

IPCC policy on exercising its powers under 28A of the Police Reform Act 2002

Introduction

1. The Independent Police Complaints Commission (IPCC) took over from its predecessor, the Police Complaints Authority (PCA), on 1 April 2004. The IPCC (Transitional Provisions) Order 2004 (“the Transitional Order”) sets out a number of transitional arrangements.
2. Article 4 of the Transitional Order contains provision which prevented complaints or other matters from being recorded by forces if they had previously been the subject of an investigation supervised by the PCA or were otherwise dealt with under the previous legislation. This in turn had the effect of preventing the IPCC from investigating those matters.
3. Section 28A was inserted into the Police Reform Act by the Police (Complaints and Conduct) Act 2012 (“the 2012 Act”) in order to allow the IPCC to re-open matters relating to the Hillsborough disaster which had previously been investigated under the oversight of the PCA. It provides the Commission with a discretionary power to direct that if “exceptional circumstances” exist, the above Transitional Order will not apply. The power is to issue a direction that the matter will be handled under the Police Reform Act regardless of the Transitional Order.
4. Parliament had not, until that point, intended that the IPCC should be able to re-open matters dealt with by its predecessor body and the 2012 Act was introduced solely to enable a complete and thorough re-investigation of the disaster. It therefore follows that, although it can be used to enable the IPCC to re-open other matters, this will be extremely rare.
5. The 2012 Act also includes a power enabling the Secretary of State to make regulations setting out which parts of the Police Reform Act will apply to a matter recorded as a result of such a direction but at the time of writing this policy, no regulations have been drafted.

Procedure

6. The scheme of delegation sets out that the decision to issue a direction under section 28A is one which must be taken by the Chair or the Deputy Chair.
7. Matters which are referred to the IPCC are initially considered by operational staff for a Mode of Investigation Decision. Where a member of operational staff

identifies that the referral is made in relation to a case which had previously been subject to an investigation under the PCA regime, s/he should immediately refer it to the IPCC Chair, who will then make an assessment of the case in line with this policy, or delegate responsibility for that decision to the Deputy Chair.

8. The discretion to disapply the Transitional Order only arises once the Chair/Deputy Chair is satisfied that there are “exceptional circumstances”. The decision should only be taken with the benefit of legal advice and informed by the views of the Commission.

Exceptional Circumstances – a high threshold

9. The explanatory notes to the Police (Complaints and Conduct) Act 2012, which introduced this power, state that *“The requirement that the IPCC should be satisfied of “exceptional circumstances” is intended to set a high threshold; what is meant by exceptional could include a number of considerations such as the unusual gravity of the circumstances or an overwhelming public interest in a matter being investigated.”*
10. When debating the introduction of the power in Parliament, Damian Green (Minister for Policing and Criminal Justice) stated that the power needed to be “tightly drawn” and was intended to set a *“high enough bar to prevent all PCA cases from being subject to another investigation.”*
11. Introducing the bill in the House of Lords, Lord Taylor confirmed that exceptional circumstances was a *“high threshold”* which *“must be tightly drawn if we are to avoid the prospect of reopening every old PCA investigation and turning the IPCC into a cold-case review body.”* He went on to say: *“we see this power being used only in truly exceptional cases.”*
12. Taking all this into account, it is clear that “exceptional” means just that – in the context of the 2012 Act this is a very high threshold, and it will be rare for a case to meet it.

Exceptional Circumstances – applying the test

13. Before reaching a determination that “exceptional circumstances” exist, the Chair/Deputy Chair must have regard to the following factors (and any others s/he considers relevant):

Overwhelming Public Interest

14. Overwhelming public interest may arise in cases where there is a continuing and significant level of public concern about the events in question and the allegations have serious implications for public confidence in the police service.

15. Public interest requires the IPCC to be able to satisfy itself that a re-investigation will serve the public good. It does not mean popular interest, and this threshold will not be met simply by demonstrating that a large number of people are interested in the subject matter of the potential investigation. However, the level of public concern is one factor which must be taken into account..
16. “Overwhelming” means irresistible – thus in order to be satisfied that there is overwhelming public interest in directing a re-investigation, the Commission needs to be satisfied that the case for a re-investigation is so strong, based on the considerations set out in this policy, that there is little alternative but to direct that such a re-investigation take place.
17. Accordingly, in order to determine that there is an overwhelming public interest in the matter, the Commission should be able confidently to answer “yes” to the following questions:
 - a) is there evidence that there is a continuing and significant level of public concern about the events in question; and
 - b) is the Commission satisfied that the public interest in directing a re-investigation is “overwhelming”?

Unusual Gravity of the subject matter

18. By the very nature of its work, the IPCC deals with cases in which the subject matter is grave on a daily basis, for example, cases which have resulted in a death or which suggest police corruption. In order to meet the threshold of “unusual gravity”, the subject matter needs to be in some way different from such cases – it must be an “exceptional” case. It is likely to be extremely rare that the subject matter of a case is so grave that re-investigation is justified. For example, this test might be met where the conduct alleged has resulted in multiple loss of life, or where there is evidence which leads to a reasonable suspicion of corruption by a number of officers on an organised scale.
19. Accordingly, in order to determine that the matter is of unusual gravity the Commission needs to be able to confidently answer “yes” to the following question: are the events in question of unusual gravity when compared to other IPCC work – i.e. are they truly exceptional?

Making the direction

20. Once the Chair/Deputy Chair is satisfied that exceptional circumstances exist there remains an overall discretion whether or not to make a direction under section 28A(1) and (4) of the PRA.
21. In deciding whether to exercise this discretion and issue a direction, the Chair/Deputy Chair must have regard to the following factors (and to any others s/he considers relevant) including any diversity implications of the decision:

Resource Considerations

22. The Commission carries out a public function and the exceptional circumstances of the subject matter must justify the IPCC diverting resources from day to day work, or be satisfied that additional funding can be secured to conduct the investigation.

Purpose/Outcome

23. Even in cases of exceptional circumstances before ordering a reinvestigation, the Commission would still need to be satisfied that the investigation would serve a real and identifiable purpose. For an investigation to serve the public good, there needs to be a realistic prospect of a meaningful outcome which will allay the public concern, for example, a realistic prospect of a criminal prosecution being brought for serious offences, or significantly adding to the public understanding of the events in question (which could not be achieved by another means, for example, disclosure of information).

24. Clearly, there will need to be some consideration of the previous investigation and outcome before such a determination can be reached.