



Police Investigations &
Review Commissioner

MEMORANDUM OF UNDERSTANDING

between

**CROWN OFFICE PROCURATOR FISCAL SERVICE
(COPFS)**

and

**THE POLICE INVESTIGATIONS AND REVIEW
COMMISSIONER (PIRC)**

MEMORANDUM OF UNDERSTANDING

This memorandum takes into account the provisions of the Police, Public Order and Criminal Justice (Scotland) Act 2006 as amended by the Police and Fire Reform (Scotland) Act 2012 and replaces the MOU signed in 2010 by COPFS and the Police Complaints Commissioner for Scotland (PCCS) which specifically addressed the complaints handling review function of the PCCS.

The 2012 Act amends the 2006 Act to confer additional functions on the PCCS and rename it as the Police Investigations and Review Commissioner (PIRC), and describes the powers and duties of the Commissioner in respect of police complaint handling arrangements, complaint reviews and categories of investigation where the PIRC may have an investigatory role.

Role of the Crown Office Procurator Fiscal Service

- 1.1 COPFS is the sole prosecuting authority in Scotland, which, in the public interest, ensures that all crimes reported to the Procurator Fiscal are investigated and that effective and consistent use is made of the range of options for proceedings.
- 1.2 COPFS has the sole discretion for determining in any case whether there is sufficient evidence in a case and whether that evidence is of a quality which justifies further investigation or the institution of proceedings in respect of that matter.
- 1.3 COPFS has responsibility for the investigation of sudden and suspicious deaths .

PIRC Statutory Responsibilities

- 2.1 Section 33A of the 2006 Act details the general functions of the Commissioner as follows;
 - a) to maintain, and to secure the maintenance by the Authority and the chief constable of, suitable arrangements for—
 - i. the handling of relevant complaints; and
 - ii. the examination of the handling of relevant complaints and the reconsideration of such complaints in accordance with sections 34 to 41;
 - b) where directed to do so by the appropriate prosecutor—
 - i. to investigate any circumstances in which there is an indication that a person serving with the police may have committed an offence;

- ii. to investigate, on behalf of the relevant procurator fiscal, the circumstances of any death involving a person serving with the police which that procurator fiscal is required to investigate under section 1 of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (c.14);
- c) where requested to do so by the Authority or the chief constable, to investigate and report on certain serious incidents involving the police (see section 41B);
- d) to investigate other matters relating to the Authority or the Police Service where the Commissioner considers that it would be in the public interest to do so (see section 41C);

The memorandum addresses the Commissioner's statutory responsibilities in relation to complaint handling reviews (under Section 33A (a)(ii)) and investigations (under Section 33A(b)(i) and (ii) separately.

INVESTIGATIONS

Purpose

- 3.1 In respect of the investigatory functions conferred upon the Commissioner the purpose of this memorandum is to:
- confirm the categories of investigations COPFS may refer to the PIRC for investigation
 - confirm the arrangements for COPFS notifying the PIRC of the requirement to carry out an investigation and establishing terms of reference for an investigation
 - ensure that the PIRC delivers investigation reports in the appropriate format as prescribed by COPFS
 - ensure that the PIRC is able to perform his/her statutory functions in relation to section 33A(1)(b) of the 2006 Act.

Role Of COPFS In Investigations

- 4.1 COPFS is the sole prosecuting authority in Scotland, which, in the public interest, ensures that all crimes reported to the Procurator Fiscal are investigated and that effective and consistent use is made of the range of options for proceedings.

- 4.2 COPFS has the sole discretion for determining in any case whether there is sufficient evidence in a case and whether that evidence is of a quality which justifies further investigation or the institution of proceedings in respect of that matter.
- 4.3 COPFS has responsibility for the investigation of all sudden and suspicious deaths.

Role of the PIRC in Investigations

- 5.1 Section 41A(1)(a) of the 2006 Act provides that when carrying out an investigation in pursuance of a direction issued under paragraph (b) of section 33A(1) the PIRC must comply with any lawful instruction given by the appropriate prosecutor who issued the direction. Section 41A(1)(b) provides that in the case of an investigation carried out in pursuance of a direction issued under sub-paragraph (i) of section 33A(1)(b), the PIRC must also comply with any instruction issued by the Lord Advocate in relation to the reporting, for consideration of the question of prosecution, of alleged offences.
- 5.2 During the course of an investigation PIRC investigators will have the powers of a constable.
- 5.3 The PIRC is independent from any policing body operating within Scotland.
- 5.4 In order to provide effective investigations, particularly those requiring specialist skills, the PIRC may second officers, or members of staff from police forces operating in Scotland or elsewhere within the UK. Officers on secondment will be directly supervised and instructed by senior PIRC investigators during the course of investigations. Any decision to second specialists will require careful consideration about independence in particular in relation to obligations under ECHR article 2 and 3 investigations.
- 5.5 PIRC Investigations are intended to comply with the five principles of effective investigation outlined by ECHR namely; independence, adequacy, promptness and so far as possible public scrutiny and victim involvement

