

# Victims' Right to Review Policy

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## Background

Article 11 of the European Union Directive 2012/29 (“the EU Directive”) establishes minimum standards on the rights, support, and protection of victims of crime, and provides for the right of a victim to a review of a decision not to prosecute.

The IOPC does not consider that the EU Directive imposes a strict legal duty on it to provide a ‘Victims’ Right to Review’ (‘VRR’), and the IOPC is in various respects in a different position to the CPS and to the police (both of which operate such a scheme). For example, the IOPC is not an authorised prosecutor and we operate under a statutory scheme that prescribes specific processes to be followed.

Nevertheless, the IOPC has decided to introduce a VRR process. This is because of the disparity that otherwise arises between the rights of a victim of a crime who alleges that the crime was committed by a member of the public and one who alleges that the crime was committed by a person serving with the police, when that allegation is subject to an IOPC independent or managed/directed investigation.

The scheme will not apply to reviews or appeals carried out by the IOPC following an investigation by the police.

## Scope of the Victims’ Right to Review (VRR)

The right to a review arises where, following a criminal investigation, the IOPC makes a “provisional decision”<sup>1</sup> not to make a referral to the CPS under paragraph 23(2) of Schedule 3 of the *Police Reform Act 2002* (“the PRA”). A “criminal investigation” refers to an IOPC investigation<sup>2</sup> in which a determination has been made that there is an indication that a person to whose conduct the investigation relates may have committed a criminal offence. However, the right to review only applies to cases that concern a criminal offence under the National Crime Recording Standard. In addition, the right to review will not apply where it has not been possible to identify a potential suspect, as no referral decision will be made in those circumstances.

The following cases do not fall within the scope of the VRR:

- Cases where the decision not to refer to the CPS was taken before 1 December 2020.
- Cases in which a decision has been taken to make a referral to the CPS on conclusion of an investigation, but that referral does not relate to all of the subjects of the criminal investigation. However, where **none** of the subjects and/or matters referred relate to the incident (alleged or otherwise) which affected a specific victim, that victim will retain a right to review.

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<sup>1</sup> A provisional decision is an initial decision not to refer to the CPS. The decision will remain provisional for the time period specified for a request for a review. If no request for a review is received, then the decision, under paragraph 23(2) Schedule 3 PRA, will become final.

<sup>2</sup> An ‘IOPC investigation’ may be independent, directed or managed.

- Cases in which the failure to make a referral to the CPS arises from the discontinuance<sup>3</sup> of a case under paragraph 21 of Schedule 3 PRA.
- Cases in which a referral was made to the CPS for a charging decision prior to the completion of the investigation; that charging decision was negative, and there has been no material change in the evidence since that time.

If a referral has been made to the CPS and the CPS has made a decision not to prosecute, then the victim will be referred to the CPS VRR Scheme.

## Who can apply for a Victims' Right to Review?

Any victim is entitled to seek a review of a decision not to make a referral to the CPS.

The IOPC adopts the definition of a victim contained in The Code of Practice for Victims of Crime ('the Code') published in 2015. For the purposes of this Code, a "victim" is defined as:

- a natural person<sup>4</sup> who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence; or
- a close relative of a person whose death was directly caused by a criminal offence.

A 'close relative' will include the victim's spouse, partner, parents, siblings or any dependents. In appropriate circumstances other family members, including guardians and carers, may also be considered close relatives.

In accordance with the Code, a person will be classified as a victim where they have made an allegation that they suffered harm (including physical, mental or emotional harm or economic loss) which was directly caused by a criminal offence, or have had such an allegation made on their behalf, or if they have been contacted as a victim in the course of investigations.

The right to review may be exercised by someone acting on behalf of a victim in appropriate circumstances. This should be considered on a case-by-case basis, and written authorisation from the victim will generally be required unless this is not possible, for example, due to the victim's age or disability. Requests on behalf of a victim will not be permitted where the victim has withdrawn their support for the investigation. Where the victim is under 18, in accordance with the Code, the IOPC will keep the victim's best interests as its primary consideration.

