

# **Police Complaints, Investigations and Misconduct: A Consultation on Legislation**

**May 2022**



**Scottish Government**  
Riaghaltas na h-Alba  
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# Table of Contents

<b>Ministerial foreword</b> .....	<b>3</b>
<b>Overview</b> .....	<b>4</b>
i.    What this consultation is about.....	4
ii.   Why we are consulting .....	5
<b>Responding to this consultation</b> .....	<b>5</b>
iii.  Dates and contact information.....	5
iv.   The layout of this consultation.....	6
v.    Handling your response .....	6
vi.   Next steps in the process .....	6
vii.  Comments and complaints.....	7
viii. Scottish Government consultation process .....	7
<b>Section 1: Rights and Ethics</b> .....	<b>8</b>
1.1  Code of ethics .....	8
1.2  Duties of candour and co-operation .....	12
1.3  Whistleblowing .....	16
1.4  Legal aid in Article 2 cases.....	19
1.5  Death of a serving police officer (investigation).....	21
1.6  Definition of “person serving with the police” and “member of the public” ...	22
<b>Section 2: Governance, Jurisdiction and Powers</b> .....	<b>25</b>
2.1  PIRC governance.....	26
2.2  Increased investigative and audit powers for PIRC.....	31
2.3  Cross-jurisdictional issues.....	38
<b>Section 3: Conduct and Standards</b> .....	<b>40</b>
3.1  Misconduct and gross misconduct proceedings.....	41
3.2  Continuation of gross misconduct proceedings.....	52
3.3  Appeals against determinations of gross misconduct .....	56
3.4  Accelerated misconduct hearings .....	58
3.5  Senior officer misconduct cases.....	61
3.6  Vexatious complainers .....	66
3.7  Additional statutory provisions relating to conduct .....	66
3.8  Special constables conduct regulations .....	74
<b>Section 4: Liability for unlawful conduct</b> .....	<b>75</b>
4.1  Clarifying the liability for unlawful conduct, in relation to the Chief Constable	75
<b>Further information</b> .....	<b>75</b>
Glossary.....	76
Acronyms .....	79
Background on key organisations .....	80
<b>Respondent information form</b> .....	<b>82</b>

## Ministerial foreword

Police officers and staff across Scotland do a vital job keeping our communities safe, often in challenging circumstances. Police Scotland's approach to the delivery of COP26 in Glasgow, alongside its ongoing role in relation to the Covid pandemic response, are recent examples of this in action.

We are committed to supporting this crucial service, and to ensuring Scotland's citizens and communities have trust and confidence in the policing system and the structures that underpin it.

The vast majority of our police officers and police staff work tirelessly to protect our communities. However we have to recognise that things do, at times, go wrong. It is in everyone's interests – from police officers and staff to the general public – that we have robust, clear and transparent mechanisms in place for investigating complaints or other issues of concern.

That is why, in 2018, we commissioned Dame Elish Angiolini to review police complaints handling, investigations and misconduct in Scotland. Dame Elish's review was wide reaching and forensic in its analysis. Her recommendations provide a strong platform on which to drive meaningful improvement, in collaboration with partners across the policing sector here in Scotland.

When accepting the majority of Dame Elish's recommendations, the Scottish Government and Crown Office made clear its commitment to work with partners to deliver improvements. A total of 34 of Dame Elish's recommendations have, at the time of writing, already been implemented, as outlined in our [Thematic Progress Reports](#). Others require legislative change and we are now looking for your views, via this consultation, to finalise our policies surrounding police complaints and scrutiny in line with this Government's commitment to ensuring all our public services are accountable, transparent and trusted.

I would like to take this opportunity to thank partners for their contributions to-date including preparing for this consultation. I trust that many will want to contribute their thoughts and opinions to the questions posed in this consultation, and I encourage all with an interest to do so. I look forward to considering the full range of opinions received and thank you in advance for your views.



**Keith Brown MSP**  
**Cabinet Secretary for Justice and Veterans**

# Overview

## i. What this consultation is about

In a police service focussed on a policing by consent approach, maintaining public confidence is vital. That is why the Scottish Government asked Dame Elish Angiolini to undertake an independent review of complaint handling, misconduct and investigations. Her final report on [Complaints Handling, Investigations and Misconduct Issues in Relation to Policing](#) was published in November 2020 and made a series of recommendations to improve the systems and structures which underpin the ways in which complaints about the police are received, managed and investigated.

Dame Elish states that ‘it should be easy to complain, easy to get a response and easy to learn the lessons’ (p. 282, para. 18.1). The report identifies barriers that currently exist and examines how these can be reduced or removed to make the systems more accessible and improve the experience of all those involved in the process including police officers, the public, and victims and witnesses of crime.

Many of the recommendations which will deliver on this do not require legislation and are being taken forward by partners (Police Scotland, the Scottish Police Authority (SPA), Police Investigations and Review Commissioner (PIRC) the Crown Office and Procurator Fiscal Service (COPFS) and Her Majesty's Inspectorate of Constabulary in Scotland (HMICS)).

The recommendations provide a strong platform on which to drive meaningful improvement, in collaboration with partners across the policing sector here in Scotland, thereby strengthening public confidence in this invaluable public service.

Public confidence in policing in Scotland is generally strong, as illustrated in a recent survey which points to continued [public confidence](#) in the service. However, when things go wrong, it is vital that complaints are investigated timeously, thoroughly, fairly and transparently, and that our police service is held to account, lessons are learned and improvements made. Equally, police officers and staff have a right to expect that they will be treated fairly and proportionately if a complaint is made against them, and that complaints will be investigated promptly through a clear process.

These principles – to bring greater fairness, transparency, accountability and proportionality to current systems and governance structures (as set out by Dame Elish Angiolini) – are key to the questions set out in this consultation.

This consultation consists of 4 sections:

- [Section 1](#) considers the recommendations which seek to clarify or to strengthen existing legislation around the rights of members of the public and police officers. It also asks for views on the responsibilities of police officers during investigations, and on Police Scotland's Code of Ethics.
- [Section 2](#) asks for views on proposed changes to the governance and jurisdiction of, and additional powers for, the Police Investigations and Review Commissioner (PIRC).
- [Section 3](#) seeks views on conduct and standards and other measures regarding disciplinary and grievance procedures.

- [Section 4](#) requests views on clarifying the liability for unlawful conduct, in relation to the Chief Constable.

ii. Why we are consulting

Partners have been delivering Dame Elish Angiolini's recommendations since her [Preliminary Report](#) was published in 2019. The Scottish Government regularly reports on progress via its Thematic Progress Reports, the second of which was published in [December 2021](#). These reports are underpinned by a [governance and reporting framework](#) which provides assurance to Ministers on progress towards implementing Dame Elish Angiolini's recommendations.

A number of recommendations have been identified as likely to require a basis in primary or secondary legislation, in order to be effected in full.

Responses to this consultation will influence the Scottish Government's policy decisions on the implementation of recommendations which may require primary or secondary legislation in order to be effectively implemented.

## **Responding to this consultation**

iii. Dates and contact information

The deadline for this consultation is Tuesday 16 August 2022.

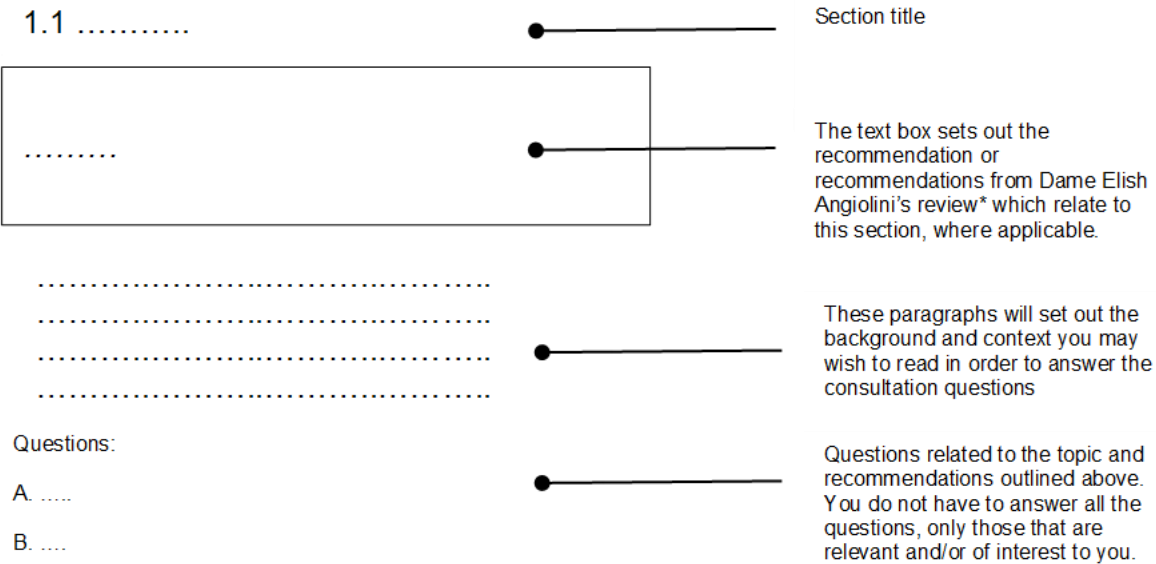
This consultation covers a number of different topics. You do not have to answer all questions. Respondents are welcome to respond only to the questions and sections of the report that are relevant to them.

Views on this consultation are being collated using the Scottish Government's consultation hub - [Citizen Space](#). You can save and return to your responses while the consultation is still open.

If you are unable to respond using our consultation hub, please complete the [Respondent Information Form](#) at the end of this document and send to [policingconsultation2022@gov.scot](mailto:policingconsultation2022@gov.scot) or

Policing Consultation  
Scottish Government  
Area 1R  
St Andrew's House  
Regent Road  
Edinburgh  
EH1 3DG

iv. The layout of this consultation



\* Dame Elish Angiolini's review published a [preliminary report](#) (recommendations from this report are represented with numbers prefixed with "PR") and a [final report](#).

v. Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, it will be treated as confidential.

Please be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

For more information see our [privacy policy](#).

vi. Next steps in the process

After the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses containing consistently and strongly offensive or defamatory language may be wholly removed from analysis and publication.

Responses will then be published on [Citizen Space](#) (only if you have given permission for us to do so). If you use Citizen Space to respond, you will receive an acknowledgement email with a unique reference number.

An analysis report will also be made available. We will provide a summary of key issues, your responses and their outcomes in the [We Asked, You Said, We Did](#) section on Citizen Space.

vii. Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to [policingconsultation2022@gov.scot](mailto:policingconsultation2022@gov.scot) or the contact address above.

viii. Scottish Government consultation process

Consultation is an essential part of the policy-making process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work; can inform the development of policy proposals as well as helping us finalise legislation before it is implemented. You can find all our consultations online on [Citizen Space](#).

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

## **Section 1: Rights and Ethics**

Woven throughout Dame Elish Angiolini's preliminary and final reports are questions of fairness, transparency and access to justice. Respect for human rights and an emphasis on individual responsibility for upholding collective values are embedded in Police Scotland's own ethos, from the declaration that constables make upon taking up office to the standards against which their conduct is assessed throughout their careers. The vast majority of police officers in Scotland meet the high standards to which they are rightly held by members of the public, and proposals to strengthen the existing legislation around the responsibilities on, and duties of, officers seek to underline the importance of maintaining and exceeding these standards.

As well as suggesting a strengthening of Police Scotland's existing code of ethics and the clarification of officers' duties in investigations of serious incidents, the Angiolini report proposes clarifying legislation to ensure the processes to deal with those who do not meet those high standards are clear and that there are clear routes for those who wish to signal wrongdoing to whistle-blow.

The Angiolini report also recommends that additional support be put in place for bereaved families in Article 2 cases, where a person has died in police custody or following police contact. While work has taken place to improve liaison with bereaved families, an additional proposal is that these bereaved families should have access to free, non-means-tested legal aid.

This section of the consultation sets out proposals to address Dame Elish Angiolini's recommendations relating to rights and ethics.

### **1.1 Code of ethics**

*(1) 'Police Scotland's Code of Ethics should be given a basis in statute. The Scottish Police Authority and the Chief Constable should have a duty jointly to prepare, consult widely on, and publish the Code of Ethics, and have a power to revise the Code when necessary' (Recommendation 1, p. 455)*

Police Scotland has a [Code of Ethics](#) setting out the standards expected of all of those who contribute to policing in Scotland. However, the existence of this Code is not currently required by law. The Angiolini report commends Police Scotland's existing, non-statutory, Code of Ethics based on 'The values of integrity, fairness and respect', (p. 22, para. 5) recommending that given its importance in setting the culture and practice of policing in Scotland (p. 58, para. 3.26) it should be given a basis in statute.

Dame Elish states (p. 57, para. 3.24) that '[t]he absence of a general reference to ethics or a specific reference to a Code of Ethics from the founding legislation for the Scottish Police Authority and the Police Service of Scotland (i.e. the Police and Fire Reform (Scotland) Act 2012) is in my view a significant omission.' This approach was supported by the [Scottish Human Rights Commission](#) in written evidence to the Justice Committee's post-legislative scrutiny of the Police and Fire Reform (Scotland) Act 2012.<sup>1</sup>

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<sup>1</sup> [Post-legislative scrutiny of the Police and Fire Reform \(Scotland\) Act 2012 - Parliamentary Business : Scottish Parliament](#)



The Code of Ethics forms part of the framework that sets out the standards and behaviours expected of police officers and staff in Scotland. As Police Scotland highlight, the Code of Ethics ‘...is not a discipline code. It is what we aspire to be.’<sup>2</sup> The code is a ‘practical set of measures’ which reflect the values of Police Scotland.

The [Constable’s declaration](#), which police officers make on entering office, has a basis in law, and police officers in Scotland already have to abide by the statutory [Standards of Professional Behaviour](#).<sup>3</sup> These Standards are closely linked to matters of conduct, with misconduct defined in the Police Service of Scotland (Conduct) Regulations 2014 as ‘conduct which amounts to a breach of the Standards of Professional Behaviour (but does not, unless the context otherwise requires, include gross misconduct)’ and gross misconduct defined as ‘a breach of the Standards of Professional Behaviour so serious that demotion in rank or dismissal may be justified’.<sup>4</sup>

The code should not be seen as interchangeable with the Standards of Professional Behaviour but serve as guidance on behaviour for all those involved in policing in Scotland and allows individuals to consider whether their behaviour reflects positively on policing and if their actions are consistent with the code. This in turn influences culture and practice.

Putting the Code of Ethics on a statutory footing would involve creating a requirement for a code to exist and could potentially set out requirements for its preparation, publication and revision.

Further details can be found on pages 54-58 (paras. 3.11-3.28) of the [final report](#).

### Questions:

A. Do you agree that there should be a statutory requirement for Police Scotland to have a Code of Ethics?

- Yes
- No
- Don’t know

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<sup>2</sup> [Code of Ethics Police Scotland](#)

<sup>3</sup> [The Police Service of Scotland \(Conduct\) Regulations 2014](#), Schedule 1. The Standards of Professional Behaviours are the same for the [Police Service of Scotland \(Senior Officers\) \(Conduct\) Regulations 2013](#), except that this refers to ‘other senior officers’ rather than ‘other constables.’

