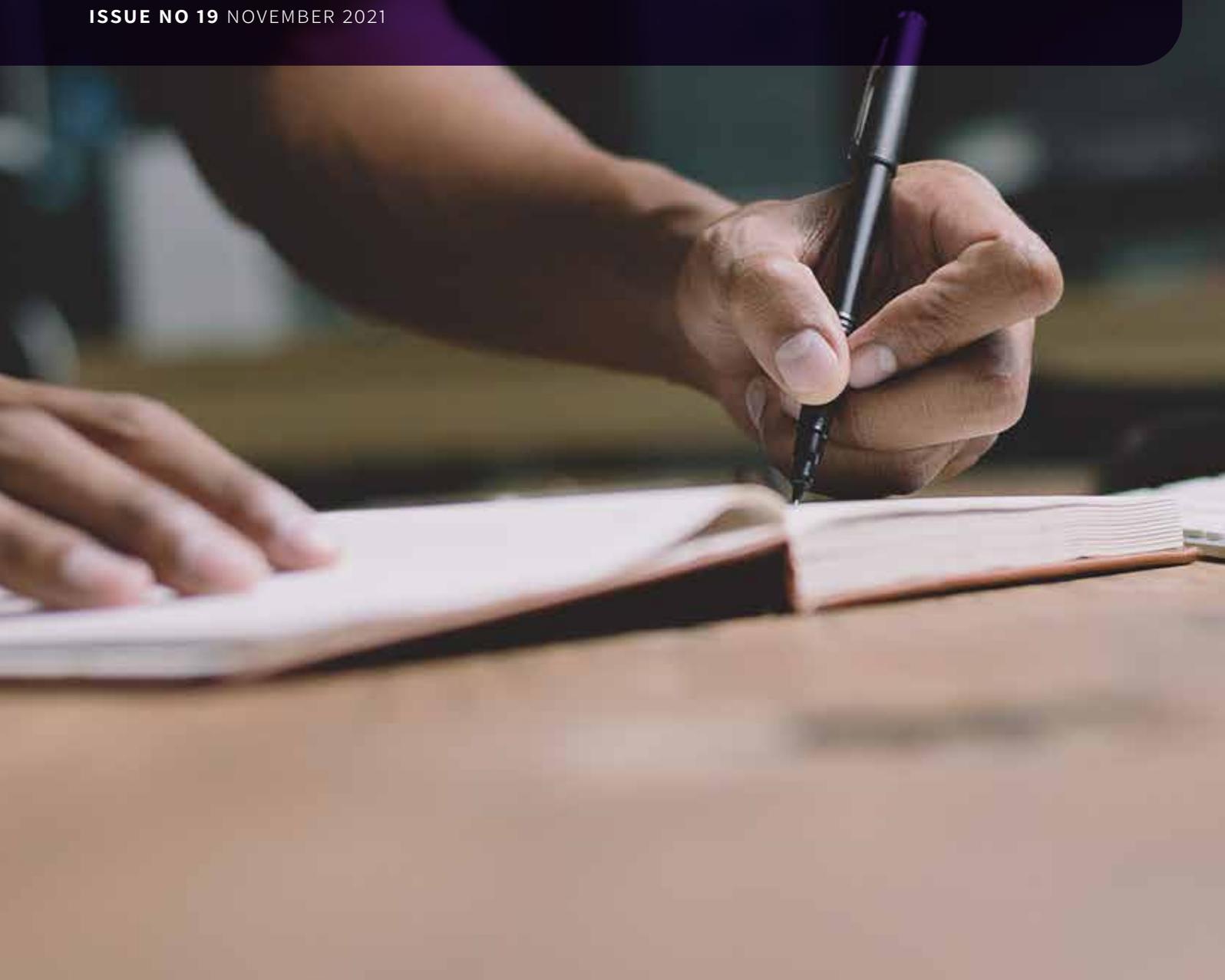


LEARNING POINT

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Police Investigations &
Review Commissioner



