the *Memorandum of Understanding between The Police Investigations and Review Commissioner, The Police Service of Scotland and The Scottish Police Authority*, 2013 (PS06953), *Procedures for Handling Shared Scenes*

<sup>146</sup> *Scene Management*, 1 April 2013 (PIRC-03873), Appendix A, *Handling of Shared Scenes by Police Service of Scotland and the Police Investigations and Review Commissioner*, paragraph 1

matters directed by COPFS, primary control of shared scenes would be discussed and agreed between the Procurator Fiscal, PIRC and Police Scotland.<sup>147</sup> As a “general rule” primary control of the scene would lie with the organisation which was investigating the more serious potential offence,<sup>148</sup> with PIRC taking priority when there were investigations into “offences of equal seriousness”.<sup>149</sup> The procedures for agreeing a forensic strategy as part of the management of shared scenes is also covered within the SOP.<sup>150</sup>

Scene Manager guidance, including a form to be completed by PIRC Scene Managers and some supporting guidance, is included as a separate appendix to the SOP.<sup>151</sup> Within the supporting guidance, it is noted that a secure cordon must be established to maintain the integrity of the scene and at the scene of a serious incident “in all cases” the police would have secured the area first.<sup>152</sup> A scene entry log required to be maintained to record details of all personnel entering the scene of a serious incident.<sup>153</sup>

## **(vi) Repatriation**

As identified within the Police Scotland Post-incident Management Law and Practice Note, the Inquiry has not identified any guidance as to whether PIRC were responsible for making contact with a consulate or High Commission in cases where there had been a death in custody of a foreign national in May 2015.<sup>154</sup> Similarly, no guidance has been identified in relation to the repatriation of bodies of persons who died in Scotland at that time.

## **(vii) PIRC independence**

### **Code of conduct**

In May 2015, PIRC had a code of conduct in place which set out the standards of behaviour expected of its staff.<sup>155</sup>

The code of conduct contains provisions covering potential conflicts of interest.<sup>156</sup> Senior staff were required to register all interests in accordance with the provisions of the code of conduct.<sup>157</sup> Other employees were required to discuss areas of potential

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<sup>147</sup> *Ibid*, Appendix A, *Handling of Shared Scenes by Police Service of Scotland and the Police Investigations and Review Commissioner*, paragraph 2

<sup>148</sup> *Ibid*, Appendix A, *Handling of Shared Scenes by Police Service of Scotland and the Police Investigations and Review Commissioner*, paragraph 3

<sup>149</sup> *Ibid*, Appendix A, *Handling of Shared Scenes by Police Service of Scotland and the Police Investigations and Review Commissioner*, paragraph 4

<sup>150</sup> *Ibid*, Appendix A. Elsewhere, forensic strategy is covered within the *Memorandum of Understanding between The Police Investigations and Review Commissioner, The Police Service of Scotland and The Scottish Police Authority*, 2013 (PS06953), *Procedures for Handling Shared Scenes*, paragraphs 7 – 13

<sup>151</sup> *Scene Management*, 1 April 2013 (PIRC-03873), Appendix B, *Considerations when attending an incident in the capacity as a PIRC Scene Manager*

<sup>152</sup> *Ibid*, Appendix B, *Considerations when attending an incident in the capacity as a PIRC Scene Manager*, page 18

<sup>153</sup> *Ibid*, Appendix B, *Considerations when attending an incident in the capacity as a PIRC Scene Manager*, page 18

<sup>154</sup> *Police Scotland – Post-incident Management – Law and Practice* (SBPI-00240), Section E(iii)

<sup>155</sup> *Code of Conduct for Employees*, version 2, March 2015 (PIRC-04574)

<sup>156</sup> *Ibid*, page 9

<sup>157</sup> *Ibid*, pages 9 – 10 and using a form annexed at page 20

conflict with their line manager and register areas of conflict. This included an employee making known to their line manager:<sup>158</sup>

*Any relative who is, or close personal friendship with, a police officer or anyone employed by a Chief Constable or a member of any body affiliated to or associated with overseeing the management of police forces in Scotland or seeking to influence the provision of police services in Scotland or a member of any other relevant authority operating in Scotland.*

Staff were required to declare personal and business interests which “may, or may be perceived (by a reasonable member of the public) to, influence their judgement”.<sup>159</sup> Employees were not to participate in the discussion or determination of matters in which they had an interest,<sup>160</sup> or to knowingly attend social events at which officers who were the subject of a PIRC investigation were present.<sup>161</sup>

### **Guidance for public and police**

Guides published by PIRC in August 2014 for distribution to the public and the police highlighted PIRC’s independence from the police.<sup>162</sup>

### **Reform**

Within Dame Elish Angiolini’s 2020 review, she recommended that the 2006 Act be amended to re-designate PIRC as a Commission comprising one Commissioner and two Deputy Commissioners “with relevant legal expertise or other relevant experience who are not former senior police officers”.<sup>163</sup>

## **Section C – Gathering and analysing information**

### **(i) Powers to compel witnesses**

Some discussion of PIRC’s powers to compel witnesses, as well as the privilege against self-incrimination, is contained within the Police Scotland Post-Incident Management Law and Practice Note.<sup>164</sup>

### **(ii) Securing evidence**

#### ***Provision of information to PIRC during COPFS-directed investigations***

Within investigations directed by COPFS, the PIRC has, and had in May 2015, the power to require the SPA and/or Police Scotland to provide information and

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<sup>158</sup> *Ibid*, page 9

<sup>159</sup> *Ibid*, page 10 (emphasis within original). Interests were declared using a form attached to the code of conduct at page 18.

<sup>160</sup> *Ibid*, page 10

<sup>161</sup> *Ibid*, page 12

<sup>162</sup> *A guide for the public on the role of the Police Investigations & Review Commissioner*, August 2014 (PIRC-04467), page 2 and *A guide for the police and staff on the role of the Police Investigations & Review Commissioner*, August 2014 (PIRC-04456), page 2

<sup>163</sup> *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, November 2020, Dame Elish Angiolini, recommendation 34, page 461

<sup>164</sup> *Police Scotland – Post-incident Management – Law and Practice* (SBPI-00240), pages 18 – 21

documents to assist with the completion of its investigations. Under section 44(2) of the 2006 Act:<sup>165</sup>

*The Authority and the chief constable must—*

*(a) provide the Commissioner with all such other information and documents specified or described in a notification given by the Commissioner to the Authority or, as the case may be, the chief constable; and*

*(b) produce to the Commissioner all such evidence and other things so specified or described,*

*as appear to the Commissioner to be required by the Commissioner for the purposes of the carrying out of any of the Commissioner's functions.*

The information and documents requested by the PIRC in accordance with the above provisions must be provided or produced in such form, in such manner (including electronically)<sup>166</sup> and within such period as required by the PIRC.<sup>167</sup> The SPA and Police Scotland are not required to provide any information or documents before the earliest time at which it is practicable to do so.<sup>168</sup>

The obligation to provide the Commissioner with information and documents under this provision is imposed on Police Scotland (as the chief constable) and the SPA, rather than individual officers.

Reference to section 44(2) of the 2006 Act is included within the pro-forma letters to be sent from PIRC to Police Scotland requesting information and documents in investigations into deaths in custody and other investigations instructed by COPFS, as set out within a MOU entered into by the PIRC, Police Scotland and the SPA in 2020.<sup>169</sup> These pro-forma letters were not in use at the time of the incident involving Sheku Bayoh on 3 May 2015.