<sup>4</sup> [Police Service of Scotland \(Conduct\) Regulations 2014](#), Reg. 2. The definition is the same for Senior officers in the [Police Service of Scotland \(Senior Officers\) \(Conduct\) Regulations 2013](#), Reg. 2 except that the reference to a possible demotion in rank is omitted.

B. Please explain your answer using the free text box below.

C. Should it be possible to amend and/or update any statutory Code of Ethics when required?

- Yes
- No
- Don't know

D. If Police Scotland is required by law to have a Code of Ethics, who should be responsible for preparing that Code of Ethics? Please select all that apply.

- Chief Constable of Police Scotland
- Scottish Police Authority (SPA)
- The Chief Constable and SPA jointly
- Other (please specify) \_\_\_\_\_
- Don't know

E. If Police Scotland is required by law to have a Code of Ethics, should whoever is responsible for its preparation (as per question 1.1D above) be required to consult on it?

- Yes
- No
- Don't know

Please specify how the responsible party should consult.

F. If there were a requirement for a Code of Ethics to be consulted upon who should be consulted?

G. If Police Scotland is required by law to have a Code of Ethics, should the body (or bodies) responsible for its preparation (as per question 1.1D above) be responsible for publishing that Code of Ethics?

- Yes
- No
- Don't know

H. Do you have any further comments you wish to make in relation to a Code of Ethics?

## 1.2 Duties of candour and co-operation

(10) *‘The Scottish Government should propose amendment of the Police and Fire Reform (Scotland) Act 2012 to the following effect: There should be an explicit duty of candour on the police to co-operate fully with all investigations into allegations against its officers’ (Recommendation 10, p. 456)*

(12) *‘The Scottish Government should consult on a statutory duty of co-operation to be included in both sets, or any future combined set, of conduct regulations as follows: “Constables have a duty to assist during investigations, inquiries and formal proceedings, participating openly, promptly and professionally in line with the expectations of a police officer when identified as a witness” (Recommendation 12, p. 456)*

(PR15) *‘Where a serious incident is being investigated by the PIRC, the investigators should also have a power, where it is necessary and proportionate, to compel police officers to attend within a reasonable timescale for interview.’ (Preliminary Recommendation 15, p. 474 of final report)*

The duties of constables in Scotland are set out in section 20 of the Police and Fire Reform (Scotland) Act 2012.<sup>5</sup> As referenced in [Section 1.1](#) of this consultation, that Act also includes the declaration that each constable makes on taking up office.<sup>6</sup> Taken together with Police Scotland’s Code of Ethics and the statutory Standards of Professional Behaviour (both also discussed in [Section 1.1](#)),<sup>7</sup> the Angiolini report considers that a statutory, ethical or procedural duty on that person to assist in the investigation of a serious incident and uphold rights under the [European Convention on Human Rights \(ECHR\)](#) is implied or expressed to some extent (p. 113, para. 7.106).

The Angiolini report also considers specific rights under the ECHR. Namely, Article 2 (Right to life - which requires parties to positively assist the state in conducting thorough and effective investigations), Article 3 (Prohibition of torture - inhuman or degrading treatment or punishment), Article 5 (Unlawful detention) and Article 6 (Right to a fair hearing including the right of a suspect to remain silent). In the report (p. 114, para. 7.109), it is stated that the fundamental right of a suspect to remain silent outweighs the obligation of the state to provide an effective investigation in the event of a death at the hands of the state or in an investigation of an alleged breach of Article 3 or Article 5. However, the report concludes that other than in those very restricted circumstances, any officer who is a witness to a serious incident should be under an obligation to assist.

It is for those reasons that, following consideration of a duty of candour for officers in Scotland in the execution of their duty (p. 114, para. 7.110) the report recommends that, to put beyond doubt that police officers will give every assistance after a serious incident, there should be an explicit duty of candour on Police Scotland to co-operate fully with all investigations into allegations against its officers and that this duty should also be reflected in the statutory Standards of Professional Behaviour (p. 435, para. 30.11) and in the wording of the Constable’s declaration (2012 Act, section 10).

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<sup>5</sup> [Police and Fire Reform \(Scotland\) Act 2012](#), section 20.

<sup>6</sup> [Police and Fire Reform \(Scotland\) Act 2012](#), section 10.

<sup>7</sup> [The Police Service of Scotland \(Conduct\) Regulations 2014](#), Schedule 1 (Standards of Professional Behaviour).

This duty could be applied to the organisation (Police Scotland) or to the individual (police officers).

Dame Elish also refers to the duty of candour in her 2017 report on Deaths and Serious Incidents in Police Custody in England and Wales,<sup>8</sup> where she states that ‘there should be a duty of candour for the police to answer all questions based on their honestly held recollection of events’ (p. 171, para. 13.10).

The report further recommends that where such an incident is being investigated by the Police Investigations and Review Commissioner (PIRC), the investigators should also have a power, where it is necessary and proportionate, to compel police officers to attend within a reasonable timescale for interview (p. 114, para. 7.108). The Police Investigations and Review Commissioner (PIRC) is an organisation led by a Commissioner (also often referred to as “the PIRC”) who is appointed by the Scottish Ministers.

Dame Elish also recommends (p. 451-452, paras. 30.85-30.88) that regulations should be amended to remove any doubt on whether former officers and staff are under the same duty to co-operate and assist as serving officers and staff; and that PIRC should have the same powers for COPFS-directed investigations in relation to co-operation assistance as they do for other investigations.<sup>9</sup>

The Angiolini report recommends that officers in Scotland should have a responsibility to give appropriate co-operation, but noted that “a duty to assist” might be simpler, clearer and more commonly understood, while also recommending that participation by officers should be “prompt” (p. 116, para. 7.118). The report also makes reference to the explicit duty of co-operation contained in the Police (Conduct) Regulations 2020,<sup>10</sup> which apply to officers in England and Wales (p. 115, para. 7.117). Those regulations make clear the duty of co-operation applies only to a police officer who has been identified as a witness.

Further details can be found on pages 113-117 (paras. 7.105-7.120) of the [final report](#).

### Questions:

A. To what extent do you agree or disagree that there should be an explicit statutory duty of candour on the police to co-operate fully with all investigations into allegations against its officers?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

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<sup>8</sup> [Report of the independent review of deaths and serious incidents in police custody](#)

<sup>9</sup> [The Police Investigations and Review Commissioner \(Investigations Procedure, Serious Incidents and Specified Weapons\) Regulations 2013](#), Reg. 5.

<sup>10</sup> ‘Police officers have a responsibility to give appropriate cooperation during investigations, inquiries and formal proceedings, participating openly and professionally in line with the expectations of a police officer when identified as a witness.’ [The Police \(Conduct\) Regulations 2020](#), Schedule 2 (Standards of Professional Behaviour).

B. If an explicit statutory duty of candour is to be placed on the police, should this be on the police as an organisation or on individual officers?

Police Scotland as an organisation

Individual officers

Both Police Scotland as an organisation and individual officers

Don't know

C. If an explicit statutory duty of candour is to be placed on the police (either as an organisation or on individual officers), should this relate specifically to incidents involving on duty officers only?

Yes

No

Don't know

D. If an explicit statutory duty of candour is to be placed on individual police officers, should that duty only apply when an officer's status as a witness has been confirmed?

Yes

No

Don't know

E. Should police officers have a statutory duty of co-operation to assist during investigations, inquiries and formal proceedings?

Yes

No

Don't know

F. If a statutory duty of co-operation should apply to police officers as per question 1.2E, should this also apply to former officers?

Yes

No

Don't know

G. If a statutory duty of co-operation should apply to police officers as per question 1.2E, should this also apply to police staff (or former police staff)?

Yes, for both police staff and former police staff

Yes, for current police staff but not former police staff

No

Don't know

H. Do you think any of the following should be required if officers have a statutory duty to co-operate during investigations, inquiries and formal proceedings?  
Please select all options that apply.

- Yes, officers should be required to participate openly
- Yes, officers should be required to participate promptly
- Other (please specify) \_\_\_\_\_
- No
- Don't know

I. If a statutory duty of co-operation is to be placed on the police, should that duty relate specifically to incidents involving on duty officers only?

- Yes
- No
- Don't know

J. Should the Police Investigations and Review Commissioner (PIRC) have a statutory power, where it is necessary and proportionate, to compel police officers to attend within a reasonable timescale for interview?

- Yes
- No
- Don't know

K. If the PIRC is to be provided with a power to compel police officers to attend within a reasonable timescale for interview, how should a reasonable timescale for interview be determined? Please select one option only.

- PIRC to determine timescales
- Timescales to be set in legislation
- Other (please specify) \_\_\_\_\_
- Don't know

L. In light of questions 1.2A-1.2K above, should the Scottish Government consider possible amendments to the constable's declaration to reflect an obligation to assist with investigations, where appropriate?

- Yes
- No
- Don't know

M. In light of questions 1.2A-1.2K above, should the Scottish Government consider possible amendments to the Standards of Professional Behaviour to reflect an obligation to assist with investigations, where appropriate?

- Yes
- No
- Don't know

N. Do you have any further comments you wish to make in relation to statutory duties of candour and co-operation?



### 1.3 Whistleblowing

*(20) 'The Police Investigations and Review Commissioner should be added to the list of prescribed persons in The Public Interest Disclosure (Prescribed Persons) Order 2014 in order that people working in Police Scotland and in the Scottish Police Authority are able to raise their concerns with an independent third-party police oversight organisation' (Recommendation 20, p. 458)*

The Angiolini report recommends that the PIRC is listed in statute as a prescribed person for whistleblowing. Officers and staff within Police Scotland and the Scottish Police Authority can currently disclose relevant concerns to prescribed bodies, for example to the Information Commissioner's Office (ICO) in relation to data breaches. However, this would provide officers and staff with an alternative option to highlight concerns regarding the conduct of a person serving with the police to an independent policing oversight body while providing protection through whistleblowing legislation.

While commending the efforts of Police Scotland in the steps they have in place for raising awareness and dealing with whistleblowing concerns (p. 166, para. 10.30), the recommendation has been made in recognition of the absence of the option to refer concerns about wrongdoing to an external and independent oversight body.

The Angiolini report notes the difference in arrangements between Scotland and in England and Wales (p. 165, para. 10.27), where the Independent Office for Police Conduct (IOPC) is a prescribed body for whistleblowing regarding conduct of a person serving with the police, and further provisions are contained within the Police and Crime Act 2017 to allow IOPC to investigate concerns raised.<sup>11</sup>

In order for PIRC to be added to the list of prescribed persons, an amendment of legislation that is reserved to the Westminster Parliament would be required.<sup>12</sup>

Amendment to the Police, Public Order and Criminal Justice (Scotland) Act 2006 would also need to be considered in order to ensure that PIRC would have the necessary powers to act on concerns received.<sup>13</sup>

Further details can be found in Chapter 10 on pages 158-167 (paras. 10.1-10.34) of the [final report](#).

#### **Questions:**

- A. Should people working in Police Scotland be able to raise their concerns about wrongdoing within that organisation (“whistleblowing concerns”) with an independent third-party police oversight organisation? Please select one option only.

Yes, with the PIRC

Yes, with another body (please specify) \_\_\_\_\_

No

Don't know

<sup>11</sup> [Policing and Crime Act 2017](#), chapter 3.

<sup>12</sup> [The Public Interest Disclosure \(Prescribed Persons\) Order 2014](#)

<sup>13</sup> [Police, Public Order and Criminal Justice \(Scotland\) Act 2006](#)

B. Should people working in the Scottish Police Authority be able to raise their concerns about wrong doing within that organisation (“whistleblowing concerns”) with an independent third-party police oversight organisation? Please select one option only.

Yes, with the PIRC

Yes, with another body (please specify) \_\_\_\_\_

No

Don't know

C. Should concerns raised about wrongdoing within policing in Scotland (“whistleblowing concerns”) be audited by an independent third-party police oversight organisation? Please select one option only.

Yes, with the PIRC

Yes, with another body (please specify) \_\_\_\_\_

No

Don't know

D. Do you have any further comments you wish to make in relation to an independent third-party police oversight organisation?

## 1.4 Legal aid in Article 2 cases

(74) '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' (Recommendation 74, p. 468)

The Angiolini report recommended that families should have access to free legal representation in Article 2 cases, where the death of a person has occurred during or following police contact. The Scottish Government and COPFS response to Dame Elish's final report noted that as part of the planning for a Legal Aid Bill, the Scottish Government will consider the issue around legal aid entitlement for relatives involved in Fatal Accident Inquiries.

Further details can be found on pages 394-399 (paras. 25.1-25.18) of the [final report](#).

Currently, civil legal aid is financially means-tested for Fatal Accident Inquiries. The other criteria for qualifying for civil legal aid in respect of Fatal Accident Inquiries are the so-called merits tests - *probable cause* and *reasonableness*. Different criteria apply in relation to FAIs which concern a death in police custody, but a means test is still applied.

For all cases, the *probable cause test* is met if the person is within the categories of people to be notified of a fatal accident, and the *reasonableness test* involves the Scottish Legal Aid Board (SLAB) assessing whether the client needs separate legal representation at the inquiry (given that FAIs are essentially fact-finding investigations and that it is the Crown Office and Procurator Fiscal Service's (COPFS') role to establish cause, not to represent individual parties). This includes looking at whether there are any areas where the client disputes COPFS' approach to the inquiry or evidence or other areas of concern, if there are areas of inquiry that the client wants to pursue that will not be addressed by COPFS, and whether these different areas of inquiry are appropriate and reasonable to be taken forward. In other cases, the client may require legal representation to protect themselves against self-incrimination. In the case of FAIs involving a death in police custody, probable cause is already established if the client is a relative of the person who died or a potential defendant. For the reasonableness test, SLAB already considers that 'It is appropriate for relatives [in FAI cases involving a death in prison or police custody] to have their own independent representation at the inquiry to determine the facts' and will look favourably on an application by such a relative.<sup>14</sup>

Since 2012, approximately 83% of all applications for legal aid to participate in an FAI have been granted.

As was set out in a previous Scottish Government [consultation on Legal Aid Reform](#), there is a balance to be struck between supporting more equitable access to engagement in the FAI process and ensuring that there is no negative impact on that process as a result. That consultation noted that a Fatal Accident Inquiry is 'intended to be a non-adversarial consideration of the facts that led to the fatal accident or

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<sup>14</sup> [Fatal Accident Inquiries - Scottish Legal Aid Board](#)

accidents', and as such any change that would increase the number of individual participants and legal representations may change the nature of FAIs. Allowing family or common interest groups to be considered collectively for legal aid funding where appropriate, as opposed to individually, would allow them to have their views represented while mitigating the potential impacts of each individual being represented separately throughout the hearing.

**Questions:**

A. Should legal aid be available to all families of people who die in police custody or following police contact, regardless of their ability to pay?

- Yes
- No
- Don't know

B. Are there any other factors that you think should be taken into account when assessing applications for civil legal aid in Article 2 cases?

C. Should there be an opportunity in Article 2 cases, where appropriate, for family and common interest groups to receive civil legal aid funding on a group basis?

- Yes
- No
- Don't know

D. Do you have any further comments you wish to make in relation to the provision of civil legal aid to families in Article 2 cases?

