

## Guidance on the National Crime Agency (Complaints and Misconduct) Regulations 2013

### 1. Introduction

- 1.1 The National Crime Agency (Complaints and Misconduct) Regulations 2013 (“the Regulations”) confer functions on the IOPC in relation to its oversight of the exercise of functions by the Director General of the National Crime Agency (NCA) and other NCA officers.<sup>1</sup> The Regulations also set out the statutory framework for dealing with complaints, conduct matters and death or serious injury matters that involve NCA officers, including the Director General of the NCA.
- 1.2 The Regulations apply only in relation to the Director General of the NCA and to NCA officers exercising NCA functions in, or in relation to, England and Wales.
- 1.2 These Regulations are based largely on the statutory system, which was in place for the police service immediately before 1 February 2020. The Independent Police Complaints Commission (IPCC)<sup>2</sup> issued detailed [Statutory Guidance](#) on this in 2015.
- 1.3 However, there are some key differences and the purpose of this advice note is to provide bespoke guidance for the NCA. This note should be read in conjunction with the Statutory Guidance<sup>3</sup> to the police service on the handling of complaints. To assist in this, it follows the same structure and provides references to relevant paragraphs. However, this note is not itself statutory guidance.
- 1.4 This note also includes additional detail to provide clarity about some queries and issues that have arisen in practice.

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<sup>1</sup> Section 26C, *Police Reform Act 2002* requires the Secretary of State to make regulations conferring functions on the Director General of the NCA in relation to the exercise of functions by the Director General of the NCA and other NCA officers.

<sup>2</sup> The IOPC’s predecessor organisation.

<sup>3</sup> Any reference to statutory guidance in this document is a reference to the [IPCC’s Statutory Guidance published in 2015](#).

1.5 The IOPC has also issued separate [guidelines on dealing with allegations of discriminatory behaviour](#).

## 2. Key definitions

### ***National Crime Agency***

2.1 The NCA is a crown body established under Part 1 of the *Crime and Courts Act 2013*. The NCA consists of NCA officers, and is under the direction and control of the Director General of the NCA. It is classified as a non-ministerial department.

### ***Functions***

2.2 The term “functions” means all functions of any description, including powers and duties, whether conferred by an enactment or arising otherwise.<sup>4</sup>

### ***NCA functions***

2.2 The term “NCA functions” means:

- functions of the NCA
- functions of the Director General of the NCA
- functions of other NCA officers<sup>5</sup>

### ***NCA complaint function***

2.3 The term “NCA complaint function” means a function in relation to the exercise of functions by the Director General of the NCA or any other NCA officer.<sup>6</sup>

### ***NCA officer<sup>7</sup>***

2.4 The term “NCA officer” means:

- (a) a person who has been appointed under paragraph 9 of Schedule 1 to the *Crime and Courts Act 2013* as an NCA officer
- (b) a person who has been seconded to the NCA to serve as an NCA officer under paragraph 13 of Schedule 1 to the *Crime and Courts Act 2013*; and
- (c) an NCA special

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<sup>4</sup> Section 16(1), *Crime and Courts Act 2013*.

<sup>5</sup> Section 16(1), *Crime and Courts Act 2013*.

<sup>6</sup> Section 26C(9), *Police Reform Act 2002*.

<sup>7</sup> Regulation 2, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

2.5 The Regulations apply to all NCA officers and to the Director General of the NCA.

### ***Senior officer***<sup>8</sup>

2.6 A senior officer means an NCA officer of at least Grade 1.

### ***NCA standards***<sup>9</sup>

2.7 The Regulations refer to “NCA standards”, which are the behaviours and standards in accordance with which the Director General of the NCA and an NCA officer are required to comply under NCA conduct and performance policies (for example, NCA values and, where applicable to an NCA officer, the civil service code).

### ***Disciplinary proceedings***

2.8 For the Director General of the NCA and NCA officers, any reference to disciplinary proceedings means any proceedings or management process that considers a person’s conduct to determine whether it is misconduct or gross misconduct and what, if any, action is to be taken as a result.<sup>10</sup>

### ***Unsatisfactory performance proceedings***

2.9 For the Director General of the NCA and NCA officers, any reference to unsatisfactory performance proceedings means any proceedings or management process that considers a person’s performance to determine whether it is unsatisfactory or not or what, if any, action is to be taken as a result.<sup>11</sup>

## **3. General information**

### ***Transitional provisions***<sup>12</sup>

3.1 The Regulations came into effect on 7 October 2013; the same day the NCA formally began operating. Where a matter came to the attention of the Serious and Organised Crime Agency (SOCA) before 7 October 2013, it will not be dealt with under the Regulations. The matter will instead be dealt with in

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<sup>8</sup> Regulation 2, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

<sup>9</sup> Regulation 2, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

<sup>10</sup> Regulation 2, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

<sup>11</sup> Regulation 2, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

<sup>12</sup> Regulation 3, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

accordance with the agreement, made under Section 26A of the *Police Reform Act 2002*, between SOCA and the IPCC.

### **Delegation<sup>13</sup>**

- 3.2 The Director General of the NCA may delegate any or all of the powers or duties conferred on the Director General of the NCA in the Regulations to an NCA officer who is:
- a senior officer where a complaint or conduct matter relates to the conduct of a senior officer
  - an officer of at least Grade 2 in any other case
- 3.3 The Director General of the NCA must not delegate any powers or duties to an NCA officer whose involvement in that role could reasonably give rise to a concern about whether that NCA officer could act impartially, whether because that NCA officer has acted as investigating officer in the case or otherwise.
- 3.4 The Director General of the NCA may delegate all or any of their powers or duties in relation to the local resolution of complaints under the Regulations to any NCA officer.
- 3.5 The IOPC expects any delegation by the Director General of the NCA to be set out in a scheme of delegation to ensure that decisions are being made at an appropriate level by NCA officers. These officers should have a suitable level of training and experience, and meet the impartiality requirements above.

