

**Police and Fire Reform (Scotland) Act 2012**

**Post-legislative scrutiny**

**Written evidence to the Justice Committee**

**Scottish Human Rights Commission**

**24 May 2018**

The Scottish Human Rights Commission was established by The Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the national human rights institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

**Introduction**

1. The Scottish Human Rights Commission (the “Commission”) welcomes the opportunity to submit evidence to the Justice Committee’s post-legislative scrutiny of the Police and Fire Reform (Scotland) Act 2012.
2. The Commission submitted stage 1 evidence to the Justice Committee in March 2012 on the then Police and Fire Reform (Scotland) Bill (the “2012 submission”). The Commission subsequently submitted a detailed response to the Scottish Government Consultation on Proposals for Regulations relating to Investigations. Those proposals formed the basis of the Police Investigations and Review Commissioner (Investigations Procedure, Serious Incidents and Specified Weapons) Regulations 2013.
3. The Commission made a number of recommendations in these submissions, the majority of which remain outstanding and highly relevant. The Commission draws out key recommendations relevant to the Committee’s post-legislative scrutiny below.

**Human rights context**

1. The Commission made clear in its 2012 submission its belief that the development of a single police force and oversight structures in Scotland was a unique opportunity to embed human rights into the police structure to ensure compliance with their obligations under section 6 of the Human Rights Act 1998 (“HRA”).[[1]](#footnote-1) The Commission agreed with the overall purpose of the legislation, which was to create a modern, statutory framework for policing in Scotland with appropriate accountability arrangements.

**Relevant human rights principles**

1. As highlighted in the Commission’s 2012 submission, there are a range of international Conventions and Codes which recognise that the primary purpose of policing includes the protection of human rights.

* The HRA requires all public authorities – including the police – to act in a way which is compatible with the individual rights and freedoms contained in the European Convention on Human Rights (“ECHR”). Articles 2 and 3 of the ECHR, which protect the right to life and freedom from torture, inhuman or degrading treatment or punishment respectively, are particularly relevant in this context.
* Article 2 of the United Nations Code of Conduct for Law Enforcement Officials[[2]](#footnote-2) states that in the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.
* The European Code of Police Ethics 2001 states that one of the main purposes of the police in a democratic society governed by the rule of law includes the requirement to protect and respect the individual’s fundamental rights and freedoms as enshrined, in particular, in the ECHR.

1. In relation to police accountability mechanisms, there are a number of international instruments that recognise the importance of monitoring and measurement, based on human rights indicators against which police policies are assessed. The Commission highlighted two in its 2012 submission:

* The European Code of Police Ethics, which requires accountability mechanisms, based on communication and mutual understanding between the public and the police, to be promoted.[[3]](#footnote-3)
* The 2011 Laxenburg Declaration, which reiterates the need to ensure transparency, accessibility, accountability, legitimacy, impartiality and integrity in all systems created for police oversight and specifically promotes respect for the rule of law and human rights through and within all police oversight activities. It also calls for strong civil society participation in police oversight. [[4]](#footnote-4)

**General recommendations relevant to the Police and Fire Reform (Scotland) Act 2012 (the “Act”)**

*Human rights reference*

1. The Commission’s 2012 submission highlighted that human rights should be explicitly articulated in legislation. The Commission called for the police oath to include a clear commitment to upholding and protecting human rights and fundamental freedoms and welcomes that this features in section 10 of the Act.
2. Although the constable’s declaration is a positive step, this is the only explicit reference to human rights in the Act despite the distinct human rights obligations for the police under the HRA. Section 32 of the Act includes a statement of policing principles to which the Scottish Ministers, the Scottish Police Authority (“SPA”) and the chief constable must have regard when setting the strategic direction of the Police Service. The Commission believes the policing principles offer an opportunity to define the fundamental values and principles of the Scottish Police Service and should reflect the human rights obligations of the police.

**Recommendation:** A commitment to upholding human rights, as protected by the HRA, should be explicitly included in the policing principles of the Scottish Police Service provided for in section 32 of the Act.

*Ethical framework*

1. The Act makes no provision for a code of ethics for the Scottish Police Service. The Commission notes the Code of Ethics for Policing in Scotland, and welcomes that it explicitly deals with human rights and police officers’ obligations under the HRA. [[5]](#footnote-5)

**Recommendation**: The Commission believes the Act should make provision for an ethics code to be placed on a statutory footing.