Under section 46 of the 2006 Act:<sup>170</sup>

*Any person may disclose information to the Commissioner if the disclosure is made for the purposes of the carrying out of any of the Commissioner's functions.*

Such disclosure does not breach any obligation of confidence owed by the person making the disclosure or any other restriction on the disclosure of information (however imposed).<sup>171</sup>

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<sup>165</sup> 2006 Act, section 44(2)

<sup>166</sup> 2006 Act, section 44(5)

<sup>167</sup> 2006 Act, section 44(3)

<sup>168</sup> 2006 Act, section 44(4)

<sup>169</sup> *Memorandum of Understanding between The Police Investigations and Review Commissioner, Police Scotland and The Scottish Police Authority, 2020 (Version 1.0) (PIRC-04436), pages 39 – 41 and 45 – 47*

<sup>170</sup> 2006 Act, section 46(4)

<sup>171</sup> 2006 Act, section 46(5)

## **Provision of information to PIRC during investigations requested by Police Scotland or SPA**

Also under the 2006 Act:<sup>172</sup>

*The Authority and the chief constable must, at such times, in such circumstances and in accordance with such requirements as may be set out in regulations made by the Scottish Ministers, provide the Commissioner with all such information and documents as may be specified or described in regulations so made.*

Under Regulation 5(1) of The Police Investigations and Review Commissioner (Investigations Procedure, Serious Incidents and Specified Weapons) Regulations 2013, a “relevant person”<sup>173</sup> must, where required to do so by the Commissioner for the purposes of an investigation under section 33A(c) or (d) of the 2006 Act:<sup>174</sup>

*(a) produce, in a form acceptable to the Commissioner, any document, record or other information the Commissioner may require;*

*(b) permit the Commissioner or a member of the investigation staff to—*

*(i) enter any premises which are used by the Authority or the Police Service;*

*(ii) inspect those premises and anything on those premises which the Commissioner or, as the case may be, member of the investigation staff considers to be relevant to the investigation; and*

*(iii) remove from those premises anything which the Commissioner or, as the case may be, member of the investigation staff considers to be relevant to the investigation; and*

*(c) provide such other assistance as the Commissioner may reasonably require.*

PIRC’s powers under the 2013 Regulations are limited to investigations under s.33A(c) or (d) of the 2006 Act – investigations requested by SPA or the chief constable in relation to serious incidents involving the police and investigations that the Commissioner considers to be in the public interest respectively – and are not available to the PIRC in the context of investigations instructed by COPFS into alleged criminality or deaths in custody under section 33A(b).

Dame Elish Angiolini has noted that “PIRC investigators therefore have weaker enforcement powers when undertaking an investigation instructed by COPFS” and

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<sup>172</sup> 2006 Act, section 44(1)

<sup>173</sup> A “relevant person” means the Scottish Police Authority or a member of its staff; any constable; and any member of the police staff (The Police Investigations and Review Commissioner (Investigations Procedure, Serious Incidents and Specified Weapons) Regulations 2013, regulation 5(2)(a) (“2013 Regulations”))

<sup>174</sup> 2013 Regulations, regulation 5(1)

has recommended that regulation 5 be amended to also give the PIRC the same powers for COPFS-directed investigations.<sup>175</sup>

### **(iii) Seizure and handling of productions**

In May 2015, PIRC had a Productions / Articles SOP, which provided guidance on the seizure, packaging, handling and management of productions / articles.<sup>176</sup>

The SOP states that investigators were to ensure that:<sup>177</sup>

*Consideration has been given to the need to seize/remove productions/articles so that only those productions/articles that are required to prove the case or that are deemed to be important to an on-going investigation are seized/removed.*

PIRC investigators were only to seize productions / articles “when there is a positive and justifiable reason for doing so”.<sup>178</sup> Where an item was seized, it was to be disposed of or returned to the owner at the earliest opportunity if it was established that its retention was no longer required.<sup>179</sup>

The SOP provides that the PIRC had no capacity to handle or manage certain productions / articles, including vehicles, drugs and firearms (including CS gas).<sup>180</sup> The assistance of Police Scotland could be sought where vehicles and firearms require to be seized by PIRC.<sup>181</sup>

### **Mobile phones**

The Productions / Articles SOP contains guidance in the relation to the seizure and handling of computers and “electronic storage devices”.<sup>182</sup> With regard to the handling of mobile phones, the SOP states:<sup>183</sup>

*Always remember to switch off mobile phones as they may interfere with the machines.*

PIRC’s Digital Media SOP also contains guidance in relation to the seizure and handling of electronic devices, including mobile phones.<sup>184</sup> It is noted within the principles of digital / computer-based evidence that:<sup>185</sup>

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<sup>175</sup> *Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, November 2020, Dame Elish Angiolini, paragraphs 30.85 – 30.88

<sup>176</sup> *Production / Articles Standard Operating Procedure*, V.2, 14 April 2014 (PIRC-04450)

<sup>177</sup> *Ibid*, paragraph 2.2

<sup>178</sup> *Ibid*, paragraph 3.2

<sup>179</sup> *Ibid*, paragraph 3.3

<sup>180</sup> *Ibid*, paragraph 1.11

<sup>181</sup> *Ibid*, paragraphs 12.8.4 and 15.1. Within the *Memorandum of Understanding between the PIRC, The Police Service of Scotland and the SPA*, 2013, *supra*, General Protocol, paragraph 11 it is identified that “*PIRC and PSS have agreed that, following seizure and labelling by PIRC of firearms, ammunitions, controlled substances, and vehicles, PSS will transport and safely store these items*”.

<sup>182</sup> *Production / Articles Standard Operating Procedure*, V.2, 14 April 2014 (PIRC-04450), paragraph 13

<sup>183</sup> *Ibid*, paragraph 13.1.2

<sup>184</sup> *Digital Media Standard Operating Procedures*, version 1, 1 April 2013 (PIRC-04731)

<sup>185</sup> *Ibid*, paragraphs 2.1(a) and 2.1(d)



*No action taken by PIRC investigators should change data held on a computer or storage media, which may subsequently be relied upon in court.*

...

*The senior investigator / depute senior investigator has overall responsibility for ensuring that the law and these principles are adhered to.*

The SOP provides that mobile phones should not be “unofficially” examined by any person as this may change the phone’s contents, potentially rendering all the evidence from the phone as inadmissible.<sup>186</sup>

## **Section D – Family liaison**

### **(i) FLO selection, deployment and communication with families**

#### ***PIRC Family Liaison Policy***

PIRC had a Family Liaison Policy in place at the time of the incident involving Sheku Bayoh in May 2015.<sup>187</sup> The policy identifies that, with regard to family liaison, PIRC’s aims were:<sup>188</sup>

*To analyse the needs, concerns and expectations of the ‘family’ in order to identify relevant and realistic action that should be taken, in the context of their human rights and the obligations set out in this document.*

*To work with the ‘family’ in order to comply with their right to receive all relevant information connected with the enquiry, subject to the needs of the investigation. To gather all information and evidence from them, which will assist the investigation, in a way, which takes cognisance of their fundamental Human Rights, the right to privacy and family life.*

*The “main objectives” arising from these aims are:*

- *To provide information to and signpost support for the family in a sensitive and compassionate manner in accordance with the needs of the investigation;*
- *To gather evidence and information from the family in a manner which contributes to the investigation and preserves its integrity; and*
- *To secure the confidence and trust of the family thereby enhancing their contribution to the investigation.*

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<sup>186</sup> *Ibid*, paragraphs 5.3.1 – 5.3.3

<sup>187</sup> *Family Liaison Policy*, 16 April 2013 (PIRC-04460). This Family Liaison Policy does not appear to be dated, but PIRC has confirmed to the Inquiry (in an email dated 15 September 2023) that the policy was in use from 16 April 2013.

