

Essential Law and Practical Guidance for Police and Crime Commissioners



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An Introduction from the Head of Chambers

It is my pleasure to provide an introduction to 5 Essex Court's publication: Essential Law and Practical Guidance for Police and Crime Commissioners. Chambers has unrivalled experience in all aspects of police law and a deep understanding of the legal framework in which the police forces operate. We have been involved in many of the highest profile, most complex and sensitive cases, whether public inquiries, inquests, disciplinary matters or civil actions. At 5 Essex Court we seek to provide a client friendly approach and the timely publication of this pamphlet is testament to this. This publication is a collaboration between a number of members of chambers including my fellow Queen's Counsel, Jason Beer, Jeremy Johnson and Dijen Basu, who have been assisted by Richard Oulton, Victoria von Wachter, Matthew Holdcroft, Claire Palmer, Beatrice Collier, Georgina Wolfe, Jonathan Dixey, Robert Cohen, Catriona Hodge and Aaron Moss. My thanks to all for their contributions.

The process of selecting the candidates is well underway; the lists of candidates across the 40 police force areas will be confirmed on 8 April 2016 with the elections to be held on 5 May 2016. We hope that this publication will be a valuable aid to all candidates and particularly to those Police and Crime Commissioners that are elected.

A handwritten signature in dark blue ink, reading 'Fiona Barton'. The signature is fluid and cursive, with the first name 'Fiona' and last name 'Barton' clearly distinguishable.

Fiona Barton QC
Head of Chambers
5 Essex Court

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Duties and functions of Police and Crime Commissioners

Georgina Wolfe and Jonathan Dixey

A radical change to policing

In 2010, the Home Secretary published a **White Paper** which set out the Coalition Government's proposals to introduce Police and Crime Commissioners: the proposals were described as "the most radical change to policing in 50 years". Six years on, it is clear that this bold experiment has brought about as much significant and fundamental change in the way policing is delivered as it has controversy.

Overview of legal duties

For police areas outside of London, PCCs were established by s.1 of the **Police Reform and Social Responsibility Act 2011 ('PRSRA')**, which provides that PCCs must:

- ◆ Secure the maintenance of the police force for their area (s.1(6));
- ◆ Secure that the police force is efficient and effective (s.1(6)); and
- ◆ Hold their chief constable to account for the exercise of his/her functions and of those persons under his/her direction and control (s.1(7)) (considered below).

Chapter 3 of the PRSRA (ss.5 – 27) sets out a series of further duties and powers including the duties to:

- ◆ Set the police and crime objectives for their area by issuing a police and crime plan and thereafter keeping the plan under review (s.5);
- ◆ Work in co-operation with other bodies, including their local authority, fire and rescue authority, provider of probation services and other criminal justice bodies (s.10);
- ◆ Provide information to the public, police and crime panels and others and to produce an annual report on the exercise of the PCC's functions and the progress which has been made in meeting the police and crime objectives in the police and crime plan (ss.11-13);
- ◆ Make arrangements for obtaining the views of the community on policing matters (s.14); and
- ◆ Set the police force budget and determine the precept (ss.21-27).

"With a strong democratic mandate from the ballot box, police and crime commissioners will hold their chief constable to account for cutting crime. They will have the power to appoint and dismiss chief constables if they do not believe they are performing effectively. If the public do not believe that their police and crime commissioner is performing effectively, the commissioner will face the ultimate sanction of rejection at that same ballot box. Importantly, police and crime commissioners will set the annual budget for their force and will determine the local precept – the local contribution to policing costs."

(The Rt. Hon. Theresa May MP, Secretary of State for the Home Department, second reading of the Police Reform and Social Responsibility Bill)

HANSARD HC DEB 13.12.10, VOL 520, COL 708

MAIN DUTIES

- secure the maintenance of the police force & that it is efficient and effective
- hold the chief constable to account
- appointment, discipline, suspension and dismissal of the chief constable
- police and crime plans
- force budget and precept
- collaboration with policing bodies and others in order to improve efficiency and effectiveness
- cooperation with other local bodies (LA, fire authority, probation & criminal justice authorities)
- publishing information necessary to enable the public to assess the PCC's and the chief constable's performance
- arranging to obtain the views of the community
- to have 'due regard' to the public sector equality duty.

Importantly, like their chief constables, PCCs are bound by the 'Public Sector Equality Duty' (s.149 **Equality Act 2010**): in the exercise of their functions, PCCs must have 'due regard' to the need to eliminate discrimination, harassment, victimisation and to advance equality of opportunity and foster good relations between persons of different gender, race, religion, age, sexual orientation, etc.

