



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE SUB-COMMITTEE ON POLICING

Thursday 3 October 2013

Thursday 3 October 2013

CONTENTS

	Col.
DECISION ON TAKING BUSINESS IN PRIVATE	221
COMPLAINTS AND INVESTIGATIONS	222

JUSTICE SUB-COMMITTEE ON POLICING

11th Meeting 2013, Session 4

CONVENER

*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

COMMITTEE MEMBERS

*John Finnie (Highlands and Islands) (Ind)

*Alison McInnes (North East Scotland) (LD)

*Margaret Mitchell (Central Scotland) (Con)

*Graeme Pearson (South Scotland) (Lab)

*Kevin Stewart (Aberdeen Central) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Roderick Campbell (North East Fife) (SNP)

Robin Johnston (Police Investigations and Review Commissioner)

Professor John McNeill (Police Investigations and Review Commissioner)

John Mitchell (Police Investigations and Review Commissioner)

CLERK TO THE COMMITTEE

Joanne Clinton

LOCATION

Committee Room 6

Scottish Parliament

Justice Sub-Committee on Policing

Thursday 3 October 2013

[The Convener *opened the meeting at 13:15*]

Decision on Taking Business in Private

The Convener (Christine Grahame): I welcome everyone to the 11th meeting of the Justice Sub-Committee on Policing. I ask everyone to switch off mobile phones and other electronic devices completely—that includes people in the public gallery—as they interfere with the broadcasting system even when switched to silent.

No apologies have been received.

Does the committee agree to take item 3, which is consideration of our work programme, in private?

Members *indicated agreement.*

Complaints and Investigations

13:16

The Convener: I hope to get through item 2 by 2.15 at the latest. It is our third evidence-taking session on the handling of complaints and investigations. Today, we will focus on the Police Investigations and Review Commissioner, which we know as PIRC. I welcome to the meeting Professor John McNeill, the commissioner; John Mitchell, the director of investigations at PIRC; and Robin Johnston, the director of reviews.

Good afternoon. If you want to answer a question from the committee, please indicate to me. In case you have not been here before, I point out that your microphone will come on automatically. I understand that Professor McNeill wishes to make a brief opening statement. Thank you for providing us with it in advance.

Professor John McNeill (Police Investigations and Review Commissioner): Thank you, convener, for inviting me to give evidence to the Justice Sub-Committee on Policing and for the opportunity to make a short opening statement.

As you will be aware, and as my title suggests, the Police Investigations and Review Commissioner has two distinct areas of responsibility under the legislation—the investigation of incidents and the review of complaints about the police by the public. When I appeared before the Justice Committee in March last year, one of the challenges was that we might not be ready in time and that the timescales were too ambitious. They certainly were ambitious, but we are up and running, we are carrying out investigations, demand is increasing and the Scottish Government is well sighted on the resources needed for me to fulfil the requirements of the legislation.

I pay tribute to my staff, whose professionalism, resilience, determination and support have helped me to meet the objectives that I set for myself when I agreed to extend my term as commissioner to 2014. They were, first, to establish PIRC as a fit-for-purpose oversight body that is capable of fulfilling its remit of undertaking independent and effective oversight of the police in Scotland; secondly, to run it for at least a year to provide stability and continuity in terms of independent oversight of the police in the lead-up to and early stages of the single police service in Scotland; and thirdly, to begin to evidence the organisation's capability and capacity by testing how the assumptions that were made on the drawing board compare with my experience.

As I began to work on those objectives, I quickly set myself a fourth, namely to ensure that relationships were established early with key stakeholders. Here, I am thinking about the Crown, Police Scotland, the Scottish Police Authority, Her Majesty's inspectorate of constabulary for Scotland and the Scottish Government. It was clear to me that, if I was to stand any chance of success in meeting my three objectives, professional working relationships would be at the heart of that.

I am pleased to report that, for the most part, those relationships are working well, although that is not to say that we do not have robust exchanges of views from time to time. I would be rather disappointed if that was not the case. Constructive challenge and pushback are healthy and contribute to assuring the public that we are an independent body that holds the police to account.

At the same time, I also set in train a public stakeholder engagement strategy to roll out information to the public using existing channels, such as Citizens Advice Scotland and other advocacy organisations, to begin to raise awareness among the public.

Without anticipating any of the committee's questions, I am happy to expand on my progress towards each of those objectives during my evidence.

Finally, I will introduce two of my directors. John Mitchell is director of investigations and Robin Johnston is director of reviews. It will come as no surprise that I have asked them to lead on answering questions that relate directly to their areas.

The Convener: Thank you, and of course if a question is directed at the witness panel in general, you may self-select and indicate which of you wishes to answer.

Kevin Stewart (Aberdeen Central) (SNP): In your opening remarks, Mr McNeill, you said that demand is increasing. Could you expand on that? In which areas is demand increasing?

Professor McNeill: I will start the answer and then, if you do not mind, I will hand over to John Mitchell, who will talk about demand in investigations and Robin Johnston, who will talk about demand in reviews.