<sup>188</sup> *Family Liaison Policy* (PIRC-04460), pages 2 – 3

*The initial priority must be to establish communication with the family as soon as practicable in order to furnish them with any information that they require in accordance with the needs of the investigation. In supporting the family throughout the investigation, sensitivity, compassion and respect for the needs and requirements of the family must underpin the approach to gathering evidence and information.*

### **Selection, training and deployment of FLOs**

In May 2015, Family Liaison Officers (FLOs) were to be deployed by PIRC in various circumstances, including in cases involving deaths in police custody and suspicious deaths where there was obvious or apparent criminality.<sup>189</sup> The Family Liaison Policy notes that it “might be considered best practice” to deploy two FLOs to any incident to ensure continuity, for example to ensure there was cover during periods of annual leave or sickness.<sup>190</sup>

Regarding the selection and deployment of FLOs, the Family Liaison Policy states:<sup>191</sup>

*On occasions, gender may be a critical factor both for cultural reasons and operational factors. Where the victim is from a minority group or particular lifestyle diversity, consideration should be given to the deployment of a FLO with specific knowledge and experience of that community. Such consideration should be balanced against the impact that any previous relationship between the officer and the family might have on the professional objectivity of the officer and the exit strategy.*

*The SI should also carefully consider the deployment of an officer who reflects the cultural or lifestyle background of the family members. The attachment of such an officer to a family without prior consultation can, on occasion, be detrimental to the police/family relationship and be viewed as tokenism. Deployment in such circumstances should only be made following discussion with family members and should be endorsed as appropriate by the SI as the result of a carefully reasoned and recorded decision.*

Where a victim was from a minority group, consideration was also to be given to obtaining “independent advice to assist with effective communication”.<sup>192</sup>

Investigators who had not received FLO training could be deployed in exceptional circumstances, for example where a family had specific requirements such as interpretation or religious or cultural needs, but this required to be alongside a trained FLO.<sup>193</sup>

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<sup>189</sup> *Ibid*, page 4. FLOs should also be considered in “hate motivated crimes where the effectiveness of the PIRC response is likely to have a significant impact on the confidence of the victim, their family and/or community or in circumstances where there is reason to believe that a police officer might be linked to a hate motivated crime”.

<sup>190</sup> *Family Liaison Policy* (PIRC-04460), pages 4 – 5

<sup>191</sup> *Ibid*, page 14

<sup>192</sup> *Ibid*, page 10

<sup>193</sup> *Ibid*, page 13

The “primary function” of a FLO was noted to be that of an “investigator”, with the FLO to offer, give and facilitate support with “consideration being given to the needs of the family”.<sup>194</sup>

The policy identifies that FLOs were trained to a “national standard”, undertaking a five-day training course delivered at the Scottish Police College.<sup>195</sup>

### *Risk assessment*

PIRC’s SI was to ensure that a risk assessment would always be carried out prior to a FLO being deployed to a family and attending the family home.<sup>196</sup> Deployment of FLOs was to take place at the “earliest possible moment” after a risk assessment had been conducted.<sup>197</sup>

The Family Liaison Policy notes that risk assessments were to be continuously reviewed throughout the FLOs’ deployment, and recorded in writing, detailing what areas had been considered, the risks identified and any control measures put in place to address the identified risks.<sup>198</sup> The risk assessments were to be recorded using risk assessment forms included as an appendix to the Family Liaison Policy,<sup>199</sup> covering details of the victim, their next of kin, the information passed to the family and how it was received and cultural and diversity issues, amongst other details.<sup>200</sup>

All PIRC FLOs were to be selected, trained and deployed in accordance with the “ACPOS Family Liaison Strategy Manual”.<sup>201</sup>

### *Family Liaison Strategy*

The Family Liaison Policy notes that it was essential that prior to any FLO deployment the SI had formulated a family liaison strategy, setting out the objectives for the liaison between the family and the investigation.<sup>202</sup> The family liaison strategy was “one of the most important considerations that the SI and investigations team will have to address throughout the course of an investigation”.<sup>203</sup> The family liaison strategy was to be defined and developed taking into consideration the needs of the family, lines of enquiry and available intelligence, with this being reviewed at regular intervals in consultation with the FLO.<sup>204</sup>

The family liaison strategy was to cover areas including the family media strategy, obtaining “victimology”, updating the family throughout the investigation, and gathering

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<sup>194</sup> *Ibid*, page 18

<sup>195</sup> *Ibid*, page 6

<sup>196</sup> *Ibid*, page 5

<sup>197</sup> *Ibid*, page 7

<sup>198</sup> *Ibid*, page 11

<sup>199</sup> *Ibid*, Appendix C

<sup>200</sup> *Ibid*, pages 11 – 12

<sup>201</sup> *Ibid*, page 5. To date, a document of this name has not been identified by the Inquiry, but this may refer to the ACPOS Manual of Guidance on Family Liaison, 2011 (PS10990).

<sup>202</sup> *Family Liaison Policy* (PIRC-04460), page 7

<sup>203</sup> *Ibid*, page 7

<sup>204</sup> *Ibid*, page 8

evidence and productions from the family. With reference to the latter, it is noted that:<sup>205</sup>

*Given the potential for compromising the FLO's relationship with the family and to minimise the chances of a challenge to the integrity of the evidence recorded, FLOs should only be asked to interview significant or vulnerable witnesses in very exceptional circumstances following full discussions on such matters with the SI.*

Various factors were to be considered before asking a FLO to interview family members, including whether or not the FLO had the skills to conduct such an interview; the extent to which the FLO's position with the family was likely to be compromised by the need to challenge the witness' account; and whether it was reasonable to expect the FLO to remain sufficiently objective in view of the particular circumstances of the case.<sup>206</sup> The rationale for asking a FLO to conduct an interview with a family member was to be recorded in the SI's policy file.<sup>207</sup>

Prior to meeting the family, PIRC's SI was to establish as much information concerning the family as possible, including determining any cultural or lifestyle considerations and religious beliefs.<sup>208</sup> The SI would thereafter brief the FLO and make the FLO aware of the family liaison strategy prepared by the SI.<sup>209</sup>

#### *Communication with the family*

In accordance with the Family Liaison Policy, PIRC's SI (or where this was not practical, a deputy) was to meet the family as soon as practicable, in line with the wishes of the family.<sup>210</sup> This meeting was to be "a main priority during the initial stage of the investigation", with the Family Liaison Policy stating that:<sup>211</sup>

*It is essential for the SI to make this contact, thereby establishing personal links with the family and ensuring their needs are being met. The crucial importance of this meeting cannot be over emphasised.*

Any delay in meeting the family was to be recorded in the SI's policy file, together with the reasons for such delay.<sup>212</sup> The SI was to offer to visit the family at "regular intervals" throughout the investigation, including at times of significant events or anniversaries, such as the release of suspects without charge.<sup>213</sup>

The family were to be provided with contact details for PIRC's SI or DSI, together with an explanation of the roles of the SI and FLO and what the family could expect from PIRC during the course of the investigation.<sup>214</sup> Any commitment or assurance provided to the family was to be documented, with the result, or explanation as to why the

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<sup>205</sup> *Ibid*, page 8

<sup>206</sup> *Ibid*, page 15

<sup>207</sup> *Ibid*, page 15

<sup>208</sup> *Ibid*, page 9

<sup>209</sup> *Ibid*, pages 10 and 18

<sup>210</sup> *Ibid*, page 15

<sup>211</sup> *Ibid*, page 15

<sup>212</sup> *Ibid*, page 16

<sup>213</sup> *Ibid*, page 16

<sup>214</sup> *Ibid*, page 16

commitment could not be delivered upon, also communicated to the family.<sup>215</sup> At no time was a victim's family to be deliberately misled<sup>216</sup> and information was to be shared with the family timeously so far as the investigation permitted.<sup>217</sup>

The Family Liaison Policy notes that:<sup>218</sup>

*Cases might arise when, from the outset or at an early stage in the investigation, direct dialogue with the family and the PIRC cannot be established or breaks down. SIs must look to families to be part of an effective investigation as it is much harder to support, protect and work with a family remotely. Anything short of direct dialogue with the family has the potential to impair the intelligence flow, weaken the investigation and further undermine the confidence of the family in the investigative process.*

