

Criminal Justice Committee
Thursday 23 May 2024
21st Meeting, 2024 (Session 6)

Police (Ethics, Conduct and Scrutiny) (Scotland) Bill

Note by the clerk

Background

1. The Committee is taking evidence on the [Police \(Ethics, Conduct and Scrutiny\) \(Scotland\) Bill](#) at [Stage 1 of the Parliament's legislative process](#).
2. The Bill proposes changes to the law to, in the view of the Scottish Government, ensure there are robust, clear and transparent mechanisms in place for investigating complaints, allegations of misconduct, or other issues of concern in relation to the conduct of police officers in Scotland.
3. The Committee expects to take Stage 1 evidence on the Bill from 17 April until the end of May 2024.

Today's evidence on the Bill

4. At today's meeting, the Committee will take evidence from **Craig Naylor**, His Majesty's Chief Inspector of Constabulary in Scotland.
5. The following submissions have been provided to the Committee by Mr Naylor and are reproduced at the Annex—
 - [HM Inspectorate of Constabulary in Scotland](#)
 - [HM Inspectorate of Constabulary in Scotland – supplementary submission](#)

Further reading

6. The Bill and supporting documents [can be found online](#).
7. A SPICe briefing on the Bill [can be found online](#).
8. The responses to the Committee's call for views on the Bill [can be found online](#).
9. A [SPICe analysis of the call for views](#) was circulated with the committee papers for the meeting on 13 March 2024.
10. A [briefing](#) on the background to the Police (Ethics, Conduct & Scrutiny) (Scotland) Bill and a review of police complaints systems in other jurisdictions was published in 2023.

Clerks to the Committee
May 2024

Annexe A: submission from HM Inspectorate of Constabulary in Scotland

HM Inspectorate of Constabulary in Scotland (HMICS) is an independent scrutiny body, which has been in existence since the nineteenth century. Its role was reaffirmed by the Police and Fire Reform (Scotland) Act 2012, which gave HMICS wide ranging powers to look into the “state, effectiveness and efficiency” of both Police Scotland and the Scottish Police Authority (SPA).

We also have a statutory duty to ensure that the Chief Constable and the SPA meet their obligations in terms of best value and continuous improvement. If necessary, we can be directed by Scottish Ministers to look into anything relating to the SPA or Police Scotland as they consider appropriate. We also have an established role in providing professional advice and guidance on policing in Scotland.

Our powers allow us to do anything we consider necessary or expedient for the purposes of, or in connection with, the carrying out of our functions. The SPA and the Chief Constable must provide us with such assistance and co-operation as we may require to carry out our functions and must comply with any reasonable request that we make. When we publish a report, the SPA and the Chief Constable must also consider what we have found and take such measures, if any, as they think fit. Where we make recommendations, we will follow them up and report publicly on progress.

We work with other inspectorates and agencies across the public sector to share specific expertise or jointly examine important areas where Police Scotland works in partnership and contribute to shared outcomes. We co-ordinate our activities to reduce the burden of inspection and avoid unnecessary duplication.

We aim to add value and strengthen public confidence in Scottish policing and will do this through independent scrutiny and objective evidence-led reporting about what we find. Where relevant, we will make recommendations to Police Scotland and the SPA that aim to improve policing. We will also identify good practice that can be rolled out across Scotland.

We can inspect other UK police services that operate in Scotland and are members of the National Preventive Mechanism, inspecting police custody centres to monitor the treatment and conditions for detainees.

Section 2: Code of ethics

8. What are your views on the proposals to establish a statutory Code of Ethics for Police Scotland, the requirement for police officers to have regard to the Code, and the procedures for producing the Code?

HMICS supports this element of the Bill. It could be argued that police officers and staff should not require a statutory code of ethics to ensure ethical behaviour, but it is an important guide and leadership tool in order that Police Scotland and the Chief Constable may clearly and consistently articulate their expectations to all within the organisation. It also allows those served by Police Scotland to understand what they may expect in the delivery of that service. The duty to widely consult on the code in

its preparation is particularly welcomed as HMICS believes that this will enhance public trust and confidence by ensuring that Police Scotland not only acts ethically, as it interprets it, but as it has been informed by consultation with those it serves. This will be particularly important in terms of traditionally hard to reach and under-represented groups.

The code will be strengthened by clearly laying out which key stakeholders will be statutory consultees and the Chief Constable's duty to ensure the code has been meaningfully communicated to officers and staff.