Examples Where COPFS May Require an Investigation by PIRC

- 6.1 Decisions as to which cases will be referred to PIRC will be taken by the appropriate prosecutor. Each case will be dealt with on its own facts and circumstances. The following examples of investigations that might be referred to PIRC are for illustrative purposes only and are not intended to be an exhaustive list, nor are they intended to bind the appropriate prosecutors discretion on the facts of any specific case.
 - a. Death in police custody. The decision about whether a death falls within the category of "death in police custody" lies with COPFS.
 - b. Death following direct or indirect contact with the police. This would include the use of firearms or other weapons, a road accident directly or

indirectly involving police vehicles, or any incident where there is an inference that there was police involvement in which it could be inferred there was a direct or indirect causal or contributory link to the death.

- c. An allegation that the police failed to take action which could have prevented someone's death, for example an inadequate response to a missing person report or threats to someone's life.
- d. Death of a police officer or member of police staff in the course of their duties except where the death is from natural causes.
- e. Any criminal allegation against an officer of assistant chief constable, deputy chief constable, or chief constable rank.
- f. Serious criminal allegation against anyone serving with the police or police authority where there is a requirement for an independent investigation

Protocols for Interaction Between COPFS and PIRC During an Investigation

- 7.1 PIRC will provide a 24 hour on call contact number for COPFS use. A PIRC Senior Investigator or Deputy Senior Investigator will be available as an initial point of contact on a 24 hour basis.
- 7.2 COPFS will assume responsibility for contacting the PIRC at the earliest possible stage following identification the requirement, or potential requirement, for PIRC to undertake an investigation into a death or serious incident.
- 7.3 In the case of death or serious injury investigations, COPFS recognises the importance of allowing the PIRC early access to ensure independence from any police investigation from the outset.
- 7.4 In the case of a death investigation, the police will be required to submit the initial death report by the next working day to the Scottish Fatalities Investigation Unit of COPFS. The PIRC will submit its full death report into the investigation of the death within timescales determined by COPFS in each individual case.
- 7.5 In the case of a criminal investigation, COPFS CAAP Division will instruct whether PIRC shall report by way of a Full Investigation Report on the agreed template or/and an SPR together with full statements and productions, and will determine the timescales for each individual case.
- 7.6 In some instances, PIRC may be undertaking an investigation into an incident involving serious injury in which COPFS has no interest.. If, during the course of such an investigation PIRC assesses that there is an inference of criminality or the injury is considered as likely to lead to death, PIRC will notify COPFS at the earliest opportunity. COPFS will investigate the matter, following which it may subsequently direct a PIRC investigation. (see appendices A and B).

- 7.7 In some instances PIRC may be carrying out an investigation at the request of Police Scotland into the application of police policies and procedures or be undertaking an investigation, at the request of the Scottish Police Authority, into potential misconduct by a senior police officer. If, during the course of such investigations, PIRC becomes aware of any information that might impact on an ongoing criminal investigation or of any information that indicates that criminal action may have occurred, PIRC will disclose this information to COPFS.
- 7.8 From time to time, following a death or serious injury, COPFS may, after an initial investigation, assess that it has no further role in the matter. In such circumstances the PIRC should be notified by COPFS at the earliest opportunity. The PIRC must investigate circumstances in which a person has died and may determine the need to investigate when a person has been subject to serious injury. The PIRC must report its findings to the police and police authority.

COMPLAINT HANDLING REVIEWS

Purpose

- 8.1 In respect of Complaint Handling reviews the purposes of this memorandum are to:
- a) confirm the steps that the PIRC should take in the event that any complaint about a police officer he/she receives, either at the outset of his review, or subsequently, contains a statement which consists of or includes an allegation of an act or omission which constitutes a crime.
 - b) ensure that the PIRC does not in any way, in the course of discharging his/her functions, prejudice ongoing or pending criminal proceedings while at the same time ensuring that the PIRC is able to perform his/her statutory functions..

Role of the PIRC

- 9.1 In terms of section 35(1) of the 2006 Act, the PIRC may examine the manner in which the police service deals with non-criminal complaints from members of the public and their representatives¹. Such an examination is referred to as a "complaint handling review".
- 9.2 In addition, the PIRC, in terms of section 42 of the 2006 Act has a number of general functions. The PIRC must secure the maintenance by the PIRC and by the police service of suitable complaint handling arrangements. This includes ensuring

¹ "Police service" for the purposes of this memorandum means the Police Service of Scotland, the Scottish Police Authority and all employees thereof. It also includes by formal agreement the British Transport Police, the Civil Nuclear Constabulary the Ministry of Defence Police, the Serious and Organised Crime Agency and the UK Border Agency.

that such arrangements are efficient and effective, contain and manifest an appropriate degree of independence and are adhered to. The PIRC must also keep under review all such complaint handling arrangements and make recommendations for the amendment of such arrangements, if deemed necessary or desirable.