Assessing complaints Investigation of breaches of Articles 3 and 5 of ECHR



Contents

2

Welcome

Commissioner's
Foreword

4

Reviews

Assessing Complaints
Relevant complaint
On and Off Duty complaints
Repeat complaints
Unacceptable Actions Policy

7

Investigations

Investigation of Allegations
of Article 3 and 5 breaches
of the European Court of
Human Rights made against
police officers and
police staff

9

Appendix

Flow chart of the model that
will be applied by the PIRC



WELCOME

Welcome to Issue 19 of Learning Point, our best practice bulletin dedicated to fostering a culture of learning and improvement within policing in Scotland.

We continue to deliver core services subject to restrictions although with a more optimistic outlook of returning to a more 'normal' and familiar way of working. We are engaging more frequently in person, subject to appropriate safeguards, to carry out necessary inquiries and to engage with our partners on key issues such as the COP26 summit. In that regard, we have been working with partners in Police Scotland to prepare for one of the most significant events, from a policing perspective, that has ever occurred in Scotland, including some of our staff attending Police Scotland public order training.

In this issue, our Review team provides guidance on what constitutes a relevant complaint, the distinction between on and off duty complaints, dealing with repeat complaints and the appropriate use of an Unacceptable Actions Policy.

One of Dame Elish Angiolini's recommendations was that complaints of criminal conduct by police officers or member of police staff alleging a breach of Article 3 of the European Convention on Human Rights (ECHR) (prohibition of

torture – inhuman or degrading treatment or punishment) including allegations of assault, should be investigated by PIRC under the instruction and direction of the Crown Office and Procurator Fiscal Service (COPFS). Similarly, allegations that a breach of Article 5 of ECHR (right to liberty and security – unlawful arrest and detention) may, depending on the seriousness of the case, likewise require early independent investigation by PIRC.¹

Following collaborative working by COPFS, Police Scotland and PIRC, it was agreed that from 4 October 2021, such allegations will be investigated by the PIRC under the direction of the COPFS. In this issue we set out the reasoning underpinning this recommendation.

I hope you enjoy this issue.

Michelle Macleod
Commissioner



¹ Recommendation 47



Reviews:

Assessing Complaints



The initial assessment of complaints is a vital stage in the 6-stage complaint handling process.

What is a relevant complaint?

Complaints about any action or omission or the standard of any service provided or not provided by an officer serving with the police, or a member of police staff are defined as relevant complaints.² In general, members of the public who are directly or adversely affected by the police actions, or those who witnessed it, can all make a relevant complaint. Complaints may also be made by third parties acting as a representative of the member of the public.

However, there are some circumstances where dissatisfaction with police action or inaction does not constitute a relevant³ complaint about the police.

On and off duty complaints

Relevant complaints can be made about officers' conduct on and off duty. The assessment of on duty complaints is relatively straightforward but when considering complaints relating to conduct while off duty, the right of police officers and members of police staff to a private life has to be balanced with their role in the police and associated expectations of certain standards of behaviour and conduct when not on duty.

We provide guidance on factors to be considered when considering whether a complaint while off duty is a relevant complaint in our statutory guidance.⁴

RELEVANT COMPLAINT

A member of the public makes a complaint of incivility following a meeting between his neighbour and local police officers. The neighbour does not want to make a complaint and the complainer was not present during the meeting or overhear the conversation. In these circumstances, as the complainer did not witness the alleged incivility, it cannot be claimed that it was directed at him, or that the alleged incivility adversely affected him and as he is not acting as his neighbour's representative, this is not a relevant complaint.

OFF DUTY COMPLAINT

A member of the public complains that her neighbour, a serving police officer, was rude and disrespectful, and deliberately parked his vehicle on a shared driveway, in a manner likely to cause inconvenience to the complainer. The complaint is about off duty conduct. As there is no link between the officer's alleged conduct and their position as a police constable, this is not a relevant complaint.