And if s.1(1) **Equality Act 2010** is ever brought into force, 6 years after that Act was passed, then when making decisions of a strategic nature about how to exercise their functions, PCCs will have to have due regard to the desirability of exercising those functions in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.

As if the list were not yet long enough, proposals contained within the **Policing and Crime Bill**, which has (at the time of writing) reached the committee stage of its passage through Parliament, would introduce further powers, for example, permitting the Home Secretary to make PCCs the fire and rescue authority for their area.

The police and crime plan

Arguably the most important document that a PCC will produce is their police and crime plan. It is the principal means by which a PCC will direct and communicate their priorities during their period in office and is the document against which the public, the police and others will judge a PCC and hold them to account. For PCCs, they are the equivalent of the Queen's Speech and Chancellor's Budget rolled into one.

A PCC must issue a police and crime plan as soon as practicable after taking office. Before doing so, he/she must consult with the chief constable and have regard to any report or recommendations made by the local police and crime panel, although he/she is not bound by the views of either of them. In issuing or varying his/her plan, the PCC must have regard to the strategic policing requirement issued by the Secretary of State pursuant to s.37A **Police Act 1996**. In summary, this document sets out what are, in the Secretary of State's view, the national threats and the appropriate national policing capabilities to counter those national threats.

A police and crime plan will include:

- ◆ The PCC's police and crime objectives;
- ◆ The policing which the chief constable is to provide;
- ◆ The financial and other resources which the PCC is to provide to the chief constable;
- ◆ The means by which the chief constable will report to the PCC on his/her provision of policing;
- ◆ The means by which the chief constable's performance in providing policing will be measured;
- ◆ The services which are to be provided in order to secure crime and disorder reduction and assistance for victims of and witnesses to anti-social behaviour offences; and
- ◆ The crime and disorder reduction grants which the PCC is to make, and the conditions (if any) of those grants.

Delegation

With so many responsibilities, it may come as a relief that PCCs may appoint deputies who can exercise some of their functions (s.18). In addition, a PCC may delegate some of their responsibilities to others who are not necessarily their deputies. However, be aware that s.18 prescribes a list of those who cannot serve as deputy PCCs. Significantly, these include police constables.

Whilst a PCC may delegate a large amount of their duties to their deputies or others, there are core duties which cannot be delegated and which must therefore be undertaken by the PCC themselves. These core duties include:

- ◆ Issuing a police and crime plan;
- ◆ Determining the police and crime objectives; and
- ◆ Appointing or suspending the chief constable, or calling upon him/her to retire or resign.

Achieving efficiency through collaboration

PCCs across the country have been fulfilling their duties under ss.22A – 23I Police Act 1996 to draw up collaboration agreements between police forces and between PCCs since those sections were introduced. The Act enables two or more PCCs to make a collaboration agreement for the provision of support for any PCCs or police forces which they maintain. It seems to have been a success: many local collaboration agreements have been used to integrate back office functions as well as to unite legal services, IT and intelligence systems and asset recovery across some forces. The National Police Chiefs' Council (which replaced ACPO) was implemented by way of a national collaboration agreement.

As well as the collaboration provisions of the Police Act 1996, which relate to agreements between a number of forces (which may also include others), the effect of s.1 Local Authorities (Goods and Services) Act 1970 ("LAGSA") is modified by s.15 PRSRA so as to permit PCCs to supply goods and services on appropriate payment terms. An example of joint working between 'blue light services' is a very successful partnership between Humberside Fire and Rescue Service and Humberside Police, launched in April 2015, which involved the merger of their vehicle and equipment facilities. This partnership has been **reported** to have achieved annual savings of £300,000 as well as other efficiencies benefitting both the local police and fire service.

COLLABORATION AND JOINT WORKING

- ss.22A – 23I Police Act 1996
- provision of services under s.1 LAGSA / s.15 PRSRA
- collaboration between policing bodies and others in order to improve efficiency and effectiveness
 - e.g. the East Midlands Police Collaboration Programme
- joint working with other local bodies
 - e.g. the Humberside Fire and Police Service partnership
- like chief constables, PCCs must consider ways of improving efficiency or effectiveness
- they must propose appropriate collaboration to potential partners
- the aim is economies and efficiencies of scale

This introduction of collaborative working between forces (and others) is crucial to the efficient and effective running of policing services and for preparing for major incidents. A well-drafted collaboration agreement can give PCCs confidence that they can draw on the resources and expertise of other forces while being protected from incurring unexpected liabilities or responsibilities. Close collaboration can provide real benefits for the public and help each force better meet the demands and challenges they face.