### **Complaints, conduct matters and DSI matters relating to a combination of NCA officers and people serving with the police**

- 3.6 Where there is a complaint, conduct matter or DSI matter that relates to a combination of NCA officers and people serving with the police, the Director General of the NCA is only the appropriate authority in relation to the NCA officers. The chief officer of the relevant police force will be the appropriate authority for any police officers. While the NCA and police may work together to carry out an investigation, the Director General of the NCA (or his/her delegate) should only make decisions and reach conclusions about an NCA officer. It will be for the chief officer of the police force to make determinations (for example whether there is a case to answer) for any police officers.

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<sup>13</sup> Regulation 80, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

### **Provision of information to the IOPC**

- 3.7 The *Police Reform Act 2002* permits an NCA officer (including the Director General of the NCA) to disclose information to the IOPC, or to a person acting on the IOPC's behalf, for the purposes of the exercise by the IOPC of an NCA complaints function.<sup>14</sup>
- 3.8 In addition, under the Regulations, the Director General of the NCA and NCA officers have a duty to provide the IOPC with all information and documents required by the IOPC to enable it to carry out its functions (as long as this is practicable).<sup>15</sup> Any sensitivity relating to the information provided should be communicated to the lead investigator or casework manager to ensure that the IOPC is aware of this. The IOPC may not disclose information provided by the NCA except as permitted by the Regulations or otherwise prescribed by law.<sup>16</sup> The exceptions to the duty to provide information will be considered by the IOPC before any information is communicated to the complainant or any other person.<sup>17</sup>
- 3.9 Both the ability of an NCA officer and the Director General of the NCA to voluntarily disclose information to the IOPC, and their duty to do so, are subject to the restrictions set out in Schedule 7 to the *Crime and Courts Act 2013*.<sup>18</sup>

### **Complaints and conduct matters concerning a person who no longer works for the NCA**

- 3.10 Complaints and conduct matters that relate to the conduct of an NCA officer who has left the NCA since the time of the conduct must be handled in the same way under the Regulations as any other complaint or conduct matter. However, the appropriate authority will not be required to determine whether disciplinary proceedings should be brought against that NCA officer.<sup>19</sup>

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<sup>14</sup> Section 26C(5), *Police Reform Act 2002*.

<sup>15</sup> Regulation 11, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

<sup>16</sup> Regulation 11, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

<sup>17</sup> Regulation 16, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

<sup>18</sup> Section 12, *Crime and Courts Act 2013*.

<sup>19</sup> Regulation 75, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

## 4. Statutory Guidance considerations

The following table sets out which parts of the IOPC's Statutory Guidance to the police service are analogous with the NCA system (albeit there are some differences in terminology and legal references).

| Area  | Paragraph numbers | Relevant to NCA                          | Notes  |
|---|-------------------|--|--|
| <b>Section 2: Promoting access</b>                    |                   |  |  |
| The importance of an accessible system                | 2.2-2.4           | Y  |  |
| Providing information and access                      | 2.5-2.10          | Y  |  |
| Complainants who need additional assistance           | 2.11-2.16         | Y  |  |
| Complaints made by children and young people under 16 | 2.17-2.20         | Y  |  |
| <b>Section 3: Complaints</b>                          |                   |  |  |
| Initial handling of a complaint                       | 3.3-3.8           | Y  |  |
| Definition of a complaint                             | 3.9-3.10          | Y  |  |
| Who can complain?                                     | 3.11-3.16         | Y, but not the information in text boxes | See sections 4.4 and 4.5 of this guidance note, the exclusion referred to in para 3.14 should be read as a reference to section 4.5 of this guidance note. |
| Recording a complaint                                 | 3.17-3.26         | Y, except paragraph 3.26                 | The conduct of NCA officers while off duty does not fall under the regulations.  |

|   |              |   |   |
|---|--------------|---|---|
| Complaints about discriminatory behaviour                               | 3.27-3.30    | Y |   |
| Who can be complained about?  | 3.31-3.34    | N | Complaints can be made about the Director General of the NCA and NCA officers – see section 2.1 of this guidance note. See also sections 3.3 and 3.5 of this guidance note. |
| Decisions not to notify or record a complaint                           | text box p24 | Y |   |
| Deciding how to handle a complaint                                      | 3.35-3.38    | Y |   |
| <b>Section 4: Disapplication</b>  |              |   |   |
| When can disapplication be carried out by the appropriate authority     | text box p25 | Y |   |
| When the IPCC's permission needs to be obtained                         | 4.3-4.6      | Y |   |
| Grounds for disapplication  | 4.7-4.19     | Y |   |
| Partial disapplication  | 4.20         | Y |   |
| Appeals against the decision to subject the complaint to disapplication | 4.21         | Y |   |
| <b>Section 5: Local handling</b>  |              |   |   |
| Introductory paragraphs   | 5.1-5.7      | Y | See also section 4.6 of this guidance note – <i>Who</i>   |
| Local resolution  | 5.8-5.9      | Y |   |

|  |              |   |   |
|--|--------------|---|---|
| Complaints suitable for local resolution                             | 5.10-5.12    | Y | <i>can carry out local resolution.</i><br><br>Note also that the procedures mentioned in para 5.9 will be the relevant NCA procedures for dealing with performance-related matters. |
| Local resolution following referral                                  | 5.13-5.14    | Y |   |
| Ways of resolving the complaint                                      | 5.15-5.16    | Y |   |
| Action plans   | 5.17-5.18    | Y |   |
| Communication  | 5.19         | Y |   |
| Statements   | 5.20         | Y |   |
| Appeal against local resolution                                      | 5.21-5.22    | Y |   |
| It is not possible to locally resolve the complaint                  | 5.23-5.25    | Y |   |
| <b>Section 6: Conduct matters</b>                                    |              |   |   |
| Definition of a conduct matter                                       | 6.3-6.4      | Y |   |
| Recording a conduct matter   | 6.5-6.10     | Y |   |
| Conduct matters involving allegations of discrimination              | 6.11         | Y |   |
| Conduct matters relating to people who no longer work for the police | 6.12         | Y |   |
| <b>Section 7: Death or serious injury matters</b>                    |              |   |   |
| Definition of a DSI matter   | text box p40 | Y |   |
| Recording a DSI matter   | 7.3          | Y |   |