## 1.5 Death of a serving police officer (investigation)

*'The Review received evidence that [...] sub-section [The Police, Public Order and Criminal Justice (Scotland) Act 2006, section 33A(b)(ii) (Investigation of deaths)] is ambiguous in that it is not clear whether the provision encompasses the death of a serving police officer' (Misc. recommendation, p. 437)*

The Angiolini report raises an issue of ambiguity in the current law which could be addressed alongside other amendments proposed to the relevant legislation as set out in this consultation. While the Procurator Fiscal is required to investigate the deaths of those who die in the course of their occupation, and the PIRC is to investigate 'on behalf of the relevant Procurator Fiscal, the circumstances of any death involving a person serving with the police',<sup>15</sup> the report notes that it is not clear whether this includes the investigation of the death of a serving police officer.

### Questions:

A. Should the existing law be clarified regarding PIRC's powers to investigate an incident involving the death of a serving police officer?

- Yes
- No
- Don't know

B. Please explain your answer using the free text box below.

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<sup>15</sup> [Police, Public Order and Criminal Justice \(Scotland\) Act 2006](#), section 33A, where the Procurator Fiscal is required to investigate the death under the [Inquiries into Fatal Accidents and Sudden Deaths etc. \(Scotland\) Act 2016](#), section 2.

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

*(8) ‘The Scottish Government should amend the relevant provisions of the Police, Public Order and Criminal Justice (Scotland) Act 2006 at the earliest opportunity to put beyond doubt the definition of a “person serving with the police”’  
(Recommendation 8, p. 456)*

Both the preliminary and final Angiolini reports highlight the uncertainty caused by the phrase “person serving with the police” not being clearly defined in legislation. While there is a definition of a person serving with the police in relation to the Police Service of Scotland,<sup>16</sup> the Angiolini report concluded that the use of the phrase “person serving with the police” has caused ambiguity, particularly in relation to determining if a person’s actions can be investigated depending on when an incident took place and under what circumstances.

The report specifically notes that as a result of the current definition of “person serving with the police” being unclear it is ambiguous whether, and under what circumstances, PIRC can investigate the actions or omissions of; firstly, officers who have retired or resigned from the service since the time of the act or omission; and, secondly, officers who were off duty at the time of the act or omission.

The Angiolini report recommends putting beyond doubt the definition of a “person serving with the police” to be clear that it includes a person who, at the time of an act or omission, was serving with the police.

Further details can be found on pages 121-122 (paras. 7.137-7.142) of the [final report](#).

### Questions:

A. Should the term “person serving with the police” be more clearly defined?

- Yes
- No
- Don’t know

B. Should the definition include clarity on PIRC powers to investigate the following people? Please select all options that apply.

- Officers who have since retired from the service
- Officers who have since resigned from the service
- Officers who were off duty at the time of the incident (“act or omission”)
- Other (please specify) \_\_\_\_\_

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<sup>16</sup> [Police, Public Order and Criminal Justice \(Scotland\) Act 2006](#), section 47.

C. Do you have any further comments you wish to make in relation to clarifying the definition of “person serving with the police”?

*(PR30) ‘The Scottish Government should consider the case for amending the legislation to put beyond doubt the definition of a member of the public who may make a relevant complaint’ (Preliminary Recommendation 30, p. 477 of final report)*

The [preliminary Angiolini report](#) calls on the Scottish Government to consider the case for putting beyond doubt the definition of a member of the public who may make a relevant complaint, in particular to clarify whether a police officer can make such a complaint (preliminary report p. 112-113, paras. 338-342) . While there is a definition of a “relevant complaint”,<sup>17</sup> there is no definition of “member of the public” relating to those who can make a complaint. The Angiolini report concludes that defining this term would give clarity to officers and all involved in the police complaints process on who can make a complaint.

Further details can be found on pages 230-231 (paras. 14.91-14.94) of the [final report](#).

**Questions:**

D. Should the term “member of the public” be more clearly defined, to make clear who may make a relevant complaint?

- Yes
- No
- Don't know

E. If “member of the public” is to be defined, should any definition make clear that it includes a serving police officer who is off duty at the time of the incident?

- Yes
- No
- Don't know

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<sup>17</sup> [Police, Public Order and Criminal Justice \(Scotland\) Act 2006](#), section 34.

F. Do you have any further comments in relation to defining a “member of the public”?



## **Section 2: Governance, Jurisdiction and Powers**

As set out in [Section 1.2](#) of this consultation, the Police Investigations and Review Commissioner (PIRC) was established in 2013 as a result of changes made through the Police and Fire Reform (Scotland) Act 2012 (“the 2012 Act”). Previously known as the Police Complaints Commissioner for Scotland, the 2012 Act renamed and extended the powers of the (then) Police Complaints Commissioner to include a number of investigative powers whilst maintaining the complaint handling review functions they had undertaken since 2007. The organisation is led by a single Commissioner, often referred to as “the PIRC”. The functions of the PIRC as set out in law are to:<sup>18</sup>

- secure the maintenance by the Scottish Police Authority (SPA) and the Chief Constable of suitable arrangements for the handling of relevant complaints
- examine the handling of relevant complaints and the reconsideration of such complaints
- investigate, where directed to do so by the appropriate prosecutor, any circumstances in which there is an indication that a person serving with the police may have committed a crime, or the circumstances of any death involving a person serving with the police which the Procurator Fiscal is required to investigate under the [Inquiries into Fatal Accidents and Sudden Deaths etc. \(Scotland\) Act 2016](#)
- determine whether to investigate, where requested to do so by the SPA or the Chief Constable, certain serious incidents involving the police
- investigate other matters relating to the SPA or the police service where the Commissioner considers that it would be in the public interest to do so

The PIRC also investigates allegations of misconduct by senior officers who hold the rank of Assistant Chief Constable and above.

The Angiolini report recommends a significant increase in the responsibilities of the PIRC through new powers and the strengthening of PIRC’s current accountability and governance structures. This section seeks views on those proposed changes.

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<sup>18</sup> [Police and Fire Reform \(Scotland\) Act 2012](#), section 62, and [Police, Public Order and Criminal Justice \(Scotland\) Act 2006](#), section 33.

## 2.1 PIRC governance

*(34) 'The 2006 Act should be amended to re-designate PIRC as a Commission comprising one Police Investigations and Review Commissioner and two Deputy Commissioners, to create a statutory Board and to provide for the necessary appointment arrangements. Given the sensitivity of the office of the Commissioner, the role should be strengthened by the appointment of two Deputies with relevant legal expertise or other relevant experience who are not former senior police officers' (Recommendation 34, p. 461)*

The Police Investigations and Review Commissioner is an independent office holder, appointed by the Scottish Ministers. The terms and conditions of employment are set by the Scottish Government. The current law provides for a single Commissioner, with the support of an office, appointed by the Commissioner,<sup>19</sup> to carry out the functions, including the powers and duties of the PIRC.<sup>20</sup>

PIRC does not have a statutory board through which it is governed or held to account. PIRC's administrative governance arrangements are set out in the publicly available [Governance and Accountability Framework](#) document. Since the publication of the Angiolini report, PIRC has, through a fair and transparent process and in line with the Scottish Public Finance Manual, appointed a Chair and 5 non-executive members to the Audit and Accountability Committee. The PIRC's Audit and Accountability Committee provides independent oversight and scrutiny of finances as well as supporting risk management and governance; approves the appointment of internal auditors; and reviews the PIRC's annual accounts, internal audit reports and key performance indicators.

The Angiolini report recommends that PIRC be re-designated as a Commission comprising one Commissioner and two Deputy Commissioners. Given the sensitivity of the role of the Commissioner, the report recommends that the appointed Deputies should have relevant legal expertise or other relevant experience and are not former senior police officers.

The report also recommends that the PIRC should be a Royal appointment and accountability should transfer from the Scottish Ministers to the Scottish Parliament, through the Scottish Parliamentary Corporate Body.<sup>21</sup> Under current legislation, the Scottish Ministers are ultimately accountable to the Scottish Parliament for the activities of the PIRC and its use of resources. While the Commissioner is individually accountable to the Scottish Ministers at a strategic level, PIRC can also be called upon to provide evidence to the Scottish Parliament through the relevant Parliamentary Committee(s).

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<sup>19</sup> [Schedule 4 of the Police, Public Order and Criminal Justice \(Scotland\) Act](#) states that the Commissioner may appoint such staff as the Commissioner considers appropriate and members of staff are to be appointed on such terms and conditions as the Commissioner determines.

<sup>20</sup> [Section 33 and 33A](#) and [Schedule 4](#) of the Police, Public Order and Criminal Justice (Scotland) Act 2006, as amended by the Police and Fire Reform (Scotland) Act 2012 sets out the current functions and governance arrangements for the Police Investigations and Review Commissioner (PIRC).

<sup>21</sup> [Police, Public Order and Criminal Justice \(Scotland\) Act 2006](#), Schedule 4, para. 2 precludes former police officers of any rank from being appointed to the office of Commissioner.

The PIRC is separately accountable to the Lord Advocate regarding investigations of deaths involving the police and allegations of criminality.

The Angiolini report recommends that legislation should be amended to create a statutory Board. The role of the members would be to monitor the performance (including financial performance) of the organisation, provide strategic direction and offer supportive advice, challenge and expertise to the PIRC. However, in order to ensure the independence of PIRC, the Board would not have any remit or responsibilities regarding operational matters. The Chair would also be responsible for reviewing the performance of the Commissioner.

To enhance and strengthen the current structure of PIRC the Scottish Government sees merit in the addition of two Deputy Commissioners and in establishing a statutory Board. It will however be necessary to consider where responsibility for the appointment of both the Deputy Commissioners and the Board's members should lie and consider whether legislation will be required.

Further details can be found on pages 208-212 (paras. 14.12-14.27) of the [final report](#).

**Questions:**

A. Should PIRC should be re-designated as a Commission?

- Yes
- No
- Don't know

B. If PIRC is re-designated as a Commission, do you agree that two Deputy Commissioners should be appointed?

- Yes
- No
- Don't know

C. Please explain your answers using the free text box below.

D. If Deputy Commissioners are to be appointed, **should they be required to have any particular expertise?** For example, should a Deputy be required to have legal knowledge? Please provide details using the free text box below.

E. If Deputy Commissioners are to be appointed, **should any categories of person be precluded from being appointable?** For example, do you think former senior police officers should be able to apply? Please provide details using the free text box below.

F. If Deputy Commissioners are to be appointed (as per question 2.1B), who in your view should be responsible for appointing them? Please provide details using the free text box below.

G. Do you agree that a statutory Board should be created?

- Yes
- No
- Don't know

H. Please explain your answer using the free text box below.

*(35) ‘The Police Investigations and Review Commissioner should be appointed by Her Majesty The Queen on the nomination of the Scottish Parliament and should be made accountable to the Scottish Parliament through the Scottish Parliamentary Corporate Body and the committees of the Parliament, but not for criminal matters, for which the Commissioner is accountable to the Lord Advocate, and not for operational matters or decisions in which she acts independently. This in accordance with the 2009 opinion of the Council of Europe’s Commissioner for Human Rights that each Police Ombudsman or Police Complaints Commissioner should be appointed by and answerable to a legislative assembly or a committee of elected representatives that does not have express responsibilities for the delivery of policing services’ (Recommendation 35, p. 461)*

As noted in relation to [Recommendation 34](#), currently the PIRC is an independent officer holder appointed by the Scottish Ministers. As such, the terms and conditions of employment are set by the Scottish Government. The current law provides for a single Commissioner, with the support of staff, to undertake the functions of the PIRC.

The Scottish Parliament is currently able to question the PIRC as a devolved public office holder should it consider it necessary to do so.<sup>22</sup> Neither the Scottish Ministers nor the Parliament have the power to direct PIRC – only the Lord Advocate can do that. Responsibility for day-to-day operational matters or decisions rests with the Commissioner who acts independently.

The Angiolini report noted that the operational independence of the body which investigates and reviews the police is of paramount importance. To further enhance PIRC’s independence; address accountability; and remove the involvement of the Scottish Ministers in the appointment of the Commissioner, this recommendation seeks legislative change whereby the Commissioner would be appointed by Her Majesty the Queen on the nomination of the Scottish Parliament.

The recommendation also seeks to make the organisation accountable, in part, to the Scottish Parliament’s Corporate Body (SPCB). PIRC falling under the auspices of the SPCB would be in line with a number of other office holders such as the Scottish Biometrics Commissioner and Scottish Public Services Ombudsman and would separate it from the policy making responsibilities of the Scottish Government around complaints and Police Scotland. Falling under the auspices of the SPCB

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<sup>22</sup> [Scotland Act 1998](#), section 23.

would also mean that PIRC would be directly accountable to Parliament through the SPCB who would have budget setting responsibility. Currently PIRC is accountable to the Scottish Ministers for certain matters which are set out in the [Governance and Accountability Framework document](#). The Scottish Ministers are not responsible for criminal matters, which are for PIRC and the Lord Advocate.

The Angiolini report highlights that implementation of this recommendation would be in accordance with the 2009 opinion of the Council of Europe's Commissioner for Human Rights that 'each Police Ombudsman or Police Complaints Commissioner should be appointed by and answerable to a legislative assembly or a committee of elected representatives that does not have express responsibilities for the delivery of policing services'.<sup>23</sup> The report is clear that the intent of the recommendation is to ensure strengthened independence as this is critical to the effectiveness of the execution of the PIRC's functions and that the public reporting of their work is critical to transparency and accountability.

Where the Scottish Ministers currently have responsibility to appoint senior independent office holders, Chairs and Board Members, the appointment process ensures fair and transparent practices are followed with appropriate auditable measures in place. Currently this means that an independently appointed panel recruits the position of the PIRC and makes its recommendation to the Scottish Ministers for their agreement. However, as is the case of the appointment of HMICS, the recruitment is again conducted by an independent panel but with an appointment by Her Majesty the Queen as recommended by Scottish Ministers. Whilst the Scottish Government sees merit in the PIRC being appointed by Her Majesty the Queen, it also believes that the current appointment process ensures there are appropriate measures in place to ensure the appointment of PIRC is an independent process.

Further details can be found on pages 212-215 (paras. 14.28-14.43) of the [final report](#).

### Questions:

- I. How do you think that the Police Investigations and Review Commissioner (PIRC) should be appointed? Please select one option only.

Remain a Scottish Ministerial appointment

Or the appointment be made on nomination of the Scottish Parliament

Don't know

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<sup>23</sup> [Opinion of the Commissioner for Human Rights Concerning Independent and Effective Determination of Complaints Against the Police](#), p. 8, para. 36. Quoted on page 213, para. 14.28 of the final report.

J. Please explain your answer using the free text box below.

K. Do you agree that PIRC should be appointed by Her Majesty the Queen?

- Yes
- No
- Don't know

L. Please explain your answer using the free text box below.

M. Where do you think that accountability arrangements for PIRC should sit? Please select one option only.

- Remain with the Scottish Ministers
- Transfer to the Scottish Parliament
- Don't know

N. Please explain your answer using the free text box below.

## 2.2 Increased investigative and audit powers for PIRC

*(13) ‘The Scottish Government should consider the case for giving the PIRC a specific legislative power that would enable staff to access the Centurion database from its own offices so that contemporaneous audit is possible. Providing a basis in law for accessing any information relevant to the PIRC’s statutory functions should ensure compatibility with GDPR and any other relevant data protection legislation’ (Recommendation 13, p. 457)*

As part of their statutory responsibilities, PIRC is responsible for reviewing how Police Scotland (and other policing bodies) have dealt with a complaint. PIRC is also responsible for undertaking audits to ensure suitable arrangements are in place, including the consistency and correctness of the approach taken throughout the decision-making process.