Where relevant, consideration should be given to any additional support that may be required by a vulnerable victim<sup>5</sup>.

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<sup>3</sup> 'Discontinuance' refers to an investigation being terminated before its completion, for one of a limited number of reasons (for example, the investigation is not reasonably practicable). Discontinuance will not apply under the *Policing and Crime Act 2017*.

<sup>4</sup> For instance, a business would not be eligible for VRR.

<sup>5</sup> A vulnerable victim will be determined with reference to section 16 of the *Youth Justice and Criminal Evidence Act 1999*.

## Notifying the victim of their right to review

The lead investigator is required to notify the victim of the provisional decision not to refer a matter to the CPS. At this time, the lead investigator will also notify the victim of their right to review. An information leaflet is available and should be sent to the victim with this notification. The appropriate authority ('AA')<sup>6</sup> and any other relevant person will also be informed of the provisional decision and the applicability of the VRR process.

Sufficient information in respect of the decision not to refer the matter to the CPS must be provided to the victim to enable them to properly consider and decide whether to request a review. However, such information will not be disclosed where necessary for the purpose of:

- (a) preventing the premature or inappropriate disclosure of information that is relevant to, or may be used in, any actual or prospective criminal proceedings;
- (b) preventing the disclosure of information in any circumstances in which its non-disclosure —
  - (i) is in the interests of national security;
  - (ii) is for the purposes of the prevention or detection of crime, or the apprehension or prosecution of offenders;
  - (iii) is required on proportionality grounds, or
  - (iv) is otherwise necessary in the public interest.

Non- disclosure will only be considered necessary where:

- (a) there is a real risk of the disclosure of that information causing an adverse effect, and
- (b) that adverse effect would be significant.

Any disclosure must be compliant with data protection law.

## Process of exercising right to review

A review must be requested within 28 calendar days from the date of the letter informing the victim of their right to review, subject to limited exceptions.

Where there is less than one calendar month before the expiry of the statutory time limit (STL) for summary offences, we will require VRR applications to be submitted sooner, in order that the application can be considered before the STL expires. In the event that no request is received within the specified timeframe, the provisional referral decision will be confirmed, and the victim, subject and AA notified accordingly.

A request for review should ordinarily be made in writing, whether by email or letter. However, a request by other means, for example a verbal request, will be accepted if a victim would otherwise be disadvantaged.

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<sup>6</sup> The 'appropriate authority' is responsible for decision making in respect of disciplinary matters on behalf of the relevant chief officer or local policing body.

The victim may exercise their right by simple request; it is not necessary for reasons or arguments to be presented. However, any representations that are made within the specified timeframe will be considered within the review.<sup>7</sup>

Each request will be logged on receipt and allocated to the next available suitable reviewer.

The subject and AA should be notified of any VRR requests received and the potential outcomes of a review as soon as possible.

## Out of time requests

Any request for a VRR submitted after the applicable time limit will only be accepted in exceptional circumstances, and subject to an absolute limit of three months from the date of the notification letter. An out of time request will be allocated to an independent reviewer in the usual manner, who will consider the particular circumstances of the case, the length of delay, and any reasons given for this.

The reviewer will first determine whether, in all of the circumstances, it is appropriate for a Review to be carried out. If not, the victim will be informed accordingly. Circumstances may be considered 'exceptional' where, for example:

- The victim has been in hospital, and has been unable to respond;
- The victim is in prison, and was not provided with notification of the provisional decision until after the response deadline;
- The victim suffers from a mental health problem, and because of this was not able to respond within the timeframe permitted.

Of course, where relevant, reasonable adjustments should be made in accordance with the *Equality Act 2010*.

If the 'out of time' request is accepted, the reviewer will proceed to consider the matter in the usual manner, as set out below. However, the delay in submitting the VRR must be considered when the reviewer determines the issue of whether it is 'appropriate' for the matter to be referred to the CPS. This is principally because the decision not to refer the matter to the CPS will have been confirmed and communicated to the subject. Any implications for other proceedings must also be considered. Ultimately, the Reviewer must assess whether public confidence in the police complaints system requires a referral to be made to the CPS in all of the circumstances.