## Section 8: Referrals

|   |                |   |  |
|---|----------------|---|--|
| Matters that must be referred to the IPCC, including definitions of mandatory referral criteria and call in | 8.3-8.21       | Y | Parts of this section are included in this guidance note. See also sections 4.11 and 4.12 of NCA guidance note for additional information. |
| Deadlines for referral  | 8.22-8.24      | Y |  |
| Voluntary referrals   | 8.25-8.26      | Y |  |
| Referral of complaints about direction and control  | 8.27           | N |  |
| Notification of referral  | Text boxes p49 | Y |  |
| Determining whether and how a matter should be investigated   | 8.28-8.29      | Y |  |

## Section 9: Investigations

|  |           |                            |   |
|--|-----------|----------------------------|---|
| Purpose of an investigation                            | 9.2       | Y                          | An investigation does not have to reach a conclusion about whether there is unsatisfactory performance. |
| Appointment of a person to carry out the investigation | 9.3-9.6   | Y (except second text box) | Instead of second text box see, section 4.14 of this guidance note.                                     |
| Terms of reference                                     | 9.7-9.9   | Y                          |   |
| Keeping an audit trail                                 | 9.10-9.13 | Y                          |   |
| The scope of the investigation                         | 9.14-9.16 | Y                          |   |

|  |           |                |   |
|--|-----------|----------------|---|
| Allegations involving discrimination                         | 9.17-9.23 | Y              |   |
| Death or serious injury matters turning into conduct matters | 9.24-9.28 | Y              |   |
| Special requirements   | 9.29-9.34 | Y              | Special requirements can be applied (where appropriate) to any complaint investigation in relation to the Director General of the NCA, or an NCA officer. |
| Severity assessments   | 9.35-9.42 | 9.36-9.38 only | See section 4.15 of this guidance note for further information about severity assessments in relation to the NCA.   |
| Notices of investigation                                     | 9.43      | N              | See section 4.16 of this guidance note.   |
| Representations to the investigator                          | 9.44      | Y              | The time period for providing any relevant statement or document will be the time period set out in the notice of investigation.                          |
| Interviews   | 9.45-9.51 | Y              |   |
| Power to suspend an investigation or other procedure         | 9.52-9.60 | Y              |   |
| Resumption of a complaint after criminal proceedings         | 9.61-9.63 | Y              |   |
| Suspension of officers and special constables                | 9.64      | N              | NCA regulations do not cover suspension.  |

|   |              |   |  |
|---|--------------|---|--|
| Providing information / communication                                   | 9.65-9.72    | Y | See also section 4.18 of this guidance note. |
| <b>Section 10: Discontinuances</b>                                      |              |   |  |
| When can an investigation be discontinued by the appropriate authority? | text box p68 | Y |  |
| When the IPCC's permission needs to be obtained                         | 10.2-10.3    | Y |  |
| Requirement to obtain representations from the complainant              | 10.4         | Y |  |
| Grounds for discontinuance  | 10.5-10.15   | Y |  |
| Notification  | text box p72 | Y |  |
| Action to be taken following a discontinuance                           | 10.16-10.17  | Y |  |
| Appeal against the decision to discontinue                              | 10.18        | Y |  |
| <b>Section 11: Concluding the investigation</b>                         |              |   |  |
| The investigation report including content and conclusions              | 11.2-11.41   | Y |  |
| Criticism   | 11.42-11.43  | Y |  |
| Who receives the report?  | text box p84 | Y |  |

|   |             |                             |   |
|---|-------------|-----------------------------|---|
| What does the IPCC expect the appropriate authority to do with the report?  | 11.44-11.48 | Y                           |   |
| Death or serious injury investigation outcomes  | 11.49-11.51 | Y                           |   |
| Publication   | 11.52       | Y                           |   |
| <b>Section 12: Action after the investigation</b>   |             |                             |   |
| Communication with the complainant and interested persons after the conclusion of the investigation   | 12.3-12.9   | Y                           |   |
| Apologies   | 12.10-12.14 | Y                           |   |
| Outcomes for individuals including allegations involving discrimination, special case procedures, unsatisfactory performance procedures, public hearings and criminal proceedings | 12.15-12.43 | 12.18-12.24 and 12.37-12.43 | Outcomes for individuals will be in accordance with the NCA disciplinary and performance processes. |
| Learning lessons  | 12.44-12.58 | Y                           |   |
| IPCC recommendations under paragraph 28A of Schedule 3  | 12.59-12.63 | N                           | This provision is not included in NCA regulations.  |
| Inquest proceedings   | 12.64-12.67 | Y                           |   |