But changes are afoot. The Conservative manifesto contained a pledge to *"enable fire and police services to work more closely together and develop the role of our elected and accountable Police and Crime Commissioners"*. The Government has invested £80m since 2013 in local projects aimed at increasing collaboration between blue light services. The results of last year's public consultation, seeking views on a range of proposals to increase joint working between the emergency services, were **published** at the end of January – many PCCs responded. Alongside these results came the announcement that the Government intends to legislate to extend joint working. It wishes to see collaborative working becoming common practice.

The proposed legislation will include the following changes in England:

- ◆ Introduction of a high level duty on all three emergency services to collaborate to improve efficiency and effectiveness.
- ◆ PCCs are to be enabled to take on the functions of fire and rescue authorities ('FRAs') where a local case is made. Fire and rescue authorities will inform any business case the PCC develops and the PCC will consult locally on the merits of that business case.
- ◆ Where a PCC and all the relevant authorities for the area are in agreement that fire and rescue should transfer to the PCC, and following local consultation, the PCC will request that the Government introduces secondary legislation to give effect to the transfer.
- ◆ If all parties are not in agreement, the PCC will still be able to submit a business case to the Secretary of State to consider whether the transfer is in the interests of economy, efficiency and effectiveness or of public safety.
- ◆ Where a PCC takes on those responsibilities, he or she will be able to create a single employer for police and fire personnel. This will remove barriers to collaboration and reduce the need for contracts or collaboration agreements.
- ◆ Where the PCC is not responsible for the FRAs, the PCC will be enabled to have representation on their local FRA along with voting rights where the FRA agrees.

The aim of these changes is for closer working to enable the emergency services to deliver more effective and efficient services to the public and interoperability. By complying with their duties, PCCs can ensure that their communities have a real say in the way that emergency services are delivered in their area.

Want to learn more about Collaboration Agreements? Take a look at [the Home Office Statutory Guidance for Police Collaboration](#) and the Toolkit for Police Collaboration (available through POLKA (the Police OnLine Knowledge Area)).



Georgina Wolfe is a police and public lawyer of almost 10 years' standing. She has successfully represented the police as junior counsel before the Supreme Court in 3 controversial landmark cases: *Catt and T* (linked appeals in relation to retention of data) and *Roberts* (stop and search). Georgina acted as junior counsel to the specialist firearms officer who fired the shots which killed Azelle Rodney in a judicial review against the resultant inquiry chairman's findings. She is currently acting as junior counsel for Leicestershire Police in the Goddard Inquiry. Georgina has been a member of the Attorney-General's C Panel of Counsel for Government cases since 2012.



Jonathan Dixey is a police and inquest law specialist of almost 9 years' standing who has advised the MPS on Operations Yewtree (historical sexual abuse), Elveden (payments to public officials) and Weeting & Tuleta (phone and computer 'hacking'). He has represented the MPS in the '7/7' bombings victims' inquest and St. John's Ambulance in the Hillsborough Stadium Disaster Inquest. He is currently junior counsel to the 'Tunisia' Inquests and junior counsel to the MPS in the Goddard Inquiry. Jonathan has been a member of the Attorney-General's C Panel of Counsel since 2013.

Policing the Chief Constable

Jason Beer QC and Catriona Hodge

Exercising powers of appointment, suspension and removal of chief constables will present new opportunities and difficult challenges for elected PCCs.

Appointment

When it comes to the appointment of chief constables, it is the PCC who has the first and last word. The appointment procedure commences with the selection of the PCC's preferred candidate ("**Stage 1**"). To be eligible for selection, the preferred candidate must meet certain criteria.

As a result of recent amendments to the **Police Reform and Social Responsibility Act 2011 ("PRSRA")**, PCCs will now be entitled to select candidates of an approved rank from within a list of more than 120 approved overseas police forces. This relaxation of the eligibility criteria promises significantly to widen the field of potential candidates for the post of Chief Constable in England and Wales.

