Response to the Home Office Consultation Paper Complaints Against the Police

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Response to the Home Office Consultation Paper
Complaints Against the Police

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Preamble

At para. 6 of the Home Office Consultation Paper Complaints Against the Police it is stated that the Government is committed to i) introduction of a stronger independent element in the investigation of police complaints, ii) greater openness regarding investigation reports and iii) restriction of independent investigation to the most serious complaints. This Response works within these parameters by focusing on matters arising out of complaints made by members of the public which allege that a criminal offence was committed by a police officer.

With incorporation of the European Convention on Human Rights imminent, this is an area of law which is likely to develop in accordance with ECHR case law on contracting states’ positive obligations to investigate crime and prosecute offenders (Aksoy v Turkey (1996) 23 EHRR 553; Kaya v Turkey (1999) 28 EHRR 1).

The apparent immunity from criminal prosecution enjoyed by police officers is an area of concern which has been addressed in recent years by:

i) the Divisional Court in R v DPP ex parte Treadaway (1997) Times, October 31, and indirectly in R v DPP ex parte Manning (2000) Times, May 19;

ii) the Home Affairs Committee in its First Report of 1997/8, Police Disciplinary and Complaints Procedures (HC 258);

iii) HH Gerald Butler QC in his 1999 Report to the DPP – Inquiry into Crown Prosecution Service Decision-Making in Relation to Deaths in Custody and Related Matters;

iv) the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in its 2000 Report on a visit to the United Kingdom and the Isle of Man carried out between 8 and 17 September 1997 (available on the internet at www.cpt.coe.int);

v) the Home Office in its response to the CPT Report (ibid.);

vi) with significant regularity by the civil courts during proceedings in which damages have been claimed against police officers for the intentional torts of assault, false imprisonment and malicious prosecution which may be the equivalent of criminal offences.

* The author gratefully acknowledges the assistance of Raju Bhatt, Bhatt Murphy Solicitors, for his helpful comments on the first draft of this Response.
The police complaints process was first codified under s.49 of the Police Act 1964 on the recommendation of the 1962 Royal Commission on the Police. The majority of Commissioners recommended what can be described as a police misconduct package consisting of 3 elements:

i) the decision to commence criminal proceedings against a police officer to be made by the DPP (enacted as s.49(3) of the Police Act 1964 and now provided for by ss.74 and 75(3) of the Police Act 1996 (the Act));

ii) introduction of a vicarious liability rule for the tortious conduct of a police officer when acting in the performance or purported performance of the police function (chief officers were made vicariously liable under s.48(1) of the Police Act 1964, now provided for by s.88(1) of the Act);

iii) chief officers made responsible for recording and investigating complaints against the police (enacted as s.49(1) of the Police Act 1964 and now generally provided for by Part IV. of the Act).

In recommending this package the Royal Commission envisaged that serious allegations against a police officer would not be entirely subject to an internal police process:

If the complaint is of conduct amounting to a crime the question of prosecution will have been decided by the Director of Public Prosecutions in England and Wales... If it amounts to a civil wrong the complainant will be entitled to sue.. Hence the only clear field in which disposal of a complaint will still be dependent on the unaided decision of a chief constable will comprise complaints either not so serious as to give rise to legal action, or in which the complainant for reasons that may appear reasonable to him does not wish for a prosecution or is unwilling to sue... (Final Report of the Royal Commission on the Police (Cmnd 1728), 1962, p.138).

During the Committee Stage of the Police Bill comment was made of the danger the above approach had for the criminal liability of police officers:

I hope complaints are going to be dealt with purely and simply as complaints that have been raised against the police in the exercise of their duty, and not as another means of investigating crimes that have been committed (Mr Winterbottom MP, Police Bill, 1963 (Standing Committee Debate) Standing Committee D, 13 February 1963, col. 725).

It is suggested that this is precisely what has happened since codification as a consequence of an overriding concern with complaints which relate to work performance at the expense of complaints which allege criminal wrongdoing. It is also the case that since the 1962 Royal Commission, when a minority report recommended that a Police Ombudsman should have responsibility for complaints, debate has been dominated by the appropriateness of lay involvement in the complaint process and there has been a corresponding trend towards independent investigation.

A corollary of preoccupation with the question who investigates police complaints has been neglect of discussion on the function of the process. As a result, sight has been all but lost of the complaints process as the sole means by which criminal proceedings can be initiated against police officers after a member of the public alleges that s/he has been the victim of a criminal offence committed by a police officer when in the execution or purported execution of his/her duty. Failure to deal properly with serious complaints of this type has been a major contributory factor to public dissatisfaction with the complaint process (as evidenced by the PCA’s public opinion surveys published in its 1992-96 annual reports).

Public confidence in the police is fundamental to democratic policing and satisfaction with
the complaint process is essential for the police to secure and maintain public support. It is suggested that the confidence of an increasingly rights aware public with the police is threatened by a flawed internal police process which continues to operate in the context of a developing climate of open and transparent governance.

