



Law Society
of Scotland

Consultation Response

Final Report of the Independent Review of
Complaints Handling, Investigations and Misconduct
Issues in Relation to Policing

10 February 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders, and our membership.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the Call for Evidence on the Final Report of the Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing (the Report). The oral session is due to be heard on Monday 15 February 2021.

As far as aspects of interests in relation to the Report are concerned, members of the Committee comprise academic as well as those representing both the Crown Office and Procurator Fiscal Service (COPFS) and the defence. Those from COPFS are involved in dealing with investigations into complaints against the police, dealing with death investigations such as those arising from deaths in custody and any criminal prosecutions. Those from the defence side are involved in advising their clients on potential complaints defending criminal allegations and potentially instructed in relation to death investigations and representation at any inquiry.

Dame Elish Angiolini published the Review's Final Report on 11 November 2020¹ which was followed by an evidence session on 7 December 2021.² We have seen the Scottish Government and Crown Office and Procurator Fiscal Office's (COPFS) response.³ We have the following observations to make.

General

This Report is a very thorough and wide-ranging review. It is accessible and makes some very relevant points. It highlights some troubling issues which have been raised in earlier cases such *Ruddy v Chief Constable of Strathclyde and the Lord Advocate*⁴ which included scrutiny of allegations of police assault

¹ <https://www.gov.scot/publications/independent-review-complaints-handling-investigations-misconduct-issues-relation-policing/>

² <https://www.parliament.scot/parliamentarybusiness/ormain.aspx> <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=13000>

³ https://www.parliament.scot/S5_JusticeCommittee/Inquiries/20210205_SG_COPFS_Response.pdf

⁴ <https://www.supremecourt.uk/cases/docs/uksc-2011-0258-judgment.pdf>

and a police complaint. These types of issues are still current in relation to the death in custody of Sheku Bayoh. This stresses the need for thorough, speedy and independent investigations conducted in the public interest to which the Report was directed.

We support the recommendations in the Report in that they include the need to streamline and clarify the complaints process, identify clearly who is responsible for investigating complaints against senior officers, ensure that the Police Investigation and Review Commissioner has effective powers, and improve the investigation of deaths in police custody.

The current system is obscure, difficult to navigate, complex and not user friendly. It seems to be process driven rather than directed at resolving issues by means of an apology where merited or by an explanation. Too much reliance is placed on email and letter and not enough on person to person interaction.

There needs to be sufficient demarcation between the officer who is the subject of the complaint and those carrying out the investigation which we address more fully below.

Third Party Reporting⁵

Clarity of process on complaint making is key. Exactly to whom any initial complaint is made is a vital part of the process which the Report fully discusses as the complaint needs to start properly to avoid any subsequent lack of scrutiny and due diligence.

That assesses how best to ensure that the complaint is handled in a relevant fashion which sets off the process and how then the complaint should be presented going forward. Those involved must maintain the professional detachment required to avoid any pressure being brought not to pursue any complaint such as comments at paragraph 7. 45 of the Report.

However inadvertent these comments may have been, they may have “an intimidating effect.” To avoid this, staff dealing with complaints must be trained and non-operational and should be achieved through a front-line professional standards department. Complaints too do not equate to whistleblowing. There are elements of overlap so the relationship of these roles must also be observed and understood.

Neutrality and objectivity of all processes is crucial to obtain and to maintain to ensure public confidence in the system is restored and is not eroded.

We had suggested that there must be public confidence in the independence of the complaint-making processes. The timescales from the time of initiation of the complaint to conclusion must be much clearer and shorter. Just as in the case of summary justice reform, investigations need to be robust, for both the purposes of the police and the complainer. The Report highlighted at paragraph 28.14 that there should be a “focus on effective triage in the early stages, removing frontline resolution from local divisions, the clarity

⁵ the Report at Page 136

around procedures and the enhanced audit arrangements” which we agree should lead to a reduction of delays and consequently, better outcomes for all concerned.

There is a general perception from our members that it can be difficult to advise a client whether to make a complaint. The question of timing of a complaint is an issue. If there is an ongoing criminal case, that may not be the best time to make a complaint. There is a lack of confidence even if the complaint has been raised and is being dealt with by other officers, that it is independent of the criminal case and that such processes are truly transparent and unbiased. Raising a complaint after the criminal case has been resolved may be much too late.

We recognise that from the Report at paragraph 9.22 that a member of the public may wish to be represented by another person, including a solicitor in making or considering a complaint.

Paragraph 9.23 explains that victims may be more comfortable reporting incidents to someone with whom they are familiar such as the examples provided of housing associations and victim support offices. There is a wide range of persons and organisations to whom a person may have the trust in which to raise a complaint. These persons or organisations that have that responsibility should be able to signpost a person to appropriate means of making that complaint timeously and appropriately.

Paragraph 9.26 promotes the encouragement of direct engagement by the public with support for those wishing to complain through a third party. Training should and must be provided to third party groups in how to submit a report to the police. Importantly this needs to include what information to include in a complaint which is salient.