Interaction Between the PIRC and the COPFS in Complaint Handling Reviews

- 10.1 Although, section 35(1) of the 2006 Act gives the PIRC power to review the manner in which complaints about the police have been handled by the police, section 34(3)(b) excludes from the definition of a relevant complaint “a statement which consists of or includes an allegation of an act or omission which constitutes a crime”. Such complaints remain a matter for the COPFS and will be investigated by the police service (or the PIRC exercising its investigative function) for and on behalf of COPFS before being reported to COPFS.

Practical Procedures Relating to Referrals by the PIRC to the COPFS in Complaint Handling Reviews

- 11.1 The Criminal Allegations Against the Police Division (CAAP Division) of COPFS will receive all referrals by the PIRC to COPFS in complaint handling reviews.
- 11.2 If the PIRC receives a complaint about a police officer or member of police staff which in his view consists of or includes an allegation of an act or omission which constitutes a crime, the PIRC will advise the CAAP Division of the allegation in writing as soon as is practicable. The PIRC may also notify the complainer and the police body concerned that it has taken this step.
- 11.3 If, during the carrying out of a complaint handling review or reconsideration direction², information becomes available to the PIRC from which it can reasonably be inferred that a criminal offence may have been committed, the PIRC will advise the CAAP Division of this in writing as soon as is practicable. The PIRC may also advise the complainer and the police body concerned that it has taken this step.
- 11.4 If it becomes clear to the PIRC that a complaint to the PIRC inferring criminality has already been the subject of investigation by the police and COPFS, and that COPFS has considered the matter and advised the police of a determination, the PIRC will advise the complainer that the PIRC will not consider that aspect of the complaint. In such circumstances, the PIRC need not report the allegation to the CAAP Division under paragraph 11.3 above.
- 11.5 Notwithstanding a referral to COPFS under paragraph 11.3 above, the PIRC may continue to review the manner in which the police body has dealt with any non-

² In terms of section 35(7) of the 2006 Act

criminal complaints which the complainer may also have made. However, the PIRC will only issue the report of its complaint handling review to the complainer and relevant police body if the PIRC and COPFS are satisfied that this will not prejudice COPFS's consideration of the referral or any criminal proceedings arising from it.

- 11.6 Notwithstanding a referral to COPFS under paragraph 11.4 above, the PIRC may continue to review the manner in which the police body has dealt with any non-criminal complaints which the complainer may also have made. However, the PIRC will only issue the report of its complaint handling review to the complainer and relevant police body if the PIRC and COPFS are satisfied that this will not prejudice COPFS's consideration of the referral or any criminal proceedings arising from it.
- 11.7 Where COPFS is involved in criminal proceedings or prospective criminal proceedings and becomes aware that the PIRC is also dealing with non-criminal complaints about the police relating to the same incident(s), COPFS will inform the PIRC of its involvement in the case. This will ensure that the PIRC is in a position to adhere to the terms of paragraphs 11.5 and 11.6 above.
- 11.8 In some cases, it may not be clear to PIRC from the available information whether criminal proceedings are ongoing or pending. In such cases, PIRC review staff may contact CAAP Division staff for clarification of the position. This will ensure that PIRC does not, by issuing or publishing a decision, inadvertently prejudice criminal proceedings.
- 11.9 Should COPFS require sight of the PIRC's files, the CAAP Division will make a request in writing specifying the particular documents required. The PIRC will then consider the request, taking into account the provisions of section 46 of the 2006 Act and, in particular, section 46(5). Where the PIRC intends to withhold any item he shall not do so without discussing the matter with the Head of the CAAP Division.

General

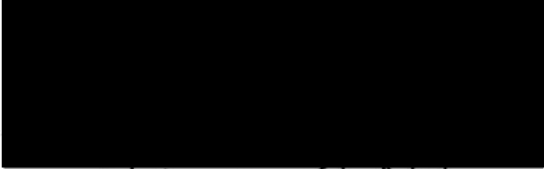
- 12.1 The PIRC, as a "listed authority" in terms of Schedule 1 to the Freedom of Information (Scotland) Act 2002, and as a "data controller" in terms of the Data Protection Act 1998, is subject to the provisions of these Acts and will discharge his functions in accordance with these Acts and any other relevant legislation.
- 12.2 PIRC has "specialist reporting agency" status for reporting criminal matters to COPFS.
- 12.3 This memorandum of understanding may, by mutual discussion and agreement be amended to reflect the needs of the PIRC and the COPFS as their working relationship develops.
- 12.4 Representatives of the COPFS CAAP Division and the Scottish Fatalities Investigation Unit and PIRC will meet annually on a date to be agreed to discuss

the operation of this memorandum and issues of mutual interest and any requirement to amend the terms of this memorandum of understanding.