## Section 13: Appeals

|   |             |                 |  |
|---|-------------|-----------------|--|
| Principles of appeal handling   | 13.2-13.10  | Y               |  |
| Who considers the appeal?   | 13.11-13.17 | Y               |  |
| Appeals to the chief officer including delegation and notification  | 13.18-13.28 | Y               |  |
| Appeals to the IPCC   | 13.29-13.30 | Y               |  |
| Appeal validity   | 13.31-13.41 | Y, except 13.34 |  |
| Appeals against a failure to notify or record a complaint   | 13.42       | Y               | See also section 4.19 of this guidance note. |
| Appeals against the decision to disapply  | 13.43-13.60 | Y               |  |
| Appeals against the outcome of local resolution or the outcome of a complaint handled otherwise than in accordance with Schedule 3 PRA 2002 | 13.61-13.67 | Y               |  |
| Appeals against the decision to discontinue   | 13.68-13.79 | Y               |  |

|  |              |   |  |
|--|--------------|---|--|
| Appeals against investigation                      | 13.80-13.107 | Y | See also section 4.21 of this guidance note - this right of appeal includes consideration of whether the decision about whether or not there is a case to answer is appropriate but not the distinction between misconduct and gross misconduct. |
| <b>Section 14: Data collection and monitoring</b>  |              |   |  |
| Responsibilities of the chief officer              | 14.5-14.8    | Y |  |
| Responsibilities of the local policing body        | 14.9-14.12   | N |  |
| The police complaints system performance framework | 14.13-14.16  | N | Data is collated separately for cases involving the NCA, but it is published in the IPCC's annual report.  |

## Section 1 of the Statutory Guidance: Introduction

### ***Appropriate authority***<sup>20</sup>

4.1 The appropriate authority is responsible for certain key actions and decisions under the regulations.

| <b>Person concerned</b>                                 | <b>Appropriate authority</b>   |
|---|--|
| Director General of the NCA                             | Permanent Secretary to the Home Office   |
| NCA officer   | Director General of the NCA  |
| Person serving with the police on secondment to the NCA | The chief officer or local policing body who would be the appropriate authority under the <i>Police Reform Act 2002</i> . <sup>21</sup><br>The appropriate authority can, however, arrange for the Permanent Secretary or Director General of the NCA to carry out the functions of the appropriate authority during the secondment. <sup>22</sup> |
| Any other person on secondment to the NCA               | The person who would have had direction and control of them if not for the secondment.   |

### ***Power of the Permanent Secretary to the Home Office to give directions to the Director General of the NCA***<sup>23</sup>

4.2 Where it appears to the Permanent Secretary that the Director General of the NCA has not complied with an obligation which has arisen by or under the Regulations or has contravened an obligation, the Permanent Secretary may direct the Director General of the NCA to take whatever steps the Permanent Secretary thinks appropriate. The Director General of the NCA must comply with such a direction.

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<sup>20</sup> Regulation 2, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

<sup>21</sup> Section 29, *Police Reform Act 2002*.

<sup>22</sup> Regulation 2(2), The National Crime Agency (Complaints and Misconduct) Regulations 2013.

<sup>23</sup> Regulation 9(3)-(5), The National Crime Agency (Complaints and Misconduct) Regulations 2013.

## **Section 3 of the Statutory Guidance: Complaints**

### ***Subject matter of the complaint***

4.3 A complaint must be about either the conduct of the Director General of the NCA or an NCA officer – i.e. the complaint is in relation to or about conduct involving the Director General of the NCA or an NCA officer exercising NCA functions.

### ***Who can make a complaint?***

4.4 A complaint may be made only by one of the following:

- a member of the public who claims that the conduct took place in relation to him or her
- a member of the public who claims to have been adversely affected by the conduct, even though it did not take place in relation to him or her
- a member of the public who claims to have witnessed the conduct
- a person acting on behalf of someone who falls within any of the three categories above

4.5 A person can only be considered as having been authorised to act on behalf of another for the purposes of making a complaint if he or she has and is able to produce written consent from that person.<sup>24</sup>

4.6 A person who does not fall within the categories above may raise a concern with the NCA and the concern may be looked into, but it should not be treated as a complaint for the purposes of the Regulations. The person who raised the concern will not have any of the statutory rights of a complainant.

### ***Complaints by NCA officers***

4.7 The Director General of the NCA or an NCA officer cannot make a complaint about the conduct of another NCA officer who falls under the Regulations if the conduct happened while that NCA officer or Director General of the NCA was on duty.<sup>25</sup> This does not mean that the Director General of the NCA or an NCA officer cannot raise concerns about something that happened while someone was on duty. In these circumstances, the Director General of the NCA or an NCA officer will not have any of the statutory rights of a complainant but may, if appropriate, be treated as an interested person.

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<sup>24</sup> Regulation 8, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

<sup>25</sup> Regulation 8(4), The National Crime Agency (Complaints and Misconduct) Regulations 2013.

## **Section 5 of the Statutory Guidance: Local handling**

### ***Who can carry out local resolution?***

4.8 The appropriate authority may appoint an NCA officer to carry out the local resolution of a complaint.<sup>26</sup>

## **Section 8 of the Statutory Guidance: Referrals**

### ***Complaints that must be referred to the IOPC<sup>27</sup>***

- 4.9 Appropriate authorities must refer to the IOPC:
- complaints alleging that the conduct complained of has resulted in death or serious injury
  - complaints that fall within the mandatory referral criteria (see paragraph 4.10)
  - complaints that the IOPC requires to be referred regardless of whether the complaint is already being investigated by any person or whether the IOPC has considered it

### ***Conduct matters that must be referred to the IOPC<sup>28</sup>***

- 4.10 Appropriate authorities must refer to the IOPC recordable conduct matters that:
- relate to any incident or circumstances in or in consequence of which a person has died or suffered serious injury
  - fall within the mandatory referral criteria (see paragraph 4.10)
  - the IOPC requires to be referred regardless of whether the conduct matter is already being investigated by any person or the IOPC has considered it previously

### ***Referral of death or serious injury (DSI) matters***

- 4.11 It is the duty of the appropriate authority to refer all DSI matters to the IOPC.<sup>29</sup>
- 4.12 A DSI matter refers to any circumstances (unless the circumstances are or have been the subject of a complaint or amount to a conduct matter) in, or as a result of which, a person has died or sustained serious injury and:

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<sup>26</sup> Regulation 26, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

<sup>27</sup> Regulation 22, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

<sup>28</sup> Regulation 32, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

<sup>29</sup> Regulation 36, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