*Scottish Police Authority*

1. Section 2 of the Act sets out the functions of the SPA. Section 2(3) of the Act states that the SPA must “*try* to carry out its functions in a way which is proportionate, accountable and transparent and which is consistent with any principle of good governance which appears to it to constitute best practice.” (emphasis added).

**Recommendation**: The word ‘try’ should be deleted. The SPA, a public authority, is required to act in compliance with rights protected by the ECHR.

1. Section 33 of the Act provides that the Scottish Ministers may determine the strategic police priorities for the SPA. Section 5(1) also provides that the SPA must comply with any specific or general direction given by the Scottish Ministers. The Scottish Ministers therefore have a comprehensive power to direct the SPA.

1. The Commission believes that the Scottish Ministers should only retain the power to set principles and overall objectives for policing and the SPA should have the independence and power to set its own strategic priorities. The Commission believes the power given to Scottish Ministers in the Act poses a significant challenge to the independence of the SPA and the integrity of the police accountability framework.

**Recommendation**: The Commission believes the SPA should have the independence and power to set its own strategic policing priorities.

*Independent Custody Visiting*

1. The Commission is a member of the UK’s National Preventative Mechanism (“NPM”), designated in accordance with the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“OPCAT”). The Commission welcomes the specific reference to OPCAT in section 93 of the Act and the objective of establishing a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.
2. The Commission also welcomes the provisions in section 95 of the Act relating to the Subcommittee on the Prevention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (“SPT”). These provisions reflect best practice and mirror those in OPCAT.
3. The determination in relation to whether the grounds of refusal are met is currently delegated to a constable of the rank of inspector or above.[[6]](#footnote-6) In its 2012 submission, the Commission made clear that, given that the purpose of independent custody visiting is to prevent torture and other cruel, inhuman or degrading treatment or punishment while in police custody, it was concerned that the decision to refuse access would be taken at an operational level, without any provision for authorisation or oversight. The Commission acknowledges that, while the inspector may be operationally removed in many instances, this may not always be the case. The Commission remains concerned that section 94(4) of the Act gives authority for the refusal of a visit to the constable who is directly responsible for the treatment of the detainee.

**Recommendation**: In order to meet the objectives of OPCAT, further consideration should be given to the procedure for refusing access.

1. The Commission also draws the Committee’s attention to the general importance of awareness raising around OPCAT and Chapter 16 of the Act. This is important for the successful implementation of Chapter 16. The Commission reiterates that the following points should be addressed to ensure the effective operation of independent custody visiting:
   * Custody visiting must be adequately resourced as required by Article 18 of OPCAT and set out in paragraph 11 of the SPT Guidelines;[[7]](#footnote-7)
   * The terms of office of custody visitors should be specified (paragraph 9, SPT Guidelines);
   * Custody visiting should enjoy financial and operational autonomy (paragraph 12, SPT Guidelines);
   * There should be a follow-up process between the police authorities and/or government and custody visitors to ensure recommendations are addressed (paragraph 13); and
   * Custody visitors should take into account human rights standards when carrying out visits (paragraph 36, SPT Guidelines).

**Recommendations relevant to the Independent Complaints and Investigation Mechanism**

1. In 2012, the Commission welcomed the establishment of the Police Investigations and Review Commissioner (“PIRC”) as a new independent investigation mechanism and made recommendations to ensure its effective functioning. [[8]](#footnote-8) The Commission provided further in-depth analysis in its submission on the Proposals for Regulations relating to Investigations (the “2013 submission”).
2. The Commission provides recommendations relevant to The Police Investigations and Review Commissioner (Investigations Procedure, Serious Incidents and Specified Weapons) Regulations 2013 (the “Regulations”) below, drawing on its 2013 submission.

*ECHR requirements regarding effective investigations*

1. Both the Act and the Regulations fail to make any reference to the essential requirements that must be met in order for the Scottish Government to discharge their procedural obligations under Articles 2 and 3 of the ECHR, which protect the right to life and freedom from torture, inhuman or degrading treatment or punishment respectively.
2. The requirement for effective official investigation where individuals have been killed or seriously injured as a result of actions of state agents is settled jurisprudence of the European Court of Human Rights.[[9]](#footnote-9) In these circumstances any investigation must be:

* **Independent.** There should be no institutional or hierarchical connections between the investigators and the officer about whom a complaint has been made and there should be practical independence;
* **Effective**. The investigation should be capable of gathering evidence to determine whether police behaviour complained of was unlawful and, if so, to identify and punish those responsible;
* **Prompt**. The investigation should be conducted promptly and in an expeditious manner in order to maintain confidence in the rule of law;
* **Open to public scrutiny**. Procedures and decision-making should be open and transparent in order to ensure accountability; and
* **Involve the victim or victim’s family where the victim is deceased.** The complainant (or the complainant’s family) should be involved in the complaints process in order to safeguard their legitimate interests.