! KEY POINT

In determining whether an off-duty allegation should be dealt with as a complaint about the police, consideration should be given as to whether a link exists between the subject matter of the complaint and the person's role as a police officer or member of police staff. The matter should be treated as a complaint about the police only if the conduct (if established) would, in the view of a reasonable observer, have a bearing upon the person's role as a police officer or member of police staff, including any conduct that has the potential of undermining the core values and objectives of the policing body or public confidence in policing in general.⁵

² Section 34 Police, Public Order and Criminal Justice (Scotland) Act 2006 (the Act)

³ Section 34 of the Act

⁴ Statutory Guidance on the handling of complaints about the police in Scotland, February 2021- Publications | Police Investigations & Review Commissioner (PIRC) Paragraph 69.

⁵ Paragraph 69 of the Statutory Guidance



Another complexity associated with the initial assessment of complaints about the police, arises out of complaints made by serving or retired police officers or members of the police staff. Any expressions of dissatisfaction by serving police officers or members of staff about the terms and conditions of their service are expressly excluded from the definition of a relevant complaint.⁶ Accordingly, dissatisfaction arising out of employee -v- employer situations (such as grievances, or disciplinary matters) should not be recorded as a relevant complaint about the police. If, however, the complaint arises from a policing matter, for example, the officer is a victim of crime, or a suspect in a criminal investigation, police officers and members of police staff can make relevant complaints about the police.

If it is assessed that a complaint is not a relevant complaint about the police, it is crucial to record the rationale underpinning this decision in the case file. The decision and, the reasons for the decision, must be communicated to the complainer at the earliest opportunity.

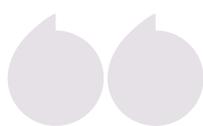
It is also best practice to include the standard PIRC paragraph⁷ advising the complainer of their entitlement to seek a review by the PIRC if they are dissatisfied with the handling of their complaint at the conclusion of the letter advising the complainer of the decision made. This promotes transparency and accountability, and increases public confidence in the police complaint process. The PIRC regularly receive requests for a complaint handling review in cases where Police Scotland has assessed that the complaint is not a relevant complaint. Irrespective of Police Scotland's decision, the PIRC will undertake its own assessment to provide an independent assurance to the complainer that the complaint had been appropriately assessed by the police. If we disagree with the decision made by the police, we will communicate our view to the policing body, providing our reasoning and rationale.

Repeat complaints

A repeat complaint is an allegation that has already been dealt with as a complaint about the police. Someone might make a repeat complaint for a number of reasons. For example, they may have been significantly affected by an incident, fixated on a particular issue, or they may be unwilling to accept an explanation that has previously been provided.

Whatever the motivation of the complainer, having to deal with repeat complaints takes up valuable resources and can adversely impact the service that the police, and indeed the PIRC are able to provide to other members of the public.

To ensure that the police complaints system is efficient and effective, a repeat complaint does not have to be investigated or responded to substantively by the police. Nonetheless, as such a complaint remains a 'relevant complaint' under the legislation, it should still be recorded as a complaint about the police. The police should also write to the complainer explaining why the complaint will not be taken forward and directing them to the PIRC if they disagree with the decision. The rationale for treating a complaint as a repeat complaint should always be noted on the police file to assist with future decision-making and enable independent oversight should the matter be referred to the PIRC.



Whatever the motivation of the complainer, having to deal with repeat complaints takes up valuable resources and can adversely impact the service that the police, and indeed the PIRC are able to provide to other members of the public.

IT IS IMPORTANT TO NOTE, HOWEVER, THAT WHAT APPEARS INITIALLY TO BE A REPEAT COMPLAINT MIGHT IN FACT BE A NEW COMPLAINT. WHEN ASSESSING WHETHER THIS IS THE CASE, IT MAY BE HELPFUL TO CONSIDER THE FOLLOWING QUESTIONS:

- Is the complaint fundamentally about the same alleged act, omission or service failing?
- Does the complaint relate to the same officer(s) or staff?
- Does the complaint simply re-frame the previous allegation by approaching it from a slightly different angle?
- Could the complaint be determined independently of the previous allegation?
- Has the complainer given a valid reason why they consider the complaint to be distinct from the previous allegation?