Both the preliminary and final Angiolini reports identify the importance of complaints being subject to regular monitoring through internal and meaningful audits as well as the critical role of external audit. Police Scotland maintains a complaints and conduct database, currently Centurion, in which both complaints against the police and conduct issues are recorded. Due to the current system retaining information on both conduct and complaints which cannot be separated, Police Scotland had data protection concerns about providing PIRC with remote access to the whole database. The SPA has read-only access to Centurion for audit purposes and PIRC have been in discussion with Police Scotland to enable them to have the same remote access as the SPA. In the meantime, PIRC have access to this database under supervision at a designated police office.

Whilst the Angiolini report acknowledges data protection concerns must be addressed, Dame Elish believes by providing a basis in law for PIRC to access information relevant to their statutory functions should ensure compatibility with GDPR and any other relevant data protection legislation. The report therefore proposes giving PIRC a specific legislative power enabling them to access this database remotely at their own office or place of work, to enable PIRC to carry out their statutory function around contemporaneous audits of complaints and to help facilitate early awareness of criminal allegations.

Further details can be found on page 94 (paras. 7.48-7.50) and pages 235-237 (paras. 14.108-14.112) of the [final report](#).

### **Questions:**

A. Should PIRC be able to access the Police Scotland complaints and conduct database remotely?

- Yes
- No
- Don't know



B. Please explain your answer using the free text box below.

C. If PIRC is to have access to Police Scotland's complaints and conduct database, are there any safeguards or limits which should be put in place? Please provide details using the free text box below.

D. Do you have any further comments you wish to make in relation to PIRC being given access to the complaints and conduct database?

*(37) 'The PIRC should be given a statutory power to call in an investigation of a complaint if there is sufficient evidence that Police Scotland has not dealt with a complaint properly, where the complainer provides compelling evidence of a failure on the part of Police Scotland and where the Commissioner assesses that it would be in the public interest to carry out an independent re-investigation'*  
*(Recommendation 37, p. 461)*

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

In reviewing the complaint, PIRC will look at the evidence used by the police to assess the complaint and form a view on whether they handled the complaint to a reasonable standard. In doing so, the PIRC can make recommendations for

improvements, issue learning points and through a statutory power, issue a reconsideration direction which in the case of the latter requires the policing body look at the complaint again in full. A reconsideration direction would require the policing body to appoint a person with no prior involvement to reconsider the complaint. The direction may also be subject to supervision of the PIRC, depending on the seriousness of the case and public interest considerations. Ultimately, the decision on whether a complaint is upheld lies with the policing body.

The Angiolini report recommends that the PIRC should have the power to take over an investigation of a complaint if there is sufficient evidence that Police Scotland has not dealt with the complaint properly but that this should only happen in the most serious non-criminal cases providing there is compelling evidence. The report also recommends that in these circumstances PIRC should be able to call in an investigation of a complaint at any point, including after the conclusion of the police process.

Further details can be found on pages 226-228 (paras. 14.78-14.84) of the [final report](#).

**Questions:**

E. Do you agree that the PIRC requires this additional power to call in an investigation of a complaint?

- Yes
- No
- Don't know

F. Should the PIRC be able to investigate a complaint against Police Scotland in certain circumstances? Please select all options that apply.

- Yes, if there is sufficient evidence that Police Scotland has not dealt with a complaint properly
- Yes, if the complainer provides compelling evidence of a failure on the part of Police Scotland
- Yes, if the Commissioner assesses that it would be in the public interest to carry out an independent re-investigation
- Yes, other (please specify) \_\_\_\_\_
- No
- Don't know

G. Do you have any further comments you wish to make in relation to the possibility of the PIRC being able to investigate complaints against Police Scotland?

(38) *'The PIRC should have an additional power, similar to the PONI's, to investigate a current practice or policy of Police Scotland if she believes that it would be in the public interest to do so; this power should be used to focus on broad themes or trends, or practices which might be of particular public concern' (Recommendation 38, p. 462)*

The Angiolini report recommends that the PIRC should be given an additional power to enable them to investigate a current practice or policy of Police Scotland if they believe that it would be in the public interest to do so. The additional power being used to focus on broad themes, trends or practices which might be of particular public concern. PIRC can currently investigate any relevant policing matters relating to the SPA, Police Scotland or any other policing body active in Scotland where the Commissioner considers that it would be in the public interest to do so.<sup>24</sup>

The Angiolini report concludes that by specifically putting this power into legislation it will give PIRC an additional platform to consider investigating current practice or policies of Police Scotland which might be in the public interest.

HM Inspectorate of Constabulary for Scotland (HMICS) also has wide ranging powers to look at the "state, effectiveness and efficiency" of both Police Scotland and the SPA under the 2012 Act.<sup>25</sup> The 2012 Act also places a duty on HMICS and PIRC to co-operate and co-ordinate activity with a view to improving how they carry out their respective functions as well as avoiding duplication of effort and to minimise the burden of scrutiny on Police Scotland and the SPA. PIRC currently shares relevant information such as themes, trends or issues of concern with HMICS for possible inspection or review.<sup>26</sup>

Further details can be found on pages 228-229 (paras. 14.85-14.87) of the [final report](#).

#### Questions:

H. Noting HMICS' role, should the PIRC be able to investigate a current **practice** of Police Scotland if the Commissioner believes it would be in the public interest?

- Yes
- No
- Don't know

I. Noting HMICS' role, should the PIRC be able to investigate a current **policy** of Police Scotland if the Commissioner believes it would be in the public interest?

- Yes
- No
- Don't know

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<sup>24</sup> [Police, Public Order and Criminal Justice \(Scotland\) Act 2006](#), section 41C.

<sup>25</sup> [Police and Fire Reform \(Scotland\) Act 2012](#), section 74.

<sup>26</sup> HMICS and PIRC have a Memorandum of Understanding (MoU) which can be accessed on HMICS' website: [HMICS | HMICS & The Police Investigations & Review Commissioner \(PIRC\) Memorandum of Understanding](#).

J. If the PIRC is to be given a new power enabling them to investigate current practices or policies of Police Scotland, should the power to investigate be restricted or limited in any way?

- Yes
- No
- Don't know

K. Do you have any further comments in relation Questions 2.2A-H on increased investigative and audit powers for PIRC?

*(PR22) 'The Commissioner, or potentially a Deputy Commissioner, should be vested with a statutory power to make recommendations in addition to the existing powers to direct reconsideration of complaints. The corollary to that is that there should be a statutory duty, subject to a public interest test, on the Chief Constable to comply with recommendations unless there are sound overriding operational or practical reasons for not complying with a PIRC recommendation and an obligation on PSD to report progress back to the PIRC. Those statutory arrangements should be supported by agreement between the PIRC and Police Scotland on how the PIRC will be kept advised of progress' (Preliminary Recommendation 22, final report pp. 475-6)*

One of the statutory functions of the PIRC is to carry out complaint handling reviews of non-criminal complaints, once the policing body involved has concluded its investigation into the complaint.<sup>27</sup> Following a complaint handling review, and if appropriate, PIRC makes recommendations to Police Scotland. Currently there is no statutory requirement to ensure policing bodies implement these recommendations.

Both the preliminary and final Angiolini reports recommend that the PIRC should have a statutory power to make recommendations, similar to the existing powers for reconsideration directions, and that there should be a corresponding duty on the Chief Constable to comply with those recommendations unless there are sound overriding operational or practical reasons for not doing so. The statutory duty would also ensure PIRC were informed of progress on the recommendations they had made. The Angiolini reports suggest the statutory duty should apply to PIRC recommendations from audits in addition to complaint handling reviews.

Further details can be found on page 229 (paras. 14.88-14.89) of the [final report](#) and pages 73-74 (paras. 214-221) of the [preliminary report](#).

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<sup>27</sup> [Police, Public Order and Criminal Justice \(Scotland\) Act](#), section 35 details PIRC's role in relation to a complaint handling review.

**Questions:**

L. Should recommendations from the PIRC be put on a statutory footing similar to current reconsideration directions following a review and/or audit of police complaints handling?

- Yes, following a review
- Yes, following an audit
- Yes, following both a review and an audit
- No
- Don't know

M. Following a complaint handling review or audit of complaint handling reviews, should Police Scotland or other policing bodies be required to act on those recommendations if it is in the public interest?

- Yes, with no restrictions
- Yes, unless there is an overriding operational or practical reason not to
- Yes, except for another reason (please specify) \_\_\_\_\_
- No
- Don't know

N. Should Police Scotland have to respond to recommendations made by the PIRC following a review of police complaints handling?

- Yes
- No
- Don't know

O. Should Police Scotland have to respond to recommendations made by the PIRC following an audit of police complaints handling?

- Yes
- No
- Don't know

P. Do you have any further comments you wish to make in relation to the PIRC making recommendations following a complaint handling review or audit of police complaints handling; or in relation to Police Scotland or other policing bodies acting on any such recommendations?

## 2.3 Cross-jurisdictional issues

*(81) ‘The Scottish Government should agree with the UK Government and the Northern Ireland Executive how best to amend the primary legislation to give the PIRC the power, in clearly defined circumstances, to investigate the actions of officers from PSNI and English and Welsh police forces or services, and the other three reserved police forces, when they are undertaking a policing function in Scotland; and explore with the other administrations how reciprocal powers could be put in place for the IOPC and the PONI in respect of the actions of Police Scotland officers when they are operating in England, Wales or Northern Ireland’  
(Recommendation 81, pp. 469-70)*

PIRC can only investigate a “person serving with the police”, which largely means a constable of Police Scotland, a member of Police Scotland staff or a member of the SPA staff ([Section 1.6](#) of this document discusses this definition in further detail), but can enter into agreements with the British Transport Police, the Civil Nuclear Constabulary, the Ministry of Defence Police, the National Crime Agency, HM Revenue and Customs and the relevant UK Government Secretary of State (in relation to certain UK borders, customs and immigration enforcement functions) to investigate serious incidents involving their officers, where it is appropriate to do so. The Angiolini report notes that PIRC do not have the power to investigate officers from the Police Service of Northern Ireland (PSNI) and English and Welsh forces or services if they are involved in serious incidents when they are undertaking a policing function in Scotland.

PIRC can also, where directed by a prosecutor, investigate any circumstances where a person serving with the police may have committed an offence. This includes where officers of British Transport Police, the Civil Nuclear Constabulary, the Ministry of Defence Police may have committed an offence in Scotland, or where – in certain circumstances – HM Revenue and Customs officers, customs officials or immigration officers may have committed an offence in Scotland.

The report therefore recommends that this gap should be addressed (p. 428, para. 29.13). Further, the Angiolini report recommends the Scottish Government should agree with the UK Government and the Northern Ireland Executive not only how this gap should be addressed but also what reciprocal powers should be put in place for the Independent Office for Police Conduct (IOPC) and the Police Ombudsman for Northern Ireland (PONI) in respect of the actions of Police Scotland officers when they are operating in England, Wales or Northern Ireland (p. 430, para. 29.18).

Since the publication of the final Angiolini report, a cross-border Memorandum of Understanding (MoU) has been developed by Police Scotland, COPFS, PIRC, the National Police Chiefs Council and IOPC in order to work around this issue, however this is not a permanent solution. The MoU covers three main areas where cross-border collaboration in investigations would be necessary: serious incidents (known as “DSI”, Deaths and Serious Incidents, in some jurisdictions); allegations of criminality; and the use or discharge of firearms.

The Scottish Government has engaged with the UK Government and Northern Ireland Executive on cross-jurisdictional matters, and it is agreed that steps should be taken to ensure the actions of police officers from the rest of the UK acting outside of their jurisdictions (whether this is officers from other forces in Scotland, or

Police Scotland officers elsewhere in the UK), can be investigated were necessary or appropriate.

Further details can be found in Chapter 29 on pages 426-431 (paras. 29.1-29.19) of the [final report](#).

**Questions:**

- A. If you have views to share in relation to cross-jurisdiction investigations, please outline them in the free text box below.

### **Section 3: Conduct and Standards**

The Scottish Government welcomed Dame Elish Angiolini's suite of recommendations on police conduct. Her recommendations relate to a range of issues including conduct legislation and senior officer (constables holding the rank of Assistant Chief Constable, Deputy Chief Constable or Chief Constable) misconduct allegations. The final Angiolini report considered some of the tensions inherent in increasing openness and transparency while also ensuring that the misconduct system protects witnesses and the rights of the officers who are the subject of proceedings.

In considering any changes to the complaints and conduct process it is important to understand the impact on, and experiences of, police officers and members of the public, including victims and witnesses. Concerns have been raised that the current system does not take into full account the experience of victims and witnesses and how communication, language and approach can all have a significant impact, particularly on those who have been affected when things go wrong. While this section is focused on changes that are likely to require a legislative solution, Dame Elish made further recommendations which are unlikely to require legislation, intended to reduce barriers, increase accessibility and improve the overall experience of all those involved with the system, the majority of which are being taken forward by partners. The Scottish Government regularly reports on progress via its Thematic Progress Reports, the second of which was published in [December 2021](#).

This section seeks views on proposals to meet the Angiolini report's recommendations on conduct and standards, either as written or with alternative or additional options to achieve the aims of a more open, transparent and fair process. Implementing these recommendations could involve changes allowing gross misconduct hearings to be held in public and/or to be allowed to continue even after an officer leaves the service through resignation or retirement. There are also proposals regarding the process for dealing with allegations of senior officer misconduct. A number of the options set out here relate to efficiency and effectiveness, including clarifying whether joint misconduct hearings can be held, how allegations against probationary police officers are dealt with and whether misconduct hearings can be accelerated where, for example, an officer admits to behaviour amounting to gross misconduct or there is assessed to be incontrovertible evidence. Additionally, there are a number of areas where the report touched on de-escalation, where minor or performance issues should be treated as such, as opposed to considering minor issues as automatically requiring the use of conduct processes. As well as setting out the Angiolini report's recommendations for statutory guidance on a Reflective Practice Review Process, this section sets out an additional proposal to review existing conduct regulations to bring them in line with current Advisory, Conciliation and Arbitration Service (Acas) statutory code of practice on discipline and grievance procedures.

In addition to the recommendations made in the report, Dame Elish highlighted a number of areas where, in her view, the regulations should be further reviewed, amended or clarified when considering any future changes. These include combining the senior and non-senior regulations into one set of regulations; amending the notice given to subject officers in advance of a misconduct hearing; and ensuring there is no gaps in provisions in relation to conduct occurring before Police Scotland came into being in 2013. Dame Elish also suggests that the regulations are



amended to give clarity on situations where a senior officer is subject to misconduct allegations for an act or omission from a time when they were a non-senior officer.