Police legitimacy, underpinned at common law by the office of constable, requires adherence to the principle that the police officer should be accountable to the law for his/her criminal wrongdoing in like manner as the citizen. The 'like manner' principle consists of two elements – firstly, that responsibility must rest with the same authority and secondly, that the same process must apply. The conventional approach to the principle has been insistence, articulated primarily by police organisations, that a criminal allegation against a police officer should be investigated by the same institution as would a member of the public. Whereas investigation of police officers by their colleagues conforms to the first element of the principle, the current process is flawed as it fails to comply with the second. That is because investigation and charge of a police officer for an alleged criminal offence following a complaint is currently subject to different procedures to those that apply to the general public under the Police and Criminal Evidence Act 1984. The manner in which the PACE provisions are applied to police officers is different than for the citizen, and whereas a member of the public suspected of an offence will normally be charged by a custody officer under s.37(7) of PACE, the decision to initiate proceedings against police officers is by the DPP under ss.74 or 75(3) of the Act.

Therefore, the like manner principle does not operate in practice under the current statutory complaints process. From a civil liberties perspective, the infrequency of criminal and disciplinary findings against police officers arising out of complaints (see Appendix 4, 'The police complaint process: a means for identifying rotten apples or satisfying grievances?') lends support to the argument that police officers are not subject to the rule of law. From the police officer's point of view, on the other hand, the gathering momentum for non-police investigation of criminal allegations against police officers will undermine the like manner principle with the likely consequence that the office of constable, already primarily of rhetorical value, will fall into disuse altogether.

Rather than ignore the fact that independent investigation of complaints will have an effect on the constitutional position, this Response addresses the like manner principle by comparing the process by which the police officer is held liable for his/her wrongdoing with procedures which apply for the citizen. This is done in order to demonstrate that a decision to formally abandon the common law office of constable will not cause undue damage to police legitimacy. On the contrary, a realistic and accurate redefinition of the constitutional status of the police in a common law system which is about to embrace positive rights can only enhance the standing of the police officer in the community.

Included as appendices is a selection of published articles by the author on the police complaints process.

Appendices
Recording and sift

Q1. Is the current definition of what constitutes a 'complaint' still satisfactory?

Under section 65 of the Police Act 1996, a complaint is defined as a complaint about the conduct of a member of a police force which is submitted -

(a) by a member of the public, or

(b) on behalf of a member of the public and with their written consent;

Section 67(4) specifically excludes those complaints which relate to the direction and control of a police force by the chief officer of police or the person performing the functions of the chief officer of police.

The term 'member of the public' is usually taken to mean the person who was personally involved in the incident which gave rise to the complaint, rather than a bystander who happened to witness it.

Response

It is not suggested that s.67(4) of the Act should be interfered with, as such complaints go directly to questions of political accountability and do not concern the individual officer's liability for his/her wrongdoing.

The definition of a complaint under s.65 of the Act (subject to express exclusions under ss.67(4) and (5)) is so general that it includes all allegations of wrongdoing against a police officer made by a member of the public for which the officer may be personally liable, whether at criminal or civil law or under the police misconduct or unsatisfactory performance regulations.

A consequence of this general classification is that the reporting to the police by a member of the public of what would be a recordable criminal offence if made against another member of the public is recorded as a complaint when made against a police officer. Thus, at the commencement of the process a police officer alleged to have committed a criminal offence is treated differently to the citizen with the consequence that the police officer arguably enjoys a privileged position relative to the citizen at the outset. This is because i) an offence can only be reported by the victim and not by a witness and ii) the allegation is dealt with separately to other criminal allegations in accordance with the police complaint process.

Ss.69(2)-(6) of the Act provides for a chief officer to categorise a complaint according to whether it is suitable for informal resolution as an alternative to formal investigation. Thus, it is accepted under the existing complaint process that different procedures apply as determined by i) the chief officer, ii) the seriousness of the allegation and iii) subject to the agreement of the complainant.

Recommendation

1a It is difficult to envisage how complaints might be differently defined in a simple and straightforward manner so that criminal allegations can be separated from other complaints. To overcome this problem it is recommended that the secondary categorisation of complaints that currently operates to siphon off cases considered suitable for informal resolution under s.69 of the Act is developed. This will require redrafting of the section, or insertion of a new section, to allow the separation of
complaints according to whether the allegation is that an officer committed a criminal offence or unsatisfactorily performed his/her duties as a public servant.

1b The IB to have responsibility for determination of whether a criminal offence has been alleged by the complainant according to the same criteria as currently operating for the police when recording criminal offences, and subject to published Codes of Practice and Guidelines.

1c The Codes of Practice to allow a bystander who happened to witness a criminal offence committed by a police officer to report a complaint.
Q2. Is the scope of the current complaints system adequate? How should complaints against (a) special constables, (b) civilian employees and (c) senior officers be dealt with?

The existing police complaints procedures only apply to regular ‘members of a police force’. Although special constables carry out the same duties and have the same powers as regular officers, they serve on a voluntary basis and do not come within the statutory complaints procedures. Likewise, civilian employees now play a greater role in the work of the police, taking over duties previously undertaken by officers. This raises the issue of whether special constables and civilians should be subject to similar or identical complaints procedures to other officers.

Part IV of the Police Act 1996 includes senior police officers (above the rank of superintendent) within the scope of the current complaints procedures, with certain amendments. The ‘appropriate authority’ responsible for recording and considering the complaint is the local police authority. There is currently no power for the PCA to review the disciplinary outcome of a complaint against a senior police officer.

Response

The general approach of this Response is to recommend a comprehensive overhaul of the manner in which the criminal process operates for police officers when alleged to have committed offences when performing their law enforcement duties. As a matter of principle all persons performing this function under the authority of the office of constable, including special constables and officers above the rank of superintendent, should be subject to the same process.

