



## **Durham Police and Crime Panel**

**24<sup>th</sup> June 2014**

### **Protocol for Section 38 of the Police Reform & Social Responsibility Act 2011**

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#### **Report of Lorraine O'Donnell, Assistant Chief Executive**

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##### **Purpose of the Report**

- 1 To present for consideration by Panel Members, a protocol between the Association of Police & Crime Commissioners (APCC) and the Chief Police Officers' Staff Association (CPOSA) for Section 38 of the Police Reform and Social Responsibility Act 2011.

##### **Background**

- 2 Section 38 of the Police Reform and Social Responsibility Act 2011 Act includes powers for the Police and Crime Commissioner to call upon the chief constable of the police force for that area to resign or retire. Schedule 8 of the Act requires the PCC inform the Panel of the reasons to call upon the resignation or retirement of the chief constable.
- 3 At its meeting on the 3<sup>rd</sup> March 2014, the Panel agreed a protocol (Appendix 2) between the Police and Crime Panel, Police and Crime Commissioner and the Chief Constable to ensure transparency and fairness and sets out a process and procedures which will be followed by the Commissioner in the event that he is contemplating the exercise of his power under section 38 of the Act.
- 4 Following the Panel's meeting, a national protocol on Section 38 of the Act, attached in Appendix 3 has been agreed between the Association of Police & Crime Commissioners (APCC) and the Chief Police Officers' Staff Association (CPOSA).
- 5 In summary, both protocols are very similar with exception that the national protocol includes mediation. The national protocol, together with the Durham Protocol was considered by the Chief Constable and PCC at a meeting of the Constabulary's Executive Board in April 2014 and recommended that Panel give consideration to the national protocol to be attached as an addendum to the existing Durham protocol on Section 38 responsibilities.
- 6 The Police and Crime Commissioner will be in attendance at the Panel's meeting to respond to questions from Panel Members.

## **Recommendation**

- 1) That the Police and Crime Panel consider information within the report and Appendices 2 and 3.
- 2) That the Police and Crime Panel agree to include the national protocol in appendix 3 as an addendum to the existing Durham Protocol on Section 38 responsibilities of the Police Reform and Social Responsibility Act 2011.

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## **Appendix 1: Implications**

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**Finance –**

**Staffing –** The report includes information on the role of the Panel should the PCC call upon the Chief Constable to resign or retire.

**Risk – None**

**Equality and Diversity / Public Sector Equality Duty – None**

**Accommodation – None**

**Crime and Disorder – None**

**Human Rights – None**

**Consultation – None.**

**Procurement – None**

**Disability Issues – None**

**Legal Implications –** information within the report is focused on Section 38 of the Police Reform and Social Responsibility Act 2011.

**DURHAM POLICE AND CRIME  
COMMISSIONER**

**AND**

**DURHAM POLICE AND CRIME PANEL**

**AND**

**CHIEF CONSTABLE OF DURHAM**

**PROTOCOL**

**Regarding the Exercise of the PCC's Power under Section 38 of the  
Police Reform and Social Responsibility Act, 2011**

## **Introduction**

The Police Reform and Social Responsibility Act, 2011 (PRSRA) introduced new governance arrangements for policing and policing accountability. Principal among these changes is the election of the Police and Crime Commissioner (PCC) and the appointment of the Durham Police and Crime Panel (PCP). The role of the PCP is to scrutinise the decisions and activities of the PCC. In turn the PCC will hold the Chief Constable to account for the delivery of policing services and the achievement of the PCC's objectives.

The PCC and the PCP have already signed up to a Memorandum of Understanding setting out the broad principles of working together to build and nurture an effective partnership in the delivery of the shared and individual responsibilities of the commissioner and the panel.

It was specifically envisaged by the original Memorandum of Understanding that it may be necessary over time to develop and agree additional protocols and procedures to deal with specific issues.

## **Purpose**

In order to ensure transparency and fairness, this protocol sets out the process and procedures which will be followed by the PCC in the event that he is contemplating the exercise of his power under section 38 of the PRSRA, to call upon the Chief Constable to retire or resign.

The provisions set out in this protocol represent statements of intention only and are not legally binding. They may be withdrawn, reviewed or amended at any time by the relevant party.