⁶ Section 34(3)(a) of the Act

⁷ Paragraph 145 of the Statutory Guidance





It should also be borne in mind that some people may continue to make complaints because not all of their concerns have been addressed by the police when handling a previous allegation. It is also not a repeat complaint if the complainer wishes to re-open an allegation that was previously dealt with by frontline resolution. Notwithstanding the above, repeat complainers who become unreasonably persistent or vexatious should be managed via the policing body's unacceptable actions policy.

Unacceptable Actions Policy

On occasion, it may be necessary to robustly manage complainers who, through their actions, behaviour, or unreasonable persistence and demands, place a significant administrative burden on Police Scotland, impacting upon staff welfare and the ability to provide a service to others.

While the PIRC does not act as an appeal body, where the police has made the decision to restrict someone's contact due to their unreasonable or unacceptable behaviour, we do have responsibility for ensuring that the police complaints system is efficient and effective. This includes processes/procedures to manage complainers that behave unreasonably.

It is not uncommon for those subject to restrictions by the police to approach PIRC for assistance. In such cases, the complainers' main concern tends to be that, despite having made complaints about the police, they have not received a

formal response. In such circumstances, PIRC will make contact with the Professional Standards Department to establish if any restrictions are placed on the individual in terms of Police Scotland's unacceptable actions policy. In such cases, the role of the PIRC is not to assess whether the police are justified in their decision to restrict contact but whether the unacceptable actions policy is being appropriately adhered to and that all 'relevant' complaints (where appropriate) are being recorded and responded to. In other words, we are seeking confirmation that complainers subject to the unacceptable actions policy are not unnecessarily prevented from making new 'relevant' complaints about the police

Accordingly, in such cases, the PIRC is looking for assurances that the police have:

- advised the complainer that they are subject of restrictions as per Police Scotland's unacceptable actions Policy;
- advised the complainer of the reasons why their contact has been restricted and what this means in terms of the level of response they should expect to receive from the police; and
- recorded and responded to any new 'relevant' complaints that have been made.

In order to assist future decision making and retrospective review by the PIRC, the onus is on complaint handlers to maintain adequate and auditable records



It is important to have a system that regularly reviews the restrictions in place and considers whether they require to be retained.

detailing their rationale for not recording/responding to the complainer. They also require to demonstrate that the complainer is aware of the restrictions and how long they will apply.

While it is counter-productive to correspond with a complainer whose contact has been restricted, it is important to have a system that regularly reviews the restrictions in place and considers whether they require to be retained and if so, notify the complainers that they still apply. Police Scotland has recently revised their unacceptable actions policy, aligning it with the approach adopted by PIRC, the Scottish Police Authority (SPA) and the Scottish Public Services Ombudsman (SPSO) when dealing with vexatious and repeat complainers. The new Unacceptable Actions by Complainers National Guidance is designed to introduce consistency of approach, improve the recording of the decision-making and rationale and empower line managers to make important decisions on unacceptable behaviour and actions quickly, in order to protect their staff and the efficient service delivery of policing.



Investigations:

Investigation of Allegations of Article 3 and 5 breaches of the European Court of Human Rights made against police officers and police staff.

In November 2020, Dame Elish Angiolini published her 'Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing'.

One of the recommendations⁸ was: Where the terms of a complaint made allege a breach of Article 3 (prohibition of torture – inhuman or degrading treatment or punishment) by a police officer or member of police staff, and therefore that a crime may have been committed, COPFS should instruct the PIRC to carry out an independent investigation, rather than directing Police Scotland to investigate the allegation. Similarly, allegations that a breach of Article 5 of ECHR (right to liberty and security – unlawful arrest and detention) may, depending on the seriousness of the case, likewise require early independent investigation.