Recommendation

2 An allegation of criminal wrongdoing arising from a complaint against a member of a police force attested as a constable under s.29 of the Act to be dealt with in the same manner irrespective of whether a special constable or police officer of any rank.
Q3. Who should have responsibility for recording a complaint?

At present the responsibility for recording a complaint rests with the chief officer of the police force concerned. Complaints received by the PCA direct are forwarded to the chief officer for his or her consideration. The Home Affairs Select Committee questioned whether it was right for the police to have the power to decide what is recorded as a complaint and recommended that the complainant should have a right of appeal to an independent body against the refusal to record a complaint. Proponents of the current model point out that most complaints are made direct to the police and it is only they who can assess whether it is a complaint within the meaning of the Act.

Others argue that the responsibility for recording a complaint and for deciding how it should be handled is central to the introduction of greater independence to the system and, even though it may be more expensive, it should be the responsibility of the independent body.

Response

The comprehensive definition of a complaint as discussed above in response to Q1 means that problems with access and sift are different according to the severity of the complaint. A complaint of incivility can be immediately resolved without controversy and hence might appropriately be recorded at the police station of the officer complained against. The complainant who has suffered a serious assault, on the other hand, is likely to experience some degree of post-traumatic stress as a consequence of their ordeal and consider any form of police involvement unacceptable, particularly during the initial stage of the complaint process. The police should not have responsibility for recording such a complaint.

If it is accepted that the major cause of public dissatisfaction with the complaints process is the manner in which serious complaints are dealt with, it follows that the reformed process should primarily address problems in this area.

If the IB is made responsible for recording complaints it will have a capacity to i) monitor police conduct, ii) conduct research on police practice and iii) participate in police training programmes. Further to Liberty’s recommendation that a Complaints Analysis Unit should be a feature of the IB, it is suggested that the police services and HMIC may utilise the IB as a monitoring/research/training resource and commission research in particular areas.

Recommendation

3a The IB to have responsibility for recording all complaints against the police.

3b The IB to have responsibility for annual presentation of complaint statistics currently prepared by the HO Research and Statistics Directorate.

3c Funding of an IB Research and Training Division to be included in the central government grant with an opportunity for the IB to generate additional funds through projects commissioned by the police, HMIC or other bodies.
Q4. What scope should there be for complaints to be dealt with other than by full investigation?

About a third of all complaints at present are informally resolved without being investigated. Under section 69 of the Act, a complaint is not suitable for informal resolution unless the conduct complained of, even if proved, would not justify criminal or disciplinary proceedings. The KPMG and Liberty reports both recognise the benefits of certain complaints being resolved without recourse to a full investigation, but safeguards may be required for the complainant and the officer concerned. The KPMG report suggests the title 'Local Direct Resolution' for its revised procedure and also refers to the potential use of restorative intervention techniques, pilots of which are being conducted by Thames Valley Police.

Response

It is recognised that the informal resolution procedure, which can be immediately effected in appropriate cases, makes a positive contribution to the complaints process and it is envisaged that the Thames Valley Police pilot scheme on 'restorative intervention' will have a similar impact.

The IB should have responsibility for deciding whether a complaint, excepting when it has been immediately resolved at a police station, is suitable for informal resolution or requires formal investigation when the IB records the complaint (Rec.3a above).

The IB’s responsibility for recording all complaints should operate as an effective safeguard against inappropriate use of the informal resolution procedure at the moment when the complaint has been reported at a police station. A complaint which has been immediately resolved and then forwarded by the police to the IB for recording can be reviewed when it is recorded. The IB should have the power, subject to consultation with the complainant and the officer responsible for resolving the complaint, to re-open the complaint. The IB should also have the discretion to exercise this power after application by the complainant, subject to consultation with the officer responsible for resolving the complaint.

The outcomes of all complaints dealt with by informal resolution, including restorative intervention, should be forwarded to the IB for recording and statistical analysis.

Recommendation

4a Reform of s.69 of the Act to make the IB responsible for determining whether informal resolution of a complaint is suitable.

4b The IB to have the power to reopen complaints which have been immediately resolved by the police.

4d The police services to forward the outcomes of all complaints for which they are responsible to the IB for statistical analysis.
Q5. What complaints should the independent body be responsible for investigating?

If, as the KPMG and Liberty reports accept, it is impractical for all complaints to be investigated by an independent body, there must be criteria to determine which complaints should be investigated by the independent body and which by the police.

The PCA is currently required to supervise all complaints relating to a death or serious injury. Complaints alleging assault occasioning actual bodily harm, an offence under section 1 of the Prevention of Corruption Act 1906 or a serious arrestable offence within the meaning of section 116 of PACE are required to be referred to the PCA, which may supervise the investigation at its discretion. The PCA may also supervise any other complaint if it determines that it is desirable in the public interest.

Response

The principle to be adhered to is that the police officer and citizen are treated in like manner. Adherence to this principle requires that:

a) criminal allegations against the police officer and citizen are investigated by the same institution and process.
b) allegations of professional misconduct against the police officer and citizen are subject to employment law and internal management procedures.

However, it is apparent that this ideal is unattainable. At present criminal allegations against the police officer and the citizen are investigated by the same institution but under different procedures in cases where the allegation against the officer arises from a complaint made by a member of the public. This is particularly the case where the criminal allegation is made in circumstances when the officer is in the performance or purported performance of his/her law enforcement duties. In addition, under the current procedures it appears, whether justified or not, that officers enjoy immunity from criminal prosecution, or disciplinary sanctions are unduly lenient, with the consequence that public confidence in the police has been undermined.