### 3.1 **Misconduct and gross misconduct proceedings**

*(52) ‘Police officer gross misconduct hearings should be held in public. The Chair should have discretion to restrict attendance as appropriate but the aim should be to ensure that as much of a hearing is held in public as possible’ (Recommendation 52, p. 464)*

*(53) ‘In addition to the existing protections for witnesses, the Chair of the gross misconduct hearing should consider whether the evidence of any vulnerable witnesses should be heard in private and they should also be under an obligation to consider any other reasonable adjustments that they believe to be necessary to ensure the protection of such vulnerable witnesses. This may include the officer who is the subject of the proceedings’ (Recommendation 53, pp. 464-5)*

*(58) ‘The outcome of gross misconduct proceedings should be made public. The Chair’s report, subject to any necessary redactions, should be published by the Scottish Police Authority on its website for a period of no less than 28 days’ (Recommendation 58, p. 465)*

The Angiolini report recommended a number of changes to gross misconduct procedures, where an officer has been accused of conduct that, if proven, amounts to a breach of the statutory Standards of Professional Behaviour so severe that it would justify demotion in rank or dismissal for non-senior officers, or dismissal for senior officers. For non-senior officers, it is the designated Deputy Chief Constable who assesses whether, if proven, the alleged conduct would amount to misconduct or gross misconduct.<sup>28</sup> In the case of allegations against senior officers, it is the SPA who would make that assessment,<sup>29</sup> although it should be noted that the transfer of responsibility for this from SPA to the PIRC is discussed later in this paper at [Section 3.5](#). If the assessment determines that the conduct, if proven, could amount to gross misconduct, then there will be a misconduct investigation. A misconduct report is produced by an Investigator. If, for non-senior officers, the Deputy Chief Constable, or for Senior Officers, the SPA, decides that there is evidence that there could be gross misconduct, then a misconduct hearing is set up to hear the evidence.

Gross misconduct hearings are currently held in private in Scotland (and in Northern Ireland). The Angiolini report proposed that they should be open to the public and the media in Scotland, as is currently the case in England and Wales, with restrictions to attendance subject to the discretion of the Chair. A further recommendation suggests that the outcome of the proceedings – whether an officer was found to have committed gross misconduct or not – would be made public. It is also proposed that the Chair of the gross misconduct proceedings be given additional powers to consider protections for vulnerable witnesses, including the officers themselves. For example, this could include reporting restrictions; the prevention of disclosure of key documents for the protection and welfare of witnesses;<sup>30</sup> the possibility of testifying

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<sup>28</sup> [The Police Service of Scotland \(Conduct\) Regulations 2014](#), Reg. 10.

<sup>29</sup> [The Police Service of Scotland \(Senior Officers\) \(Conduct\) Regulations 2013](#), Reg. 8.

<sup>30</sup> [The Police Service of Scotland \(Conduct\) Regulations 2014](#), Reg. 15. To note that the designated Deputy Chief Constable already has the power to prevent the disclosure of key documents ‘for the

via video-link or from behind a screen if attending the hearing in person. It should be noted that complainers who are a member of the public are made aware of the outcome of proceedings (though this may not always be the case if the complainer is another officer) and that the hearing Chair does already have the discretion to consider and agree requests for complainers to attend (p. 323, para. 19.122). The hearing Chair can allow other people to attend the hearing, with the agreement of the constable involved.

In her 2017 review into [Deaths and Serious Incidents in Police Custody](#) in England and Wales, which is referred to in the final report, Dame Elish noted that the official definitions of misconduct and gross misconduct were ‘a breach of professional standards’ and ‘a breach of professional standards so serious that dismissal (being sacked) would be justified’ respectively,<sup>31</sup> as set out at the time in the Policing and Crime Bill (since enacted as the Policing and Crime Act 2017, where these definitions are not included). Similarly, in Scottish regulations, misconduct is currently defined as ‘conduct which amounts to a breach of the Standards of Professional Behaviour’ and gross misconduct as ‘a breach of the Standards of Professional Behaviour so serious that demotion in rank or dismissal may be justified’.<sup>32</sup> While Dame Elish recognised that a degree of discretion would always be required on the part of investigators to determine the level of culpability based on the facts and circumstances of each unique case (2017 report, p. 174, para. 13.31), she also recommended that in the interests of transparency and public confidence ‘it would be useful to have greater specification about the criteria used by investigators to reach their decisions’ (2017 report, p. 175, para. 13.32).

The report notes, in relation to Article 2 cases involving deaths in police custody in particular, that once clear criteria for deciding what constitutes misconduct and gross misconduct are made transparent, dismissal must follow a finding of gross misconduct unless there are exceptional circumstances (which should, in Article 2 case, be made clear to the bereaved family) which justifies dismissal not being the sanction that is imposed. In her final report, Dame Elish recommended that the Scottish Government consider whether recommendations from her earlier report could or should be applied in Scotland. An option to make the misconduct processes more open, which could be considered in addition to the other proposals set out here, would therefore be to require the publication of the criteria used to determine whether an action amounts to misconduct or gross misconduct.

It is important to note that actions amounting to gross misconduct are not criminal proceedings – they are not a criminal trial and proof is to the civil standard – “on the balance of probabilities” as opposed to “beyond reasonable doubt”, which is the case in criminal trials. In most professions it would be highly unusual that employment proceedings would be made public. In other professions, for example in medicine or law, employment matters would be dealt with in private while professional registration matters would often be held in public. For example, doctors are registered with and licensed by the General Medical Council, and the Medical Practitioners Tribunal Service hold public registration hearings and [make and publish](#)

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welfare and safety of any informant or witness’ to the constable who is the subject of proceedings (though a written summary must be provided as far as reasonably possible).

<sup>31</sup> Angiolini, ‘[Report of the Independent Review of Deaths and Serious Incidents in Police Custody](#)’, January 2017, p. 174, para. 13.29.

<sup>32</sup> [Police Service of Scotland \(Conduct\) Regulations 2014](#), Reg. 2. The definitions are the same for Senior officers in the [Police Service of Scotland \(Senior Officers\) \(Conduct\) Regulations 2013](#), Reg. 2, except that the reference to a possible demotion in rank is omitted.

[decisions](#) if there is an allegation that a doctor's fitness to practise is impaired (through, for example, misconduct or a criminal conviction). It should also be noted that gross misconduct proceedings cannot be used to determine whether an officer has committed a criminal offence.

There are high expectations of the police in Scotland, and the police's ability to fulfil their functions and undertake their duties effectively depends on the relationship the police maintain with the public. The concept of "policing by consent", so central to policing in Scotland, relies on the respect and approval of the public. The Angiolini report highlighted the high public interest in scrutiny of the police and police misconduct issues, and argued that 'high public office carries with it legitimate and well understood expectations of public scrutiny, accountability and transparency' (p. 256, para. 15.10). She notes she has 'weighed the benefits of conducting gross misconduct hearings in public with the benefits of conducting them in private [and has] concluded that the balance lies in favour of opening them up to the public and media' (p. 324, para. 19.125).

As previously noted in [Section 3](#), Dame Elish suggested others areas of the regulations which should be considered for amendment or review. In relation to misconduct proceedings, these included amending the definition of "misconduct" and "misconduct allegation"; updating the regulations to allow subject officers to make written representations at any point during investigations; and defining the stages of misconduct pre-hearings in the regulations.

Further details can be found in Chapter 19 of the [final report](#) and pages 173-175 (paras. 13.26-13.32) of the 2017 review into [Deaths and Serious Incidents in Police Custody](#).

**Questions:**

A. Should police officer gross misconduct hearings be held in public?

- Yes
- No
- Don't know

B. Please explain your answer using the free text box below.

C. If gross misconduct hearings are to be held in public, should these hearings be for officers of all ranks who are being investigated for gross misconduct, or senior officers only?

- All ranks of officers
- Senior officers only
- Don't know

D. If gross misconduct hearings are to be heard in public, should the Chair of a hearing have discretion to restrict attendance as they see appropriate?

- Yes
- No
- Don't know

E. If you answered "Yes" to question D, under which circumstances should attendance be restricted? Please provide details using the free text box below.

F. To what extent do you agree or disagree that in addition to the existing protections for witnesses, the Chair of the gross misconduct hearing should consider whether the evidence of any vulnerable witnesses should be heard in private to ensure the protection of such vulnerable witnesses (this may include the officer who is the subject of the proceedings)?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

G. In addition to the existing protections for witnesses, to what extent do you agree or disagree that the Chair of the gross misconduct hearing should be obliged to consider any other reasonable adjustments that they believe to be necessary to ensure the protection of such vulnerable witnesses (this may include the officer who is the subject of the proceedings)?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

H. If you agree the Chair of gross misconduct hearings should be obliged to consider other reasonable adjustments to ensure protection of vulnerable witnesses, what reasonable adjustments should be considered? Please provide details using the free text box below.

I. To what extent do you agree or disagree the outcome of gross misconduct proceedings should be made public?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

J. If you do not agree that the outcome of gross misconduct hearings should be made public, is there more that Police Scotland (for non-senior officers) or the relevant body responsible in future for holding misconduct hearings for senior officers, can do within current practices to increase transparency around gross misconduct proceedings?

K. To what extent do you agree or disagree that an illustrative, publicly available list of matters likely to be considered by a gross misconduct hearing would be useful?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

L. If a publicly available list of matters to be considered by a gross misconduct hearing were to be available who should be responsible for its publication?

M. If a publicly available list of matters to be considered by a gross misconduct hearing were to be available, should a finding of gross misconduct always result in dismissal, unless there are exceptional circumstances to justify an alternative sanction?

- Yes
- No
- Don't know

N. If the outcome of gross misconduct proceedings is to be made public, should the Chair's report, subject to any necessary redactions, be published by the Scottish Police Authority on its website?

- Yes
- No
- Don't know

O. If the Chair's report is to be published by the Scottish Police Authority on its website as per question 3.1N, what type of details, if any, should be redacted? Please provide details using the free text box below.

P. If the outcome of gross misconduct hearings is to be published by the Scottish Police Authority on its website, how long should the report be available online?

- Made available online for at least 28 days
- Made available online for a different time period (please specify) \_\_\_\_\_
- Don't know

Q. Dame Elish highlighted a number of areas where amendments to the conduct regulations should be considered or regulations could be clarified. Do you agree that these further recommendations should be considered as policy is further developed?

Yes

No

Don't know

R. If you have any further views to share in relation to changes to the regulations that should be considered as part of this work, please outline them in the text box below.

*(27) 'Gross misconduct hearings for all ranks should have 1) an independent legally qualified chair appointed by the Lord President, 2) an independent lay member appointed by the Lord President and 3) a policing member. This means in senior officer cases the role of Chair should transfer from the SPA to the independent legally qualified person. The policing member in senior officer cases should be appointed by the Lord President; in all other cases the policing member should be appointed by the Chief Constable' (Recommendation 27, p. 459)*

The Angiolini report recommends that both misconduct and gross misconduct hearings against senior officers should be considered by an independent, legally chaired panel, with the Chair and members appointed by the Lord President (p. 185, para. 12.31; p. 186, para. 12.32; p. 220, para. 14.60; p. 197, para. 12.79). The report recommends that panel members should consist of an independent lay person and a senior expert in policing. Dame Elish recommends that the independent lay person be someone capable of understanding complex disciplinary issues and that the senior expert in policing has not previously worked with the subject officer. According to further recommendations in the report, the legally chaired independent panel would follow on from a preliminary assessment of senior officer misconduct allegations undertaken by PIRC (as opposed to the SPA as is currently the case – the preliminary assessment aspect of this process is treated in [Section 3.5](#) of this consultation) and an independent investigation by the PIRC before referral to the panel (p. 185-6, para. 12.31).

In the case of non-senior officers, the report recommends that legally qualified chairs, appointed by the Lord President, should also be employed for **all gross misconduct** hearings (p. 191, para. 12.52). The Angiolini report further recommends that gross misconduct hearings for non-senior officers should include an

independent lay person appointed by the Lord President and a police officer of at least two ranks above the subject officer appointed by the Chief Constable (p. 191, paras. 12.52-12.56). Having legally qualified chairs will in particular help to assuage concerns that Chief Superintendents (the most senior of the non-senior ranks) are likely to have some previous interaction with the majority of the pool of senior officers from which the Chair can currently be drawn, given that the Chair must be an officer of at least two ranks above the subject officer (p. 192, para. 12.58).<sup>33</sup> For the purposes of gathering views on whether a specific set of requirements should be set out for misconduct hearings for Chief Superintendents due to the issue outlined above, the questions below separate Chief Superintendents from both non-senior ranks (of which they are the most senior rank) and senior officers. In the Angiolini report, Dame Elish's suggestion is that the policing member for Chief Superintendent hearings should be a senior officer from a different police force, a retired senior officer or an Inspector of Constabulary (p. 191, para. 12.55).

The Angiolini report does not discuss the impact legally qualified chairs might have on the approach to, or the tone of, hearings particularly if subject officers feel compelled to engage a lawyer rather than being supported by staff associations. An alternative or additional option, as proposed in the questions below, could be to engage a qualified HR professional to chair (or as one of the members of) the hearing.

**Questions:**

S. From which category of person should the appointment of the Chair of any misconduct hearing which is considering allegations against senior officers be made? Please select one option only.

An independent legally qualified person

A member of the SPA

HM Chief Inspector of Constabulary

A senior expert in policing (other than HM Chief Inspector)

An independent lay person

An HR professional

Other (please specify) \_\_\_\_\_

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<sup>33</sup> [The Police Service of Scotland \(Conduct\) Regulations 2014](#), Reg. 16 states that the constable conducting the hearing 'must be of at least the rank of superintendent [and] (b) must be at least two ranks higher than the constable who is the subject of the misconduct allegation'.



T. In addition to an appointed Chair (as per question 3.1S above), should any misconduct hearing which is considering allegations against senior officers include members made up of any of the following categories of person? Please select all options that apply.

- An independent legally qualified person
- A member of the SPA
- HM Chief Inspector of Constabulary
- A senior expert in policing (other than HM Chief Inspector)
- An independent lay person
- An HR professional
- Other (please specify) \_\_\_\_\_

U. Please explain your answers to questions 3.1S-3.1T using the free text box below.

V. From which category of person should the appointment of the Chair of any gross misconduct hearing which is considering allegations against an officer of the rank of Chief Superintendent be made? Please select one option only.

- An independent legally qualified person
- A member of the SPA
- A senior expert in policing
- An independent lay person
- An HR professional
- Other (please specify) \_\_\_\_\_

W. In addition to an appointed Chair, should any gross misconduct hearing which is considering allegations against an officer of the rank of Chief Superintendent include members made up of any of the following categories of person? Please select all options that apply.

- An independent legally qualified person
- A member of the SPA
- A senior expert in policing
- A senior officer from another police service
- A retired senior officer
- An independent lay person
- An HR professional
- Other (please specify) \_\_\_\_\_

X. Please explain your answers to questions 3.1V-W above using the free text box below.

Y. From which category of person should the appointment of the Chair of any gross misconduct hearing which is considering allegations against non-senior officers below the rank of Chief Superintendent be made? Please select one option only.

An independent legally qualified person

A member of the SPA

A serving officer of the rank of superintendent or above who is at least two ranks higher than the subject officer

An independent lay person

An HR professional

Other (please specify) \_\_\_\_\_

Z. In addition to an appointed Chair (as per question 3.1Y above), should a gross misconduct hearing which is considering allegations against non-senior officers below the rank of Chief Superintendent include members made up of any of the following categories of person? Please select all options that apply.

An independent legally qualified person

A member of the SPA

A serving officer of the rank of superintendent or above who is at least two ranks higher than the subject officer

An independent lay person

An HR professional

Other (please specify) \_\_\_\_\_

AA. Please explain your answers to questions 3.1Y-Z above using the free text box below.

BB. Do you agree that the Lord President should appoint the Chair of a misconduct hearing which is considering allegations against officers? Please select all options that apply.

Yes, for senior officers

Yes, for Chief Superintendents

Yes, for non-senior officers below the rank of Chief Superintendent

No, not for any police officer

Don't know

CC. Do you agree that the Lord President should appoint the panel of a misconduct hearing which is considering allegations against officers? Please select all options that apply.