This type of training ought to be available to solicitors willing to undertake this kind of work. Consideration as to the form and content of that training should be carefully considered and from where and what source this might best be undertaken, respecting that the content of any Continuing Professional Development (CPD) that is undertaken is for the solicitor themselves and is not mandatory.

There is a lack of funding available for solicitors to undertake this kind of work. There may also be access to justice issues as many potentially making complaints may not qualify for legal aid and they may be concerned about the costs of contacting a solicitor to take forward any complaint. It should be recognised that this may be a deterrent for those making legitimate complaints.

Accessibility issues will also adversely affect those that are the most vulnerable as well as those whose native language may not be English or are representative of any of the “protected characteristics” groups.

Just how to achieve that effective communication is about how to complain and to ensure the system is robust and fit for purpose which is essential for the promotion of confidence that underpins the successful implementation of the Report’s recommendations.

The Report therefore recognises a legitimate requirement for access to a legal representative.

Problems may be compounded where there have been police station closures or those that have limited operating hours. Those seeking to complain may be required to travel a significant distance or to find a time when the police station is open. Just what processes exist for online reporting may not work for all where they may not have access or be able to access computers. In some small local jurisdictions making a complaint may be difficult because of the need as highlighted above for public confidence as well as practicality that such matters will be treated as confidential.

Consideration should be given as to how best to ensure that there is not a two-tiered system which differentiates between those wishing to complain and who can afford to instruct a third party and those who cannot.

It would be helpful to seek assurance from the Scottish Government that this aspect of provision of advice and indeed support should be considered under the heads of one of the working groups being set up and referred to in the Scottish Government and COPFS response. Does this fall under the remit of the Practitioner Working Group?⁶

If so, is it intended that its representation should include members from the legal profession other than COPFS to provide that broader perspective?⁷

Direct Reporting of criminality to COPFS⁸

The Report identifies that the public may be unaware of their right to complain directly to COPFS about alleged criminality by on-duty police officers. A member of the public ought to be able to engage a representative such as a solicitor in considering making a complaint to the police, and that the same access ought to be granted for this specific route of complaint. Information on this route does need to be made publicly available on the COPFS website – it seems that this flags meantime to highlight making complaints again COPFS and not in relation to the police.⁹

It is likely that many solicitors are unaware of the process for making a direct complaint to COPFS. Training and CPD in respect of this area would be beneficial to those solicitors wishing to engage or be involved in this process.

⁶ https://www.parliament.scot/S5_JusticeCommittee/Inquiries/20210205_SG_COPFS_Response.pdf

⁷ The response from COPFS and SG indicates that with membership will be drawn from each of the operational partners and policy leads from the Scottish Government. The PWG will meet more frequently to co-ordinate progress across a range of detailed crosscutting recommendations, delivering specific tasks and projects commissioned by the SOG and reporting against objectives. In addition to a stable core membership, providing the main points of contact for each organisation, there will be scope to extend membership to bring in subject matter experts, depending on the specific areas under consideration. https://www.parliament.scot/S5_JusticeCommittee/Inquiries/20210205_SG_COPFS_Response.pdf

⁸ Page 274 of the Report

⁹ <https://www.copfs.gov.uk/about-us/comments-complaints>

Accelerated Hearings for Gross Misconduct¹⁰

In cases where evidence of gross misconduct is incontrovertible as outlined in paragraph 19.104, the recommendation is that these cases can be expedited if they fit the necessary criteria. Implementation of that recommendation would in our view dilute due process, particularly where it is not clear who would be required to certify evidence as being ‘incontrovertible.’ The system must be equally fair and transparent to both sides.

That leads onto ensuring that the system for dealing with all allegations of misconduct needs to be subject to the same sift mechanisms and assessment to achieve that necessary consistency of process.

Family Support in relation to deaths in custody¹¹

Paragraph 25.15 of the Report identifies the need for free independent legal advice for the family from the point of death.¹²

The immediate aftermath of a death is the most crucial point where families need advice as was echoed by Dame Elish Angiolini when she gave evidence to the Justice Committee in December 2020 who stated: “The family need to have access to the same type of legal advice that the person who was in custody would have had. That should be immediate and expert advice, so that the family can get advice on what their rights are.”

She outlined the important background to the investigation into deaths in custody which are the responsibility of the State to investigate under its Article 2 obligations under the European Convention on Human Rights – the right to life. As well as recognising the role of the families, in relation to such deaths, there is a need to consider those officers who may have been involved in order to avoid the long term consequences of what has happened, and becoming ill and not being able to work.

In her evidence session at the Justice Committee Dame Elish Angiolini talked about the timescale for completing these inquiries as being a year as these cases do require “expertise and resource, because they are the most serious cases.”

We support the introduction of a timescale as it is in the interests of justice that these investigations are concluded as soon as reasonably practical.