It is suggested that the principal objective of reform of the police complaints process should be adherence to the like manner principle. Recent reform of the police discipline regulations has brought the police services more in line with standard employment law and it is proposed that interference with the new police conduct and efficiency regulations should be avoided. Thus, complaints which allege that an officer has offended against the code of conduct should continue to be investigated by the police.

Serious complaints, particularly those which allege criminal misconduct, are the main problem area and it is proposed that the IB should solely have responsibility for the investigation of complaints made by a member of the public that an officer has committed a criminal offence. Determination of whether a complaint amounts to an allegation of criminal wrongdoing which is appropriate for independent investigation to be the responsibility of the IB (see Rec.1b above).

If, as recommended above at Rec.3a, the IB is responsible for recording all complaints, those determined appropriate for police investigation will be referred back to the police service concerned.
Recommendation

5  IB to be responsible for investigating a complaint made by a member of the public which alleges that a criminal offence has been committed by a police officer and which the IB determines appropriate for independent investigation according to a published Code of Practice and Guidelines.
**Investigation**

**Q6. Who would carry out the independent body's investigations?**

Although investigations carried out by the independent body would be under the direction of lay members, professional investigative expertise would still be required to carry out enquiries. The KPMG study considered two possible models, one based on using only non-police investigators and the second on a mix of seconded police officers and non-police investigators. The Liberty report also considered mixed investigating teams but proposed a ceiling on the number of police investigators allowed. There are many possible models to consider, including using retired officers to provide experience of police procedures or officers from the local force to provide background local knowledge. It will also be necessary to identify the skills required of investigators and appropriate training providers.

**Response**

In their recommendations KPMG and Liberty seek to achieve a compromise between the benefits of public confidence with independent investigation and the expertise associated with police investigation. It is accepted that the IB should draw on police experience and that the IB should run its own training programmes for investigators.

Rather than consider how police officers might work with the IB, the emphasis should be on how police officers can be encouraged to work for the IB and become members/employees of the new service. This issue is addressed further when considering the organisational structure of the IB in response to Q10.

**Recommendation**

6a The IB to draw on police investigative expertise.

6b The IB to run training programmes for investigators.
Q7. What powers should be provided to the independent body's investigators & duties placed on the police?

Investigations will have to be carried out to the full standard necessary to pursue criminal or disciplinary proceedings. This implies that investigators need the same powers available to a police officer. The Liberty report suggests that the independent body should have a right of entry to police property and the power to compel the preservation or production of evidence. The report also proposes that police officers would be under a duty to co-operate with a complaints investigation, with appropriate safeguards for officers who are the subject of the investigation.

Response

Adherence to the like manner principle requires that a police officer alleged to have committed a criminal offence has that allegation investigated according to standard criminal procedure and is entitled to the same safeguards as a civilian suspect under PACE.

It follows that IB investigators should operate under the same authority as police officers, currently the office of constable (although it is suggested that the ancient office is in need of re-examination), and have the same statutory and common law powers as the police. The IB should also have access to all services available to police services, e.g. the Forensic Science Service.

Two problem areas are identified in response to this question. Firstly, regarding the police officer's right of silence when answering an allegation of criminal wrongdoing investigated by the IB which may also be the subject of disciplinary proceedings. A difficulty will arise where it is decided not to prosecute on evidential or public interest grounds and consideration will then have to be given to disciplinary proceedings. It is suggested that a pragmatic solution to this problem would be for the disciplinary decision to be made on the basis of the evidence available after conclusion of the IB’s criminal complaint investigation. For all misconduct complaints investigated by the police it is suggested that standard employment practice should apply and that officers will be expected to answer allegations put to them subject to standard protection against criminal self incrimination.

A second area of concern is where the circumstances of the complaint are also the subject of criminal proceedings. This type of complaint is highly problematic and has given rise to successful malicious prosecution claims in civil proceedings. A different view, offered by the PCA in its earlier reports, is that such a complaint might be ‘tactically’ made by a suspect in order to bolster their defence. At present a sub judice rule applies so that the investigation of a complaint is delayed until the conclusion of criminal proceedings. It is suggested that this practice encourages the police officer who knowingly commits a criminal offence to arrest and cause their victim to be charged in order to protect him/herself from criminal or disciplinary proceedings. With the advent of independent investigation of complaints modification of the sub judice rule will be possible in the likelihood that the same institution will no longer be responsible for the criminal and complaint investigations. A further complication will then be to decide whether the police or IB investigation takes precedence. Due to the complexity of such complaints it is suggested that independent research should be undertaken in this area.

Recommendation

7a Police officers investigated by the IB entitled to the PACE safeguards.

7b IB investigators to be attested under s.29 of the Act allowing them to operate under
the same authority as police officers and with the same statutory and common law powers.

7c The HO to commission independent research on complaints where the complainant or witnesses to the complaint are also the subject of criminal proceedings.
Q8. What powers should the independent body have in relation to complaints investigated by the police?

In cases investigated by the police, it might still be appropriate for the independent body to have a discretionary power to supervise the investigation, fulfilling a role similar to that currently performed by the PCA and provided with similar powers to ensure a thorough investigation.

The PCA also has responsibility at present for reviewing the report of the investigation and the recommendations made by the chief officer for disciplinary action. It has the power to recommend or direct that disciplinary proceedings are brought against an officer suspected of misconduct.