Yes, for senior officers

Yes, for Chief Superintendents

Yes, for non-senior officers below the rank of Chief Superintendent

No, not for any police officer

Don't know

DD. Please explain your answers to questions 3.1BB and CC above using the free text box below.

EE. Do you have any further comments you wish to make in relation to questions regarding misconduct and gross misconduct proceedings?

### 3.2 Continuation of gross misconduct proceedings

*(22) ‘The Scottish Government should develop proposals for primary legislation that would allow, from the point of enactment, gross misconduct proceedings in respect of any police officer or former police officer to continue, or commence, after the individual ceases to hold the office of constable’ (Recommendation 22, p. 458)*

*(23) ‘In gross misconduct cases, for all ranks, the Police Investigations and Review Commissioner should determine if it is reasonable and proportionate to pursue disciplinary proceedings in relation to former police officers after the twelve month period, taking into account the seriousness of the alleged misconduct, the impact of the allegation on public confidence in the police, and the public interest’ (Recommendation 23, pp. 458-9)*

*(24) ‘The Scottish Government should engage with the UK Government with a view to adopting Police Barred and Advisory Lists, to learn from experience south of the border and to ensure compatibility and reciprocal arrangements across jurisdictions.’ (Recommendation 24, p. 459)*

The Angiolini report stated that there is strong public interest in dealing with gross misconduct even after officers leave the service (whether that be through resignation or retirement). She stated that while there can be no sanction against former officers who would have been dismissed had they still been serving, it is right and proper that processes can be followed to a conclusion in exceptional and serious cases which are likely to do damage to public confidence in policing.

There is an argument for ensuring that gross misconduct proceedings reach their conclusion even if an officer leaves the force. It should be noted that continuing proceedings does not necessarily mean that a sanction can be applied, since the ultimate sanction – the removal from post of a police officer who is not fit to serve – has already been achieved through the officer’s resignation or retirement. It should be noted that while those who are currently serving officers can be supported by staff associations during gross misconduct proceedings, a former officer would not have access to this support. In cases where gross misconduct came to light 12 months after the officer leaves the service, the report suggests that it should be the PIRC who determines whether it is reasonable and proportionate to pursue disciplinary proceedings.

It should also be noted that this power would be “enabling” – that is to say that it would **allow** gross misconduct proceedings to continue where Police Scotland (for non-senior officers and former officers for up to 12 months after they have resigned or retired) or PIRC (for senior officers, and with discretion to pursue proceedings for all officers if the allegations came to light more than 12 months after the officer has left the service) deem this necessary and appropriate, and would not **require** the proceedings to continue.

The Angiolini report also recommended that the Scottish Government should adopt the use of Barred and Advisory Lists to strengthen vetting processes and prevent any police officer with a finding of gross misconduct from being appointed by another police service, force or other policing body. For England and Wales, these are maintained by the College of Policing, the professional body for the police in England and Wales. In England and Wales, where an officer resigns or retires during gross misconduct proceedings those proceedings can continue until a conclusion is

reached. Where there is a finding of gross misconduct the officer's name will be added to the Police Barred List which prevents them from being appointed by another police service, force or other policing body in England and Wales. The Advisory List is a vetting tool for policing employers which contains information about individuals who have resigned or retired during an investigation into a matter that could have resulted in their dismissal, or who leave before such an allegation comes to light. Individuals remain on the list until the investigation has concluded and an outcome has been determined.

Police Scotland can currently access the Barred List which is publicly available to search and should routinely check this as part of their vetting process. They do not have access to the Advisory List. This means that currently, Police Scotland is unable to access the full Barred List or the Advisory List, and UK legislation governing the lists does not currently allow for any dismissals from Police Scotland to be added to the them. Dame Elish recommends that adopting the use of a Barred and Advisory list should ideally include cross-border and UK-wide application. This would involve working with the UK Government to discuss possible changes to Westminster legislation or establishing a Scottish version of the Barred and Advisory Lists and entering into information-sharing agreements with other jurisdictions. The Police Service of Northern Ireland, as well as the States of Jersey Police, the British Transport Police, the Civil Nuclear Constabulary, the Ministry of Defence Police and Border Force already have information sharing agreements with the College of Policing in relation to the England and Wales Barred and Advisory lists, which can be utilised as part of each service's vetting procedures.

Further details can be found in Chapter 11 of the [final report](#).

**Questions:**

A. Should it be possible to continue, or begin, gross misconduct proceedings against former officers? Please select one option only.

- Yes, for all ranks of police officers
- Yes, but only for senior officers
- Yes, but only for rank of Chief Superintendent and above
- No, not for any police officer
- Don't Know

B. If it is to be possible to continue, or begin, gross misconduct proceedings against former officers, under what circumstances should this be done? Please provide details using the free text box below.

- C. If it is possible to continue, or begin, gross misconduct proceedings after an officer has left the service, who should be responsible for making that decision (to continue or begin proceedings)? Please select all options that apply.

Chief Constable

The Police Investigations and Review Commissioner (PIRC)

The Scottish Police Authority (SPA)

Other (please specify) \_\_\_\_\_

Don't know

- D. Please explain your answer using the free text box below.

- E. In deciding whether to continue with, or begin, gross misconduct proceedings after an officer has left the service, should the relevant authority be required to take into account the wishes of a complainer?

Yes

No

Don't know

- F. Do you think any of the following changes to gross misconduct hearings would have altered how you answered the above questions (3.2A-E)? Please select all options that apply.

Yes, if gross misconduct hearings were to be held in public

Yes, if gross misconduct hearings were to be chaired by a legally qualified chair

No

Don't know

- G. Please explain your answer using the free text box below.

H. Should it be possible for gross misconduct proceedings to be taken forward where allegations came to the attention of the relevant authority (as per question 3.2.C above) more than 12 months after the person ceased to be an officer, and the following conditions are met:

- a) the case is serious and exceptional,
- b) the case is likely to damage public confidence in policing, and
- c) the PIRC has determined disciplinary proceedings reasonable and proportionate?

Yes  
No  
Don't know

I. Please explain your answer to the question above.

J. If gross misconduct proceedings are to begin more than 12 months after a person ceased to be an officer, should these proceedings be for officers of **all** ranks? Please select one option only.

Yes, for all ranks of police officers  
Yes, but only for senior officers  
Yes, but only for rank of Chief Superintendent and above  
No, not for any police officer  
Don't Know

K. Should the Scottish Government work with the UK Government to adopt Barred and Advisory lists and other potential models?

Yes, by using the Barred and Advisory Lists model  
Yes, by adopting other measures (please specify) \_\_\_\_\_  
No  
Don't know

L. Do you have any further comments you wish to make in relation to continuation of gross misconduct proceedings?

### 3.3 Appeals against determinations of gross misconduct

*(28) 'There should be one route of appeal against a determination of a gross misconduct hearing or the disciplinary action to be taken and that should be to a Police Appeals Tribunal, as at present. This recommendation is subject to the Police Appeals Tribunals being transferred into the [Scottish Tribunals]' (Recommendation 28, pp. 459-60)*

The Police Appeals Tribunal is currently the final stage of appeal against the determination made at gross misconduct hearing. For senior officers, an appeal can be made to the Police Appeals Tribunal if a decision made by a misconduct hearing panel results in their dismissal.<sup>34</sup>

The Police Appeals Tribunal may either confirm or replace the decision being appealed.

Internally, under current regulations, it is for the Scottish Police Authority to convene an appeal hearing panel to consider an appeal for senior officers, and a person assigned by the Deputy Chief Constable to do so for appeal hearings for non-senior officers.<sup>35</sup> As Dame Elish recommends the transfer of senior officer misconduct functions from the SPA, she also recommends removing this internal appeal stage to ensure the independence of the appeals process.

The Scottish Government is restructuring Scotland's tribunals to make sure they are more user-friendly and to promote consistency across tribunals, particularly in their practises and procedures. As part of this transfer programme, the Police Appeals Tribunal is to be transferred to the Scottish Tribunals. This work is underway, and, subject to that transfer being effected, the Angiolini report recommends that in the case of senior officers, there should be only one route of appeal and that should be to a Police Appeals Tribunal.

Further details can be found on page 187 (paras. 12.35-12.37) of the [final report](#).

#### **Questions:**

- A. Do you agree that, given the transfer of the Police Appeals Tribunal to the Scottish Tribunals, senior officer conduct regulations should be revised to ensure that for all gross misconduct hearings where there has been a finding of gross misconduct, there should be **only** one route of appeal i.e. the Police Appeals Tribunal?

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<sup>34</sup> 'In a case where a decision to dismiss the senior officer has been confirmed, a notice under paragraph (9) must inform the senior officer of that officer's right under section 56 of the [2012 Police and Fire Reform] Act to appeal to a police appeals tribunal', [Police Service of Scotland \(Senior Officers\) \(Conduct\) Regulations 2013](#), Reg. 26.

<sup>35</sup> [The Police Service of Scotland \(Conduct\) Regulations 2014](#), Reg. 25 and [The Police Service of Scotland \(Senior Officers\) \(Conduct\) Regulations 2013](#), Reg. 26.



Yes, for senior officer regulations  
No, the regulations should not be revised

B. Do you agree that the same route of appeal to the Police Appeals Tribunal should be included in regulations for findings of misconduct against senior officers or should the appeal process be managed by the independent legally chaired panel?

Yes, to the Police Appeals Tribunal  
No, by the independent legally chaired panel  
Don't know

C. Please explain your answer using the free text box below.

### 3.4 Accelerated misconduct hearings

*(51) 'Provision equivalent to that in England and Wales for accelerated misconduct hearings should be included in Scottish conduct regulations for all ranks of constable to deal with circumstances where the evidence is incontrovertible and where that evidence means that without further evidence it is possible to prove gross misconduct, or where the subject officer admits to their behaviour being gross misconduct' (Recommendation 51, p. 464)*

The Angiolini report recommends that it should be possible to hold accelerated gross misconduct hearings for all ranks of officer in Scotland, in certain circumstances, similar to processes in place in England and Wales for accelerated misconduct hearings. The legislative framework in England and Wales makes provision for misconduct hearings to be accelerated when certain conditions are met – firstly, that there is enough evidence for the authority deciding on the case to establish that, on the balance of probabilities, the officer's actions amounted to gross misconduct; and secondly, that it is in the public interest for the case to be treated as a special case and for the officer concerned to be removed from their functions without delay.

While the Angiolini report cites CCTV as a possible source of incontrovertible evidence (p. 318, para. 19.104), it does not clarify if this is deemed to be incontrovertible after having considered that evidence in its full context. Neither does the report make clear who should have responsibility for determining whether evidence can be deemed to be incontrovertible.

Giving the Chairing Panel, in the case of senior officers, or the Chairing Constable, in the case of non-senior officers, the ability to dismiss an officer who is convicted of criminal conduct which would amount to gross misconduct would also strengthen their ability to remove without delay individuals who have behaved in a way which demonstrates they are not fit to be a police officer. There would be two key conditions, firstly that the action, if proven, would amount to gross misconduct (not all criminal offences are likely to amount to gross misconduct, for example some road traffic or regulatory offences would have to be evaluated to consider whether they are serious enough to constitute gross misconduct). Secondly, the evidence would have to be deemed sufficient. This second condition would likely already be met should the individual have received a criminal conviction, given that gross misconduct hearings are not criminal trials and proof is to the civil standard. In a criminal trial, the standard of proof is higher – “beyond reasonable doubt” as opposed to “on the balance of probabilities” as in the civil standard, and so a criminal conviction would almost certainly mean that the evidence is sufficient for a finding of gross misconduct. If these two conditions are met then it would be considered that the individual should be dismissed without delay.

Further details can be found on pages 322-323 (paras. 19.119-19.120) of the [final report](#).

**Questions:**

A. Should accelerated gross misconduct hearings be able to take place when the evidence is incontrovertible and can prove gross misconduct without any additional evidence being needed?

- Yes
- No
- Don't know

B. Should accelerated gross misconduct hearings be able to take place to deal with circumstances where the subject officer admits to their behaviour being gross misconduct?

- Yes
- No
- Don't know

C. If accelerated gross misconduct hearings are to be a possibility, in cases involving non-senior officers, who should decide what evidence is considered to be incontrovertible? Please select one option only.

- Police Scotland's Professional Standards Department
- Assistant Chief Constable (ACC) responsible for conduct matters
- Deputy Chief Constable (DCC) responsible for conduct matters
- Chief Constable
- Other (please specify) \_\_\_\_\_
- Don't know

D. If accelerated gross misconduct hearings are to be a possibility, in cases involving senior officers, who should decide what evidence is considered to be incontrovertible? Please select one option only.

- Chief Constable
- The Police Investigations and Review Commissioner
- The Scottish Police Authority
- Other (please specify) \_\_\_\_\_
- Don't know

E. What type of evidence would you expect to be considered incontrovertible? Please provide details using the free text box below.

- F. If accelerated gross misconduct hearings are to be a possibility, in cases involving non-senior officers, who should decide if expedited proceedings would be appropriate in each circumstance? Please select one option only.

Police Scotland's Professional Standards Department  
ACC responsible for conduct matters  
DCC responsible for conduct matters  
Chief Constable  
Other (please specify) \_\_\_\_\_  
Don't know

- G. If accelerated gross misconduct hearings are to be a possibility, in cases involving senior officers, who should decide if expedited proceedings would be appropriate in each circumstance? Please select one option only.

Chief Constable  
The PIRC  
The SPA  
Other (please specify) \_\_\_\_\_  
Don't know

- H. Should an investigation into allegations take place in circumstances where evidence is deemed to be incontrovertible, but the subject officer does not admit to their behaviour being gross misconduct?

Yes  
No  
Don't know

- I. Should the Scottish Ministers consider (either in legislation or guidance) applying indicative timescales to the investigation of misconduct allegations?

Yes  
No  
Don't know

- J. Where an officer is convicted of a criminal offence which would constitute gross misconduct, should the Charing Panel or Charing Constable be able to move to dismiss that officer immediately, without separate misconduct proceedings?

Yes  
No  
Don't know

### 3.5 Senior officer misconduct cases

*(25) 'The statutory preliminary assessment function should be transferred from the SPA to the PIRC in order to enhance independent scrutiny of allegations, remove any perception of familiarity, avoid any duplication of functions or associated delay, and give greater clarity around the process. The preliminary assessment should be carried out by the Commissioner or a Deputy Commissioner' (Recommendation 25, p. 459)*

*(39) 'The PIRC should take on responsibility for the key stages of the senior officer misconduct proceedings (both misconduct and gross misconduct) i.e. the functions of receipt of complaints/allegations, preliminary assessment, referral to COPFS of criminal allegations and, where appropriate, referral to an independent legally chaired panel' (Recommendation 39, p. 462)*

*(PR19) 'Any process for preliminary assessment of senior officer misconduct should require the relevant authority both 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. Scottish Government should consider amending the conduct regulations to reflect this process' (Preliminary Recommendation 19, pp. 474-5 of the final report)*

*(40) 'The PIRC should be given a new statutory function and power to present a case at a senior officer gross misconduct hearing where the case would be determined by a three-person panel comprising an independent legally qualified chair, a lay person and an expert in senior policing' (Recommendation 40, p. 462)*

As noted in [Section 3.1](#) of this consultation regarding the composition of gross misconduct panels, the Angiolini report recommended that a number of the stages of senior officer misconduct proceedings be transferred to the PIRC in the interests of increasing the structural independence of investigations into senior officers' conduct. It has been broadly recognised that while the SPA undertakes its current functions with integrity and independence, the small number of senior officers in Scotland means that prior professional contact between the subject officer and the SPA board members is likely.<sup>36</sup> In addition, if PIRC were to take on the key stages of senior officer misconduct proceedings, Dame Elish recommends existing legislation is amended to make clear that the PIRC is the appropriate authority for senior officer complaints, while the SPA would be the appropriate authority for the SPA and its staff.