I would like to go back a bit. In terms of reviews, in the run up to 1 April it became apparent that there was an increase in the workload. Indeed, for the first six months of this year, there has been something like a 50 per cent increase in the number of complaints that I have been dealing with. With regard to investigations, it is important to recognise that the work of the project board, of

which I was a member, was based on the best available information at that point in time and there has been a considerable increase in a number of areas that I had not expected: examples are death following contact with the police and serious injury following contact with the police.

Having established ourselves to go live on 1 April, we have very quickly found that demand has continued to increase from that date. John Mitchell might want to say something about demand for investigations.

John Mitchell (Police Investigations and Review Commissioner): Yes, thank you commissioner.

As the commissioner says, we tried to set a baseline during the reference groups to give us some form of understanding of the demand that we might face. To be able to do that, we had to rely on information that was available at that time. We ingathered information about the number of deaths in police custody and the number of investigations that would be directed by the Crown and conducted by police but that might, come 1 April, be passed to the commissioner for investigation.

When we looked at the number of deaths in police custody, that was fairly well understood. Numbers were available. However, the new legislation particularly brings in an investigation into deaths following police contact or serious injuries following police contact. None of that sort of information was available to the reference group. That is clearly a growth area and many of those investigations are quite complex and time consuming.

The Convener: I am consulting the clerks because we have the data about the number of deaths in custody and deaths following police contact, but they are not public: they are in a private paper. I am just assuring members that the data will go on to our website. Are you happy with that?

Professor McNeill: I am very happy with that.

The Convener: Good. The figures that we have show that, of deaths following police contact, which is a bit more difficult for you, five were investigated, 10 were not investigated, and there were 15 in total, obviously. Those are things that the public would like to know.

John Mitchell: Absolutely, and even since you have received the figures, which was a relatively short time ago, we have had a further three referrals in relation to deaths following police contact. They are going through the assessment process at the moment. The process is continuously evolving, as I am sure you appreciate.

Professor McNeill: With regard to Robin Johnston's area, it has been apparent for some time that there has been an increase in the number of cases that we are dealing with. Indeed, from my perspective, there has been an increasing degree of complexity in some of the cases.

Robin Johnston (Police Investigations and Review Commissioner): That is correct. The increase in the number of cases that we have received started in January and has continued largely unabated since then. As at the end of September, we have recorded an increase of around 50 per cent in the number of cases that we have been asked to investigate. That is unprecedented, and we have begun to look into the possible reasons for it. One possible reason is that PIRC is a higher-profile organisation than the Police Complaints Commissioner for Scotland was. In addition, the Police and Fire Reform (Scotland) Act 2012 introduced a three-month time limit for complainers to bring their cases to PIRC having received a response from the police. We feel that that may be contributing to the increase in the sense that, when a complainer receives a final response to their complaint from the police, it contains a standard paragraph at the end informing them of the three-month time limit. In the past, complainers may have delayed the submission of an application to us and then may not have submitted an application at all, whereas complainers may be acting with a greater degree of urgency now that they have been given a time limit.

Kevin Stewart: The situation that you describe seems to be pretty open and transparent. The complainers are taking up the offer at the bottom of the police response and are contacting you.

I have a question to enable us to get our heads around something and to give the public an insight. The convener talked about a total of 15 deaths following police contact, five of which were investigated and 10 of which were not investigated. The explanation that has been given to us is that, in the 10 cases that were not investigated, the Crown had indicated that a police investigation would be sufficient. We have been advised:

"When assessed by the PIRC, it was concluded that there were no additional matters relating to police contact with the deceased that would warrant a PIRC investigation."

Can you expand on the Crown's role in that?

John Mitchell: The responsibility for the investigation of all unexplained deaths in Scotland still lies with the Lord Advocate and the Crown Office. The legislation also requires the chief constable to refer to the commissioner for the consideration of an investigation relating to any death when the police have had contact, either

directly or indirectly, with the individual who subsequently died. In real terms, the police refer all deaths to the Crown, as they always have done. On some occasions, the Crown will instruct a police investigation that fulfils that need, answers all questions and reports back to the Crown in its independent state. There will, however, occasionally be circumstances around the death—probably more around the process—after the assessment of which we at PIRC may believe that there would be an opportunity to investigate and comment on good practice or on any failing and to give an open and clear understanding of the way in which the police have dealt with a particular matter.

Kevin Stewart: That is useful.

The Convener: With your leave, we will put up on the committee's webpage that entire annex to one of our papers—which includes the bit that Kevin Stewart just read out—as it has explanatory notes attached to the statistics. That would be helpful, if PIRC is content with that.

Professor McNeill: Yes, certainly. If it would be helpful to the committee, we would be happy to update the figures so that they are for the first six months of our operation.

The Convener: That would be very helpful. Otherwise, we are discussing stuff that the public does not know about. It would be helpful if that information were in the public domain.

Kevin Stewart: I have one further question in the same area—it will probably be unhelpful to the public again, unfortunately, but they will get to see the information in due course. There were zero investigations into the use of CS spray and 105 cases were not investigated. We have an explanation for that that you might want to expand on.