*The onus is therefore on the SIs to take all possible steps to overcome any barriers or difficulties. If these cannot be overcome directly, or constructive progress made towards this goal, the SI should look to other agencies to liaise with victims and families.*

Where a family had appointed a legal representative, PIRC's SI required to ensure that any telephone call with that representative was subsequently supported by written correspondence to provide a formal record of communication.<sup>219</sup>

FLOs were to be responsible for gathering victimology or lifestyle information about the victim at an early stage of the investigation to open up possible lines of inquiry.<sup>220</sup>

### *Guide for families*

At the time of the incident involving Sheku Bayoh in May 2015 the PIRC provided a short guide for families on the role of the PIRC and FLOs.<sup>221</sup> This contained some background information on the PIRC and an explanation of the role of PIRC's FLOs. The main role of the FLO was noted as being to "develop a two-way flow of information between the investigation team and you and your family".<sup>222</sup> Updated guidance, which was not in place in May 2015, is currently provided on PIRC's website.<sup>223</sup>

### *Family Liaison Log*

At the start of every deployment a PIRC FLO was to commence a Family Liaison Log to document all contact with the family and its representatives.<sup>224</sup> The log was to be the only method of recording such contact and required to include details of non-sensitive strategic and tactical decisions agreed in relation to the family liaison

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<sup>215</sup> *Ibid*, page 16

<sup>216</sup> *Ibid*, page 21

<sup>217</sup> *Ibid*, page 19

<sup>218</sup> *Ibid*, page 17

<sup>219</sup> *Ibid*, page 17

<sup>220</sup> *Ibid*, pages 19 – 20. This would include a photograph; personal description; routine and variations thereto; names and addresses of associates, amongst other details

<sup>221</sup> *A guide for families on the role of the PIRC and Family Liaison Officers*, July 2014 (PIRC-04457)

<sup>222</sup> *Ibid*, page 2 of leaflet (page 4 of pdf)

<sup>223</sup> [A guide for families on the role of the PIRC](#), April 2019

<sup>224</sup> *Family Liaison Policy* (PIRC-04460), page 20

strategy; the date, time and purpose of contact (and attempts to establish contact) with the family and its representatives; and details of the information exchanged during such contact.<sup>225</sup>

### *Identification and viewing of the body*

The policy states that the FLO would have a “crucial” role to play in the identification process of the deceased, with close liaison with the SI and Procurator Fiscal required in this regard.<sup>226</sup> The FLO, in consultation with the SI, was to ask the family who they wish to nominate to formally identify the body. Provided that “no conflict occurs” in this regard, the wishes of the family were to be followed.<sup>227</sup>

FLOs were to view the body at an early stage to allow family members to be prepared for any subsequent viewing of the body, taking account of the condition of the body at that time.<sup>228</sup> Where viewing took place after a post-mortem the FLO, in advance, was to explain to the family the necessity and consequences of this procedure, proceeding with sensitivity in cases where cultural or religious beliefs were contrary to such a process taking place.<sup>229</sup> FLOs was also to be prepared to discuss with the family the reasons for the retention of tissues or organs at the conclusion of a post-mortem.

### *Exit strategy*

PIRC’s FLOs were to make families aware at the outset that there would come a point when they would “exit” their role and the Victim Information and Advice (VIA) service run by COPFS would undertake the liaison responsibility.<sup>230</sup> The “natural exit” from the family would generally be at the conclusion of the investigation.<sup>231</sup>

### ***PIRC Family Liaison Officer Standard Operating Procedure***

PIRC’s Family Liaison Officer SOP is dated 24 June 2015 and, accordingly, was not in place at the time of the incident involving Mr Bayoh on 3 May 2015.<sup>232</sup>

The Family Liaison Officer SOP covers the division of responsibilities between Police Scotland and the PIRC in relation to the delivery of death messages to next of kin and the deployment of FLOs by both organisations thereafter:<sup>233</sup>

*As it is of the utmost importance that the delivery of the death message to the next of kin is not delayed, Police Scotland will always assume responsibility for delivering this message.*

*Thereafter, Police Scotland would normally deploy a FLO to the family should the death have occurred following police contact. However, immediately it is*

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<sup>225</sup> *Ibid*, pages 20 – 21 and 24

<sup>226</sup> *Ibid*, page 24

<sup>227</sup> *Ibid*, page 25

<sup>228</sup> *Ibid*, page 25

<sup>229</sup> *Ibid*, page 26

<sup>230</sup> *Ibid*, page 29

<sup>231</sup> *Ibid*, page 29

<sup>232</sup> *Family Liaison Officer Standard Operating Procedure (Version 1)*, 24 June 2015 (PIRC-03885)

<sup>233</sup> *Ibid*, page 2

*known that the PIRC will be carrying out an independent investigation, Police Scotland will liaise with the PIRC and arrange a handover of FLO responsibilities.*

Guidance is provided in relation to the handover of FLO responsibilities from Police Scotland to the PIRC, including the information that was to be passed to the PIRC FLOs at this time.<sup>234</sup> Such handovers were to involve a face-to-face meeting between Police Scotland and PIRC's FLOs, with handovers taking place via telephone on "very rare occasions...when all other alternatives have been exhausted."<sup>235</sup> To ensure a "smooth transition" it was recommended that the police and PIRC FLOs meet the family together for introductions to take place, although it was "accepted that there may be occasions where this is totally inappropriate", for example where the family wished no to have no contact with the police.<sup>236</sup>

Police Scotland's family liaison strategy was to form part of the handover of FLO responsibilities from Police Scotland to PIRC.<sup>237</sup>

### ***Memorandum of Understanding between the PIRC, Police Scotland and the SPA***

The MOU entered into between the PIRC, Police Scotland and the SPA in 2020 (and, accordingly, not in place at the time of the incident involving Sheku Bayoh in May 2015) confirms that responsibility for notification of the death to family members (immediately following the death) rests with Police Scotland.<sup>238</sup>

The MOU includes some information on the transfer of responsibility for family liaison from Police Scotland to the PIRC in instances where the PIRC is to take on an investigation,<sup>239</sup> as well as the requirement to "take cognisance" of the needs of persons who have relevant protected characteristics and to support such persons with any necessary or reasonable adjustments.<sup>240</sup>

## **(ii) Complaints handling**

### ***Complaint Handling Procedures***

The PIRC had a document in place outlining its complaint handling procedure at the time of the incident involving Sheku Bayoh in May 2015.<sup>241</sup> The document provided PIRC staff with guidance on how to handle complaints from members of the public.