## **Policing Protocol**

The PCC fully acknowledges the independence of the Chief Constable in operational policing matters as set out in the Policing Protocol (the Protocol).

This is underpinned by the statement in the PCC's Oath of Office that he will not interfere with the Chief Constable's operational independence. Indeed, the PCC and the Chief Constable are required by the Protocol to work together to safeguard the principle of operational independence.

## **The Police (Conduct) Regulations, 2012 (the Conduct Regulations)**

It is acknowledged by the PCC that the existence of the new statutory powers in Section 38 of the PRSRA does not affect the application to Chief Constable of the existing statutory regime for disciplining constables as set out in the Conduct Regulations. The Conduct Regulations contain detailed procedures and incorporate a number of safeguards to ensure that the relevant officer receives a fair hearing.

It is also acknowledged that in enacting Section 38 of the PRSRA, Parliament did not intend that the power contained in that provision should be exercised in a way that would defeat the intent and purpose of the Conduct Regulations.

Accordingly, the PCC undertakes to follow the process and procedures laid down by the Conduct Regulations in respect of any allegations of misconduct by the Chief Constable.

## **Performance Failure**

The PCC intends, subject to exceptional and unforeseen circumstances, to use his power under Section 38 of the PRSRA only in a case of serious failure in the Chief Constable's performance of his duties and functions which could jeopardise the achievement of the PCC's local policing priorities or the effective delivery of local policing needs.

All parties to this protocol agree that the PCC, as the local elected community representative, has a discretion to determine whether the Chief Constable's performance has been so unacceptable, by reference to local needs and priorities, as to compromise the efficiency and effectiveness of the police force and therefore justify his dismissal. However, it is also agreed that the PCC should reach any such

conclusion in good faith and have a reasonable basis for doing so, by reference to the ordinary public law principles of rationality.

The PCC recognises that the use of the power to call upon the Chief Constable to retire or resign should be a matter of last resort and exercised only, where appropriate, after full and frank discussion with the Chief Constable and after a reasonable opportunity has been provided to enable the failure of performance to be rectified.

## **Process and Procedures**

Without prejudice to the statutory process which the PCC is required to follow by virtue of part 2 of schedule 8 to the PRSRA and regulation 11A of the Police Regulations 2003, the PCC will consult with Her Majesty's Chief Inspector of Constabulary at an early stage and shall take account of his/her views in formulating any proposal to call for the Chief Constable's retirement or resignation.

The PCP will permit the Chief Constable to be accompanied by a friend or legal representative at any scrutiny meeting which is held in pursuance of paragraph 15 of schedule 8 to the PRSRA. The PCP will determine the procedure to be followed at the scrutiny meeting. At the meeting the Chief Constable and the PCC will answer on their own behalf any questions put to them by or on behalf of the Panel.

Before making any recommendation in pursuance of the said paragraph 15, the PCP will consult Her Majesty's Chief Inspector of Constabulary and take account of his/her views.

In the event that the PCP recommends that the PCC should not call for the retirement or resignation of the Chief Constable, the PCP will provide the PCC with the full written reasons for the recommendation. The PCC will not reject the recommendation until he has notified the Chief Constable and PCP in writing why he is minded to reject it.

## Section 38 Police Reform & Social Responsibility Act 2011

### Protocol between the Association of Police & Crime Commissioners (APCC) and the Chief Police Officers' Staff Association (CPOSA)

#### **INTRODUCTION**

The purpose of this protocol is to provide guidance to those considering using the powers in Section 38 and those who may be the subject of such use; to help avoid recourse to use of the powers in the first place, for example, through mediation; and to help ensure that where the powers are invoked they are used lawfully.

The protocol draws on legal advice whose principles have been accepted by both parties. It is also supported by the Home Office and HMIC.

The key legal principles are:

- The powers in s. 38 are not unfettered
- The powers must be exercised in a way that is consistent with the purposes of the Police Reform & Social Responsibility Act ("PRsRA")
- Public law principles such as fairness and reasonableness apply
- Article 6 of the ECHR may apply

It is recognised that the protocol is not a definitive interpretation of the relevant legislation. Interpretation is ultimately a matter for the courts. Moreover there may be circumstances where it is appropriate to depart from the protocol. However it is expected that regard will be had to the protocol in all cases and that any departure from it can be explained.