The transfer of these functions could involve PIRC taking receipt of complaints about senior officers and undertaking the preliminary assessment which is currently performed by the SPA before referral to the PIRC for investigation.<sup>37</sup> The Angiolini report recommends that the preliminary assessment of misconduct cases for senior officers be carried out by senior PIRC staff but decided on by the Commissioner or one of the two deputies proposed, discussed in this document in [Section 2.1](#). It would also take into account further factors including any potentially vexatious basis for the complaints, as discussed in [Section 3.6](#) of this document. Following preliminary assessment by PIRC, criminal allegations would continue to be referred

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<sup>36</sup> There are currently 15 senior officers in Scotland: [Executive Team - Police Scotland](#).

<sup>37</sup> [The Police Service of Scotland \(Senior Officers\) \(Conduct\) Regulations 2013](#), Regs. 8-9.

to COPFS. For misconduct allegations, if investigation by PIRC determines there is a case to answer, they would be referred to an independent panel which, should the recommendations discussed in [Section 3.1](#) of this document be implemented, would be led by a legally qualified chair. A panel led by this legally qualified chair could then determine whether a preliminary hearing should be held by the panel to identify any evidence that is not in dispute and any other matters that can be agreed or resolved prior to the formal hearing.

The preliminary assessment is currently defined in regulations as; ‘whether the conduct which is the subject matter of the misconduct allegation would, if that conduct were proved, amount to (a) misconduct, (b) gross misconduct, or (c) neither’.<sup>38</sup> The Angiolini report suggests that three factors should be taken into consideration when deciding whether the matter should be investigated further: whether the allegation is made (i) anonymously, (ii) is sufficiently specific in time and location, and (iii) either malicious or vexatious. Although the recommendation from the preliminary report (PR19) relates to the preliminary assessment of senior officer misconduct only, the final report (p. 183-184, paras. 12.28-12.29) states this should apply to all officers.

The report notes that while there are reasons for which anonymous complaints may be made, including fear of reprisal, the response ‘needs to be proportionate based on an assessment of the reliability and credibility of the information’ (p. 120, para. 7.134), and the seriousness of the complaint should also be taken into account. While all complaints must be treated with an open mind, cases where complaints are frivolous (about a matter that would not require an investigation), vexatious (for example, unreasonable behaviour) or malicious (vindictive or intended purely to cause harm to the subject), should be considered carefully at this preliminary assessment stage for the purposes of proportionality.

A further proposed change is that PIRC would then present the case to the panel during the formal hearing where appropriate.

Further details on proposed changes to the powers of the PIRC in relation to senior officers can be found on pages 218-222 (paras. 14.54-14.65) of the [final report](#). Details on the preliminary assessment of alleged misconduct can be found on pages 181-184 (paras. 12.18-12.29) of the [final report](#) and pages 59-62 (paras. 170-180) of the [preliminary report](#).

### **Questions:**

A. To what extent do you agree or disagree that the preliminary assessment of misconduct allegations made against senior police officers should be carried out by the PIRC?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

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<sup>38</sup> [The Police Service of Scotland \(Senior Officers\) \(Conduct\) Regulations 2013](#), Reg. 8

B. If the PIRC is to carry out the preliminary assessment of misconduct allegations made against senior police officers, should the preliminary assessment of an allegation or complaint be decided on by the Commissioner or their Deputy?

- Yes
- No
- Don't know

C. Should the PIRC take on responsibility for key aspects of misconduct and gross misconduct proceedings for senior officers? Please select all options that apply.

- Yes, for receipt of complaints and allegations, where appropriate, referral to an independent legally chaired panel.
- Yes, for preliminary assessment
- Yes, for referral to COPFS of criminal allegations
- Yes, for referral to an independent legally chaired panel where appropriate if there is a disciplinary hearing subsequent to referral to COPFS
- No
- Don't know

D. When the relevant body is deciding whether an investigation into an allegation against a senior officer or non-senior officer should be carried out, should that body take into consideration whether an allegation is made anonymously? Please select one option only.

- Yes, for senior officers only
- Yes, for non-senior officers only
- Yes, for both senior officers and non-senior officers
- No, not for any police officers
- Don't know

E. When the relevant body is deciding whether an investigation into an allegation against a senior officer or non-senior officer should be carried out, should that body take into consideration whether an allegation is sufficiently specific in time and location? Please select one option only.

- Yes, for senior officers only
- Yes, for non-senior officers only
- Yes, for both senior officers and non-senior officers
- No, not for any police officers
- Don't know

F. When the relevant body is deciding whether an investigation into an allegation against a senior officer or non-senior officer should be undertaken, should that body take into consideration whether an allegation is malicious? Please select one option only.

- Yes, for senior officers only
- Yes, for non-senior officers only
- Yes, for both senior officers and non-senior officers
- No, not for any police officers
- Don't know

G. When the relevant body is deciding whether an investigation into an allegation against a senior officer or non-senior officer should be undertaken, should that body take into consideration whether an allegation is vexatious? Please select one option only.

- Yes, for senior officers
- Yes, for non-senior officers
- No, not for any police officers
- Don't know

H. Please explain how, in your view, it can be ensured that genuine complaints are not misrepresented as "vexatious" or "malicious".

I. Do you agree that the PIRC should be able to present a case at a senior officer gross misconduct hearing?

- Yes
- No
- Don't know

J. Do you agree that the independent legally chaired panel should have the capacity to hold a preliminary hearing to identify any evidence that is not in dispute and can be agreed, as well as any other matters that can be resolved ahead of the formal hearing?

- Yes
- No
- Don't know

K. Do you have any further comments you wish to make in relation to senior officer misconduct cases?



*(41) 'The PIRC should have the power to recommend suspension of a senior officer if she or he believes that not suspending the officer may prejudice an effective misconduct investigation. The PIRC should provide supporting reasons when they make such a recommendation to the SPA that a senior officer should be suspended' (Recommendation 41, p. 462)*

The SPA currently has remit over decisions relating to the suspension of senior officers. Given that PIRC has jurisdiction over the investigation of senior officer misconduct, the Angiolini report proposed that the PIRC obtains the power to recommend suspension of a senior officer to the SPA if, in the view of the PIRC, there is a risk that not suspending them may prejudice the investigation. Any final decision on suspension would remain to be a responsibility for the SPA.

Further details can be found on pages 326-327 (paras. 19.131-19.133) of the [final report](#).

**Questions:**

L. Should the PIRC have the ability to recommend the suspension of a senior officer?

- Yes
- No
- Don't know

M. If the PIRC is to be able to recommend the suspension of a senior officer, to what extent do you agree or disagree that suspension should only be recommended in circumstances when not suspending the officer may prejudice an effective misconduct investigation?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

N. Please explain your answer using the free text box below.

O. If the PIRC is to be able to recommend the suspension of a senior officer, should the PIRC be required to provide supporting reasons when they make such a recommendation to the SPA?

- Yes
- No
- Don't know

### 3.6 Vexatious complainers

*(PR13) 'The Scottish Government should consider the case for amending the legislation to include a provision to deal with vexatious complainers' (Preliminary Recommendation 13, p. 473 of final report)*

[Section 3.5](#) of this consultation discusses consideration of the potential vexatious or malicious basis of some complaints during the preliminary assessment process. The Angiolini report recommends that the Scottish Government should consider the strengthening of the legislation to deal with vexatious or malicious complainers. The report recommended that in order to deal effectively with vexatious or malicious complaints, there should be a policy in place to ensure consistency in handling allegations and to prevent reputational damage as a result of false allegations. Equally, the system needs to remain open to members of the public with genuine complaints, even where they have previously been deemed to behave in a vexatious manner regarding other issues.

Since publication of the preliminary report, Police Scotland, PIRC and the SPA have been working collaboratively to align their processes and policies for dealing with vexatious and malicious complaints. A revised [SPA Complaints Policy](#) and [Unacceptable, Persistent or Unreasonable Actions by Complainers Policy](#) was [approved for publication](#) at its Complaints and Conduct Committee in August 2021.

It is important to note that there are existing penalties for those who are proven to have knowingly made a false complaint or allegation about a police officer or member of staff. They may be prosecuted for wasting police time or attempting to pervert the course of justice and may also be liable to civil action.

Further details can be found on pages 117-120 (paras. 7.121-7.132) of the [final report](#) and pages 33-34 (paras. 80-82) of the [preliminary report](#).

#### **Questions:**

A. Given the work that is already underway to align processes and policies on vexatious complainers across policing bodies, should the Scottish Government also consider amending legislation to deal with vexatious complainers?

- Yes
- No
- Don't know

B. What safeguards should be put in place in relation to vexatious complainers to ensure anyone complaining to policing bodies in Scotland is treated appropriately and fairly? Please provide details using the free text box below.

### 3.7 Additional statutory provisions relating to conduct

*(54) 'The 2012 Act should be amended to confer on Scottish Ministers a power to issue statutory guidance in respect of conduct and a duty to consult on any such guidance, and confer a duty on policing bodies to have regard to any such guidance. Scottish Ministers should use that power at the earliest opportunity to issue guidance in respect of a new Reflective Practice Review Process. That guidance should build on the spirit of existing Scottish guidance and take into account any valuable elements of English and Welsh best practice' (Recommendation 54, p. 465)*

The Angiolini report recommended that amendments to the 2012 Police and Fire Reform (Scotland) Act should allow the Scottish Ministers to issue statutory guidance in respect of conduct (with a corresponding duty to consult on any such guidance) and that a duty should be placed on policing bodies to have regard to any such guidance.

The report notes that over-reliance on conduct processes, as opposed to performance processes, were seen by some who gave evidence to the Review as a disproportionate escalation (p. 106, para. 7.81). The Police Service of Scotland (Conduct) Regulations 2014,<sup>39</sup> contain provisions to transfer from misconduct proceedings to the performance process at various stages to allow consideration of action under the performance procedures in order that the police officer may learn and improve.

The Angiolini report's recommendation is that the Scottish Ministers should use the power conferred to issue guidance in respect of a new Reflective Practice Review Process. The intention of a Reflective Practice Review Process would be that where a matter does not reach the threshold for disciplinary proceedings and the officer's behaviour constitutes practice requiring improvement (defined as 'underperformance or conduct not amounting to misconduct or gross misconduct, which falls short of the expectations of the public and the police service as set out in the Code of Ethics' (p. 316, para. 19.94)), then low-level performance issues or mistakes can be addressed through a line-management or performance conversation between the officer and the reviewer, which is not a hearing where parties are formally represented (p. 316, para. 19.96).

Further details can be found on pages 315-317 (paras. 19.92-19.98) of the [final report](#).

#### **Questions:**

A. Should the Scottish Ministers be able to issue statutory guidance in respect of conduct?

- Yes
- No
- Don't know

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<sup>39</sup> [The Police Service of Scotland \(Conduct\) Regulations 2014](#), Reg. 10.

B. If the Scottish Ministers are to be able to issue statutory guidance, should they be required to consult on any such guidance?

- Yes
- No
- Don't know

C. If the Scottish Ministers are to be able to issue statutory guidance, then should a duty to have regard to any such guidance be placed on policing bodies?

- Yes
- No
- Don't know

D. If the Scottish Ministers are to be able to issue statutory guidance, then should any such guidance be used to bring forward guidance in respect of a new Reflective Practice Review Process?

- Yes
- No
- Don't know

E. If statutory guidance on conduct is to be prepared, should the Scottish Ministers consider using this to make clear where matters relate to conduct and where they do not (i.e. where they may relate to performance or grievance matters instead)?

- Yes
- No
- Don't know

F. Do you have any further comments you wish to make in relation to the issuing of statutory guidance?

Employment tribunals in other sectors in Scotland will generally take into account the Advisory, Conciliation and Arbitration Service (Acas) statutory code of practice on discipline and grievance procedures,<sup>40</sup> which provides basic practical guidance to employers, employees and their representatives and sets out principles for handling disciplinary and grievance situations in the workplace. A review of the regulations relating to police conduct in Scotland could be undertaken to ensure that processes are closely aligned with this code of practice.

**Questions:**

G. To what extent do you agree or disagree that regulations governing police conduct in Scotland should be reviewed in order that consideration can be given to bringing them into line with Acas' latest code of practice on disciplinary and grievance procedures?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

*(55) 'Subject to safeguards needed to protect the rights of each individual officer, the regulations should make provision for the possibility of joint misconduct proceedings to deal with any number of officers, including senior officers' (Recommendation 55, p. 465)*

The guidance on the Police Service of Scotland (Conduct) Regulations 2014 (which govern officers of federated ranks)<sup>41</sup> provides for joint hearings where more than one officer has to appear in relation to a matter stemming from the same incident. Paragraph 6.4 of the guidance provides that it would normally be appropriate for the subject officers to attend the same proceedings so that the alleged misconduct can be considered in context. A subject officer may request separate proceedings if they can demonstrate that joint proceedings would lead to unfairness and it is for the person conducting the proceedings to decide whether to hold separate proceedings. The Angiolini report recommends that, subject to safeguards needed to protect the rights of each individual officer, legislation should allow for the possibility of joint misconduct proceedings to deal with any number of officers, including senior officers.

It is important to note that senior officers are subject to a different set of conduct regulations than non-senior officers. This means that consideration would need to be given to the regulations to which the proceedings would be subject should the officers concerned be from both senior and non-senior ranks. As part of this consultation (see [Section 3.5](#) above), views are being sought on different procedures

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<sup>40</sup> [Code of Practice on disciplinary and grievance procedures | Acas](#)

<sup>41</sup> [Police Service of Scotland \(Conduct\) Regulations 2014 Guidance](#)

for senior officers in relation to public hearings and the composition of gross misconduct panels, including legally qualified chairs.

**Questions:**

H. Should it be possible for joint misconduct proceedings to be held to deal with any number or rank of officers?

- Yes
- No
- Don't know

I. If joint misconduct proceedings are to be possible when appropriate as per question 3.7H, what should be taken into account in making the decision to hold joint proceedings? Please provide details using the free text box below.

J. If joint misconduct proceedings are to be possible when appropriate, what safeguards should be put in place to protect the rights of each individual officer? Please provide details using the free text box below.

K. If joint misconduct proceedings are to be possible when appropriate, who should make the decision as to whether joint proceedings are appropriate in each circumstance? Please select one option only.

- Police Scotland's Professional Standards Division
- Assistant Chief Constable responsible for conduct matters
- Deputy Chief Constable responsible for conduct matters
- Chief Constable
- Other (please specify) \_\_\_\_\_
- Don't know

L. Do you think any of the following changes to gross misconduct hearings would have altered how you answered the above questions (3.7H-3.7K)?