PIRC's complaints handling procedure reflected its "commitment to dealing with complaints of dissatisfaction in a timely, effective and fair manner".<sup>242</sup> Anyone who received, requested or was affected by PIRC's services could make a complaint

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<sup>234</sup> *Ibid*, pages 2 – 3

<sup>235</sup> *Ibid*, page 2

<sup>236</sup> *Ibid*, page 3

<sup>237</sup> *Ibid*, page 2

<sup>238</sup> *Memorandum of Understanding between The Police Investigations and Review Commissioner, Police Scotland and The Scottish Police Authority*, 2020 (PIRC-04436), section 16.10

<sup>239</sup> *Ibid*, section 16.12

<sup>240</sup> *Ibid*, section 16.13

<sup>241</sup> *Complaint Handling Procedures*, December 2014 (PIRC-04478)

<sup>242</sup> *Ibid*, page 3



personally, or through a third party.<sup>243</sup> Overall responsibility and accountability for the management of complaints about PIRC lay with the Director of Corporate Services.<sup>244</sup>

PIRC's complaints handling procedure had two stages: frontline resolution and investigation.<sup>245</sup>

Stage one saw PIRC attempting to resolve complaints quickly using frontline resolution, with decisions provided within five working days or less.<sup>246</sup> Frontline resolution was appropriate for issues that were straightforward and easily resolved, requiring little or no investigation, and could be addressed by any member of staff. Forms of frontline resolution included an "on-the-spot" apology, or a face-to-face discussion with a customer.<sup>247</sup> In practice, "frontline resolution means resolving the complaint at the first point of contact with the customer, either by the member of staff receiving the complaint or other identified staff".<sup>248</sup> Once a complaint was received, relevant details would be entered onto PIRC's complaints system.<sup>249</sup>

Complaints would be referred to stage two – investigation – in circumstances where a complaint had not been resolved to a complainer's satisfaction at stage one (or the complainer refused to take part in the frontline resolution process), or where the complaint was complicated, serious or "high risk".<sup>250</sup> The Scottish Public Services Ombudsman (SPSO) defined potential high-risk or high-profile complaints as including those that may involve a death or terminal illness, or a serious service failure (such as a major delay or repeated failure to provide a service).<sup>251</sup> Stage two would see a complaint acknowledged within three working days and a full response provided as soon as possible (and within twenty working days, other than in exceptional circumstances).<sup>252</sup> Responses to stage two investigations would be signed off by PIRC's senior management.<sup>253</sup>

Where complaints remained unresolved through frontline resolution and investigation, mediation and independent external review by the SPSO were identified as further options to resolve matters.<sup>254</sup>

### ***PIRC public guidance***

A short guide to complaints about the PIRC was published in October 2014.<sup>255</sup> Together with the internal Complaint Handling Procedures referred to above, this public-facing guide formed part of the PIRC's complaints handling procedure.<sup>256</sup>

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<sup>243</sup> *Ibid*, page 5

<sup>244</sup> *Ibid*, page 13

<sup>245</sup> *Ibid*, page 6

<sup>246</sup> *Ibid*, page 6

<sup>247</sup> *Ibid*, page 6

<sup>248</sup> *Ibid*, page 7

<sup>249</sup> *Ibid*, page 7

<sup>250</sup> *Ibid*, page 9

<sup>251</sup> *Ibid*, page 10

<sup>252</sup> *Ibid*, page 11

<sup>253</sup> *Ibid*, page 13

<sup>254</sup> *Ibid*, page 12

<sup>255</sup> *A guide for complaints about the Police Investigations and Review Commissioner*, October 2014 (PIRC-04468)

<sup>256</sup> *Complaint Handling Procedures*, December 2014 (PIRC-04478), page 3

The guide outlines the frontline resolution and investigation stages described above. Potential complainers were also informed that they may ask the SPSO to look at a complaint where they remain dissatisfied with the PIRC's decision, or with the way a complaint had been dealt with.<sup>257</sup> The guide identifies that complaints to the PIRC required to be made within six months of the event complained about, or of the complainer finding out that there was a reason to complain (but in the latter instance, no longer than twelve months after the event itself).<sup>258</sup>

## **Section E – Liaison with the Health and Safety Executive (HSE)**

### ***Health and safety offences***<sup>259</sup>

Under the terms of the Health and Safety at Work etc. Act 1974, it is necessary for chief constables, as “employers” of police officers, to take account of the risks posed to the health and safety of members of the public, as follows:<sup>260</sup>

*It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.*

It is an offence for a person to fail to discharge the duty referred to above, in relation to ensuring the health and safety of members of the public.<sup>261</sup>

### ***Role of the HSE***

HSE has a duty to make adequate arrangements for the enforcement of health and safety legislation with a view to securing the health, safety and welfare of workers and protecting others, principally the public.<sup>262</sup>

Decisions on whether to prosecute health and safety offences, whether or not a fatality has occurred, are made by COPFS.<sup>263</sup>

It is intended that the role of HSE will be covered in more detail within a future law and practice note.

### ***PIRC Protocol with the HSE***

In 2014, PIRC entered into a “Protocol for Liaison” with the HSE.<sup>264</sup> This states that:<sup>265</sup>

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<sup>257</sup> *A guide for complaints about the Police Investigations and Review Commissioner*, October 2014 (PIRC-04468), page 5

<sup>258</sup> *Ibid*, page 4

<sup>259</sup> Further information on the Health and Safety at Work etc. Act 1974 and associated regulations pertaining to health and safety at work can be found within the *Hearing 1 – Law and Practice Note* (SBPI-00002), pages 22 – 24.

<sup>260</sup> Health and Safety at Work etc. Act 1974, section 3(1) (“1974 Act”)

<sup>261</sup> 1974 Act, section 33(1)

<sup>262</sup> 1974 Act, section 18. *A Protocol for Liaison, Investigation of deaths or serious injury of police officers at work or members of the public following contact with the police*, 2014 (PIRC-04624), page 2

<sup>263</sup> *A Protocol for Liaison, Investigation of deaths or serious injury of police officers at work or members of the public following contact with the police*, 2014 (PIRC-04624), page 2

<sup>264</sup> *Ibid*, page 2

<sup>265</sup> *Ibid*, page 2

*The protocol addresses the working arrangements for liaison in the event of a serious injury to, or death of, a police officer at work or a member of the public following contact with the police (including when in police custody).*

The Protocol includes a summary of the factors that the HSE will take into account when deciding which incidents to investigate and when deciding which authority will lead an investigation.<sup>266</sup> The Protocol also covers the working arrangements and cooperation between the PIRC and the HSE in circumstances where there was to be a joint investigation between the two organisations.<sup>267</sup>

The Protocol provides that:<sup>268</sup>

*The PIRC agrees that where it becomes aware, during the course of an investigation into a serious incident, of matters that may represent a breach of the HSW Act<sup>269</sup> and health and safety regulations, the Commissioner will make both COPFS and HSE aware of these matters at the earliest opportunity.*

With reference to cases of death or serious injury, the Protocol provides that the police or COPFS may report the matter to the HSE:<sup>270</sup>

*In the case of death or serious injury arising from their work, the police, in addition to referring the matter to the PIRC, may report the matter to HSE to meet their obligations under the HSW Act. In addition, HSE may be informed of a death by COPFS. Although COPFS has no authority to direct HSE, the Executive will assist COPFS and PIRC where it has the skills, competencies and resources to do so.*

## **Section F – Issues pertaining to race and equality**

### ***Investigations where race may be a factor in the incident***

In 2010, the Commissioner confirmed in response to Dame Elish Angiolini's Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing that PIRC did not have any specific guidance for investigations on race and discrimination.<sup>271</sup> PIRC was planning to adapt the IOPC's Guidelines for Handling Allegations of Discrimination<sup>272</sup> for its own use.<sup>273</sup>

Within the review Dame Elish states as part of her recommendations that:<sup>274</sup>

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<sup>266</sup> *Ibid*, Appendix 2

<sup>267</sup> *Ibid*, page 3

<sup>268</sup> *Ibid*, page 3

<sup>269</sup> 1974 Act

<sup>270</sup> *A Protocol for Liaison* (PIRC-04624), page 4

<sup>271</sup> *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, November 2020, Dame Elish Angiolini, paragraphs 9.73 and 14.106

<sup>272</sup> *IPCC guidelines for handling allegations of discrimination* (SBPI-00386)

<sup>273</sup> *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, November 2020, Dame Elish Angiolini, paragraphs 9.73 and 14.106

<sup>274</sup> *Ibid*, recommendation 44, page 463, and separately at paragraph 14.105.

*The PIRC should ensure that discrimination issues are considered as an integral part of their work. A systematic approach should be adopted across the organisation and in all cases investigators should consider if discriminatory attitudes have played a part.*

PIRC has since published internal guidelines in this regard.<sup>275</sup> The document includes guidance in relation to conducting investigations where there is alleged discrimination, including looking at officers' complaint histories, comparator evidence, discriminatory language, the use of generalisations and probing officers' accounts of an incident.