#### **MEDIATION**

Given the challenging nature of the roles of Police & Crime Commissioner ("PCC") and Chief Constable and the relationship between the two, a difference of views or other tensions may arise in that relationship from time to time. This is to be expected.

The parties involved will be best placed to determine whether, and if so, how, such tensions may be shared and addressed. The PCC's chief executive and the Deputy Chief Constable may be able to assist in this regard.

On occasion, with a view to avoiding any unnecessary escalation and to facilitate a brokered and pragmatic solution in the interest of all parties, the two parties may wish to consider mediation.

The Acas guide, "Mediation explained", provides a brief summary of the principles of mediation:

- Mediation is voluntary – you only take part if you want to.
- Mediation is confidential – nothing you tell the mediator will be passed on to anyone else unless you want it to be and what has gone on in mediation cannot normally be used in any later procedures or court action.
- Mediation is quick – mediation can be arranged in a few days and the mediation itself usually takes less than a day.
- Mediation can be cheaper and less stressful than going to court.
- Mediation is most effective at the early stages of conflict.
- Mediation aims to maintain the employment relationship.



It is also important to note that mediation cannot force a resolution and will only provide a solution if both parties feel able to agree to it. Furthermore, any mediator will need to be seen as independent and have the confidence of both parties. The mediator should not be a person or member of a body who could at a later date become involved in any formal proceedings.

The APCC and CPOSA have identified that Acas are suitable and willing to provide an accredited mediation service.

Contact should be initiated through the APCC or CPOSA. Any costs will have to be met from the respective Force budget.

### ***SUSPENSION - SECTION 38 (2)***

Section 38(2) of the PRSRA contains a generally phrased power to suspend a chief officer. This does not, however, mean that it is open-ended or that there is some unfettered discretion in the PCC to suspend without cause. Indeed, the government response of December 2013 to the Sixth Report from the Home Affairs Committee Session 2013-14 noted "*suspension under section 38(2) should only occur in a case where the PCC is considering calling on the Chief Constable to resign or retire under section 38(3)*".

The power is subject to regulations laid down under s. 50 of the Police Act 1996. The relevant regulations are the Police (Conduct) Regulations 2012 which encompass those cases where investigations of misconduct or gross misconduct are instigated with a view to referral under Regulation 19(1) to misconduct proceedings if the PCC decides (at the end of an investigatory process governed by the Regulations) there is a case to answer. The Regulations lay down a comprehensive procedural regime that must be adhered to in respect of suspension for alleged misconduct. Accordingly any decision to suspend a Chief Constable in respect of alleged misconduct must accord with that regime.

The 2012 Regulations intersect with the power of the PCC to suspend under s. 38(2) because suspension is permitted under Regulation 10 of the 2012 Regulations where two conditions are satisfied. These are that:

- (i) the appropriate authority (*in casu* the PCC) has determined (having considered temporary redeployment to alternative duties or an alternative location as an alternative to suspension) that such redeployment is not appropriate in all the circumstances of the case, and
- (ii) it appears to the PCC that either: (a) the effective investigation of the case may be prejudiced unless the officer concerned is so suspended, or (b) having regard to the nature of the allegation and any other relevant considerations, the public interest requires that he/she be so suspended.

It should be noted that the power to suspend under Regulation 10(5) is limited in time and applies only until it has been decided by the PCC that there shall be no referral to misconduct proceedings or such proceedings have concluded.

It is clear that s. 38(2) may be exercised for wider purposes than misconduct but it may not be used for a collateral purpose (such as to bypass applicable regulations) or for a reason outside the scope and purpose of the PRSRA. Thus, interference with the operational independence or other legitimate exercise of functions of a Chief Constable by suspension would therefore probably be held to be unlawful.