- at the time of death or serious injury the person had been arrested by the Director General of the NCA or an NCA officer and had not been released, or the person was, at the relevant time, otherwise detained in the custody of the Director General of the NCA or an NCA officer; or
- at or before the time of the DSI, the person had contact of any kind – whether direct or indirect – with the Director General of the NCA or an NCA officer who was acting in the execution of his or her duties, and there is an indication that the contact may have caused – whether directly or indirectly – or contributed to the DSI. However, this sub-category excludes contact that a person who suffered the DSI injury had whilst he or she was acting in the execution of his or her duties.<sup>30</sup>

### ***Mandatory referral criteria***<sup>31</sup>

4.13 The appropriate authority must refer complaints and conduct matters to the IOPC that include allegations of conduct that constitute:

- serious assault, as defined in guidance issued by the IOPC
- serious sexual offence, as defined in guidance issued by the IOPC
- serious corruption, as defined in guidance issued by the IOPC
- criminal offence or behaviour that is liable to lead to misconduct proceedings and which, in either case, is aggravated by discriminatory behaviour on the grounds of a person's race, sex, religion or other status identified in IOPC guidance
- a relevant offence, or
- complaints or conduct matters that are alleged to have arisen from the same incident as anything falling within these criteria

4.14 An appropriate authority must also refer complaints that arise from the same incident about which there is a complaint alleging that the conduct complained of resulted in death or serious injury.

4.15 An extract of the Statutory Guidance providing fuller definitions of the mandatory referral criteria can be found at Annex 1 of this guidance note.

### ***Who can make a referral?***

4.16 A referral can be made by the appropriate authority. Where the Director General of the NCA is the appropriate authority, the Permanent Secretary to the Home Office may also refer complaints or recordable conduct matters that either have not been referred or are not required to be referred by the appropriate authority if the Permanent Secretary considers referral would be

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<sup>30</sup> Regulation 8(7)-(10), The National Crime Agency (Complaints and Misconduct) Regulations 2013.

<sup>31</sup> Regulations 22 and 32, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

appropriate because of the gravity of the subject matter or any other exceptional circumstances.<sup>32</sup>

### ***Making a referral***

4.17 The remit of the IOPC is set out by the Regulations that focus on the actions or failings of NCA officers, including the Director General of the NCA. The IOPC can only look at wider issues and learning where it arises from an individual case where a complaint, conduct matter or DSI matter has been recorded. Any complaint or conduct matter can be referred to the IOPC voluntarily, and in circumstances where there is significant public interest and concern this should be considered. However, a matter does need to be identified and recorded as either a complaint or conduct matter prior to referral. In particular, while it is not compulsory for a specific officer(s) to have been located and identified in order for a conduct matter to be recorded, it is a requirement to identify the conduct that is alleged to have infringed the NCA standards of professional behaviour.

### ***Deadlines for referral***

4.18 A mandatory referral must be made without delay and, in any case, not later than the end of the day after the day it first becomes clear to the appropriate authority that it is a matter that must be referred.<sup>33</sup>

## **Section 9 of the Statutory Guidance: Investigations**

### ***Appointment of a person to carry out an investigation***

4.19 The appropriate authority may appoint an NCA officer or a person serving with the police to carry out the investigation. In managed and supervised investigations, this will be subject to the agreement of the IOPC.<sup>34</sup>

4.20 However, the appointment of an investigating officer is subject to a number of important qualifications. These are:

- (i) the investigating officer must have an appropriate level of knowledge, skills and experience to plan and manage the investigation

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<sup>32</sup> Regulation 22 and 32, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

<sup>33</sup> Regulations 22, 32 and 36, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

<sup>34</sup> Regs 41-43, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

- (ii) the investigating officer must not work, directly or indirectly, under the management of the person being investigated
- (iii) where an investigation relates to a senior officer, the investigating officer must not be the Director General of the NCA
- (iv) the investigating officer must not be appointed if his or her involvement in that role could reasonably give rise to a concern about whether he or she could act impartially<sup>35</sup>

### ***Special requirements and severity assessments***

4.21 Under the Regulations, this is referred to as a “special procedure”, this should not be confused with the accelerated procedures for “special cases”.

4.22 If, during the course of an investigation of a complaint, it appears to the person investigating that there is an indication that a person to whose conduct the investigation relates may have:

- committed a criminal offence or
- behaved in a manner that would justify the bringing of disciplinary proceedings

then the investigator must certify the investigation as one subject to special requirements. They must then make a severity assessment.

4.23 A “severity assessment” for the Regulations is defined as “an assessment as to whether the conduct, if proved, would amount to misconduct or gross misconduct”. It does not include making an assessment about what form any disciplinary proceedings might take.

4.24 The same applies to revised severity assessments.<sup>36</sup>

### ***Notices of investigation***<sup>37</sup>

4.25 The standards to refer to in the notice are the “NCA standards”.

4.26 The notice must be in writing and comply with the requirements of regulation 49(7).

4.27 The notice should not include the likely form of any misconduct proceedings.

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<sup>35</sup> Regulation 39, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

<sup>36</sup> Regulation 49, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

<sup>37</sup> Regulation 49, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

- 4.28 The notice should give a right to seek advice from the trade union or any other body representing the interests of the person concerned (they can also have an NCA friend (see paragraph 4.17)).
- 4.29 The time limit for providing representations to the investigator is not specified in the Regulations, instead they say: “such period as determined by the NCA”. The ten working days allowed for those serving with the police by the Police (Complaints and Misconduct) Regulations 2012 and associated regulations should be used as a starting point for determining this time period, although the investigator may extend this period if required.
- 4.30 In a managed investigation, the investigator should consult the IOPC’s managing investigator about the content of the notice, whether serving the notice should be delayed, or any revision of the severity assessment.

***NCA friend<sup>38</sup>***

- 4.31 An NCA officer or the Director General of the NCA may have another NCA officer or a trade union official who is not otherwise involved in the matter as an “NCA friend”.