### ***Institutional discrimination***

PIRC's code of conduct that was in place in May 2015 states that:<sup>276</sup>

*You are expected to understand the concept of institutional discrimination<sup>277</sup> and institutional racism in particular and work to identify and eliminate it in the work of the PIRC and in relationships within PIRC itself and with stakeholders.*

### **Section G – Media liaison**

PIRC had a policy relating to media relations in May 2015.<sup>278</sup> This identifies that all media relations activity aimed to “educate, inform and raise awareness about the PIRC and improve understanding of the Commissioner’s role and remit in Scotland”.<sup>279</sup>

PIRC's Head of Communications<sup>280</sup> was, in May 2015, the first point of contact for all media enquiries and offered a “full out-of-hours and weekend service”.<sup>281</sup> During periods of annual leave or other absence, “COPFS communications” handled all media enquiries in relation to Crown-directed investigations.<sup>282</sup> The policy includes a flowchart outlining the process that was to be followed in relation to media liaison at the initial stages of a Crown-directed PIRC investigation.<sup>283</sup>

The policy identifies that only “authorised spokespeople” would respond to press enquiries, being the Head of Communications and other senior staff, “who have been media trained”.<sup>284</sup>

The Head of Communications was to work with the Commissioner, Director of Investigations (or their deputy) to develop proactive and reactive media strategy.<sup>285</sup> The Commissioner, or the Director of Investigations, was to approve all releases and

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<sup>275</sup> *PIRC Guidelines: for dealing with allegations of discrimination when undertaking Investigations and Complaint Handling Reviews*, November 2021 (PIRC-04724)

<sup>276</sup> *Code of Conduct for Employees*, version 2, March 2015 (PIRC-04574), page 8

<sup>277</sup> A definition of institutional racism, which refers to the Stephen Lawrence Inquiry and quotes from the MacPherson Report, can be found on page 9 of the code of conduct (PIRC-04574)

<sup>278</sup> *Media Relations policy and procedures*, May 2015 (PIRC-04578)

<sup>279</sup> *Ibid*, page 3

<sup>280</sup> Identified within the document as the Commissioner's “official spokesperson” (*Media Relations policy and procedures*, May 2015 (PIRC-04578), page 3)

<sup>281</sup> *Media Relations policy and procedures*, May 2015 (PIRC-04578), page 2

<sup>282</sup> *Ibid*, page 2

<sup>283</sup> *Ibid*, page 6 (Appendix 1)

<sup>284</sup> *Ibid*, page 3

<sup>285</sup> *Ibid*, page 3

statements to the media in relation to PIRC's investigations prior to issue.<sup>286</sup> If a media query had "wider 'political' sensitivities", the Head of Communications was to liaise with the Scottish Government Justice Communications team.<sup>287</sup> All media queries were to be entered in the "media contact log".<sup>288</sup>

It is noted within the policy that media responses were always to be "on the record", be truthful and accurate, and not include any disparaging comments about individuals.<sup>289</sup> Background briefings were to be notified to the Head of Communications, including details on the information provided.<sup>290</sup>

### ***FLO involvement in media management***

PIRC's Family Liaison Policy identifies that, in May 2015, FLOs were required to ensure that they are in a position to notify families of any form of media release made by the PIRC prior to it being broadcast or published.<sup>291</sup> FLOs were to apprise themselves of media reporting on a daily basis, through liaison with PIRC's "media officer", to ensure that they were prepared for questions that might be raised by families.<sup>292</sup>

FLOs were to "actively discourage the family from issuing statements to the media that are independent of the investigation and could impact on the investigative process".<sup>293</sup> The family, together with PIRC staff, were to work in partnership to agree the PIRC/family media strategy.<sup>294</sup>

### ***Joint protocol between PIRC, COPFS and Police Scotland***

PIRC entered into a joint protocol with COPFS and Police Scotland relating to media liaison in October 2014.<sup>295</sup> The joint protocol sets out the "key principles" that the organisations would follow when providing information to the media, including openness in media dealings, providing information to assist the media to accurately report cases and holding briefings for "high profile cases involving significant public interest and/or legal complexity".<sup>296</sup>

Within Crown-directed PIRC investigations, PIRC's interaction with the media was to follow the same guidelines as those outlined in the protocol for Police Scotland, with, for example, PIRC permitted to release "general information" about an incident in order to appeal for witnesses or request assistance in relation to ongoing investigations.<sup>297</sup>

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<sup>286</sup> *Ibid*, page 3

<sup>287</sup> *Ibid*, page 4

<sup>288</sup> *Ibid*, page 4

<sup>289</sup> *Ibid*, page 3

<sup>290</sup> *Ibid*, page 3

<sup>291</sup> *Family Liaison Policy* (PIRC-04460), page 28

<sup>292</sup> *Ibid*, page 28

<sup>293</sup> *Ibid*, page 17

<sup>294</sup> *Ibid*, page 17

<sup>295</sup> *Working with the Media: COPFS, Police Scotland and PIRC Joint Protocol*, October 2014 (PS18478)

<sup>296</sup> *Ibid*, pages 5 – 6. It is noted that briefings would be "routinely considered" by COPFS, in consultation with the police and PIRC, for high profile cases and investigations (PS18478, page 9).

<sup>297</sup> *Working with the Media: COPFS, Police Scotland and PIRC Joint Protocol*, October 2014 (PS18478), page 7

Initial media enquiries about deaths in custody were to be directed to the PIRC.<sup>298</sup> The protocol notes that, following a death in police custody, the name of the deceased would only be released by PIRC after the FLO had confirmed that the point of the contact in the family had been informed that the information was to be made public.<sup>299</sup> Additionally, “whenever possible, nearest relatives of the deceased will always be informed and any other relevant agencies consulted, before information is provided to the media”.<sup>300</sup>

## **Section H – PIRC reporting, and disclosure of information**

### ***Reporting***

The 2006 Act contains an obligation on PIRC to prepare a report of each investigation into serious incidents involving the police and investigations carried out in the public interest.<sup>301</sup> The 2006 Act contains no such obligation for PIRC investigations directed by COPFS under section 33A(b) of the Act.

The 2013 MOU between the PIRC and COPFS identifies that, in the context of a criminal investigation, CAAPD would decide whether the PIRC would report to COPFS by way of a “Full Investigation Report” on the agreed template and/or a “Standard Prosecution Report” together with full statements and productions.<sup>302</sup> COPFS would determine the timescales for each individual case.<sup>303</sup>

In the context of a death investigation, the PIRC will also submit its full death report into the investigation of the death within timescales determined by COPFS in each individual case.<sup>304</sup>

### ***Powers of enforcement***

PIRC has no powers to enforce recommendations made within reports upon the conclusion of an investigation. The authors of the Stair Memorial Encyclopaedia state that:<sup>305</sup>

*The commissioner has no concrete powers of enforcement, which may lead to questions about the effectiveness of the organisation.*

Within the MOU entered into by the PIRC, Police Scotland and the SPA in 2020, and accordingly not in place at the time of the incident involving Mr Bayoh, it is stated that:<sup>306</sup>

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<sup>298</sup> *Ibid*, page 8

<sup>299</sup> *Ibid*, page 8

<sup>300</sup> *Ibid*, page 8

<sup>301</sup> 2006 Act, section 41E(1). Such reporting relates to investigations carried out under s.33A(c) and (d) of the 2006 Act.