To avoid the potential for blurred lines, overlaps or gaps HMICS believes that there should be clarity as to when the Police Service of Scotland Regulations 2013, or any other legislation, has primacy in circumstances where the statutory code of ethics could also be considered applicable. HMICS believes that the provisions of the statutory Code of Ethics will require to be weaved through the Police Scotland Competency and Values framework, standard operating procedures and policies but recognises this will be a matter for the Chief Constable.

HMICS would recommend, if not already done, that due consideration is given to the position in England and Wales and their experience in undertaking a similar exercise. HMICS recognises that the position is markedly different in Scotland in that the Scottish Code of Ethics will be created by the Chief Constable who is required to deliver against it rather than by a separate body. Also, unlike in England and Wales the code will not be at the same risk of varying interpretation across 43 different forces. There may be valuable learning nonetheless, if not already secured.

Section 3: Duty of candour

9. What are your views on the proposal to introduce a duty of candour for constables as set out in section 3?

HMICS supports this element of the Bill. As above, it could be argued that police officers and staff should understand the need for candour without the need for a specific duty. The creation of a specific duty does not imply that officers currently may seek to be less than candid but, again, provides additional clarity and leadership to those delivering Police Scotland's service at all levels of seniority. The almost unique powers that police officers may deploy in respect of their fellow citizens make it reasonable that they should be subject to a greater degree of scrutiny and accountability. HMICS concurs with Lady Elish Angiolini's contention that whilst there is currently an assumption of co-operation, that this requires to be put beyond doubt. This element of the Bill is further strengthened by the inclusion of an organisational duty of candour.

Section 4: Liability of the Scottish Police Authority for unlawful conduct of the Chief Constable

10. Do you have any views on the proposal for the SPA to be liable for the unlawful conduct on the part of the Chief Constable in the carrying out of their functions?

HMICS supports this element of the Bill and agrees that liability for any unlawful conduct on the part of the Chief Constable should sit with the SPA.

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

11. What are your views on the proposal to broaden the functions of the PIRC to include any aspect of the regulatory disciplinary procedures, not just misconduct investigations?

HMICS supports this element of the Bill. This will enhance public trust and confidence by minimising any perception of familiarity between the SPA and Police Scotland. In addition, as this is thankfully a rare occurrence, it appears challenging for the SPA to maintain the skill set necessary to conduct the preliminary assessment effectively. HMICS believes that this assessment is best conducted by the PIRC from a transparency, independence and public trust and confidence perspective but also when considering the PIRC's natural skill set as opposed to that of the SPA. HMICS supports proposals for the assessor to take into account whether the allegation is made anonymously, is specific in time and location, or whether it appears, on the face of the allegation, to be either vexatious or malicious.

Section 6: Procedures for misconduct: former constables

12. What are your views on the proposals to continue disciplinary procedures for gross misconduct, should an officer retire or resign?

HMICS supports this element of the Bill whereby disciplinary procedures set out in regulations made under the Police and Fire Reform (Scotland) Act 2012 act (the 2012 Act) may be applied to persons who have ceased to be constables in certain circumstances where gross misconduct allegations are concerned. HMICS supports the provision for an advisory and barred list to prevent unsuitable persons from applying to join forces in other jurisdictions and the enhancement of public safety, trust and confidence that this would promote. This provision would also create valuable consistency across Great Britain and enhance the robustness of vetting procedures when former officers seek to join forces from other jurisdictions. The addition of a person's name to such a list would only be reasonable after the conclusion of a suitably robust and structured process. This would logically appear to be misconduct proceedings in line with those which would have taken place had the officer not resigned or retired.

The ability to conduct what are essentially internal conduct proceedings once a police officer has left the organisation could be considered disproportionate and would subject police officers to processes which cannot be applied to other members of society. HMICS has considered this and believes that the new provision is reasonable and proportionate given the powers that police officers may deploy in respect of their fellow citizens. Such powers may pose a particular risk where a police officer who avoided misconduct proceedings by means of resignation or retirement is able to join a force in another jurisdiction.

13. Do you have any views on the proposed time period after which no steps, or only certain steps in the misconduct procedures would be applied unless additional criteria were met?

HMICS supports the inclusion of relevant time limits, with provision for exceptional circumstances, and a proportionality test to be carried out by the PIRC.