***Exceptions to the duty to provide information to the complainant and interested persons<sup>39</sup>***

- 4.32 The duty to keep the complainant and interested persons informed does not apply in circumstances where non-disclosure is:
- (i) necessary to prevent premature or inappropriate disclosure of information that is relevant to, or may be used in, any actual or prospective criminal proceedings
  - (ii) necessary to prevent the disclosure of information in any circumstances in which its non-disclosure is:
    - in the interest of national security
    - for the purposes of the prevention or detection of crime, or the apprehension or prosecution of offenders
    - required on proportionality grounds; or
    - otherwise necessary in the public interest

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<sup>38</sup> Regulation 53, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

<sup>39</sup> Regulation 16, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

- 4.33 The appropriate authority must consider whether the non-disclosure of information is justified under any of the above grounds where:
- (i) that information is relevant to, or may be used in, any actual or prospective disciplinary proceedings or unsatisfactory performance proceedings
  - (ii) the disclosure of that information may lead to the contamination of the evidence of witnesses during such proceedings
  - (iii) the disclosure of that information may prejudice the welfare or safety of any third party
  - (iv) that information constitutes criminal intelligence

## **Section 13 of the Statutory Guidance: Appeals**

### ***Appeals against the non-recording of complaints<sup>40</sup>***

- 4.34 There is no right of appeal against a failure by the Permanent Secretary to the Home Office to record a complaint or to notify the correct appropriate authority of the complaint.

### ***Appeals against investigation***

- 4.35 The complainant has the following rights of appeal to the relevant appeal body:
- (a) a right to appeal on the grounds that the complainant has not been provided with adequate information
    - i. about the findings of the investigations; or
    - ii. about any determination of the appropriate authority relating to the taking (or not taking) of action in respect of any matters dealt with in the investigation report
  - (b) a right to appeal against the findings of the investigation
  - (c) a right of appeal against any determination by the appropriate authority that a person to whose conduct the investigation related has a case to answer or that such a person's performance is, or is not, unsatisfactory in respect of that person's conduct or has no case to answer

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<sup>40</sup> Regulation 21, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

- (d) a right of appeal against any determination by the appropriate authority relating to the taking (or not taking) of action in respect of any matters dealt with in the report; and
- (e) a right of appeal against any determination by the appropriate authority under regulation 68(2)(a) as a result of which it is not required to send the Director of Public Prosecutions a copy of the report<sup>41</sup>

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<sup>41</sup> Regulation 71, The National Crime Agency (Complaints and Misconduct) Regulations 2013.

## **Annex 1 – Definitions of referral criteria (taken from the IOPC’s Statutory Guidance to the Police Service on the Handling of Complaints pp 44 – 47)**

### **Serious assault**

- 8.7 ‘Serious assault’ is conduct that results in an injury that amounts to actual bodily harm or a more serious injury.
- 8.8 ‘Serious assault’ is interpreted in accordance with the law on what constitutes an assault occasioning actual bodily harm contrary to Section 47 of the Offences Against the Person Act 1861. The offence is committed when a person assaults another, thereby causing actual bodily harm to that other person. One factor in law that distinguishes a charge under Section 39 of the Criminal Justice Act 1988 (common assault) from one under Section 47 is the degree of injury. The Crown Prosecution Service (CPS) legal guidance on the charging standards for the offence of assault occasioning actual bodily harm should be applied in determining whether an offence is one of assault occasioning actual bodily harm rather than common assault.
- 8.9 Any attempt, incitement or conspiracy to commit any offence referred to above must also be referred to the IPCC<sup>42</sup>.
- 8.10 Where a person is injured as a result of the conduct of a person serving with the police, forces should first consider whether the injury is a serious injury or one which must be referred. If not, they should ask themselves whether there is anything about the conduct or the circumstances in which the injury was sustained which points to the need for a voluntary referral. For injuries occurring once a person is in custody, the threshold for force to be necessary or proportionate is higher.

### **Serious sexual offences**

- 8.11 The term ‘serious sexual offences’ includes:
- all offences under the Sexual Offences Acts 1956 to 2003 that must be tried in the Crown Court; or
  - any other offences under these Acts which appear, to an appropriate authority, to be an offence for which the individual concerned, if convicted, would be likely to receive a sentence of more than six months.
- 8.12 Any attempt, incitement or conspiracy to commit any offence referred to above must also be referred to the IPCC.

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<sup>42</sup> References in this extract are to the IPCC as the Statutory Guidance was issued in 2015 before the IPCC became the IOPC. However, any reference to the IPCC is to be read as the Director General of the IOPC.

## **Serious corruption**

8.13 The term serious corruption refers to conduct that includes:

- any attempt to pervert the course of justice or other conduct likely seriously to harm the administration of justice, in particular the criminal justice system;
- payments or other benefits or favours received in connection with the performance of duties amounting to an offence for which the individual concerned, if convicted, would be likely to receive a sentence of more than six months;
- abuse of authority;
- corrupt controller, handler or covert human intelligence source (CHIS) relationships;
- provision of confidential information in return for payment or other benefits or favours where the conduct goes beyond a possible prosecution for an offence under Section 55 of the Data Protection Act 1998;
- extraction and supply of seized controlled drugs, firearms or other material; or
- attempts or conspiracies to do any of the above.

8.14 The law requires that allegations of serious corruption are referred to the IPCC without delay. It is therefore not appropriate to wait until there is sufficient information to make an arrest.

8.15 Where an allegation of serious corruption is made or potential serious corruption is identified this may require covert investigation. This should not prevent or delay referral to the IPCC.

8.16 The IPCC expects covert cases to be referred if any of the following factors are present:

- reasonable suspicion that a criminal offence has been committed
- the investigation has moved to an operational phase
- covert intrusive tactics are about to be deployed
- the allegations are extremely sensitive or likely to have an adverse impact on public confidence

8.17 If it is unclear whether any of these factors are present the case should be discussed with the IPCC to establish whether referral is necessary.