Response

It is suggested that it will not be necessary for the IB to have oversight of misconduct complaints investigated by the police if the above recommendation (Rec.5) is accepted. This is due to the fact that serious complaints alleging criminal offences will have been investigated by the IB and further recommendations on the IB's role in other matters, outlined below in response to QQ11-16, should be sufficient to ensure public confidence. In keeping with the general approach of this Response, breach of the police code of conduct is considered primarily as a matter for police management, and any failings in this area should be subject to the tripartite arrangement for police accountability.

If, in the course of a police investigation of a misconduct complaint, evidence is discovered that a police officer may have committed a criminal offence, the investigating officer should immediately inform the IB. In such circumstances, and depending on how near the investigation is to completion, it should be at the discretion of the IB whether to assume responsibility for a criminal investigation or allow the police investigation to proceed.

The outcomes of misconduct complaints investigated by the police should be forwarded to the IB for statistical analysis.

Anti-corruption investigations are more problematic. Anti-corruption enquiries may be the product of proactive policing and may also involve a large number of complaints made by members of the public, including allegations that officers committed serious criminal offences. The author has experience of the Operation Jackpot investigation into allegations against Metropolitan police officers serving in its Stoke Newington Division which was active between April 1991 and February 1993, initially as an undercover operation. It would be extremely difficult for an IB to conduct an effective operation of this kind due to access, logistical, resource and personnel difficulties. It is suggested that this is an area which would require close co-operation between the IB, with its responsibilities for criminal allegations against police officers, and the police services, with their responsibilities for crime prevention and detection. It is suggested that the role of the IB in connection with police anti-corruption strategies will benefit from further discussion informed by detailed research.

Recommendation

8a The police services to forward outcomes of misconduct complaint investigations to the IB for statistical analysis.

8b Transfer to the IB for the investigation of misconduct cases where the police have discovered evidence of criminal offence to be at the discretion of the IB.
8c The HO to commission research on police anti-corruption strategies.
Q9. What powers should the independent body have in relation to non-complaint cases?

Under section 71 of the 1996 Act, forces currently have the power to refer to the PCA any case not based on a complaint in which an officer may have committed a criminal offence or which might justify disciplinary proceedings, if it appears that the matter ought to be referred by reason of its gravity or other exceptional circumstances. The PCA has discretion to supervise the investigation if it appears desirable in the public interest.

The Home Affairs Select Committee recommended that the independent body should be given the power to call in for possible supervision investigations which arise from any matter, whether or not it has been the subject of a complaint. The Government’s view up to now has been that this should only be exercised on the direction of the Home Secretary. It might be appropriate for the independent body to have the power in future to investigate such cases itself.

Response

This question has been partly dealt with in response to Q8 above.

Where there has been a death in police custody or in connection with the action of a police officer in the performance or purported performance of the police function the death should be investigated by the IB. The IB should also investigate all cases where a person suffers serious injury in these circumstances and is unable to record a complaint or another party has not recorded a complaint on their behalf.

Other than the above exceptions it should not be necessary to empower the police to refer cases to the IB or for the IB to ‘call in’ criminal cases for investigation. If, as recommended at 8b above, the IB has the discretion to assume responsibility for an investigation after the discovery of evidence that a criminal offence has been committed during the course of a police complaint investigation this should be sufficient to ensure public confidence. In the interest of encouraging co-operation between the police services and the IB it should be sufficient to allow professional and informal relations to develop between the services.

Recommendation

9 The IB to be responsible for the investigation of deaths and serious injuries where the person is unable to record a complaint which occurs in police custody or in connection with the action of a police officer in the performance or purported performance of the police function.
Q10. What would be the best organisational structure for the independent body?

Both the KPMG and Liberty studies propose that the independent body should have a regional operational structure with a central headquarters. A regional structure, it is argued, is essential if the independent body is to be effective in conducting its own complaints investigations. This structure contrasts, however, with the PCA which is organised in a single headquarters based in London but still has responsibility for the supervision of investigations across the country. The optimum organisational structure may depend on the number of cases to be dealt with by the independent body.

Response

Below, in response to QQ11 and 12 it is recommended that the IB should have a role in criminal and disciplinary proceedings. This has major implications for the organisational structure of the IB, which should have a national headquarters with regional offices. It is suggested that the PCA membership structure is abandoned and the IB organised as an independent service under a system of accountability similar to the tripartite arrangement for police governance. As the model proposed in response to this question represents a radical departure from current orthodoxy, the only recommendation made is that further consideration is given to the structure of the IB.

In effect this Response recommends the creation of a service with responsibility for the investigation of criminal complaints against, and the prosecution of, police officers. Therefore, it will have to be composed of two completely separate operational divisions; one responsible for investigation and the other for prosecutions. In addition, it is suggested that Research and Training should constitute a third division.

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<th>Structure of Independent Body</th>
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<td>Director General</td>
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<td>Research &amp; Training Division</td>
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<td>Prosecution Division</td>
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It is proposed that the IB should be under the leadership of a Director General and directors should head the three divisions.

The Director of the Investigation Division should be a civil servant equivalent in rank to a chief constable. Investigators should be civil servants who occupy equivalent ranks and be entitled to the same salaries and conditions of service as members of the police services. Police officers who successfully apply for positions with the IB should be entitled to continuity of service and the same should apply for IB investigators who transfer to the police. All IB investigators should be in the service of the IB and there should be a limit on the number of operational former police officers. It is apparent from this brief outline that the distinction between police and non-police investigators as discussed by KPMG and Liberty, and raised under Q6 above, is not of major importance to this model. However, the need to maintain a proper balance between independence from and co-operation with the police services will be the same for this model as for any other.
The Director of the Prosecution Division should be equivalent in status to a Chief Crown Prosecutor and the same principles should apply to IB prosecutors serving as IB prosecutors who are former CPS officials as for former police officers in the Investigation Division.