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

14. What are your views on the proposals to establish Scottish police barred and advisory lists and the criteria for the inclusion of an officer to either list?

HMICS supports this element of the Bill. Currently Police Scotland utilises intelligence systems to assess the suitability of a candidate to join the organisation. Advisory and barred lists would strengthen this process and thereby reduce the risk of former officers joining a force in another jurisdiction and would bring Police Scotland in line with other forces within Great Britain.

Section 8: Procedures for misconduct: senior officers

15. What are your views on the proposal to have an independent panel determine misconduct cases against senior officers?

HMICS supports the proposal for a newly structured misconduct panel consisting of a mix of police and non-police legally qualified and lay members. HMICS supports the proposal that this panel would hear evidence of misconduct and determine whether the conduct forming the allegation is related to that of a senior officer and whether that conduct constitutes misconduct, gross misconduct or neither. HMICS agrees with Lady Elish Angiolini that such hearings should be chaired by the legally qualified member appointed by the Lord President. Such independent panels would both improve public trust and confidence in the independence and transparency of such hearings by removing the SPA from proceedings, which by the very nature of its role works closely and routinely with senior officers of Police Scotland.

This independence will also provide reassurance to the senior officer concerned that there is reduced scope for any prior workplace conflicts, relationships or pre-conceived notions to influence the outcome. HMICS considered whether the presence of a police officer on the panel may inhibit public trust and confidence in the process and its independence. Upon due consideration HMICS concluded that any such risk would be mitigated by the presence of the legally qualified chair and other panel member(s) and outweighed by the advantages of the panel being provided with up-to-date expertise of Scottish policing.

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

16. What are your views on the proposals to clarify the PIRC's investigatory powers in relation to criminal conduct and incidents involving deaths of serving police officers, as set out in section 9?

HMICS supports the provisions of the Bill which will provide the PIRC with the ability to investigate criminal offending by those who were constables or police staff at the time of the act being investigated but who have since resigned or retired or those who were not constables or staff at the time of the relevant act but have since become so, or who were off duty at the time the incident occurred.

HMICS also supports the clarification of the PIRC's investigatory powers into deaths involving a person serving with the police to make clear that they apply to off-duty police. This brings clarity to the phrase 'person serving with the police' which Lady Elish Angiolini had highlighted had caused ambiguity as it has not yet been clearly defined in legislation. This will also allow a consistent approach with regard to officers within a group where some were on duty and some were off duty, preventing the need for any parallel processes to be undertaken.

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

17. What are your views on the proposals to clearly define who can make a "relevant complaint" to the PIRC and in what circumstances?

HMICS supports the provision of the Bill allowing police officers and staff who experience poor service, which affects them in a personal capacity (as opposed to in their capacity as a constable or member of staff) to be able to make a complaint about the police to the PIRC. This will clarify that officers and staff can expect the same rights as other members of the public.

Section 11: Complaint handling reviews

18. What are your views on the proposals to enable the PIRC to carry out complaint handling reviews of its own volition and make recommendations in relation to complaints in a review report?

HMICS supports the provision in the Bill which will allow the PIRC to make recommendations regarding the handling of individual complaints. The Bill seeks to put this into statute alongside requirements that the outcomes are published and the SPA or Chief Constable (as relevant) respond to any recommendations. This will assist openness and transparency and therefore public trust and confidence.

Section 12: Call-in of relevant complaints

19. What are your views on the proposal to give the PIRC a statutory power to take over investigation of complaints being dealt with by the Chief Constable or the SPA under the circumstances set out in section 12?

HMICS is supportive of the element of the Bill which seeks to provide the PIRC with a power to take over consideration of (or call in) complaints being dealt with by the Chief Constable or the SPA. Strengthening the power of the PIRC in statute will provide for greater scrutiny. This will have positive effects for public trust and confidence in knowing that where members of the public have concerns about a complaint handling review, they may contact the PIRC for review or that the PIRC may undertake this on their own volition. The ability to call in a complaint prior to the conclusion of the complaint handling review will have positive effects in terms of minimising delay.

Section 13: Review of investigation of whistleblowing complaints

20. What are your views on the proposals for the PIRC to audit and have oversight of the SPA and Chief Constable's arrangements for handling whistleblowing complaints and to report and make recommendations on the arrangements?

HMICS supports the element of the Bill which will provide the PIRC with the power to audit the handling of whistleblowing complaints.