## **Criminal offences and behaviour liable to lead to misconduct proceedings and which in either case is aggravated by discriminatory behaviour**

8.18 This refers to any criminal offence or other behaviour liable to lead to misconduct proceedings that is aggravated by discrimination on the grounds of a person's:

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex, or
- sexual orientation

8.19 The form of the alleged discrimination may be direct through language or behaviour, for example, the use of discriminatory words or use of stereotypes to describe individuals. The complainant or interested person may allege that the criminal offence or behaviour was motivated by discrimination. He or she may allege treatment which amounts to discrimination by comparison with the treatment given to others. While it is not for the complainant to prove that the person serving with the police discriminated against him or her it is important that when raising allegations about the treatment he or she received that he or she is able to identify (where possible) how that treatment was discriminatory. The person dealing with the matter should encourage the complainant or interested person to provide as much information as possible as to why they consider they were discriminated against. It is equally possible that the complainant or interested person does not allege discrimination, but that the investigator believes discrimination is a factor.

### **Relevant offence**

'A relevant offence' is defined as any offence for which the sentence is fixed by law or any offence for which a person of 18 years and over (not previously convicted) may be sentenced to imprisonment for seven years or more (excluding any restrictions imposed by Section 33 of the Magistrates Court Act 1980).

Regulation 1, Police (Complaints and Misconduct) Regulations 2012

## Annex 2 – Counterpart provisions in the PRA and Police Regulations and the NCA Regulations

The following table provides the equivalent provisions in the *Police Reform Act 2002* (immediately prior to amendments made by the *Policing and Crime Act 2017*, which commenced on 1 February 2020), and associated regulations for each of the NCA Regulations to assist with applying the IOPC Statutory Guidance in practice.

| <b>NCA Regulation</b>   | <b>Counterpart provision</b>   |
|---|--|
| 1. Citation commencement and extent   | n/a  |
| 2. Interpretation   | Regulation 1, Police (Complaints and Misconduct) Regulations 2012 and Section 29, PRA  |
| 3. Revocation and transitional provisions                                     | n/a  |
| 4. Application: general   | Section 12, PRA  |
| 5. Application of the 2002 Act  | Applies sections: <ul style="list-style-type: none"> <li>• 9 (the Independent Police Complaints Commission),</li> <li>• 19 (use of investigatory powers by or on behalf of the Commission),</li> <li>• 22 (power of the Commission to issue guidance),</li> <li>• 24 (consultation on regulations), regulations made under section 27 and Schedule 2 of the PRA</li> </ul> |
| 6. General functions of the Commission under these Regulations                | PRA, Section 10  |
| 7. Reports to the Secretary of State  | PRA, Section 11  |
| 8. Complaints, matters and persons to which these Regulations apply           | PRA, Sections 12 and 29  |
| 9. General duties of the Permanent Secretary, Director General and Inspectors | PRA, Section 15  |
| 10. Payment for assistance with investigations                                | PRA, Section 16  |
| 11. Provision of information to the Commission                                | PRA, Section 17  |
| 12. Inspection of premises on behalf of the Commission                        | PRA, Section 18  |

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| 13. Duty to keep the complainant informed  | PRA, Section 20  |
| 14. Duty to provide information for other persons  | PRA, Section 21 and regulation 12-13, Police (Complaints and Misconduct) Regulations 2012  |
| 15. Manner in which duties to provide information are to be performed                                    | Regulation 12 Police (Complaints and Misconduct) Regulations 2012                          |
| 16. Exceptions to the duty to keep the complainant informed and to provide information for other persons | Regulation 13 Police (Complaints and Misconduct) Regulations 2012                          |
| 17. Duties to preserve evidence relating to complaints   | PRA, Schedule 3 para 1   |
| 18. Initial handling and recording of complaints   | PRA, Schedule 3 para 2   |
| 19. Copies of complaints, etc  | Regulation 15, Police (Complaints and Misconduct) Regulations 2012                         |
| 20. Recording of complaints  | Regulation 3, Police (Complaints and Misconduct) Regulations 2012                          |
| 21. Failures to notify or record a complaint   | PRA, Schedule 3 para 3   |
| 22. Reference of complaints to the Commission  | PRA, Schedule 3 para 4 & reg 4, Police (Complaints and Misconduct) Regulations 2012        |
| 23. Duties of the Commission on references under regulation 22   | PRA, Schedule 3 para 5   |
| 24. Handling of complaints by the appropriate authority  | PRA, Schedule 3 para 6   |
| 25. Disapplication of requirements of these Regulations  | PRA, Schedule 3 para 7 & regulation 5, Police (Complaints and Misconduct) Regulations 2012 |
| 26. Local resolution of complaints   | PRA, Schedule 3 para 8 & regulation 6, Police (Complaints and Misconduct) Regulations 2012 |
| 27. Appeals relating to complaints dealt with other than by investigation                                | PRA, Schedule 3 para 8A  |
| 28. Conduct matters arising in civil proceedings   | PRA, Schedule 3 para 10  |