<sup>302</sup> *Memorandum of Understanding between Crown Office Procurator Fiscal Service and The Police Investigations and Review Commissioner*, dated 10<sup>th</sup> and 11<sup>th</sup> December 2013 (PIRC-04453), paragraph 7.5

<sup>303</sup> *Ibid*, paragraph 7.5

<sup>304</sup> *Ibid*, paragraph 7.4

<sup>305</sup> *Stair Memorial Encyclopaedia, Police* (2<sup>nd</sup> Reissue), paragraph 96

<sup>306</sup> *Memorandum of Understanding between The Police Investigations and Review Commissioner, Police Scotland and The Scottish Police Authority*, 2020 (Version 1.0) (PIRC-04436), paragraphs 11.15 – 11.18

*11.15 The PIRC's reports may contain Findings and Recommendations.*

*11.16 Recommendations are designed to address any issues identified as a result of the investigation. Recommendations may be specific to the investigation or to address wider issues identified as a result of the investigation.*

*11.17 Police Scotland or the Authority will notify the PIRC within 3 months of receiving the report of any steps taken or measures implemented to address the Recommendations.*

*11.18 Where Police Scotland or the Authority disagree with any Findings or Recommendations, they should identify this during consideration of the draft report and their view will be taken cognisance of by the PIRC prior to finalising the report.*

Whilst not explicitly stated within the above provisions, this approach appears to relate only to PIRC reports following investigations requested by SPA or Police Scotland under section 33A(c) of the 2006 Act and not to reports resulting from COPFS-directed investigations under section 33A(b).

#### *Use of CS spray at Victoria Hospital*

By way of an example of the operation of PIRC's powers of enforcement, within an investigation into the use of CS spray within Victoria Hospital, PIRC found that:<sup>307</sup>

*Police Scotland's procedures in relation to the issue, use and storage of CS Spray did not contain sufficient guidance for officers in Fife Division.*

The investigation also found that Kirkcaldy Police Office was not following this limited guidance. Within the report, PIRC outlined two recommendations for Police Scotland, including around the provision of guidance to officers relating to the issue, use and storage of CS spray.<sup>308</sup>

*Police Scotland should ensure that it provides fuller guidance to officers in Fife Division in relation to the issue, use and storage of CS Spray and standardises these procedures throughout Scotland.*

Following the production of this report, Police Scotland issued a letter to PIRC on 10 November 2015 identifying that Police Scotland had "accepted and acted upon" the two recommendations contained within PIRC's report, with brief details provided in relation to the steps that had been taken to address the issues raised.<sup>309</sup>

#### **Disclosure and provision of information**

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<sup>307</sup> *Use of CS Spray Within Accident and Emergency Department, Victoria Hospital, Kirkcaldy, 18 October 2014, Operation Ciaran, December 2014, Police Investigations and Review Commissioner, (PIRC-04474), page 7*

<sup>308</sup> *Ibid*, pages 7 – 8

<sup>309</sup> *Letter from Chief Superintendent Ellie Mitchell to John Mitchell, PIRC, dated 18 November 2015 (PS18853)*

The PIRC must provide Scottish Ministers with such information and documents that are required to satisfy the Scottish Ministers that the PIRC is carrying out her functions efficiently and effectively.<sup>310</sup> The PIRC is not, however, required or authorised to provide the Scottish Ministers with information or documents relating to investigations carried out under section 33A(b) of the 2006 Act without the consent of COPFS.<sup>311</sup>

Information obtained by the Commissioner in connection with any of the Commissioner's functions may be disclosed to public bodies or office-holders for any purpose connected to the Commissioner's functions or for the purpose of enabling the public body or officer-holder to carry out any function.<sup>312</sup> Similar to the above, such disclosure is not required or authorised, however, where the information relates to an investigation carried out under section 33A(b) of the 2006 Act without the consent of COPFS.<sup>313</sup>

## **Section I – Police (Ethics, Conduct and Scrutiny) (Scotland) Bill**

On 6 June 2023, the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill was introduced.<sup>314</sup> Consideration of the Bill at stage 1 is to be completed by 21 June 2024.<sup>315</sup> The Bill implements some of the recommendations arising from the independent review carried out by Dame Elish Angiolini in relation to complaints handling, investigations and misconduct issues in relation to policing.<sup>316</sup>

The Bill, as introduced, includes provisions relating to ethics of the police, police conduct and the functions and governance<sup>317</sup> of the PIRC. Only the provisions of most relevance to the PIRC post-incident management hearing will be explored, briefly, within this note.

### *Code of ethics*

The Bill, as introduced, would amend the Police and Fire Reform (Scotland) Act 2012 (“2012 Act”) and require the chief constable to prepare a code of ethics for Police Scotland, setting out “the values of the Police Service<sup>318</sup> and expectations relating to the conduct and practice of its constables and of police staff”.<sup>319</sup> PIRC, amongst other individuals and organisations, would require to be consulted by the chief constable during the preparation of the code of ethics.<sup>320</sup> The explanatory notes associated with

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<sup>310</sup> 2006 Act, Schedule 4, paragraph 11(1)

<sup>311</sup> 2006 Act, Schedule 4, paragraph 11(2)

<sup>312</sup> 2006 Act, section 46(1)

<sup>313</sup> 2006 Act, section 46(6)

<sup>314</sup> [Police \(Ethics, Conduct and Scrutiny\) \(Scotland\) Bill. Explanatory Notes](#) and a [Policy Memorandum](#) have also been published in relation to the Bill, alongside a “[background note](#)” in relation to police complaints.

<sup>315</sup> [Stage 1 timetable](#)

<sup>316</sup> *Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing*, Final Report, November 2020, Dame Elish Angiolini

<sup>317</sup> Relating to the establishment of an advisory board to the Commissioner (Police (Ethics, Conduct and Scrutiny) (Scotland) Bill, section 17)

<sup>318</sup> In terms of the 2012 Act, section 99, “Police Service” means the Police Service of Scotland. It is envisaged that the statutory code of ethics will build on Police Scotland’s existing non-statutory [code of ethics](#) (*Police (Ethics, Conduct and Scrutiny) (Scotland) Bill, Explanatory Notes*, paragraph 20)

<sup>319</sup> Police (Ethics, Conduct and Scrutiny) (Scotland) Bill, section 2 (section 36A(2) within the amended 2012 Act)

<sup>320</sup> Police (Ethics, Conduct and Scrutiny) (Scotland) Bill, section 2 (section 36B(1)(a)(i) and schedule 2ZA within the amended 2012 Act)



the Bill identify that the Code “will not have any particular legal effect” and a “failure to comply with the Code will not of itself give rise to grounds for any legal action”.<sup>321</sup>

### *Duty of candour*

The Bill, as introduced, would also amend the 2012 Act and conduct regulations relevant to police officers to introduce a “duty of candour”.<sup>322</sup> The duty of candour would be introduced for Police Scotland as an organisation, with the policing principles contained within the 2012 Act amended to include a further principle that Police Scotland “should be candid and co-operative in proceedings, including investigations against constables”.<sup>323</sup> Under the existing provisions of the 2012 Act, the chief constable must seek to ensure that the policing of Scotland is done “with due regard to the policing principles”.<sup>324</sup>

An explicit<sup>325</sup> duty of candour would also be introduced for officers as individuals, through the introduction of a new standard of professional behaviour.<sup>326</sup>

*Constables act with candour and are open and truthful in their dealings, without favour to their own interests or the interests of the Police Service.*

*Constables attend interviews and assist and participate in proceedings (including investigations against constables) openly, promptly and professionally, in line with the expectations of a police constable.*

As with the existing standards of professional behaviour, conduct which amounts to a breach of this new standard of professional behaviour, by constables or senior officers, will be misconduct, or potentially gross misconduct.<sup>327</sup>

The Bill's explanatory notes state that:<sup>328</sup>

*As is clear from the way in which the duty [of candour] is expressed and implemented, it is subject to the specific protections of the general law, which includes the right to silence and the privilege against self-incrimination.*

### *Functions of the PIRC*

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<sup>321</sup> *Police (Ethics, Conduct and Scrutiny) (Scotland) Bill, Explanatory Notes*, paragraph 21

<sup>322</sup> The conduct regulations being the Police Service of Scotland (Senior Officers) (Conduct) Regulations 2013 and the Police Service of Scotland (Conduct) Regulations 2014

<sup>323</sup> *Police (Ethics, Conduct and Scrutiny) (Scotland) Bill*, section 3(3) (amending section 32 of the 2012 Act).