There is a public interest in ensuring that the CPS has the opportunity to make a charging decision in appropriate cases and that complainants and interested persons have confidence in our investigations and decision making. These factors need to be balanced against the public interest in certainty in the decision making of public bodies and the risk of abuse of process arguments where final decisions are revisited.

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<sup>7</sup> Representations received after the expiry of the applicable deadline may be taken into account by the Reviewer, at their discretion.

An order from the High Court quashing the final decision not to refer to the CPS may also be required in these circumstances before a referral can be made.

## Interaction with other decision-making

As above, the AA and any subject officer should be informed that the provisional CPS-referral decision may be challenged by way of VRR, which is ordinarily exercisable within 28 calendar days.

The AA will be asked to provide its opinion as to whether it is able to submit a memorandum under paragraph 23(6) of Schedule 3 PRA (for pre 1 February 2020 cases) or express its views under paragraph 23(5A) of Schedule 3 PRA (for cases from 1 February 2020).

The IOPC considers that it will be highly unusual for decisions regarding disciplinary matters to be delayed pending the conclusion of the VRR process. Should this be contemplated, the IOPC encourages AAs to engage in an open discussion in this respect. Where appropriate, the IOPC may agree for the AA's decision-making to be delayed beyond 15 working days<sup>8</sup> for investigations under the 2012 statutory scheme, or for an extension to be granted beyond 28 calendar days under Regulation 27(5) Police (Complaints and Misconduct) Regulations 2020, as applicable.

The IOPC notes that the Home Office Guidance 2020<sup>9</sup> emphasises that disciplinary matters will ordinarily be expected to proceed notwithstanding the possibility of a criminal prosecution:

*“7.81 Where there are possible or outstanding criminal proceedings against an officer, these will not normally delay the misconduct proceedings. They will only delay proceedings under the Conduct Regulations where the appropriate authority considers such action would prejudice the outcome of the criminal case.*

*7.82 The presumption is that action for misconduct should be taken prior to, or in parallel with, any criminal proceedings. Where it is determined that prejudice to the outcome of the criminal case would result, then this decision shall be kept under regular review to avoid any unreasonable delay to the misconduct proceedings. If there is any doubt then advice should be sought from the Crown Prosecution Service (CPS) or other relevant prosecuting authority.*

*7.83 Where potential prejudice is identified, the proceedings under the Conduct Regulations will proceed as normal up until the referral of a case to misconduct proceedings or an accelerated misconduct hearing. The matter will be investigated under the relevant regime and the investigation report submitted. The appropriate authority will then decide whether there is a case to answer in respect of misconduct or gross misconduct or neither. Where there is a case to*

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<sup>8</sup> Paragraph 11.46 of the IPCC/IOPC Statutory Guidance 2015 stipulates: “The IPCC expects the appropriate authority’s memorandum as soon as practicable having made its determinations and in any event, within 15 working days of the request”.

<sup>9</sup> Conduct, Efficiency and Effectiveness: Statutory Guidance on Professional Standards and Integrity in Policing issued by the Home Office.

*answer, no referral to misconduct proceedings or an accelerated misconduct hearing will take place if this would prejudice the criminal proceedings, as per Regulation 10 of the Conduct Regulations.”*

However, in appropriate cases Regulation 9 Police (Conduct) Regulations 2012, and Regulation 10 Police (Conduct) Regulations 2020, as applicable, can be utilised in order to protect against prejudice to criminal proceedings.

The IOPC will encourage and expect an open dialogue with the AA in respect of these matters.

The IOPC will ensure that the subject and the victim are kept updated as to the decisions that are made, the processes being followed, and the relevant timescales.

## The review

Who will be responsible?