Beyond that, it says in our papers that information was requested

"for approximately 50% of cases, generally to clarify issues around cross-contamination."

Will you explain what is meant by "cross-contamination"? No explanation is given.

13:30

Professor McNeill: If you do not mind, I will ask John Mitchell to respond.

John Mitchell: The use of CS spray causes cross-contamination on occasion for people who are in the vicinity at the time. We have a robust pro-forma, which gives us all the information about the use of the spray. Quite often in the early days, the cross-contamination box was ticked, so we went back to ask for an explanation about who was contaminated and in what circumstances. On

each occasion, it was a police officer who had been contaminated, by his or her colleague.

Kevin Stewart: Thank you. I will let other members in, because I think that I have done what I meant to do in the area.

The Convener: I will let other members in. I have a little role here, as Margaret Mitchell knows.

Margaret Mitchell (Central Scotland) (Con): Thank you, convener. The commissioner said that the Scottish Government is “well sighted” on his office’s resource needs. Given the increase in reviews of complaints, and given PIRC’s new investigative role, do you have sufficient resources, in terms of not just finances but expertise?

Professor McNeill: Yes. At regular intervals I have alerted Government officials to patterns of demand, so if it became apparent that demand was increasing, for example in relation to investigations into the use of firearms, I flagged that up to officials. Similarly, in Robin Johnston’s area, the Government has been well sighted on developing trends. As a result, I secured additional resources during the current year. At this point two additional temporary staff are employed in John Mitchell’s area, and Robin Johnston has appointed two additional staff, who are awaiting final security clearance before they take up their duties.

That said, I have advised the Scottish Government of trends in areas that were not anticipated by the project board—death or serious injury following contact with the police, and the use of sprays and firearms—and the need for additional resources in that regard. I am confident that the Scottish Government is considering a business case from me.

Sorry, I did not answer the second part of your question. I will let John Mitchell speak to the skills mix in respect of investigators.

John Mitchell: There is a strong skills mix in relation to core business—the type of investigation that we envisaged having to take on. In my team, I have people who have expertise in family liaison and the critical business of keeping victims and members of the public up to date. I have people with a very strong background in road traffic collision examination, and I have people who have a background in counter-corruption.

We also have people who have a background in firearms. Ultimately, if we needed more support, we would have the option to go outwith Scotland for advice and support from firearms units and experts elsewhere, but currently I think that we have someone in our area of business with experience of the type of investigations that we have faced to date.

Margaret Mitchell: I note that if PIRC finds that the handling of a complaint was not reasonable, you can recommend that an apology is issued. Do you consider that willingness to apologise early on not only assists in the handling of the complaint for the complainer but enables the complaint to be dealt with more efficiently, thereby perhaps saving money? You are probably aware that I have an interest in the matter, as I am proposing a bill to encourage such willingness to apologise.

Professor McNeill: I have been heartened by the willingness of the police to offer an apology at various stages and by their willingness to accept almost totally my recommendations to make an apology. There are a few occasions on which they have not been able to offer an apology, for various reasons, at that point in time. Robin Johnston might like to add a further comment, but I agree with you.

Robin Johnston: Margaret Mitchell is absolutely right that an apology is sometimes the remedy that we suggest to the police. As far as 2012-13 is concerned, we are working towards a situation in which the police will have implemented 100 per cent of our recommendations. The reason that I say that we are working towards that situation is that there are a small number of cases outstanding on which we are awaiting a response to the recommendations, but we have no indication in relation to the cases that we dealt with in 2012-13 that the police were not willing to implement recommendations, including recommendations to apologise.

Margaret Mitchell: If the police offered the apology sooner, perhaps that would save money and time and be more effective, as people would not have to come to PIRC.

Robin Johnston: There is also the point that when the police deal with a complaint they will take a particular line or particular angle on the evidence and it is not until it reaches PIRC that we shed light on other evidence that perhaps undermines their approach to the complaint. It is only at that point that an apology becomes relevant, because prior to that the police will have approached the complaint on the basis that there was no need for an apology.

The Convener: It might also be the case that the police are concerned that civil proceedings might follow from an apology without some kind of caveat.

Who signs the letter of apology? Which rank signs it? How far up does it go? Does it depend on what the apology is for?

Robin Johnston: It can usually be any rank up from chief inspector. Responses to recommendations are usually made by chief inspectors, but they can also be made by the

deputy chief constable. It depends on the nature of the case and how far up the hierarchy it has gone.

The Convener: It is useful for people to know, if they are getting a letter of apology, who has signed it. They might not be satisfied by the rank of the person who has signed an apology, because what might seem a small matter—I do not mean in a bad way—to the police might be a very big matter in somebody's life. They might therefore be a bit peeved if it is not somebody who they think is important who has signed the letter, if I can put it like that—not that I am saying that superintendents are not important, but you know what I am saying; I think that I know what I am saying.