Section 14: Investigations involving constables from outwith Scotland

21. What are your views on the proposals to allow the PIRC to investigate serious incidents, potential criminal offending and some deaths involving English, Welsh and Northern Irish constables who are carrying out policing functions in Scotland?

HMICS supports this element of the Bill.

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

22. What are your views on the proposals for the PIRC to review and make recommendations on the practices and policies of Police Scotland or the SPA, either in relation to a specific complaint or more generally?

HMICS does not support the element of the Bill concerned with providing the PIRC with a specific new power to review a practice or policy of the SPA, Chief Constable or Police Scotland where the PIRC considers it would be in the public interest to do so. The 2012 Act already places a duty on the PIRC and HMICS to coordinate activity. This is supported by a memorandum of understanding between the PIRC and HMICS which lays out the framework to facilitate this collaborative working. This framework is designed to optimise the skills and expertise involved in conducting inspections, reviews or investigations whilst also avoiding duplication and minimising the burden of scrutiny. This approach to collaborative working also provides for consideration of which body has the skill set most suitable for each undertaking.

HMICS recognises that the PIRC is undoubtedly a skilled organisation, comprised of many skilled individuals but believes that these skills are most appropriately deployed in investigations and complaint handling reviews. HMICS also recognises that the PIRC, in the course of its duties, may encounter practices or policies which cause concern and warrant further examination. This does not necessarily make the PIRC the most appropriately equipped body to review said practice or policy. HMICS, as an inspection body, trained and experienced in the use of the EFQM model, is the independent body best suited to review practices and policies. HMICS believes that where, in the course of an investigation, the PIRC identifies a practice or policy which requires further investigation this would best be referred to, and if appropriate conducted by, HMICS in order that it may deploy its relevant skills and experience. In terms of that referral or handover and duty to coordinate activity, HMICS believes that this is already adequately laid out in the 2012 Act and the memorandum of understanding.

Notwithstanding the foregoing, if it was still considered necessary to formalise this in statute, HMICS believes that the provisions should be limited to the PIRC making a referral to HMICS and creating a duty for HMICS to give such a referral due consideration. This consideration would allow HMICS to assess whether the practice or policy in question is already being addressed by means of an existing recommendation from a previous inspection, will form the basis for a recommendation in an ongoing inspection or should be considered in the course of a future inspection. Where HMICS considers the work to be urgent, the review of the practice or policy could be expedited as a bespoke piece of work.

Section 16: Provision of information to the Commissioner

23. What are your views on the proposal to allow the PIRC to have remote access to Police Scotland's complaints management database?

HMICS supports the element of the Bill which will provide PIRC with access to Police Scotland's complaints management database to audit and review files. Whilst this will be a positive development in terms of transparency and efficiency it is important that the legislation takes due consideration of security (including vetting levels of those with access), regular audit and data protection.

Section 17: Advisory board to the Commissioner

24. What are your views on the proposal to establish a statutory advisory board for the PIRC?

HMICS supports the requirement for the PIRC to have a statutory advisory board. This will support a new governance and accountability framework to ensure suitable advice and expertise is provided to support the PIRC and provide suitable challenge. This will enhance public trust and confidence in policing and in the view of HMICS, this is necessary and proportionate to the new powers being provided to the PIRC by means of this Bill.

Supplementary submission from HM Inspectorate of Constabulary in Scotland

9th May 2024

Dear Convenor

Police (Ethics, Conduct and Scrutiny) (Scotland) Bill Committee Scrutiny

I write in relation to the ongoing scrutiny being provided by your committee to the above Bill. Unfortunately, the only date (15 May 2024) offered to His Majesty's Inspectorate of Constabulary to provide evidence to your committee was provided at short notice, at a time of annual leave, significant other commitments, and ongoing inspection work. We would be very grateful to the committee if it could find to allow us to provide evidence and to be questioned by the members of the committee.

However, I wanted to make some points in relation to evidence provided by other witnesses to your committee. I am firmly of the view that vetting, complaint handling and conduct matters are a significant challenge to policing in Scotland and more widely across the United Kingdom in relation to assuring the public that those in the service are suitable to the role that they undertake. Police Scotland has worked hard to provide assurance and demonstrate that they undertake appropriate vetting, investigations and matters to address any misconduct.