The Director of the Research and Training Division, and IB research, training and administrative personnel should occupy civil service grades. The Research and Training Division should be responsible for the training of IB investigators and prosecutors as well as for police and CPS training programmes. IB personnel should also have access to police and CPS support services.

With regard to the accountability of the IB it is suggested that it should be by tripartite arrangement consisting of the Director General, the Home Secretary and the Attorney General, and that provision is made for an advisory board.

In conclusion to this response to Q10 attention is drawn to the comment made on the structure of the PCA by the ECtHR in Khan v UK (2000) unreported. The Court unanimously found that the police complaints process does not meet the requisite standards of independence needed to constitute sufficient protection against abuse of authority and that there had been a violation of Art.13, the right to an effective remedy against an arguable breach of an ECHR right. In reaching this decision the Court noted:

..the important role played by the Secretary of State in appointing, remunerating and, in certain circumstances, dismissing members of the Police Complaints Authority.

The structure proposed here will address these concerns of the ECtHR.

Recommendation

10 The HO convenes a working group to consider the structure of an IB.
Q11. Should the independent body have any role in the decision making process in respect of criminal proceedings?

At present, the chief officer is required to refer a case to the Crown Prosecution Service (CPS) if the report of the investigation indicates that a criminal offence may have been committed. The CPS is then responsible for deciding whether any officer should face criminal proceedings. Where the independent body conducts the investigation, the decision to refer a case to the CPS would presumably fall to the independent body. It has also been suggested that the independent body should have the power to refer cases which have been investigated by the police. The Liberty report also asks whether the CPS’ role in determining whether criminal proceedings are brought could be assumed by the independent body in complaints cases.

Response

If, as is widely accepted, confidence in the police suffers as a consequence of public dissatisfaction with the complaints process it must equally be the case that the integrity of the criminal justice process suffers as a consequence of the apparent immunity from prosecution enjoyed by police officers. It follows that public dissatisfaction with the CPS with regard to the conduct of prosecutions against police officers is the same as for the police with regard to criminal investigations against police officers (see Appendix 1. 'The DPP and prosecutions of police officers'). Therefore, it is suggested that in cases investigated by the IB the responsibilities of the CPS should also be transferred to the IB in the same manner as the transfer of the police’s responsibilities for the investigation of complaints under Rec.5 above.

This suggestion is made in recognition of the CPS’s poor record when prosecuting police officers and in order to protect the integrity of the reformed police complaints process. Furthermore, transfer of responsibility for the decision to prosecute and the conduct of the prosecution will be a safeguard against contamination of the complaint process by the special working relationship which exists between the police and CPS when performing their respective criminal justice duties.

The separation of criminal investigation and prosecution powers, as provided by creation of the CPS under s.1 of the Prosecution of Offenders Act 1985, will have to be recreated in the new IB by complete separation of its responsibilities for investigation and prosecution along the lines suggested in response to Q10.

There have been several controversial incidents in recent years when allegations against police officers which have been the subject of a complaint have not resulted in criminal prosecutions despite the fact that non-criminal proceedings have determined that there was evidence that police officers committed criminal offences (see Appendices 1 and 2, 'The DPP and prosecutions of police officers’ and ‘The Butler Report: an opportunity missed?’, respectively). It is suggested that after the recent judgment by the Lord Chief Justice in R v DPP ex parte Manning (2000) Times, May 19, the IB should be under an obligation as a matter of good administrative practice to provide a reasoned explanation not to prosecute in such cases.

Further, if the government decides that achieving public confidence with the complaints process and restoring the legitimacy of that process in criminal proceedings is best served by providing the IB with powers to conduct prosecutions, it may also consider it appropriate for the IB to assume responsibility for all criminal proceedings against police officers.
Recommendation

11a The IB to be responsible for the decision to bring criminal proceedings against a police officer after the conclusion of an IB investigation using the same criteria as the CPS (including cases investigated by the police under Rec.8b).

11b The IB to be responsible for the conduct of criminal proceedings against a police officer after the conclusion of an IB investigation under the same rules as apply for the CPS (including cases investigated by the police under Rec.8b).

11c As a matter of good administrative practice the IB to provide a reasoned explanation not to prosecute in cases where non-criminal courts have determined that there is evidence that a police officer committed a criminal offence.

11d The government to consider the transfer of all the DPP’s responsibilities regarding criminal proceedings against police officers to the IB.
Discipline

Q12. Is the PCA’s role regarding police discipline a suitable model for the independent body?

The report of every complaints investigation is submitted to the PCA, together with a memorandum from the chief officer indicating whether or not disciplinary proceedings are to be brought. The PCA reviews the whole case and decides whether to accept the chief officer's recommendation. The PCA has the power to recommend or direct that disciplinary proceedings are brought if it disagrees with the chief officer's recommendation.

Once the PCA has made a decision, the responsibility for the conduct of disciplinary proceedings rests with the police force concerned. Under revised arrangements, the independent body might continue to review all fully investigated complaints, whether the case was investigated by the police or the independent body itself. It might also, in certain cases, want to have responsibility for the presentation of the case at the misconduct hearing.