Alison McInnes (North East Scotland) (LD): Mr Mitchell talked about PIRC's staff. Can you give us your view on whether you are sufficiently independent of the police? The public must have confidence in the system, and a number of your staff are ex-police officers. Can you reassure us about the independence of your organisation?

Professor McNeill: Yes.

John Mitchell: Yes.

The Convener: They are all doing so together.

Professor McNeill: I will start off by giving a commissioner's perspective. As you will be aware, a level of assurance is already built in in respect of the role of the Crown. The independence of the commissioner is set out in legislation. The work of the commissioner is my work: they are my reports and my investigations. My office is the guarantor of independence, and of independence of approach.

We recruited investigators in a very short timeframe with great success. I am not trying to be flippant, but it became apparent to me that the process was not like buying a new house: it was not as if I went to Ikea, got a starter pack and got everything that I needed for my kitchen, my living room or anything else. There was no way in which I could access the skills that I required to gain credibility and provide effective investigations for members of the public without having a spine of experience running through the organisation.

I am sure that John Mitchell will expand on this point, but as he said, we have added a range of people with investigatory experience from non-policing backgrounds. I recognise the importance of perception. At a very early stage, we have introduced a trainee scheme and we have two people who are already embarked on training to become investigators. As we go forward, the intention is to bottom feed the organisation and to broaden out independence. At the moment, our investigators are independent because they answer to me. There is no institutional, actual or

hierarchical association with the police. We are effective because of the skills mix within investigations.

John Mitchell: I do not know that there is a great deal that I can add. I simply reiterate that all the investigation staff are now employed by the commissioner and directed either by him or by the Crown in the investigations that they carry out. The important thing is to ensure that the quality of the investigations that we undertake stands scrutiny from wherever scrutiny comes. We hope that that will build confidence and make some difference to how we are perceived in some areas.

The Convener: Why might investigations be directed by the Crown? I am interested in that phrase.

John Mitchell: If we are investigating a criminal matter or a death that might go to a fatal accident inquiry, the Crown directs us in that investigation. The Crown instructs the commissioner to undertake an investigation into the circumstances and we then report our findings back to the Crown and liaise closely with it throughout the lifespan of the investigation.

The Convener: Has that always been the case, or is that a new process?

John Mitchell: The process is new only in so far as PIRC is new. In the past, that role would have been performed by the police, who would have spoken to and liaised directly with the Crown.

The Convener: So it is new because you are independent of the police.

John Mitchell: It is new because we are new. That is where the independence element has again been strengthened.

Professor McNeill: What we have now is a strengthening of independence. The current arrangements guarantee that the investigation is seen to be independent because of the break in the link with the police. There is a separation now because the investigators work for me.

Alison McInnes: Do you have unfettered powers in relation to disclosure of all relevant documents and so on? Do you have powers to make witnesses attend?

Professor McNeill: The powers are quite considerable and extend to powers under the Regulation of Investigatory Powers Act 2000 and the Regulation of Investigatory Powers (Scotland) Act 2000 as well. From an investigatory point of view, John Mitchell has assured me—and I am sure that he will assure the committee—that the powers are sufficient to carry out the investigations.

John Mitchell: Yes, I agree whole-heartedly with that. The powers that we have are the same

as the powers that a constable in Scotland has when undertaking specific investigations. I think that the powers are more than sufficient at this time.

Alison McInnes: Robin Johnston spoke about “working towards” 100 per cent uptake of PIRC’s recommendations. How do you monitor the take-up of the recommendations? At what point do you follow them up to ensure that they are properly and whole-heartedly endorsed?

Robin Johnston: We do not regard a case as closed until the recommendations are implemented. We have created a database that contains details of every recommendation that we make. Generally, the police have 28 days within which we expect a recommendation to be implemented. However, there will be cases—for example, in which there is a recommendation to review procedures in a particular area—where that might take longer than 28 days. We will continue to remind the police about our recommendations until such time as we have received a response.

As far as 2012-13 is concerned, as I said, we are already at around 96 per cent implementation. The reason why we do not yet have 100 per cent implementation is not because the police have refused to implement recommendations but simply because either we are awaiting a response or we are evaluating a response to check whether the recommendations have in fact been implemented.

Professor McNeill: Each month when we have the case-handling review, as commissioner I ensure that we review the implementation of the recommendations.

Alison McInnes: Each case will have specific recommendations for a specific force or officer, but there may also be what I think these days are called learning points about good practice for the rest of the force. Do you also roll those out and monitor how they are taken on board?

Robin Johnston: We make a distinction between recommendations and what we refer to as learning points. Recommendations are made in relation to a specific matter. Learning points are of more general application—they perhaps raise issues that the police service in general can learn from. They were probably more relevant under the previous system, when there were eight separate forces, whereas now there is one. However, we still draw the distinction between recommendations and learning points.

13:45

Learning points can relate to a set of procedures: we might say that it would be useful if procedures were adapted in a particular way. Learning points do not carry the force of a

recommendation, in the sense that we are not asking the police to do something; we are simply asking them to take note of something and spread the learning throughout the organisation.