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| 29. Recording etc of conduct matters in other cases                   | PRA, Schedule 3 para 11 & regulation 7, Police (Complaints and Misconduct) Regulations 2012                          |
| 30. Conduct matters not required to be recorded                       | Regulation 7(2) and (3), Police (Complaints and Misconduct) Regulations 2012, PRA Schedule 3 para 10(4A) and 11(3B), |
| 31. Duties to preserve evidence relating to conduct matters           | PRA, Schedule 3 para 12  |
| 32. Reference of conduct matters to the Commission                    | PRA, Schedule 3, para 13 & regulation 7(4) & (5), Police (Complaints and Misconduct) Regulations 2012                |
| 33. Duties of the Commission on references under regulation 28        | PRA, Schedule 3, para 14   |
| 34. Duty to record DSI matters  | PRA, Schedule 3, para 14A  |
| 35. Duty to preserve evidence relating to DSI matters                 | PRA, Schedule 3, para 14B  |
| 36. Reference of DSI matters to the Commission                        | PRA, Schedule 3, para 14C and regulation 8, Police (Complaints and Misconduct) Regulations 2012                      |
| 37. Duties of Commission on references under regulation 36            | PRA, Schedule 3, para 14D  |
| 38. Power of the Commission to determine the form of an investigation | PRA, Schedule 3, para 15   |
| 39. Appointment of persons to carry out investigation                 | Regulation 24, Police (Complaints and Misconduct) Regulations 2012   |
| 40. Withdrawn complaints  | Regulation 21, Police (Complaints and Misconduct) Regulations 2012   |
| 41. Investigations by the appropriate authority on its own behalf     | PRA, Schedule 3, para 16   |
| 42. Investigations supervised by the Commission                       | PRA, Schedule 3, para 17, regulation 9 Police (Complaints and Misconduct) Regulations 2012                           |
| 43. Investigations managed by the Commission                          | PRA, Schedule 3, para 18   |
| 44. Investigations by the Commission itself                           | PRA, Schedule 3, para 19   |

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| 45. Combining and splitting investigations   | Regulation 25, Police (Complaints and Misconduct) Regulations 2012                                 |
| 46. Relinquishing the Commission's supervision or management of an investigation         | Regulation 26 Police (Complaints and Misconduct) Regulations 2012                                  |
| 47. Circumstances in which an investigation or other procedure may be suspended          | Regulation 22, Police (Complaints and Misconduct) Regulations 2012                                 |
| 48. Resumption of investigation after criminal proceedings                               | Regulation 23, Police (Complaints and Misconduct) Regulations 2012                                 |
| 49. Special procedure: assessment of seriousness of conduct under investigation          | PRA, Schedule 3, para 19B, regulation 16 & 18, Police (Complaints and Misconduct) Regulations 2012 |
| 50. Duty to consider submissions from person whose conduct is being investigated         | PRA, Schedule 3, para 19C  |
| 51. Interview of person whose conduct is being investigated                              | PRA, Schedule 3, para 19D, regulation 19, Police (Complaints and Misconduct) Regulations 2012      |
| 52. Duty to provide certain information to appropriate authority                         | PRA, Schedule 3, para 19E  |
| 53. NCA friend   | Regulation 17 Police (Complaints and Misconduct) Regulations 2012                                  |
| 54. Interview of the Director General or an NCA officer during certain investigations    | PRA, Schedule 3, para 19F, regulation 1&2 Police (Complaints and Conduct) Regulations 2013         |
| 55. Restrictions on proceedings pending the conclusion of an investigation               | PRA, Schedule 3, para 20   |
| 56. Accelerated procedure in special cases   | PRA, Schedule 3, para 20A  |
| 57. Investigations managed or carried out by Commission: action by appropriate authority | PRA, Schedule 3, para 20B  |
| 58. and 59 Investigations managed or carried out by Commission: action by Commission     | PRA, Schedule 3, para 20C and 20D  |
| 60. and 61 Other investigations: action by appropriate authority                         | PRA, Schedule 3, para 20E and 20F  |

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| 62. and 63 Special cases:<br>recommendation or direction of Commission   | PRA, Schedule 3, para 20H and 20I   |
| 64. Power to discontinue an investigation  | PRA, Schedule 3, para 21 and regulation 10, Police (Complaints and Misconduct) Regulations 2012 |
| 65. Procedure where conduct matter is revealed during investigation of DSI matter  | PRA Schedule 3, para 21A  |
| 66. Final reports on investigations: complaints, conduct matters and certain DSI matters                                       | PRA Schedule 3, para 22, regulation 20 Police (Complaints and Misconduct) Regulations 2012      |
| 67. Action by the Commission in response to an investigation report under regulation 66  | PRA Schedule 3, para 23   |
| 68. Action by the appropriate authority in response to an investigation report under regulation 66                             | PRA Schedule 3, para 24   |
| 69. Final reports on investigations: other DSI matters   | PRA Schedule 3, para 24A  |
| 70. Action by the Commission in response to an investigation report under regulation 69  | PRA Schedule 3, para 24B & 24C  |
| 71. Appeals with respect to an investigation   | PRA Schedule 3, para 25   |
| 72. Reviews and re-investigations following an appeal  | PRA Schedule 3, para 26   |
| 73. Duties with respect to disciplinary proceedings  | PRA Schedule 3, para 27   |
| 74. Information for complainant about disciplinary proceedings   | PRA Schedule 3, para 28   |
| 75. Complaints or conduct matters concerning a person who has subsequently ceased to be the Director General or an NCA officer | Regulation 27, Police (Complaints and Misconduct) Regulations 2012                              |
| 76. Complaints or conduct matters concerning a person whose identity is unascertained  | Regulation 28, Police (Complaints and Misconduct) Regulations 2012                              |
| 77. Notification of actions and decisions  | Regulation 29, Police (Complaints and Misconduct) Regulations 2012                              |

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| 78. Keeping of records                                      | Regulation 31, Police (Complaints and Misconduct) Regulations 2012                               |
| 79. Register to be kept by the Commission                   | Regulation 32, Police (Complaints and Misconduct) Regulations 2012                               |
| 80. Delegation of powers and duties by the Director General | Regulation 33, Police (Complaints and Misconduct) Regulations 2012                               |
| 81. Manner and time limits of notifications                 | Regulation 34, Police (Complaints and Misconduct) Regulations 2012                               |
| 82. Appeals   | Regulation 11, Police (Complaints and Misconduct) Regulations 2012                               |
| 83. Relevant appeal body                                    | PRA, Schedule 3, paras 30-32, Regulation 30, Police (Complaints and Misconduct) Regulations 2012 |

September 2020