Yes, if gross misconduct hearings were to be held in public for senior officers only

Yes, if gross misconduct hearings for senior officers were to be chaired by a legally qualified chair

No

Don't know

M. Please explain your answer using the free text box below.

*(56) 'The regulations governing probation (the Police Service of Scotland Regulations 2013) should be amended so that a fair and speedy consideration of any allegation of misconduct can be dealt with during the probation period' (Recommendation 56, p. 465)*

The Angiolini report stated that the Police Service of Scotland Regulations 2013, which govern probation, should be amended so that a fair and speedy consideration of any allegation of misconduct can be dealt with during the probation period. A police officer's probation period lasts for two years. Currently, where allegations relating to conduct are raised, Police Scotland follow the same conduct regulations as for any other police officer. There is an argument that the intention of the probation period is to assess whether the probationary officer is suitable to be a constable, and that this assessment should take into account their conduct. Amending the regulations to reflect this would allow Police Scotland to consider the officer's suitability to serve as a police officer in light of their conduct during the probation period.

This has the potential to expedite the process of dismissing a probationary constable who is considered to be unsuitable to serve as a police officer as a result of their conduct.

**Questions:**

N. Given that the speed of an investigation and its perceived fairness and rigour can be considered to trade off against one another, to what extent do you agree or disagree that any allegation of misconduct should be dealt with more speedily during an officer's probation period?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

O. If allegations of misconduct are to be dealt with during an officer's probation period, how should these be dealt with? Please select one option only.

- Through the conduct regulations which all other officers are subject to when allegations of misconduct are made
- Through the regulations which govern probation
- Other (please specify) \_\_\_\_\_
- Don't know

P. Would your answer to either N or O be different if timescales relating to the investigation stages of misconduct allegations were set out in legislation to say how quickly an investigation should be conducted (as discussed at question 3.4I)?

- Yes
- No
- Don't know

Q. Please explain your answer using the free text box below.

*(57) 'A statutory suspension condition in England and Wales that temporary redeployment to alternative duties or an alternative location should have been considered as an alternative to suspension should be replicated in Scottish regulations in relation to all ranks of constable. Provision should also be made for regular review of the suspension of an officer' (Recommendation 57, p. 465)*

The Angiolini report recommended that a statutory suspension condition should be added to regulations governing suspension for both senior and non-senior officers. This would replicate a condition in England and Wales that temporary redeployment



to alternative duties, or an alternative location, should have been considered as an alternative to suspension before an officer can be suspended. There is already provision in both senior and non-senior officer regulations that officers cannot be suspended unless one of two conditions are met: in summary, firstly that *not* suspending the officer may prejudice a misconduct or criminal investigation, and secondly that it is in the public interest for the officer to be suspended.

Further details can be found on pages 326-327 (paras. 19.131-19.133) of the [final report](#).

**Questions:**

R. Should there be a condition which must be met before an officer is suspended? Please select all options that apply.

- Yes, that temporary redeployment to alternative duties has been considered
- Yes, that a temporary alternative location to operate from has been considered
- Yes, other (please specify) \_\_\_\_\_
- No
- Don't know

S. If a condition must be met before it is recommended that an officer is suspended, which officers should this relate to?

- All ranks of officers
- Senior officers only
- Don't know

T. Should all suspended officers have the terms of their suspensions reviewed regularly? Please select one option only.

- Yes, suspension should be reviewed every 4 weeks
- Yes, suspension should be reviewed on another time frame (please specify)  
\_\_\_\_\_
- No
- Don't know

### 3.8 Special constables conduct regulations

*'[...] a revision of the Police Service of Scotland (Special Constables) Regulations 2013 in respect of special constable misconduct to align them with The Police Service of Scotland (Conduct) Regulations 2014. The intention would be to ensure consistency in assessment and investigation of misconduct by special constables and regular police officers' (Misc. recommendation, p. 453)*

Special constables are part-time, voluntary officers with the same powers as regular police officers. The regulations covering special constables are different from those covering regular police officers.<sup>42</sup>

The Angiolini report concludes that the Police Service of Scotland (Special Constables) Regulations 2013 in relation to misconduct should be revised to align them with the Police Service of Scotland (Conduct) Regulations 2014. This follows a submission from Police Scotland to the review which proposed this approach with the intention to ensure consistency in the assessment and investigation of misconduct issues.

Further details can be found on page 453 (para. 30.91) of the [final report](#).

#### **Questions:**

A. Do you agree that conduct regulations for special constables should be revised to bring them in line with those for regular police officers?

- Yes
- No
- Don't know

B. Do you have any further comments you wish to make in relation to changes to conduct regulations for special constables?

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<sup>42</sup> [The Police Service of Scotland \(Special Constables\) Regulations 2013](#). Part 4 details the misconduct process for special constables while Schedule 2 details conduct constituting misconduct.

## **Section 4: Liability for unlawful conduct**

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

Policing stakeholders have asked that the Scottish Ministers consider clarifying the liability for unlawful conduct, in relation to the Chief Constable. [Section 24\(1\) of the Police and Fire Reform \(Scotland\) Act 2012](#) makes provision for the Chief Constable to have liability for any unlawful conduct by a constable under his or her direction and control, in the carrying out (or purported carrying out) of that person's functions. This is required as constables are office holders, not employees, and the usual liability arrangements whereby employers are liable for unlawful acts on the part of their employees do not apply.

Section 24(1) provides protections for the victims of unlawful conduct by constables, where the Chief Constable is liable to pay any sum required (including expenses) in relation to the settlement of any such claim against a constable.

In contrast, this section does not provide similar cover to the Chief Constable for unlawful conduct in the carrying out (or purported carrying out) of their functions. Section 24(5) does give discretion to the Scottish Police Authority (SPA) to pay any damages or expenses awarded against a constable (including a Chief Constable) in proceedings arising in respect of any unlawful conduct, but this leaves the Chief Constable in a different position to all other constables, who are covered for unlawful conduct while carrying out their functions as constables.

The Scottish Government therefore proposes that section 24 of the Police and Fire Reform (Scotland) Act 2012 is amended to make provision for the SPA to have liability for any unlawful conduct by a Chief Constable, in the carrying out (or purported carrying out) of that person's functions. This change would ensure that a Chief Constable has the same protections in place as all other constables, when carrying out their functions and would further protect the victims of unlawful conduct, when action is taken against the Chief Constable.

#### **Questions:**

A. Should liability for unlawful conduct, provided to all other constables when carrying out their functions, be extended to cover the rank of Chief Constable?

- Yes
- No
- Don't know

B. Please explain your answer using the free text box below.

## **Further information**

### **Glossary**

#### **Advisory List**

The Advisory List in England and Wales is a vetting tool for policing employers which contains information about individuals who have resigned or retired during an investigation into a matter that could have resulted in their dismissal, or who leave before such an allegation comes to light

#### **Article 2**

The European Convention on Human Rights (ECHR) Article 2 protects individuals' right to life, and also requires parties to positively assist the state in conducting thorough and effective investigations

#### **Article 3**

The European Convention on Human Rights (ECHR) Article 3 is about prohibition of torture - inhuman or degrading treatment or punishment

#### **Article 5**

The European Convention on Human Rights (ECHR) Article 5 is about unlawful detention

#### **Article 6**

The European Convention on Human Rights (ECHR) Article 6 is about the right to a fair hearing including the right of a suspect to remain silent

#### **Barred List**

The Barred List in England and Wales is maintained by the College of Policing. The publicly available version of the Barred list is a list of police officers and special constables who have been dismissed for conduct matters. The list is used as a vetting tool and prevents officers from being appointed by another police service, force or other policing body.

#### **Centurion**

Police Scotland's complaints and conduct database

#### **Chief Constable**

The most senior police officer in Scotland. The Chief Constable has overall command and responsibility for the Police Service of Scotland.

#### **Code of Ethics**

The Code of Ethics for Policing in Scotland sets out the standards of those who contribute to policing in Scotland

#### **Consultation**

A consultation lets the public and stakeholders share their opinions on a proposed area of work.

#### **Constable**

A police officer of any rank

**Constable's declaration**

An oath police officers take upon joining the service. The text of the constable's declaration can be viewed online.

**Federated ranks**

Officers of the rank from constable to chief inspector, who are represented by the Scottish Police Federation

**Final report**

The final report by Dame Elish Angiolini: Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing

**Financially means-tested**

The person's ability to pay the costs of a service themselves is assessed before a decision is made as to whether they qualify for assistance.

**Gross misconduct**

A breach of the Standards of Professional Behaviour which is so serious that dismissal would be justified

**In statute**

In law passed by a legislative body

**Incontrovertible evidence**

Evidence or facts which are absolutely certain and cannot be shown to be wrong

**Lord President**

The Lord President chairs the Board of the Scottish Courts and Tribunals Service and is the senior judge in Scotland and the head of the judiciary. The current Lord President is Lord Carloway, appointed in 2015.

**Malicious complaint**

A malicious complaint is made with the intention of causing harm

**Misconduct**

Conduct which amounts to a breach of the Standards of Professional Behaviour (but does not, unless the context otherwise requires, include gross misconduct). This means that misconduct is an action (or failure to act) severe enough to be considered a breach of standards, but is unlikely to warrant dismissal.

**Misconduct hearing panel**

The panel that considers misconduct and gross misconduct allegations against senior officers, unless otherwise stated

**Misconduct meeting**

The panel that considers misconduct allegations against non-senior officers

**Non-senior police officer**

Any constable holding a rank below assistant chief constable

## **Preliminary Angiolini report**

Dame Elish Angiolini's preliminary report: Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing

## **Professional Standards Department**

The Professional Standards Department of Police Scotland has responsibility for ensuring that officers across Police Scotland's Police force maintain a high quality of policing and provides a good service to the public and its staff.

## **Relevant body / organisation**

The organisation responsible for the issues being described

## **Senior officer**

Any constable holding rank of chief constable, Deputy chief constable or assistant chief constable

## **Special constable**

Special constables are part-time, voluntary officers with the same powers as regular police officers

## **Staff Association**

Statutory Staff Associations are in place to represent the interests of their members. The Scottish Police Federation is the largest staff association for police officers in Scotland. Police staff may join a trade union. There are also 'Diversity Staff Associations' such as SEMPER which are in place to provide support, advice and information to Police Officers and Staff, and these are sometimes also referred to as staff associations. In this document, staff association refers to Statutory Staff Associations.

## **Standards of Professional Behaviour**

The expectations set on Scottish officers, whether on or off duty. These standards are set out in law in the conduct regulations.

## **The 2006 Act**

Police, Public Order and Criminal Justice (Scotland) Act 2006

## **The 2012 Act**

Police and Fire Reform (Scotland) Act 2012

## **Vulnerable witness**

The definition under the Vulnerable Witnesses (Scotland) Act 2004 (Section 11) in civil proceedings can be summarised as: a child under 18, or an adult where there is a significant risk that the quality of the evidence to be given by the person will be diminished by reason of a mental disorder (as defined under section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003) or fear or distress in connection with giving evidence. There are a number of factors which must be taken into account when considering if a person is a vulnerable witness under this definition, including the nature of the evidence they may give, the circumstances, their relationship with anyone party to the proceedings, behaviour towards them by people party to the proceedings (or their associates), and other matters regarding the witnesses' background.

## **Whistleblowing**

When a worker reports certain types of wrongdoing which is in the public interest. A person considered a whistle-blower is protected by law. Further details can be found on UK Government's website.

## **Acronyms**

<b>Acas</b>	Advisory, Conciliation and Arbitration Service
<b>ACC</b>	Assistant Chief Constable
<b>CAAP-D</b>	Criminal Allegations Against [the] Police Division
<b>COPFS</b>	Crown Office and Procurator Fiscal Service
<b>DCC</b>	Deputy Chief Constable
<b>DSI</b>	Deaths and Serious Incidents
<b>ECHR</b>	European Convention on Human Rights
<b>FAI</b>	Fatal Accident Inquiry
<b>HMICS</b>	Her Majesty's Inspectorate of Constabulary for Scotland
<b>IOPC</b>	Independent Office for Police Conduct (England and Wales)
<b>MoU</b>	Memorandum of Understanding
<b>PIRC</b>	Police Investigations and Review Commissioner
<b>PONI</b>	Police Ombudsman for Northern Ireland
<b>PSD</b>	Professional Standards Division (of Police Scotland)
<b>PSNI</b>	Police Service of Northern Ireland
<b>SLAB</b>	Scottish Legal Aid Board
<b>SPA</b>	Scottish Police Authority

## **Background on key organisations**

### **Police Scotland**

Police Scotland is responsible for policing in Scotland. The Chief Constable (CC) is responsible for all aspects of policing in Scotland and is answerable to the Scottish Police Authority (SPA). The country is divided geographically into 3 regions – North, East and West, each headed by an Assistant Chief Constable (ACC) with territorial responsibilities, while the other 6 ACCs have functional responsibilities. There are 13 Divisions, each covering one or more local authority areas and headed by a Chief Superintendent, though there are many more Chief Superintendents than the 13 who are divisional commanders.

The Command Structure is as follows:

- Chief Constable
- Deputy Chief Constable
- Assistant Chief Constable
- Chief Superintendent
- Superintendent
- Chief Inspector
- Inspector
- Sergeant
- Constable

### **The Scottish Police Authority (SPA)**

The SPA employs Police Scotland's staff. The SPA and other public bodies are often described as operating at "arm's length" from government. This means that they have a significant degree of independence in decision-making within their statutory functions, but operate within a policy framework set by Ministers and are accountable to Ministers and Parliament for the exercise of their functions. The SPA is led by a [Chair and a Board](#) who are appointed by Ministers through a public appointments process. Appointments to the Board are regulated by the Commissioner for Ethical Standards in Public Life in Scotland.

The functions of the SPA are to:

- maintain Police Scotland
- promote the policing principles
- promote and support continuous improvement in the policing of Scotland
- hold the Chief Constable to account

In relation to complaints, the SPA has specific functions under the [Police, Public Order and Criminal Justice \(Scotland\) Act 2006](#) and [the Police and Fire Reform \(Scotland\) Act 2012](#). It must deal with:

- complaints against the Authority and its staff
- complaints about senior officers of Police Scotland (those of the rank of Chief Constable, Deputy Chief Constable and Assistant Chief Constable)
- The SPA must keep itself informed of the manner in which Police Scotland deals with relevant complaints, and be satisfied that Police Scotland has suitable arrangements in place.



The SPA's Complaints and Conduct Committee provides assurance that the Authority has suitable arrangements in place for the handling of complaints about the SPA, its staff and senior officers of Police Scotland and monitors the handling of complaints by the Chief Constable.

### **Police Investigations and Review Commissioner (PIRC)**

The organisation is led by a single Commissioner, often referred to as "the PIRC". The functions of the PIRC are:

- to ensure the SPA and the Chief Constable have in place suitable arrangements for the handling of complaints
- to examine the handling of complaints and the reconsideration of such complaints
- to investigate, where directed to do so by the appropriate prosecutor, any circumstances in which there is an indication that a person serving with the police may have committed a crime, or the circumstances of any death involving a person serving with the police
- determine whether to investigate, where requested to do so by the authority or the Chief Constable, certain serious incidents involving the police
- investigate other matters relating to the SPA or the police service where the Commissioner considers that it would be in the public interest to do so

The PIRC also investigates allegations of misconduct by senior officers at the rank of Assistant Chief Constable and above.



## Respondent information form

**Please note** this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:  
<https://www.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- Individual  
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name  
 Publish response only (without name)  
 Do not publish response

### **Information for organisations:**

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- Yes  
 No



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