<sup>324</sup> 2012 Act, section 17(4)(a)

<sup>325</sup> Within her final report, Dame Elish Angiolini refers to police officers being under an implied duty to assist in the investigation of a serious incident and to uphold Convention Rights (*Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing*, Final Report, November 2020, Dame Elish Angiolini, paragraph 7.106)

<sup>326</sup> Police Service of Scotland (Senior Officers) (Conduct) Regulations 2013, Schedule 1 and the Police Service of Scotland (Conduct) Regulations 2014, Schedule 1. The constable's declaration contained within the 2012 Act would also be amended to reflect the introduction of the duty of candour (*Police (Ethics, Conduct and Scrutiny) (Scotland) Bill*, section 3(2), amending section 10(1) of the 2012 Act).

<sup>327</sup> Police Service of Scotland (Conduct) Regulations 2014, regulation 2; Police Service of Scotland (Senior Officers) (Conduct) Regulations 2013, regulation 2. “Gross misconduct” means a breach of the Standards of Professional Behaviour so serious that demotion in rank or dismissal may be justified. The misconduct of police officers is covered in more detail within *Police Scotland – Post-incident Management – Law and Practice* (SBPI-00240), section B(iv).

<sup>328</sup> *Police (Ethics, Conduct and Scrutiny) (Scotland) Bill, Explanatory Notes*, paragraph 33

The Bill, as introduced, would amend section 33A(b)(i) of the 2006 Act to provide that PIRC's investigations of alleged criminality against persons serving with the police may also cover persons who have subsequently left the police.<sup>329</sup> Section 33A(a)(ii) of the 2006 Act would also be amended to clarify that PIRC may be directed to investigate deaths involving off-duty police officers, not just deaths that occur in the course of duty.<sup>330</sup>

### *Powers of review and enforcement of recommendations*

The Bill, as introduced, amends the 2006 Act to provide that where the Commissioner considers that it would be in the public interest to do so, the Commissioner may review a practice or policy of SPA or Police Scotland.<sup>331</sup> This gives PIRC a “bespoke power” to review practices and policies of the police generally, and not just in relation to a particular incident.<sup>332</sup>

The person whose practice or policy is to be reviewed would be required to assist the Commissioner during such reviews, providing evidence and attending hearings, for example.<sup>333</sup> Upon completion of the review, the Commissioner would be required to prepare a report, which may include recommendations in relation to the practice or policy to which the review relates or “any other practice” of SPA or Police Scotland.<sup>334</sup> The report would then require to be shared with SPA, Police Scotland and other organisations, with the Commissioner also required to publish the report.<sup>335</sup>

The Bill, as introduced, would also permit the Commissioner to make such recommendations, and give such advice, in relation to arrangements relating to complaints handling under the 2006 Act and the practice of the SPA or the chief constable “in relation to other matters”, as appear from the carrying out of the Commissioner’s functions to be “necessary or desirable.”<sup>336</sup> Such recommendations could be set out in a report prepared by the Commissioner, which would then be shared with SPA, Police Scotland and other organisations and published.<sup>337</sup>

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<sup>329</sup> Police (Ethics, Conduct and Scrutiny) (Scotland) Bill, section 9(a). The wording of the provision, as introduced, would also mean that a person currently serving with the police could be investigated by PIRC for an offence allegedly committed before they joined the police and a former officer could be investigated for an offence allegedly committed before or after they joined the force, or after they retired.

<sup>330</sup> Police (Ethics, Conduct and Scrutiny) (Scotland) Bill, section 9(b)

<sup>331</sup> Police (Ethics, Conduct and Scrutiny) (Scotland) Bill, section 15(2) (section 41I(1) within the amended 2006 Act)

<sup>332</sup> *Police (Ethics, Conduct and Scrutiny) (Scotland) Bill, Explanatory Notes*, paragraph 104. This being in addition to the existing power that the PIRC has to investigate “relevant policing matters” – subject to exceptions, incidents in relation to which there is an indication that SPA, Police Scotland or a person serving with the police has been involved – in the public interest (2006 Act, sections 33A(d) and 41C).

<sup>333</sup> Police (Ethics, Conduct and Scrutiny) (Scotland) Bill, section 15(2) (section 41I(4) within the amended 2006 Act)

<sup>334</sup> Police (Ethics, Conduct and Scrutiny) (Scotland) Bill, section 15(2) (sections 41I(5) and 41I(6) within the amended 2006 Act)

<sup>335</sup> Police (Ethics, Conduct and Scrutiny) (Scotland) Bill, section 15(2) (section 41I(7) within the amended 2006 Act)

<sup>336</sup> Police (Ethics, Conduct and Scrutiny) (Scotland) Bill, section 15(2) (section 41J(1) within the amended 2006 Act)

<sup>337</sup> Police (Ethics, Conduct and Scrutiny) (Scotland) Bill, section 15(2) (sections 41J(2) and 41J(3) within the amended 2006 Act)

The Bill, as introduced, thereafter provides that the recipient of a report containing recommendations made by the Commissioner under the above provisions must provide a written “initial response” along with, other than in in specific situations,<sup>338</sup> a report outlining the steps taken, or proposed to be taken, in response to the recommendations.<sup>339</sup> If the recipient has not done, or does not intend to do, anything in response to the recommendations, the initial response must state the reasons for that.<sup>340</sup> The Commissioner must publish the initial response and report as soon as reasonably practicable following receipt.<sup>341</sup> If the initial response is not provided to the Commissioner within the timeframe provided for within the Bill, the Commissioner is also obliged to publish notice of that fact.<sup>342</sup>

The Bill, as introduced, contains no variation to the provisions within the 2006 Act which provide that the PIRC is not required or authorised to provide the Scottish Ministers,<sup>343</sup> or public bodies and officer holders,<sup>344</sup> with information relating to Crown-directed investigations carried out under section 33A(b) of the 2006 Act without the consent of COPFS.<sup>345</sup> It would appear, therefore, that the provisions contained within the Bill, as introduced, are not intended to amend PIRC’s powers to make or enforce recommendations following Crown-directed investigations.

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<sup>338</sup> Where the recipient has already done all of the things that the recipient proposes to do in response to the recommendations, or does not intend to do anything in response to the recommendations (Police (Ethics, Conduct and Scrutiny) (Scotland) Bill, (section 15(2), section 41K(5) within the amended 2006 Act))

<sup>339</sup> Police (Ethics, Conduct and Scrutiny) (Scotland) Bill, section 15(2) (sections 41K(2) and 41K(3)(a) within the amended 2006 Act)

<sup>340</sup> Police (Ethics, Conduct and Scrutiny) (Scotland) Bill, section 15(2) (section 41K(3)(b) within the amended 2006 Act)

<sup>341</sup> Police (Ethics, Conduct and Scrutiny) (Scotland) Bill, section 15(2) (section 41L(2) within the amended 2006 Act)

<sup>342</sup> Police (Ethics, Conduct and Scrutiny) (Scotland) Bill, section 15(2) (section 41L(4) within the amended 2006 Act)

<sup>343</sup> 2006 Act, Schedule 4, paragraph 11(1)

<sup>344</sup> 2006 Act, section 46(1)

<sup>345</sup> 2006 Act, Schedule 4, paragraph 11(2) and section 46(6)