Response

In keeping with the like manner principle which underpins this Response it follows that the IB should not play a central part in discipline. It is suggested therefore that the PCA’s powers to review complaint investigations and direct a chief officer to commence disciplinary proceedings should not be transferred to the IB. This proposal is subject to adherence to principles of openness and transparency as a means of securing and maintaining public confidence in the complaints process. In practice this will require the IB and police services to disclose a complaint investigation officer's report to the complainant (see reference to Liberty’s recommendation in response to Q15) and provide a reasoned explanation for a decision not to bring disciplinary proceedings.

Serious complaints investigated by the IB under Rec.5, above, should be subject to a different procedure. Following a decision not to commence criminal proceedings after the conclusion of an IB investigation the IB should be responsible for the decision to bring disciplinary proceedings and, in the event of a positive decision, the IB should act as the prosecuting authority.

This suggestion is put forward as a pragmatic means of dealing with cases where all the papers are held by the IB and as reassurance to the public that a significant independent element is present throughout the discipline process for serious complaints.

Where there has been a decision not to commence criminal proceedings after the conclusion of a police complaint investigation which the IB decided should remain with the police (see Recs.8b and 11a) the police should act as both discipline decision-maker and prosecutor. In such cases the assumption should be that public confidence will not be an issue where effective police investigation of a complaint uncovered evidence of a criminal offence.

The recommendations presented here should not interfere with the fast-track disciplinary process under Reg.39 of the Police (Conduct) Regulations 1999 (S.I. 1999 No. 730). Therefore, the IB should be made responsible for informing a chief officer of evidence which might require urgent action.

Recommendation

12a Repeal of the PCA’s powers to review police complaint investigations and direct chief
officers to bring disciplinary proceedings.

12b The IB to be responsible for the decision to bring disciplinary proceedings and the conduct of those proceedings against a police officer after the conclusion of an IB investigation.

12c The police to be responsible for the decision to bring disciplinary proceedings and the conduct of those proceedings against a police officer after the conclusion of a police investigation.

12d As a matter of good administrative practice the IB or the police service responsible for the complaint investigation to provide a reasoned explanation not to bring discipline proceedings.

12e In order to assist a chief officer with his/her discipline responsibilities under Reg.39 of the Police (Conduct) Regulations 1999 the IB to provide immediate notice of evidence that may be relevant for this purpose.
Q13. Should there be an independent element on discipline panels?

Under the existing procedures, discipline cases are heard by a senior police officer supported by two police assessors. The Home Affairs Select Committee and others have suggested that, particularly in cases arising from a complaint, there should be at least one independent member of the adjudication panel. This might be a member of the local police authority or a person nominated from a legal background, as happens in Police Appeals Tribunals.

Response

In keeping with the rationale of this Response, it is suggested that discipline panels should consist of police managers and that adequate accountability mechanisms should be in place to ensure that police discipline is properly maintained. This proposal is subject to adherence to principles of openness and transparency as detailed in response to Q14 below.

Prior to codification of the police complaint process under s.49 of the Police Act 1964, watch committees had responsibility for discipline in borough police forces under s.194 of the Municipal Corporations Act 1882. It is suggested that if it is decided that discipline panels hearing cases arising out of complaints are to include an independent member then it should be a member of the local police authority. This will have the additional benefit of improving the capacity of police authorities to perform their statutory responsibility of keeping informed of complaint proceedings under s.77 of the Act.

If discipline panels are to include a member of the local police authority, reform of The (Police Appeals) Tribunal Rules 1999 (SI 1999 No. 818) will be necessary as appeal tribunals are currently convened by local police authorities.

No substantive recommendation is made in response to this question.
Transparency/Disclosure

Q14. Who should be entitled to attend a discipline hearing?

In its response to the Home Affairs Select Committee report, the Government argued that the advantages in making disciplinary hearings in general open to the public at large were outweighed by the disadvantages with regard to the confidential nature of some aspects of most of the proceedings and the fact that this would be allowing the public admittance to what is essentially a management exercise.

Under present arrangements, in any case arising from a complaint the complainant may attend up to the point that a finding is reached. It has been argued that public confidence would be increased if discipline hearings were opened to the public and that there should be a presumption in favour of public hearings in cases arising from a complaint.

Response

It is suggested that the police complaints process has evolved primarily as an aid to police managers, and as a consequence the interests of complainants have been neglected (see Appendix 4. ‘The police complaint process: a means for identifying rotten apples or satisfying grievances?’). What may be uppermost in the mind of the complainant, public vindication of his/her conduct, need not be catered for at all under the current process.

While it is accepted that the primary purpose of the police complaint process is to serve the public interest, it should operate in a manner which accommodates the needs of the citizen who brings to the police’s attention the conduct of an officer which is detrimental to the public interest. In order that this can be achieved it is fundamental that every stage of the complaints process should be open and that decisions should be made in a transparent manner.

Therefore, it is crucial that a police discipline hearing which is held as a consequence of a complaint made by a member of the public should be held in public so that justice can be seen to be done.

Recommendation

14 A discipline hearing against a police officer to be heard in public unless the Discipline Panel decides there are good reasons to the contrary.
Q15. What restrictions, if any, should be placed on the disclosure of complaints reports and related material and on the publication of information by the independent body?