Furthermore, s. 38(2) may only be exercised compatibly with traditional public law requirements including, possibly, fundamental rights requirements. Any decision to suspend outside the sphere of misconduct will, thus, have to be conducted by means of a fair and

lawful process and be a rational decision. Accordingly, the main relevant public law constraints are likely to be:

- (a) the power may only be used in a way that is consistent with the object and purpose of the statute. In particular, a decision taken for a collateral or legally improper purpose will be unlawful. It is clear that the concept of improper purpose is by no means co-extensive with bad faith. A purpose will be improper if it is legally impermissible. Thus, it is likely that a power contained in one statute would be unlawfully exercised if it were to be used to subvert the purpose of another statute including regulations made under that statute.
- (b) in order to be lawful a decision-maker must only take lawful considerations into account and must not consider legally irrelevant factors.
- (c) the decision must not be irrational in the sense that it *'is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'*.
- (d) the decision must be taken fairly. Ordinarily this requires observance of the principles of natural justice or, in the language of the cases a decision must not reflect procedural impropriety.

These are by no means the only public law constraints but are the ones most likely to apply to a decision by a PCC to suspend a Chief Constable under s. 38(2).

The only express procedural requirement for suspension under s. 38(2) is that the PCC notify the local Police & Crime Panel ("PCP"). It will be for the PCP to determine how it exercises its duty to *'review or scrutinise decisions made, or other action taken, by the PCC in connection with the discharge of the PCC's functions'* in keeping with s. 28(6) of the PRSRA in this regard. It is the government's view (response of December 2013 to the Sixth Report from the Home Affairs Committee Session 2013-14) that PCPs should fully exercise their powers of scrutiny in examining and deciding whether the proposed removal (and any associated suspension) of a Chief Constable is justified.

It may lay the PCC open to a challenge on rationality grounds were the PCC to ignore - without rationally articulating their reasons for doing so - any recommendations or expressed views of the PCP as to the fact or continuation of suspension.

Although there is no set procedure for suspension outside the scope of the 2012 Regulations, in the interests of fairness (and having regard to Article 6 of the Human Rights Act) the PCC should normally inform the Chief Constable of the case against them and afford them an opportunity to make representations. A failure to do this may render the decision to suspend open to legal challenge.

It is likely that the relatively high threshold for suspension for alleged misconduct in the available case-law would be held by a court to apply to suspension under s. 38(2) for other reasons outside the sphere of alleged misconduct. Accordingly, the following should be borne in mind:

- Suspension is an extraordinary step to take and impacts dramatically upon the individual and the reputation of the Force. It should only be considered when the continuing presence of the Chief Constable in the workplace is untenable and genuinely not in the best interests of the Force and the public.
- Retaining the Chief Constable in the workplace may not only be in the best interests of the individual but will also avoid the significant expense of suspension that often attracts public criticism.
- Alternatives to suspension, such as a secondment elsewhere, should be considered. The regional Inspector of Constabulary may be able to assist in this regard and also offer professional advice.

- Where the Chief Constable has nominated a CPOSA Panel of Friends member to act as their Friend that individual may be able to act as an intermediary and assist in brokering an agreed alternative to suspension.
- The PCC should consider taking professional and legal advice before invoking a suspension.
- Any suspension should accord with the principles of natural justice and relevant case law.
- Where a suspension is invoked, it should be regularly reviewed and the proportionality and necessity principles applied on each occasion. A review should take place if the circumstances relevant to the suspension have changed and in any case not less than every four weeks and be documented by the PCC. The Chief Constable, or their representative, should be invited to make representations in writing prior to each review.

### **REMOVAL/RESIGNATION - SECTION 38(3)**

Similar considerations to those outlined above in the context of suspension apply to the power to call for retirement/resignation (the removal power) under s. 38(3). The central elements of the regime to be followed are to be found in the Appendix.

In keeping with the observations made in respect of suspension under s. 38(2), the power under s. 38(3) is not intended to be exercised in respect of misconduct which is governed by the Police (Conduct) Regulations 2012.

The s. 38(3) power should also be exercised within the principles of public law and only in a manner that is consistent with the object and purpose of PRSRA.

If the exercise of the power is to be pursued following receipt of the written views of the Chief Inspector of Constabulary, the PCC should explicitly explain how they have had regard to those views in their written explanation to the Chief Constable and the PCP of the reasons why they are continuing to proceed

A failure on the part of the PCC to obtain the written views of the Chief Inspector of Constabulary and take them into account before calling for a Chief Constable's resignation or retirement would be a clear breach of the regulations. Were the Chief Inspector's views not to be obtained then they clearly could not be taken into account and on the simplest public law analysis that would reflect a failure to take account of a legally material (indeed, legally imperative) consideration.