Professor McNeill: Increasingly, as we move forward and deal with more investigations, we will invariably identify learning points that arise from those investigations. We will advise all the key bodies of those learning points.

The Convener: I take it that those learning points will be recorded, although they are gentler than recommendations. Presumably, if learning points are not learned from, you will have something stronger to say.

Robin Johnston: Exactly.

Professor McNeill: That is an excellent point. There is quite a gap between identifying learning points and actively taking them forward. My experience to date is that the police have received learning points positively.

The Convener: It is not very often that I get told that I have made an excellent point. I am delighted. I think that I will leave now—that has made my day.

Graeme Pearson (South Scotland) (Lab): We will need to turn that round somehow, convener.

Good afternoon, gentlemen. Right at the start, commissioner, you talked about good relationships and said that relationships are currently working well. What most interested me—as well as my colleagues, I am sure—is that you also mentioned “robust exchanges of views”. Can you share with us the areas that generate those robust exchanges? Also, how are those exchanges resolved?

Professor McNeill: One of the things that I was quite concerned about in my previous incarnation as Police Complaints Commissioner for Scotland was that disagreements should not inhibit us or prevent us from moving forward in our work. It is uncomfortable to be criticised, but relationships need not be acrimonious. I have continued that approach. I believe that there is a shared agenda, which is about confirming confidence in policing for the people of Scotland. From my perspective, I do that by providing independent and impartial investigations and reviews.

The committee will be very aware that in the early stages, in the run-up to 1 April, the focus was quite properly on the imperative to be operationally ready on 1 April. Although we advertised over Christmas and new year and were spread over three sites on 1 April, we were active. In the run-up to 1 April, I and my staff invested heavily in making sure that people were sighted on our respective roles.

As we became operationally active, the system was a little bit clunky at times because people were—quite properly, as I was, too—focused on their own priorities. When that happened, I sought meetings or other people sought meetings with me and we had frank exchanges of views about how to go forward. On a number of occasions, if there were differences, it was my practice to phone people the next day, after we had slept on things, to confirm my approach.

After testing our understanding on a few occasions of what was required of each of us—in this case, Police Scotland and ourselves—the response was generous. I can confirm that, to date, no one has sought to prevent me from carrying out my function. No one has actively opposed the work that I have done. There have been differences of interpretation, and when that happens, we sit down and talk.

In the run-up to 1 April, I established a reference group to bring together the key players from all the bodies—the Crown, the police, the Scottish Police Authority, Her Majesty's inspectorate of constabulary and the Scottish Government—because I did not want gaps to open up between us. Where there are disagreements, I follow that up, or the police, the SPA or someone else follows it up. We meet, sit down and bottom out our disagreements. That is not to say that at the end of the day we are all in agreement, but the approach ensures that we work effectively together.

Graeme Pearson: Okay. I think we know who—

The Convener: You were expecting me to say something, but I did not fulfil that function.

Graeme Pearson: No—uncharacteristically. I am trying to be kind now and move forward.

On those relationships, we know the who but not so much the what. From what Professor McNeill said, I think that it was largely about how the organisations were building towards the future and that the robust exchanges have largely settled down as the processes and so forth have been sorted out.

Professor McNeill: I would not want to overstate the frequency of robust exchanges. That has not been—

The Convener: We have not started robust exchanges. When we start—

Graeme Pearson: That was the comment in your introduction, Professor McNeill.

Professor McNeill: That has not been my experience.

Graeme Pearson: That is fine.

Professor McNeill: I think that we have all been focused on our own priorities and, invariably, it takes a while for new relationships to mature. It takes a while—

Graeme Pearson: I am comfortable with your answer. I am happy with that.

The Convener: Let us move on.

Graeme Pearson: I am conscious of the time.

The Convener: Are you going to ask something specific?

Graeme Pearson: You talked about the growth in your business, Professor McNeill. Can you give us some insight into the size of your organisation and its budget in comparison with the size and budget of the deceased organisation, if I can put it that way?

Professor McNeill: It has been a bit of a rollercoaster ride for the past four years, as a number of you will be aware. When I was the Police Complaints Commissioner, I finished up with 12 or 13 staff and a budget below £1 million. I currently have 41 staff—so there is the commissioner plus 41—the budget is £2.61 million, and staff costs account for almost £2 million of that. It is different in scale and complexity, and in terms of responsibility.

Graeme Pearson: Yes, I understand that.

Professor McNeill: We are now spread over two sites on one campus in Hamilton.

Graeme Pearson: At an earlier stage, there was concern about the lines of demarcation between the various organisations: Police Scotland, its professional standards department, the newly organised PIRC, and the Crown Office and Procurator Fiscal Service. Do you feel comfortable that the boundaries have now largely been identified and that no complaint that comes through the system will somehow get into a no man's land?

Professor McNeill: I have helped to mitigate that risk by working through the reference group, but principally it has been done through the development of memorandums of understanding. They are all at various stages, but there are no major disagreements or areas of disagreement left. An MOU has been agreed between the Scottish Police Authority, Police Scotland, our organisation and various other bodies. Some have not signed, but I think that that has more to do with the sequencing of committees than any fundamental differences.