1. The State also has positive obligations under Article 8 ECHR to safeguard the individual’s physical integrity and this may extend to questions relating to the effectiveness of a criminal investigation.[[10]](#footnote-10)

**Recommendation:** The Commission stresses that the Regulations and Act must meet the essential requirements for an effective investigation and believes the Regulations and Act should explicitly refer to these requirements. In particular, this includes guaranteeing the independence of the PIRC, providing the PIRC with adequate investigatory powers of disclosure and attendance of witnesses, providing a level of public scrutiny of the PIRC’s investigation processes and ensuring the involvement of the victim or the victim’s family (where the victim is deceased). Adequate training and guidance on the requirements of ECHR obligations should be provided.

*Mandatory referral to the Commissioner*

1. Regulation 3 of the Regulations sets out the mandatory duty to refer serious incidents to the PIRC. Duties apply to both the chief constable and the SPA. Regulation 3 fails to address the position where the chief constable decides not to refer an incident to the PIRC, but which the SPA believes should be referred to the PIRC.

**Recommendation**: Although the Regulations do not preclude the SPA from referring serious incidents where the chief constable does not, the Committee should consider whether explicit provision should be made to make clear this is a possibility.

1. Regulation 3 (mandatory referral) does not apply to any circumstances mentioned in Regulation 6 or where a member of the police service has used a weapon specified in Regulation 7. The circumstances set out in Regulation 6 are:

“Any circumstance in which a person serving with the police has, acting in the execution of that person’s duties, used any item to –

(a) attempt to cause a member of the public serious injury; or

(b) cause or attempt to cause a member of the public an injury which is not serious,…”[[11]](#footnote-11)

1. The policy note accompanying the Regulations explains that, although referral to the PIRC would not be mandatory, circumstances covered by Regulation 6 may be referred to the PIRC if the SPA or chief constable considers that an independent investigation would be appropriate. Paragraph 11 of the policy note explains that Regulation 6 is intended to ‘cover circumstances in which, for example, a police officer has used an item to prevent a member of the public being harmed, or to defend themselves. This might happen if an officer were deprived of their safety equipment had to use whatever was to hand.’ Paragraph 12 goes on to state that it is anticipated the number of these types of incidents will be very low.
2. Although an element of discretion is justified given the category of incidents is intended to be lower level in terms of harm caused, it is important to note that situations referred to in Regulation 6 have the potential to engage Articles 3 and 8 ECHR. In these circumstances, legal *obligations* to investigate may arise.
3. Similarly, Regulation 3 does not apply to:

“…(b) a circumstance in or in consequence of which a person serving with the police has used a weapon specified in regulation 7.”

Regulation 7 provides that police batons are specified weapons.

1. The Regulations therefore afford the chief constable or SPA with discretion as to whether or not to refer circumstances of baton use to the PIRC for independent investigation. The Commission reiterates that baton use has the potential to engage Articles 3 and 8 ECHR, leading to obligations to investigate.

**Recommendation**: The Regulations should explicitly refer to ECHR obligations and require discretion on whether to refer incidents covered by Regulation 6, or involving a specified weapon, to be exercised in line with ECHR obligations. Sufficient training should be provided to ensure those with decision making power understand those obligations.

*Investigation of serious incidents*

1. Regulation 4 of the Regulations provides that the PIRC must investigate serious incidents where a person has died and the person, at or before the time of death, had contact with the police and there is an indication that the contact may have caused or contributed to the death. However, the Act is broader in its terms in relation to this type of serious incident. Section 64 of the Act defines such serious incidents as a circumstance in which, or in consequence of which, a person has died *or sustained serious injury* and there is an indication that contact may have caused (directly or indirectly) or contributed to the death *or serious injury*.

**Recommendation**: Consideration should be given to including the wording of the 2012 Act to broaden the scope of Regulation 4. The PIRC should be required to investigate serious incidents where a person who has had direct or indirect contact with a person serving with the police has died or sustained serious injury where there is an indication that such conduct may have caused (directly or indirectly) or contributed to the death or serious injury.