¹⁰ Page 318 of the Report

¹¹ Page 398 of the Report

¹² This re-iterates her view (previously published in the 2017 Deaths and Serious Incidents in Police Custody in England and Wales) that the immediate aftermath is the most crucial point where families need advice.

Legal representation too is important for any police officers and conflict of interests do need to be managed where more than one officer is involved. Statements as to their role and involvement need to be taken as to ensure that there is a robust investigation of the death.

For advice for families, this will require the institution of a non- means tested route to independent legal advice which was reflected by the Society in its response to the consultation in September 2019 on “Legal aid reform in Scotland”¹³ where we stated:

“We doubt that families making applications for legal aid in [Fatal Accident Inquiries] fully understand the current legal aid application process and are likely to have difficulties in understanding the eligibility criteria for legal aid and the types of cases where funding may be available. Exactly who should be given legal aid in estranged families is also a matter on which views should be canvassed.”

We consider that families of those bereaved, particularly deaths in custody notwithstanding if they arise in police custody, do not appreciate the important role that they may play in proceedings (because they do not understand its significance). As Dame Elish Angiolini stated to the Justice Committee that consideration is needed as to “the ability a family has to do anything after a death, even if their intellectual agility is supreme. Given the grief and the shock, they will be dazed, and they need someone to look after their legal interests and the rights that they have at that time.”

They are not aware of the potential to obtain legal aid to engage a solicitor as a route to obtain that necessary advice and assistance to effect open and necessary communication and understanding of the process, usually required against the backdrop of intense media and public scrutiny.

We welcome the commitment¹⁴ that was given around a new Legal Aid Bill, that the Scottish Government will consider the issue around legal aid entitlement for relatives involved in Fatal Accident Inquiries.

The recommendation that families benefit from having travel expenses paid in certain circumstances is welcome as this will ensure that there is truly no financial barrier or access to justice issues to effective engagement in the process by any bereaved family.

Body worn cameras¹⁵

¹³ <https://www.lawscot.org.uk/media/363609/19-09-19-la-consultation-legal-aid-reform.pdf>

¹⁴ https://www.parliament.scot/S5_JusticeCommittee/Inquiries/20210205_SG_COPFS_Response.pdf

We refer to our response on “Police Scotland’s use of remote piloted aircraft systems and body worn video cameras.”¹⁶ That important debate as is this is inevitably taking place against the focus of attention on the issues in respect of the COVID-19 pandemic. We urged that there is a need to ensure effective public consultation as to any use or extension of that use which is to be undertaken. That needs to be followed by robust scrutiny and evaluation processes established to allow for the development of an appropriate legal and regulatory framework to capture all authorized use of body worn video cameras.

Such use should not be extended or indeed, where their use has exceeded the previously notified range of processes, that should not continue until such time as all these steps for scrutiny and guidance on its use have been undertaken and are in place accordingly.

These are necessary to respect the rights of the public and the rule of law for all involved.

Police training¹⁷

The issue of CPD of police officers is an important concern and underpins all the recommendations in the Report. The Report highlights the paucity of continued training in relation to specific areas (that includes unconscious bias). The general requirement for a high level of training and information sharing seems to be of paramount importance in ensuring a sustained and prolonged improvement in policing standards. That is supported by the Report at paragraph 1.14 where it states that

“We expect police officers in the 21st century to be equipped with the skills to reduce, so far as possible, the threat of harm and danger to themselves and others arising from the perceived potential for violence and from other breaches of their human rights. Emotional intelligence, intellectual acuity, integrity and empathy should be in play, along with physical competence.”

Training needs to support police officers but training also include experiential learning which must ensure that that it takes in the communities in which the police operate and to include them as contributors to the development of that training as outlined in paragraph 9.17 where it states that:

“Community representatives felt that learning about different communities and cultures should not be an internal police training exercise but rather a process based on regular interaction with those communities. That cultural awareness would help the police to treat people with more respect, to work in partnership with families and to understand their background. Trust depended on the everyday actions of the local police. Taking the community with you and simply enabling people to talk to the police is fundamentally important.”
(our emphasis)

¹⁶ <https://www.lawscot.org.uk/media/370279/2021-01-15-police-scotlands-use-of-remote-piloted-aircraft-systems-and-body-worn-video-cameras.pdf>

¹⁷ Page 37 of the Report

It would be good to understand how police training is to be overhauled to deal specifically with these aspects.

If training provision is effective, then complaints should fall both because officers are better trained but also because the training equips them to undertake their role to the satisfaction of the communities involved. That builds trust.

A study from America provides some useful insight into how training can be developed into a programme about procedural justice policing strategies. The strategies emphasized respect, neutrality, and transparency in the exercise of authority, while providing opportunities for civilians to explain their side of events. This seems a useful model of training to follow.¹⁸

¹⁸ Procedural justice training reduces police use of force and complaints against officers <https://www.pnas.org/content/117/18/9815>



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