While material gathered in the course of a complaints investigation may be disclosed, for example for the purpose of civil proceedings, subject to the 'substantial harm' test, the courts have previously held that it is in the public interest for investigating officers’ reports to be protected from disclosure as a class. This is because it might have an inhibiting effect on investigating officers if their reports became disclosed generally, including to those whose conduct they are scrutinising and possibly criticising.

The Government has accepted in principle the recommendation of the Stephen Lawrence Inquiry that investigating officers’ reports should not attract public interest immunity as a class and that they should be disclosed to complainants, subject to the ‘substantial harm’ test for withholding disclosure. The Home Office has consulted the police and other interested parties on how this might be implemented in practice, but no consensus emerged. The work on an independent complaints investigation system provides an opportunity to reconsider this issue in a new context.

Section 80 of the 1996 Act places restrictions on the disclosure of information by the Police Complaints Authority, other than in the circumstances specified. These include disclosures for the purposes of criminal, disciplinary or civil proceedings or in the form of a summary or general statement which does not identify the parties concerned. The Government has accepted that the restrictions in section 80 inhibit the PCA in explaining its work and it intends to relax the restrictions when a suitable legislative opportunity arises.

Response

The author supports Liberty’s recommendations on disclosure and no substantive recommendation is made in response to this question.
Q16. What, if any, procedure should be followed to review criminal/disciplinary issues when civil cases against the police are lost or settled?

Litigation against the police is increasingly common, sometimes pursued without any recourse to the formal complaints system. Civil claims arising from allegations of wrongdoing sometimes result in significant awards of damages against the police or they may be settled without any admission of liability. There may be legitimate reasons for settling a case, in order to save the greater cost to the public purse of a civil hearing, even though the force may not believe that any police officer was at fault. There are cases, however, which involve allegations that a police officer acted unlawfully or improperly and, where those cases are settled or result in award of damages, it has been argued that there should be a formal procedure for reviewing whether criminal or disciplinary action should be taken against the officers concerned.

Response

The torts of assault, false imprisonment and malicious prosecution correspond with criminal offences, and neglect of duty by a police officer is also a criminal offence at common law. Depending on the severity of the allegation made by the claimant in civil proceedings the burden of proof is on a sliding scale (Hornal v Neuberger [1957] 1 QB 247) and may equate with the criminal standard as a safeguard for the defendant ostensibly accused of a criminal offence. Where a judge in civil proceedings gives a reasoned decision that there is evidence that a police officer committed a criminal offence there should be a formal procedure, based on the evidence heard by the court, to determine whether criminal or disciplinary proceedings should be brought against that officer.

A similar procedure should also apply where a jury finds for a claimant in civil proceedings and it is obvious from the verdict that the jury concluded from the evidence that a police officer committed a criminal offence. Under these circumstances the case law in criminal proceedings on evidence relevant to the credit of a police officer (R v Edwards (1991) 93 Cr App R 48 and R v Maxine Edwards [1996] 2 Cr App R 345) may be of assistance on the relevance of a jury verdict.

There is a dearth of information in the public domain on police actions. Until HMCIC published statistics for England and Wales in his 1998/99 Annual Report the only statistics available were those published by the Metropolitan Commissioner in his annual reports since 1991 (some ad hoc statistics are also available in Parliamentary Written Answers). The author conducted empirical research on police actions for his doctoral thesis in 1996 and is aware of only a small number of academic papers written on the subject.

Before an informed response can be given to this question there is a need for independent research on police actions. It may be that the IB will be able to conduct its own research by monitoring court hearings and sending out questionnaires to claimants’ and police solicitors. However, as a consequence of the highly adversarial nature of police actions, or their politically charged character, an independent academic research project may be more appropriate with the researcher(s) gaining access to claimants and defendants.

Recommendation

16a As a matter of principle there should be a formal review of criminal and disciplinary decisions following a reasoned judgment or jury verdict in civil proceedings where the court’s finding that a police officer committed a criminal offence or breached the police code of conduct is evident from the outcome.
16b  The HO to commission independent research on police actions.

16c  The IB to conduct research on police actions after it has been established.
Q17. How can the interests of the complainant be served where a police officer receives words of advice or admonishment as a result of a substantiated complaint?

An important feature of the current informal resolution process is that a meeting may be arranged between a complainant and an officer complained against subject to the consent of both parties. This presents the complainant with an opportunity to achieve some form of satisfaction that his/her grievance has been addressed in a meaningful way, irrespective of whether or not the officer apologises for his/her action.

It is something of an anomaly that a similar opportunity is not available after a complaint has been substantiated and a supervisory officer offers words of advice or issues an admonishment to the officer. In these circumstances the complainant is informed in writing by the PCA that their complaint has been substantiated and the nature of the action taken (approximately 80% of substantiated complaints result in this outcome; see Appendix 4, ‘The police complaint process: a means for identifying rotten apples or satisfying grievances?’).

For the purpose of good administration and furtherance of public confidence in the complaints process it is suggested that a meeting should be arranged between a complainant and the officer complained against following substantiation of a complaint and prior to the officer being given words of advice or an admonishment. This will allow the police to demonstrate to the complainant that the issue has been appropriately dealt with and provide the complainant with an opportunity to hear the officer give an account for his/her action.

Recommendation

17 Where it is decided, following substantiation of a complaint, that a police officer's misconduct does not warrant criminal or disciplinary proceedings, the IB or the police force concerned will arrange a meeting between the complainant and the officer complained against.

* This issue is raised in addition to the questions asked in the Consultation Paper.