The responsibility for devising a suitable selection process rests with the PCC. To assist in this regard, the College of Policing has published Guidance for the Appointment of Chief Officers, dated November 2012¹ (and amended in December 2014²). It reminds PCCs that the procedure adopted must respect the three principles of *merit*, *fairness* and *openness*. The latter principle, which places upon the PCC a duty to ensure that the role is advertised so as to make all eligible candidates aware of the vacancy, is likely to present particular challenges in circumstances where the pool of eligible applicants has recently expanded to include individuals from overseas. As part of the selection process, it is recommended that PCCs assemble an appointments panel to assist in the short-listing, interviewing and assessing of eligible candidates. The panel should include at least one independent member, e.g. a magistrate, chief executive of a local authority or a representative of a community organisation. It will be the responsibility of the independent member to produce a report to the police and crime panel ("PCP") on the adequacy of the selection process. The report is to be submitted to the PCP at the same time as it receives notification of the PCC's preferred candidate.

Upon the selection of a preferred candidate, the PCC is required to notify the PCP of the following: the candidate's name; the criteria used to assess suitability; the reasons why he/she satisfies those criteria; and the terms and conditions upon which he/she is to be appointed ("**Stage 2**").

Before the PCP is permitted to report upon the PCC's preferred candidate, it must hold a confirmation hearing, that is, a public meeting to which the candidate is invited in order to answer questions about the proposed appointment ("**Stage 3**"). The candidate need not attend the meeting in person provided that there are means by which he/she can hear the proceedings and be heard.

ELIGIBILITY CRITERIA

The candidate is serving or has served:-

- EITHER as a constable in any part of the United Kingdom and has successfully completed both the Senior Police National Assessment Course and the Strategic Command Course;
- OR in an approved rank within an approved overseas force. Police forces in the following countries have received Home Office approval: Australia, Canada, New Zealand and the USA.

PRINCIPLES OF APPOINTMENT

Merit: the preferred candidate must be the strongest applicant when measured against the appointment criteria.

Fairness: the method of assessing each applicant against the appointment criteria must be applied consistently, impartially and objectively.

Openness: all potential candidates must be given access to information about the appointment process and the criteria for the role.

¹ <http://www.college.police.uk/What-we-do/Support/Recruitment/chief-officers/Documents/GuidanceSelectionAndAppointment.pdf>

² <http://www.college.police.uk/What-we-do/Development/Promotion/Documents/COAptsAmendmentToGuidance.pdf>

Unless the appointment procedure falls within a designated post-election period, the PCP has 3 weeks from the date of the Stage 2 notification within which to review the proposed appointment and report to the PCC (“**Stage 4**”).

The PCP’s report (which it has to publish) must include a recommendation to the PCC as to whether or not the preferred candidate should be appointed. If two thirds of the PCP determine that the PCC’s preferred candidate should not be appointed, it can veto the appointment within the 3-week period.

(“**Stage 5**”): If the PCP fails to report to the PCC within the 3-week period, the PCC is free to appoint the preferred candidate. Provided that the PCP does not veto the preferred candidate, the PCC is entitled to accept or reject the PCP’s recommendation and may proceed to appoint a candidate who has not received the PCP’s approval. If the PCP vetoes the candidate, then the PCC cannot proceed with the appointment and instead must submit to the PCP a reserve candidate whose proposed appointment will be scrutinised in accordance with the appointment procedure detailed above. Importantly, the PCP has no power to veto the PCC’s reserve candidate.

5-Stage Appointment Procedure (s. 38 and Sch. 8 to the PRSRA)

Stage One

Selecting a preferred candidate

Stage Two

Notifying the police and crime panel

Stage Three

Holding a confirmation hearing

Stage Four

Reviewing and reporting on the candidate

Stage Five

Appointing or rejecting the candidate

Suspension and removal

In holding the chief constable to account, it seems inevitable that the PCC will from time to time come into conflict with him/her. However, it would be a mistake to regard the PCC’s powers of suspension and removal as a quick-fix solution for resolving differences of opinion regarding the chief constable’s exercise of his/her functions, particularly where those issues impinge directly on the latter’s operational independence and effectiveness.

The lack of express constraints within the PRSRA as to the circumstances in which the PCC may lawfully exercise the powers of suspension and removal have led some to believe that the PCC enjoys an unfettered discretion to dispense with the chief constable at will. Experience suggests that this cannot possibly be the case.

Firstly, there is a clear line of authority which establishes that powers of summary dismissal ought not to be exercised where disputed allegations of misconduct have been made. The fact that the PCC’s powers of suspension and removal have expressly been made subject to the Police (Conduct) Regulations 2012 provides a strong indication that, in circumstances of alleged misconduct, chief constables should continue to enjoy the procedural protections afforded by the regulations.