12.5 Nothing in this memorandum of understanding prevents the PIRC and COPFS adopting alternative practical arrangements should circumstances dictate or should this be necessary in light of subsequent statutory instruments adopted by the Scottish Ministers under the 2006 Act.

12.6 The undersigned agree to work together in furtherance of the provisions of this memorandum of understanding.

Signed .



Date..... 10.12.2015.....

Police Investigations & Review Commissioner for Scotland

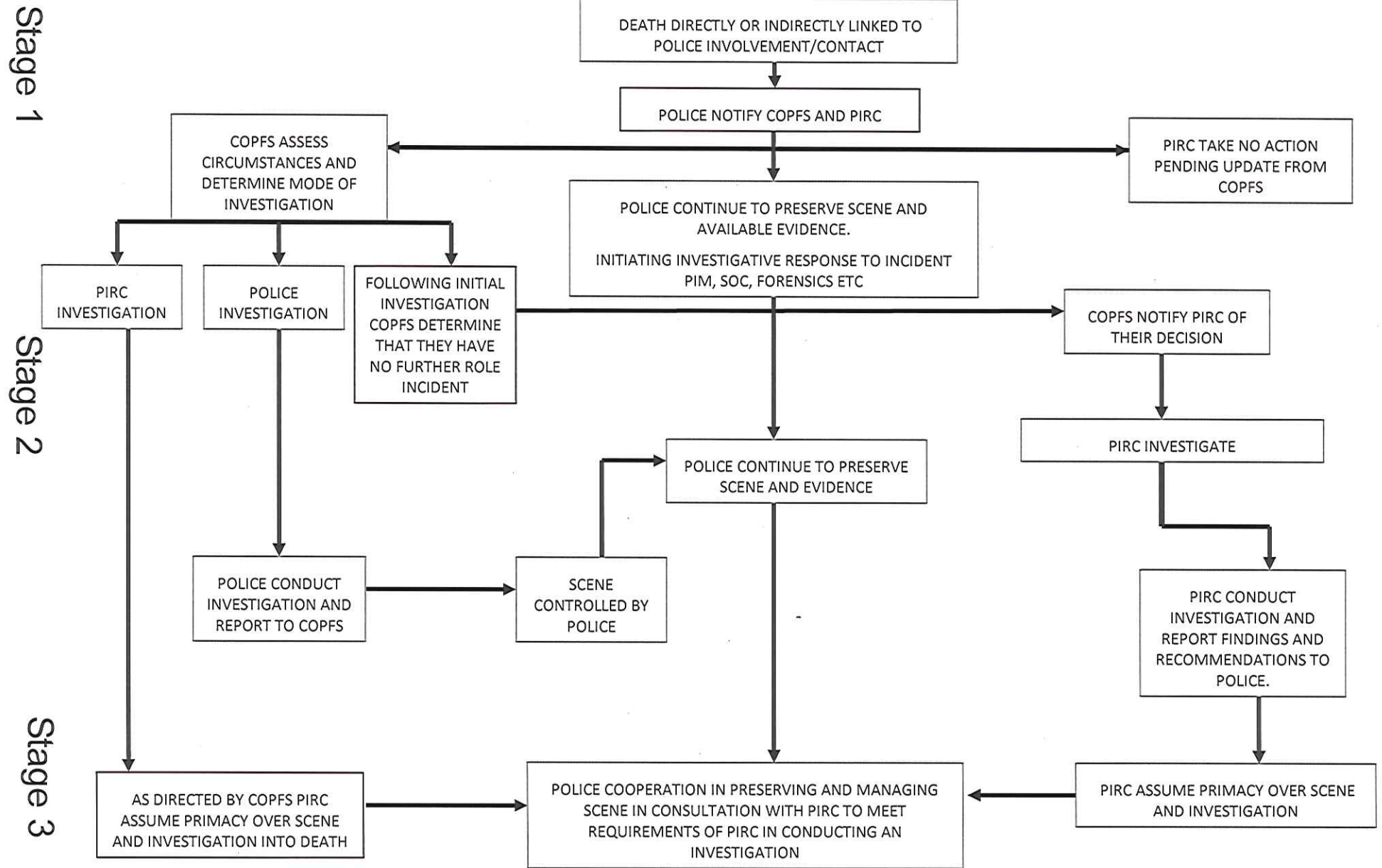
Signed ...



Date..... 11.12.2013.....

On behalf of the Crown Office Procurator Fiscal Service

**APPENDIX A
INITIAL OPERATIONAL RESPONSE**



APPENDIX B

INITIAL OPERATIONAL RESPONSE