Your committee has heard from those who have been subject to the process and their stories were harrowing to hear and undoubtedly caused stress and affected the wellbeing of the individuals. Each case on its merits requires to be understood but must also stand alongside the large number of other cases that are reported, assessed, investigated, and brought effectively to an outcome. Police officers and their police staff colleagues expect significant scrutiny of their actions and spend considerable energy on making good decisions that help keep people safe. The pertinent issues that we have understood from a number of inspections are as follows:

- It takes far too long for the Criminal Justice organisations to investigate criminal complaints or conduct matters leaving those who report them and those subject to investigation with unresolved matters for far too long.
- There is a general lack of pace applied to the investigation but probably more importantly the decision making around these cases. For example, an officer who is convicted at court can be served with pre-prepared misconduct immediately on conclusion of court proceedings. This allows for the process to be conducted expeditiously and certainly within a 35-day time limit as described to the committee by David Kennedy on the 8 May 2024.
- The fear of being investigated for simply making a mistake when undertaking your core role is very prevalent and is often described to HMICS as "error terror". It is palpable that officers dealing with high-risk situations such as missing persons or mental health crises often overprotect the individual as they

do not see the safety required being provided by partner agencies and fear that if an incident occurs after they have dealt with the individual that they will be the one subject to significant scrutiny and potentially misconduct proceedings.

- Lack of communication between the three parties involved (Police Scotland, PIRC and COPFS) leaves those who complain dissatisfied with the service they receive and often dissatisfied with the outcome. Greater levels of communication need to be developed based firmly on the needs of the victim and those under investigation.
- To provide the public with assurance that the process is robust, fair and delivers justice requires an opening up of the system to scrutiny and transparency. This can be brought through greater communication but probably through the publication of outcomes of investigations. To deliver this requires an element of bravery from the organisations involved but also an ambition to show the service in its true light as staffed by a highly skilled, motivated, and capable majority who do not want to work with those who commit criminal acts or otherwise misconduct themselves.

In wider terms you are aware that we undertook an inspection of the Police Scotland vetting system. Without rehearsing the recommendations and areas for improvement I feel it is imperative to advise the committee that we have sought and continue to seek answers around the provision of new powers for the Chief Constable to terminate the employment of officers or staff who are unable to sustain at least recruitment vetting standards. This capability is being considered by Scottish Government lawyers and it is our understanding that there may be consideration of additions to this bill to achieve this outcome. HMICS would welcome favourable consideration of enabling the Chief Constable to dismiss officers or staff who fail and do not remedy the vetting requirements through a robust but fair process. Failure to deliver this will embed officers and staff who cannot be deployed, cannot be trusted and who pose a risk to the public. We are aware that steps are being taken in the Home Office to provide such capability to chief constables in England and Wales.

The committee examined witnesses on their understanding of the financial implications of the new legislation. While I do not accept the premise that Scottish Government deliberately misled the committee or others with the financial memorandum, I am of the view that there has been insufficient consideration of the impact of the proposals and potential legislative requirements. In considering this I would draw attention to a number of areas that will impact upon public finance:

- The requirement to continue to progress conduct enquiries once individuals have resigned or retired is one that is strongly supported by HMICS. However, many of the current gross misconduct processes terminate due to the individual leaving their role. To protect other policing organisations from officers moving to different forces, it is clear that continuing with gross misconduct processes to conclusion is necessary and thereafter for the individual to be placed on the barred list. This will significantly increase the number of cases being taken to hearings requiring the use of officers' time to present, hear and defend those individuals.

- The creation and administration of a barred and advisory list is a new endeavour in Scotland and will have financial implications to ensure that the data is kept securely, available to those who have a right to see it and to be subject to Data Protection safeguards.
- While I have no role in the oversight of PIRC or COPFS I remain concerned that there has been little estimation of the additional work required, the costs required of an independent board and the need for additional legal representation for the presentation of cases, police appeals tribunals or costs associated with chief officer hearings. As such I would suggest that there needs to be some revision to this memorandum to fully scope the additional costs now that there is a better understanding of the contents of the bill for all parties concerned.

In closing, we support elements of the bill and the policy ambitions behind it. The work done to address many of the recommendations made by Lady Angiolini have shown a drive and collaborative effort to ensure the best service possible in Scotland. Further work to enhance this bill is needed and I stand ready to assist the committee if a time slot becomes available.

Yours sincerely

Craig Naylor
HM Chief Inspector of Constabulary