Secondly, it is plainly incumbent on the PCC to exercise the powers of suspension and removal in accordance with the statutory purpose for which they were granted, namely to secure the maintenance of the police force and to hold the chief constable to account for the exercise of his/her functions. This legislative context provides a strong indication that the PCC’s powers to suspend and remove chief constables were intended to be exercised for reasons relating to the chief constable’s performance of his/her duties and functions, particularly where any shortcomings in performance are likely to impede the achievement of local policing priorities.

Restrictions on the powers of suspension and removal

- Allegations of misconduct should be investigated in accordance with the Police (Conduct) Regulations 2012.
- There should be good grounds for believing that any shortcomings in performance are likely to impede the efficiency and effectiveness of the force or frustrate the achievement of local policing priorities.
- The power of suspension should not be exercised unless the public interest leaves no other course open to the PCC.

Thirdly, the circumstances in which the power of suspension may be exercised by the PCC are subject to very strict limitations, as illustrated in the recent case of *R (Rhodes) v Police and Crime Commissioner for Lincolnshire* [2013] EWHC 1009 where the Court held that the chief constable should not be suspended unless: (1) temporary redeployment to alternative duties or an alternative location has been considered as an alternative to suspension and determined not to be appropriate in all the circumstances of the case **AND** (2) it appears to the PCC that either the effective investigation of the case may be prejudiced unless the chief constable is suspended or the public interest requires that he should be suspended, which carries the implication that **suspension is necessary because the public interest leaves no other course open.**

The procedure by which the PCC may call upon the chief constable to retire or resign is known as the **scrutiny process**. Unsurprisingly, it is the PCC who initiates this process by giving the chief constable written reasons to explain why the PCC is calling for retirement or resignation ("**Stage 1**"). The PCP must also be given notification and a copy of the PCC's reasons. Prior to giving the chief constable notification, the PCC must first obtain in writing the views of Her Majesty's Chief Inspector of Constabulary (HMIC) and have regard to those views. A copy of HMIC's written views is to be provided to the chief constable and the PCP at the time of notification. As part of Stage 1, the chief constable is entitled to make written representations to the PCC who is obliged to consider any such representations and to provide a copy to the PCP.

If the PCC proposes to call upon the chief constable to retire or resign, after considering any representations made by him/her, the PCC must notify the chief constable and the PCP of this and provide them with a written explanation of the reasons why he/she still proposes to call for the retirement or resignation ("**Stage 2**"). HMIC must be given a copy of the Stage 2 notification and the PCC's written explanation. The PCC must also provide to his/her chief executive a copy of the Stage 2 notification, the written explanation and the written views of HMIC.

On receipt of the Stage 2 notification, the PCP must hold a scrutiny hearing, in private ("**Stage 3**"), and may consult HMIC, although it will, of course, already have HMIC's written views.

The PCC and chief constable are entitled to attend the scrutiny hearing to make representations concerning the proposal to call for retirement or resignation.

Unless the scrutiny process happens to fall within the designated post-election period, the PCP must make (and publish) a written recommendation to the PCC as to whether or not the PCC should call for the retirement or resignation of the chief constable within 6 weeks of receiving the PCC's Stage 2 notification ("**Stage 4**").

The final decision as to whether or not the chief constable should be called upon to retire or resign rests with the PCC ("**Stage 5**"). The PCC has a discretion to accept or reject the recommendation of PCP which has no power to veto the proposal. The PCC must notify the PCP of the decision and, having done so, may call upon the chief constable to retire or resign. The decision whether to accept or reject the PCP's recommendation will, of course, have to be made in accordance with well-established legal principles governing public sector decision-making.

5-STAGE SCRUTINY PROCESS (s. 38 and Sch. 8 to the PRSRA & reg. 11A Police Regulations 2003)

Stage One

Notification and Representations

Stage Two

Further Notification

Stage Three

Consultation and Scrutiny Hearing

Stage Four

Recommendation of PCP

Stage Five

Decision of PCC

ILLUSTRATION

In August 2015, the PCC for Avon & Somerset requested the written views of HMIC regarding her proposal to call upon Chief Constable Nicholas Gargan to resign.

The proposal was made following the conclusion of misconduct proceedings against the Chief Constable and after being informed by the four principal representative groups in Avon & Somerset Constabulary that they no longer had confidence in him.

Whilst warning that the PCC's power of removal should not be used as a "back door" to achieve an outcome which misconduct proceedings were intended to achieve but did not, HMIC expressed the view that the PCC was entitled and justified to call upon the Chief Constable to resign in these circumstances.