The report also recommended that the PIRC should conduct an annual triage within Professional Standards Department of public complaints to ensure that matters that can be resolved by Front Line Resolution, or misconduct or potential criminality are being properly identified and to provide assurance that Article 3 and 5 cases are being correctly identified and reported to COPFS.

The rationale for these recommendations derives from the ECHR - an international treaty to protect human rights and fundamental freedoms. These rights include Article 2, commonly known as the right to life, and Article 3, the prohibition of torture, inhuman or degrading treatment or punishment. The ECHR has developed five principles for the effective investigation of complaints against the police that engage Article 2 or 3 of the ECHR including a requirement for independence of complaints of alleged breaches.



From 4 October 2021, all on-duty allegations of assaults made against police officers or police staff will be assessed and investigated by the PIRC.



THE FIVE PRINCIPLES ARE:

1. **Independence:** there should not be institutional or hierarchical connections between the investigators and the officer complained against and there should be practical independence;
2. **Adequacy:** the investigation should be capable of gathering evidence to determine whether police behaviour complained of was unlawful and to identify and punish those responsible;
3. **Promptness:** the investigation should be conducted promptly and in an expeditious manner in order to maintain confidence in the rule of law;
4. **Public scrutiny:** procedures and decision-making should be open and transparent in order to ensure accountability; and
5. **Victim involvement:** the complainant should be involved in the complaints process in order to safeguard his or her legitimate interests.



⁸ Recommendation 47





A death in custody or at the hands of the state or following police contact engages Article 2 as well as a possible breach of national criminal and/or civil law. Similarly an allegation of assault or inhuman or degrading treatment or punishment at the hands of the police could amount to a breach of Article 3. A complaint of unlawful detention also engages Article 5 rights.



In due course the PIRC will undertake audits of allegations of use of excessive force and unlawful arrest and detention.

In accordance with the ECHR, all of these matters should be dealt with independently of the police.

The Lord Advocate accepted the recommendation that PIRC should investigate all allegations of on-duty assaults made against police officers and police staff and advocated the creation of a multi-agency group, including representation from the Criminal Allegations Against the Police Division (CAAPD) of COPFS, the

PIRC and the PSD of Police Scotland to develop a model to implement the recommendation. The creation of this group aligned with wider governance and assurance arrangements developed by the Scottish Government.

As a consequence, a short term working group was established in April with representatives from CAAPD, PSD and PIRC. The group has been working collaboratively to develop a model whereby the PIRC undertakes the assessment and investigation of all allegations of assault made against police officers or police staff. The model also had to take account of Police Scotland's responsibility to examine and investigate associated non-criminal allegations against the police.

Additionally, in due course the PIRC will undertake audits of allegations of use of excessive force and unlawful arrest and detention. To facilitate the increased number of investigations of allegations of assault made against police officers or police staff and to audit allegations of use of excessive force and unlawful arrest or detention, the PIRC has recruited additional Investigators.

Commencement date

Following agreement of a model for referring these investigations to the PIRC, on the instruction of COPFS, from 4 October, PIRC will carry out investigation into all on-duty allegations of assault, unlawful arrests and unlawful detentions (and all associated criminal allegations) made against police officers and police staff.