**Recommendation**: Consideration should be given to including in the Regulations the explicit requirement that the victim or the victim’s family (where the victim is deceased) be involved in the investigation process in order to safeguard his/her legitimate interests.

1. The Regulations and the Act give the PIRC discretion to decide whether to investigate other serious incidents or matters in the public interest.[[12]](#footnote-12) It is important that the PIRC is given discretion and independence to decide which incidents and matters to investigate. That said, it is equally important that the PIRC’s decision-making process is open, transparent, objective and independent to ensure accountability and public confidence.

**Recommendation**: There should be a requirement that the PIRC gives reasons, at least to those affected, for a decision not to investigate any ‘serious incident’ involving a person serving with the police or ‘matter in the public interest’.

1. Regulation 4(3) states that where the PIRC decides not to carry out an investigation, it may refer the matter back to the person who requested the investigation with appropriate recommendations. The Regulations are silent on the status of those recommendations.

**Recommendation**: The Regulations should require the Police or SPA to comply with the PIRC’s recommendations.

*Co-operation and assistance*

1. Regulation 5 sets out the co-operation and assistance that must be provided from the Police Service and the SPA in respect of PIRC investigations. In its 2013 submission, the Commission welcomed this important duty of co-operation and assistance. However, the Commission made clear in its 2013 submission that in order to ensure, and not assume, that the investigation will meet ECHR requirements, there should be an explicit requirement that the PIRC was to be given access to persons serving with the police who may be able to assist investigations.

**Recommendation**: The Regulations should include an explicit requirement that the chief constable and SPA allow the PIRC access to ‘persons serving with the police’ who may have information that could assist an investigation.

**Conclusion**

1. In its 2012 submission, the Commission made clear its view that a focus on human rights must be integrated into and made explicit in the Act. The Commission reiterates this view; human rights are essential to achieving the fundamental purpose of the police. Further, it is vital that provisions relating to investigations explicitly reference the clear human rights obligations that arise in this area.
2. The Commission has made a number of recommendations in this submission, many of which were made during the course of the Act’s and Regulations’ passages into law. The Commission would be pleased to answer any questions that the Committee may have in relation to this submission.

**Scottish Human Rights Commission**

**May 2018**

1. Section 6 of the Human Rights Act 1998 requires all public authorities, including the police, to act in a way which is compatible with the rights and freedoms contained in the European Convention on Human Rights. [↑](#footnote-ref-1)
2. Adopted by General Assembly resolution 34/169 of 17 December 1979. [↑](#footnote-ref-2)
3. Recommendation Rec(2001)10 adopted by the Committee of Ministers on 19 September 2001 at the 765th meeting of the Ministers’ Deputies. [↑](#footnote-ref-3)
4. Adopted by the key representatives of the national Police Oversight Bodies and national Anti-Corruption Authorities of the Member States of the Council of Europe and the European Union at the Eleventh Annual Professional Conference of the European Partners Against Corruption, including the EU’s Anti-Corruption Contact-point Network, in Laxenburg, Austria, 22 to 25 November 2011. [↑](#footnote-ref-4)
5. Available at: <http://www.scotland.police.uk/about-us/code-of-ethics-for-policing-in-scotland/> [↑](#footnote-ref-5)
6. Section 94(4) of the Act. [↑](#footnote-ref-6)
7. SPT, *Guidelines on national preventive mechanisms* CAT/OP/12/5 (9 December 2010), available at <http://www2.ohchr.org/english/bodies/cat/opcat/docs/SPT_Guidelines_NPM_en.doc> [↑](#footnote-ref-7)
8. See section 3.5 of 2012 submission. [↑](#footnote-ref-8)
9. See, for example, *Edwards v United Kingdom* (2002) 35 E.H.R.R. 19. [↑](#footnote-ref-9)
10. See *Osman v United Kingdom* (2000) 29 E.H.R.R. 245. [↑](#footnote-ref-10)
11. Regulation 6, The Police Investigations and Review Commissioner (Investigations Procedure, Serious Incidents and Specified Weapons) Regulations 2013. [↑](#footnote-ref-11)
12. See s. 64 Police and Fire Reform (Scotland) Act 2012; Reg 4 Police Investigations and Review Commissioner (Investigations Procedure, Serious Incidents and Specified Weapons) Regulations 2013. [↑](#footnote-ref-12)