Relationships and professional respect are crucial. Working closely at different levels within the organisation with our opposite numbers is helping to iron out any wrinkles as we go forward. I am confident that we are travelling in the right

direction and learning to trust one another more. I know how to deal with any difficulty or misunderstanding. For example, in relation to any issues that come up between the Scottish Police Authority and me, Ian Ross and I meet or communicate regularly—he comes to my reference group, and his head of complaints deals with her opposite number. The same applies in the investigative area and in relation to professional standards. It also applies in Robin Johnston's area. It is a multi-layered approach.

I did not plan to be in this position, and if you had asked me back then whether it would turn out so well, I would have been more pessimistic. It is not just going, but going well, although that is not to say that there is no room for improvement.

Graeme Pearson: I have another question.

The Convener: It will have to be brief. I am conscious of the time—I know that that is one of our problems.

Graeme Pearson: My question is on the issue that Alison McInnes raised with Mr Mitchell about powers and PIRC's ability to deal with investigations. There has been some controversy in England over the ability of investigative bodies to compel police officers to make operational statements—to give an account of circumstances. You do not have powers to compel.

John Mitchell: No, we do not have powers to compel; nor have we, at this stage, experienced any reluctance among officers to speak to us, although we will keep a count of such circumstances. Since 1 April, we have taken it upon ourselves to interview a number of officers with no problem whatever.

Graeme Pearson: Looking to the future, do you see yourselves needing to move in the direction of powers to compel, or do you not foresee having to do so, given your experience and knowledge of the current challenge?

John Mitchell: We have to keep an open mind on that. We would have to gather evidence to sustain an argument for further powers. We will do that but, as things stand just now, I do not envisage any problem in that regard.

Graeme Pearson: My final question is a very brief one.

The Convener: That is three questions—I thought that you had two. I am counting.

Graeme Pearson: That was just a point of clarification.

The national crime agency will come into being next week. You previously had the ability to review situations in the Serious Organised Crime Agency if it was involved in incidents in Scotland. Will that power extend to the new agency as of Monday?

John Mitchell: Yes, it will, and there is a memorandum of understanding waiting to be signed on 7 October.

The Convener: That was a good question. Are any of your questions left, John?

John Finnie (Highlands and Islands) (Ind): In part, convener—you may be dismayed to hear that.

The Convener: I am in an awfully good mood.

John Finnie: Good afternoon. I want to return to the issue of deaths in custody, which the public are overconcerned about. Given the many thousands of dealings that the police have with the public and the number of vulnerable people they take in, people should not be alarmed about the issue.

I am trying to get my head around the relationships, the questioning that would have taken place in advance of the changes that were introduced and our understanding of initial responses. We know that there is an obligation on the police to report all deaths in custody to the Crown. We also know that there is an obligation on the Scottish Police Authority and Police Scotland to advise you of all deaths in custody.

John Mitchell: They must advise us of all deaths following police contact.

John Finnie: Right. You will be made aware of them all, but you may have had only some of them referred to you by the Crown for further investigation.

John Mitchell: Yes, indeed.

John Finnie: Is there the facility for you to say that, although you have not been requested by the Crown to investigate, you would nonetheless like to look into a particular case?

John Mitchell: Yes, there is. Our interest is more in process and procedures. To date, all deaths in police custody have been referred to us to investigate. There is a wider definition of death in police custody, which seems to encompass death following police contact.

You will see from our written evidence that, on occasions, the Crown has decided that there is no requirement for a full independent investigation by PIRC into all aspects of a death. However, we get the information and we assess the information that we receive. If we believe that there is an opportunity to comment either positively or negatively on the case, we will speak to the Crown, agree the terms of reference for our further investigation and take it forward.

John Finnie: That brings me to my point. If some poor soul is found dead in a cell, at what point are you advised?

John Mitchell: We are advised as soon as is practicable thereafter, and we will liaise with the Crown. It is important that we are able to put that independent element into play at the earliest opportunity.

John Finnie: Indeed, but some investigation may well have been initiated.

John Mitchell: Yes.

John Finnie: And some response.

John Mitchell: Yes.

John Finnie: You say that you will receive documents. What information will you receive if the Crown has not referred the case to you?

John Mitchell: Ultimately, the Crown will refer deaths that are clearly defined as deaths in police custody. We get access to all documentation that Police Scotland may have at that stage, and we continue that investigation.

John Finnie: A note on your figures says:

"All deaths in custody are referred to the Crown, which may then refer to the PIRC to investigate."

John Mitchell: Yes.

14:00

John Finnie: Notwithstanding the fact that an incident has not been referred to you by the Crown, you can take the decision to look at aspects of it. What is that decision based on?

John Mitchell: That is not the case. The circumstances are that the police are required to notify the commissioner of all deaths following police contact. The commissioner may choose to investigate some of those.