However, although the Chief Inspector's views must be obtained they do not necessarily have to be followed. They must be taken into account and cannot merely be disregarded. Provided that they are taken into account and adequate and intelligible reasons are given for departing from those views they are not legally binding.

Similarly, whilst the regime expressly permits the PCC to decide to remove notwithstanding the PCP's recommendation, nonetheless the PCC may wish to articulate a reasoned case for disregarding any such recommendation: A failure to do this may similarly be open the decision to legal challenge.

### **Appendix**

S. 38 is subject to regulations under the Police Act 1996, s. 50 and (materially) also subject to the provisions of Part 2 of Schedule 8 as regards the suspension or removal of a Chief Constable.

In this respect the Police Regulations 2003 (as amended) are also regulations made under s. 50 of the Police Act 1996. By virtue of the Police (Amendment) Regulations 2011, a new Regulation 11A was added to the Police Regulations 2003.

Having regard to Schedule 8 and Regulation 11A the central elements of the regime to be followed are:

*(1) If a PCC is proposing to call on a Chief Constable to retire or resign the PCC shall:*

- (a) obtain the views of the Chief Inspector of Constabulary in writing;*
- (b) have regard to those written views;*

*(2) The PCC must give the Chief Constable a written explanation of the reasons why the PCC is proposing to call for their retirement or resignation and at the same time provide a copy of the written views of the Chief Inspector of Constabulary.*

*(3) The PCC must give the relevant PCP:*

- (a) written notification that the PCC is proposing to call upon the Chief Constable to retire or resign;*
- (b) a copy of the reasons given to the Chief Constable, and.*
- (c) a copy of the written views of the Chief Inspector of Constabulary*

*(4) The PCC must give the Chief Constable the opportunity to make written representations about the proposal to call for the Chief Constable's resignation or retirement.*

*(5) The PCC must:*

- (a) consider any written representations made by the Chief Constable; and*
- (b) give the relevant PCP a copy of any such representations made by the Chief Constable, as soon as practicable after the PCC is given them.*

*(6) If a PCP is given a notification under (3), the PCP must make a recommendation to the PCC as to whether or not the PCC should call for the retirement or resignation.*

*The recommendation must be given to the PCC in writing before the end of the period of six weeks beginning with the day on which the PCP receives the notification.*

*(7) Before making the recommendation, the PCP:*

- (a) may consult the Chief Inspector of Constabulary, and*
- (b) must hold a scrutiny hearing at which the PCC and Chief Constable are both entitled to be heard.*

*The PCP must publish the recommendation made under this paragraph. It is for the PCP to determine the manner in which the recommendation is to be published in accordance with the relevant sub-paragraph (5).*

*(8) The PCC:*

- (a) must consider the PCP's recommendation, and*
- (b) having considered the recommendation, may accept or reject it.*

*(9) The PCC must notify the PCP of the decision whether or not to accept the recommendation.*

*(10) If, following the above, the PCC is still proposing to call upon the Chief Constable to retire or resign the PCC must:*

- (a) notify the Chief Constable and PCP and provide a written explanation of the reasons why the PCC proposes to call for the retirement or resignation;*
- (b) give the Chief Inspector of Constabulary a copy of the notification and the explanation, and*

*(c) give the chief executive appointed under paragraph 6(1)(a) of Schedule 1 to the 2011 Act a copy of the notification and the explanation, as well as the written views of the Chief Inspector of Constabulary obtained at the outset of the process.*

*A PCC must not call upon a Chief Constable to retire or resign until the end of the scrutiny process has been reached.*

*The end of the scrutiny process is reached when the first of the following events occurs:*

- (a) the period of six weeks has ended without the PCP having given the PCC any recommendation as to whether or not the PCC should call for the retirement or resignation;*
- (b) the PCC notifies the PCP under (9) of the decision whether or not to accept the PCP's recommendation in relation to the resignation or retirement.*

*(11) The Chief Constable must retire or resign if called upon to do so.*