The review will be carried out by an independent reviewer. The reviewer must:

- (i) be of equal or more senior grade to the initial decision maker;
- (ii) have had no decision-making responsibility in the investigation;
- (iii) have no relevant conflict of interest, in accordance with IOPC policy; and
- (iv) insofar as possible, be based in a different office to the investigation and decision maker.

How long will the review take?

The review should be completed, wherever possible, within 28 calendar days of the date of the request. The victim, subject, AA and any other relevant person will be updated if it is anticipated that this deadline will not be met, and will be updated regularly thereafter on progress.

Reviews should be expedited where there is a risk that the deadline for charging a summary offence will expire during the time period for the review. The reviewer should consider liaising with the CPS in such circumstances.

What material will the reviewer consider?

The reviewer should be provided with the final report and provisional decision, and be given access to all material that was available to the original decision maker. The reviewer should also be provided with any representations made by or on behalf of the victim.

## What standard will be applied?

The review will be comprised of two stages:

1. Does the reviewer consider that the referral conditions are met?
2. If yes, does the reviewer consider that the original referral decision was wrong?<sup>10</sup>

### **Stage 1: Are the referral conditions met?**

The reviewer will consider the case afresh and reach a view on whether the test for referral under paragraph 23(2) of Schedule 3 to the PRA is met. This test requires that the following conditions are fulfilled:

- (i) The report indicates that a criminal offence may have been committed by a person (if any)<sup>11</sup> to whose conduct the investigation related; and
- (ii) the circumstances are such that, in the opinion of the [Director General] 1, it is appropriate for the matters dealt with in the report to be considered by the Director of Public Prosecutions.

If the reviewer is unclear about anything relating to the investigation, they should engage with the team responsible for the investigation in the first instance.

The reviewer should pay regard to any representations submitted by the victim in support of a request for review<sup>12</sup>. Where the victim has provided new evidence, consideration may need to be given to whether it is necessary to reopen the investigation.

If the reviewer is of the view that the test for referral is not met, then the provisional decision not to make a referral to the CPS will be confirmed.

If the reviewer is of the view that the test for referral is met, then the reviewer will go on to consider the provisional decision in order to determine whether it is wrong.

### **Stage 2: Was the original referral decision wrong?**

A decision is not wrong simply because the reviewer disagrees with it. In reaching a view as to whether the decision is wrong the reviewer should consider whether any of the following non-exhaustive list of factors applies:

- a material error in the interpretation of the evidence
- an incorrect interpretation or application of the law
- an incorrect application of the test under paragraph 23(2) of Schedule 3 to the PRA, or a failure to follow relevant IOPC guidance on that test

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<sup>10</sup> Guidance on whether a decision is 'wrong' is provided further below.

<sup>11</sup> Note that 'if any' appears in the legislation applicable to post 1 February 2020 cases only. However, this makes no material difference to the test.

<sup>12</sup> Where those representations have been submitted 'on time'. Where representations have been received late, they may be considered, subject to the discretion of the reviewer.

If the reviewer determines that the provisional decision is not wrong, then the provisional decision will be confirmed.

If the reviewer determines that the provisional decision is wrong, then a new decision will be taken to make a referral to the CPS.

In the event that the time-limit for prosecuting a summary only offence has passed, no referral will be possible, and consideration will need to be given to the appropriate outcome.

## Record-keeping

The reviewer must record:

- their decision, if relevant, as to whether an out of time request should be considered;
- their decision as to whether a matter will be referred to the CPS, with accompanying rationale.

The victim will be informed of the final decision and provide sufficient information to enable them to understand the decision that has been made. The lead investigator will at the same time update the AA, subject and any other relevant person of the decision and rationale.

The victim should be informed that there is no right of appeal or review of this decision, other than by way of judicial review through the courts.

## Identification of further investigative steps and/or erroneous decision-making

It is possible that in undertaking their review, the reviewer identifies (i) further investigative steps that they consider should have been undertaken; and/or (ii) that decisions made regarding disciplinary matters appear to be erroneous. It is anticipated that these cases will be rare. In such circumstances, the reviewer should consider whether re-opening the matter or re-investigating may be appropriate.