In the event that there is a Crown-instructed investigation, we would not want to duplicate work or to cut across that. The operational response would be for us to contact the Crown to get an understanding of the investigation that is being undertaken—on occasion, by Police Scotland under the direction of the Crown—because we may have an interest in particular areas of that investigation to do with processes or procedures. We would then get the Crown's agreement that it would be appropriate for us to investigate some of those processes and procedures to enable us to report back whatever learning may be available, whether that relates to good practice or bad practice.

John Finnie: I understand the outcome; I am trying to understand the difference between the two sets of circumstances. I want to know about circumstances in which there is a death in custody that the Crown decides not to refer to you, which you nonetheless choose to investigate.

John Mitchell: I will give an example. There might well be a set of circumstances in which a missing person unfortunately ends up as a deceased person. The response to that would be for the police to investigate the circumstances behind the death and to report it as an unexplained death to the Crown. Such a death would not be a death in police custody that would require a mandatory fatal accident inquiry. However, it would be referred to us, along with an outline of the circumstances. The chief constable might ask us to look at aspects of the process and to determine whether the police behaved correctly, what they did well and what they did not do quite as well. That would give us an opportunity to have a second investigation.

John Finnie: You will have quite a heavy workload. It is extremely important that there is public confidence in the independent element of what you do. It is the self-initiation of work that I am wondering about.

John Mitchell: We do not self-initiate work. We are talking about a set of circumstances in which the chief constable makes a referral and asks the commissioner to consider the circumstances and the way in which the police dealt with a situation that ended up with someone dead. Did the police make any contribution to that? Were the police in any way involved or responsible? Is there anything to be learned about how the missing person aspect of the investigation was handled?

It is not a case of us self-initiating work. The chief constable is required to ask the commissioner to consider an investigation into all incidents of death following police contact.

John Finnie: Forgive me, but that is not necessarily clear from the document that we have before us.

What is different? What will the Crown Office ask you to do in relation to such a death that Police Scotland will not ask you to do?

John Mitchell: The Crown Office will not ask us. If we are investigating something that clearly falls under the definition of a death in police custody that requires a mandatory fatal accident inquiry, the Crown will direct us. We are talking about a death following police contact in relation to which it may be possible to learn something about the processes or procedures that the police adopted. Such cases will not necessarily end up in a fatal accident inquiry.

John Finnie: Is there a definition of what would trigger an FAI? At one stage, I think that one was triggered if someone died within 24 hours of being in police custody.

John Mitchell: The definition is very open. As you know, with a death in police custody, the

Crown takes a decision to approach a sheriff for the right to run a fatal accident inquiry.

John Finnie: Okay.

I have a couple of other questions.

The Convener: Are you staying with the chart?

John Finnie: I am moving away from the chart.

The Convener: Before you do so, I want to ask something. It is unfortunate that this information is not already up but it will go up on the Parliament website. There is a line in the chart that refers to

“Serious injury following police contact”,

of which four cases were investigated and three were not investigated. What would you define as serious injury? What is the range?

John Mitchell: The legislation does not define serious injury but, in the memorandum of understanding and to support the setting of the bar so that referrals are made, everyone has agreed that a serious injury means:

“a fracture, deep cut, deep laceration, injury causing damage to an internal organ or the impairment of any bodily function, or severe psychological trauma from which the victim's recovery is expected to be difficult or impossible.”

That has been agreed with the SPA, Police Scotland and the Crown in relation to meeting and setting the bar for referrals.

The Convener: I am glad that you have put that on the record. Perhaps when you provide us with updated data, you might want to expand on some of those issues.

John Finnie: That is helpful. Perhaps it is too late in the week and I am not interpreting right, but would it be possible to have a flow chart that indicates the triggers, for instance?

John Mitchell: Yes.

John Finnie: That would help.

I would like to move on to two other issues. Previously, I had discussions with Professor McNeill about the last refuge for a complainer. Many people always look for another level to go to.

The Convener: Like us—MSPs.

John Finnie: How would PIRC respond to what it clearly understood to be a vexatious complaint following an investigation?

Professor McNeill: As members well know, dealing with individuals who are not—for a variety of reasons, many of which are understandable—easily or readily satisfied can take up inordinate amounts of time and, in a small organisation, disproportionate resources.

The Convener: We are nodding in agreement.

Professor McNeill: The issue is common to most public bodies. Sometimes I spend quite a bit of time on it and I am satisfied with what happens, but on other occasions that is not the case at all. Would Robin Johnston like to talk us through the firing sequence?

Robin Johnston: Yes. Like most public bodies, we have in place a policy to deal with individuals who impose a disproportionate burden on resources or are perhaps aggressive or abusive to staff. Under the policy, where that behaviour becomes apparent, we will first of all write to the individual concerned to highlight the behaviour and essentially ask for it to stop. If that does not work, we have the ability to restrict contact with the individual under the policy. That might mean restricting telephone contact on the basis that the individual has been abusive, or it may mean not providing a substantive response to correspondence that raises issues that we have already dealt with.