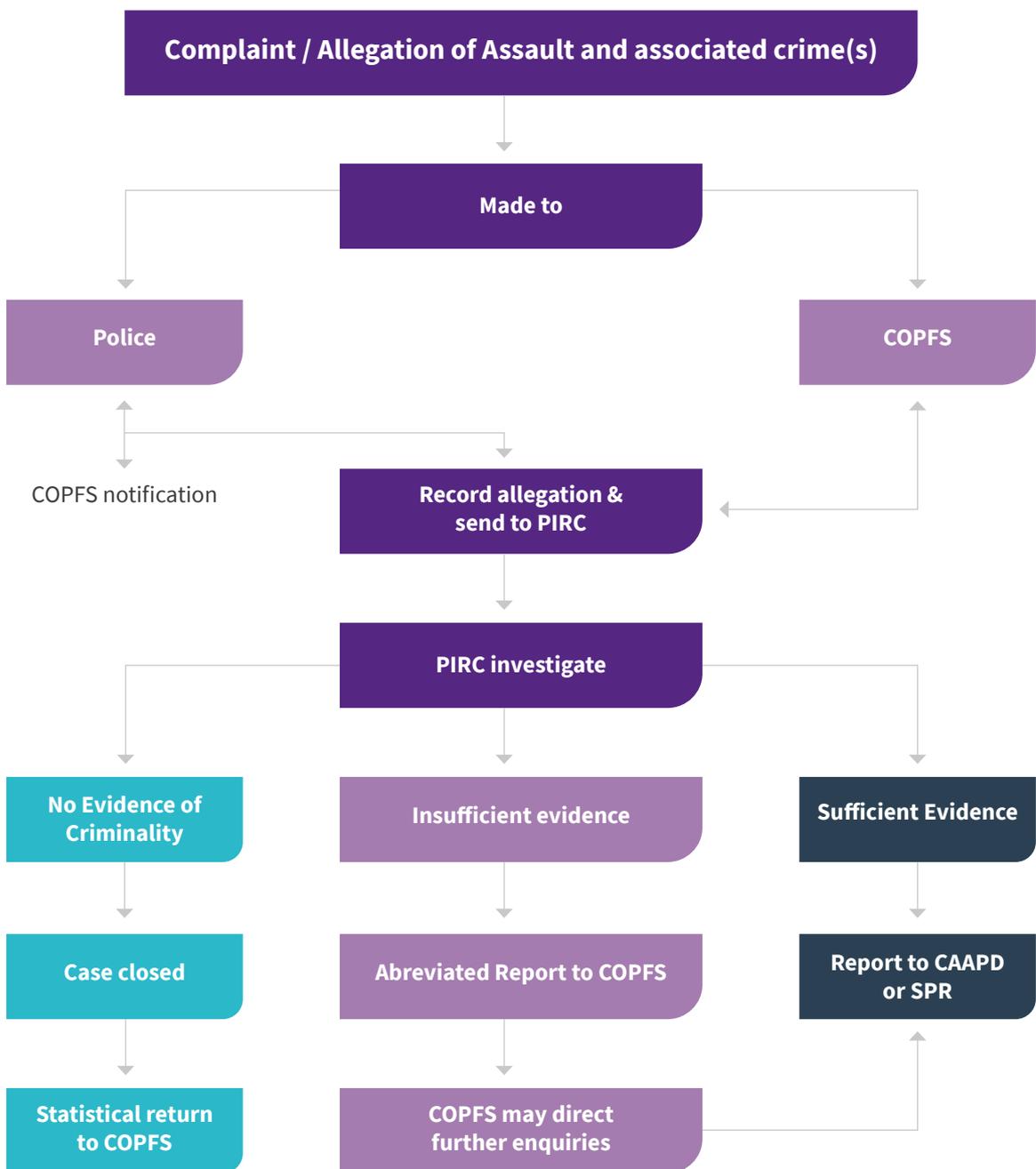
Appendix A provides a flow chart of the model that will be applied by the PIRC.

PSD will retain responsibility for the examination of non – criminal allegations.

In April 2022, PIRC plans to undertake an audit of complaints made against police officers or police staff containing allegations of use of excessive force and unlawful arrest or detention.



Appendix A:



Get in touch

If you have any queries about the topics covered in this issue, or would like to speak to a member of our team, please contact us at enquiries@pirc.gov.scot.

If you would like to be added to our mailing list please email communications@pirc.gov.scot.

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Hamilton House, Hamilton Business Park, Caird Park, Hamilton ML3 0QA
T: 01698 542 900 E: enquiries@pirc.gov.scot [in](#) | [t](#) @PIRCNews | pirc.scot

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