The senior management team sits down on a monthly basis and reviews the cases of any individuals whose contact is restricted. If we consider that it is appropriate to extend the time in which the individual has restricted contact, we will write to the individual and ask them to make representations if they see fit to do so. We will then make a decision based on our views and those of the individual concerned.

The issue is very difficult for most public bodies, because public bodies instinctively do not wish to restrict contact with someone who is trying to use their service. Equally, however, when staff are abused on the telephone or we find that our ability to review other cases is prejudiced because of the resources that are unjustifiably taken up by a particular individual, we must take steps to try to remedy that. The important thing is that the policy must be applied fairly and consistently at all times, and I think that we generally achieve that.

John Finnie: I have a direct question. If, following an investigation, you formed the view that someone had made a false accusation of crime against an individual, would you report that matter to the procurator fiscal? If not, why not?

Robin Johnston: We have a memorandum of understanding with the Crown Office. There is a provision in that document that states that, if we become aware of a criminal offence, we will refer the matter to the Crown Office. From memory, I think that we have done that on one occasion.

If we come across someone who is threatening on the telephone and perhaps poses a risk more widely, what sometimes happens is that, rather than refer it to the Crown, we report it directly to

the police, who might then take action on the individual.

John Finnie: It was a huge frustration—it certainly was in my day—in the police service. People saw that false accusations were made. A lot of them were made out of misunderstandings, but a very small percentage were criminal accusations. Setting aside that you want to be accessible and seen to be supportive, I would be grateful to hear some assurance that, on the rare occasions when such accusations surface, appropriate action is taken on people who make them.

Robin Johnston: That is absolutely right. If we come across the commission of any criminal offence, we report it directly either to the Crown, under the memorandum of understanding, or to the police.

The Convener: What about false accusations? I think that John Finnie is referring to false accusations.

John Finnie: Clearly you would have to prove criminal intent—I accept that. There will be inaccurate accusations that are based on false premises or information, but I was seeking assurance on clearly malicious accusations, and I think that I have received it.

Robin Johnston: If it is a malicious allegation or complaint, it is a criminal offence, which would be reported. The difficulty is identifying when one occurs.

John Finnie: Indeed.

The Convener: In addition, if someone has mental health issues, there are a whole lot of complexities. As politicians, we are aware from our casework that each case has to be dealt with individually, on its merits.

Roddy, you will have the last question. Welcome to Mr Campbell—he has found us so enticing that he has come along.

Roderick Campbell (North East Fife) (SNP): Good afternoon. I wanted to touch on resources and the increase in workload: whether you have observed any trends, where you think things are going in the next four to five years and whether you think that there is a risk that the catch-all investigations—those in relation to any matter affecting the SPA or Police Scotland in which you think it is in the public interest to investigate—might be squeezed out.

Professor McNeill: I will see whether I can recap what I said earlier about the resources.

The resources that I have at the moment are sufficient. The Scottish Government has granted me additional resource, and John Mitchell will have an additional short-term resource, as will

Robin Johnston. As we go forward and the demands on the organisation increase, we will have to revisit that from time to time.

It is equally relevant to say that the organisation must have an ability to flex or surge in response to some demand, which might be something in the public interest or a complex, lengthy investigation that we are required to carry out.

I am fairly relaxed about resources at the moment. The situation is demanding, but as I have said I have a business case, the Scottish Government is aware of the need, and I have a certain ability to begin to deal with that myself, in-house.

You asked whether public interest might be squeezed out. A number of my colleagues—some of whom you will know quite well—used to get exercised about public interest. The excitement around that has died down as we have gone forward six months into the new arrangements.

One interpretation of public interest might be that I would exercise it only when—I am being crude here—the sky fell in: if something so dramatic happened that Parliament, the justice secretary, the media and the public all demanded some form of action.

A more relevant way of looking at the issue is that there is a general catch-all. If my powers were not appropriate or sufficient to cover such a situation, I would exercise the public interest. I have exercised it once in six months, which takes us back to the point about us teasing out our respective stances and responsibilities. That would not happen now; it was exercised without fuss and I secured complete co-operation from the police.

That is a rather long-winded way of saying that I am quite confident that this power is additional and valuable and one that—unlike in other jurisdictions—is not subject to ministerial direction or veto. In the Republic of Ireland it has been used only once, in a long and complex inquiry that is on-going.

The Convener: I am sorry that we are always truncating things; there is much more that we might wish to ask. Thank you very much for your evidence and for attending today. If you feel that there is something that we ought to have asked but have not, feel free to let us know. We look forward to receiving the revised data with explanatory notes, which will be helpful.

14:15

Meeting continued in private until 14:19.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice to SPICe.

Available in e-format only. Printed Scottish Parliament documentation is published in Edinburgh by APS Group Scotland.

All documents are available on
the Scottish Parliament website at:

www.scottish.parliament.uk

For details of documents available to
order in hard copy format, please contact:
APS Scottish Parliament Publications on 0131 629 9941.

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@scottish.parliament.uk

e-format first available
ISBN 978-1-78351-814-2

Revised e-format available
ISBN 978-1-78351-832-6

Printed in Scotland by APS Group Scotland