Ultimately, the scrutiny process was not completed as Mr. Gargan voluntarily stepped down.



Jason Beer QC took silk in 2011, having been called to the Bar in 1992. He is regularly instructed to act on behalf of PCCs and has advised on the s.38 procedure for the suspension and removal of chief constables. Jason has represented police forces in many of the leading police law cases, including *Daniel* (immunity from prosecution), *Miranda* (terrorism act detention), *GC & C* (retention of biometric data), *Hayes* (necessity of arrest) and *Brooks* (liability in negligence). He regularly acts for and advises police forces on highly sensitive investigations and related proceedings. He has also appeared in a large number of very high profile inquests and public inquiries, including the Stephen Lawrence Inquiry (for the MPS), the Hutton Inquiry (for the family of Dr David Kelly), the Billy Wright Inquiry (for prison officers and governors), the Baha Mousa Inquiry (for 15 soldiers), the Al-Sweady Inquiry (as Counsel to the Inquiry), the Azelle Rodney Inquiry (for the MPS), the Leveson Inquiry (for a senior MPS officer), and the Hillsborough Inquests (for Sheffield Wednesday Football Club). He is currently acting for the MPS in the Phone Hacking Litigation and the Goddard Inquiry, for Surrey Police in the Surrey Puppy Farm Murders and the inquest into the death of Breck Bednar and for Devon & Cornwall Police in the inquest into the death of Thomas Orchard. Jason is described in Chambers & Partners as “*extremely clever with surgically precise cross-examination skills*”, “*fantastic, the real deal*”, “*a brilliant questioner with juries and judges*”, “*extremely well respected by judges for his intellect and for his understated and reliable advocacy*”, “*incredibly astute and very client-friendly*”, and “*very thorough, a good technical lawyer and someone who is very easy to work with.*”



Catriona Hodge has developed a specialism in police law and inquests since being called to the Bar in 2012. She has successfully defended a claim for unlawful arrest and false imprisonment following a 5-day civil trial with a jury, has acted as junior counsel in judicial review proceedings seeking an order quashing a search warrant and has brought a successful appeal by case stated to the High Court concerning the scope of football banning orders. Catriona has been instructed to act for police forces in a number of Article 2 inquests involving deaths in the context of police pursuits or collisions.

Maintaining Discipline

Fiona Barton QC and Matthew Holdcroft

The Standards of Professional Behaviour

The PCC is responsible for the discipline of the chief constable. The police disciplinary regime is complex and heavily regulated by statute and secondary legislation. It has two sets of statutory guidance and has amassed a considerable body of case law. However, the aim of the regime is simple – it is designed to ensure that all police officers act in a manner that is consistent with the ‘Standards of Professional Behaviour’ (‘the Standards’):-

THE STANDARDS OF PROFESSIONAL BEHAVIOUR FOR POLICE

- **Honesty and Integrity:** *Police officers are honest, act with integrity and do not compromise or abuse their position*
- **Authority, Respect and Courtesy:** *Police officers act with self-control and tolerance, treating members of the public and colleagues with respect and courtesy. Police officers do not abuse their powers or authority and respect the rights of all individuals*
- **Equality and Diversity:** *Police officers act with fairness and impartiality. They do not discriminate unlawfully or unfairly*
- **Use of Force:** *Police officers only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances*
- **Orders and Instructions:** *Police officers only give and carry out lawful orders and instructions. Police officers abide by police regulations, force policies and lawful orders*
- **Duties and Responsibilities:** *Police officers are diligent in the exercise of their duties and responsibilities*
- **Confidentiality:** *Police officers treat information with respect and access or disclose it only in the proper course of police duties*
- **Fitness for Duty:** *Police officers when on duty or presenting themselves for duty are fit to carry out their responsibilities*
- **Discreditable Conduct:** *Police officers behave in a manner which does not discredit the police service or undermine public confidence in it, whether on or off duty. Police officers report any action taken against them for a criminal offence, any conditions imposed on them by a court or the receipt of any penalty notice*
- **Challenging and Reporting Improper Conduct:** *Police officers report, challenge or take action against the conduct of colleagues which has fallen below the Standards of Professional Behaviour*

The Home Office **Guidance** provides more information in relation to the Standards and the College of Policing has produced a **Code of Ethics** about exactly what is expected of officers. The Code of Ethics sets out at paragraphs 1.4.3 – 1.4.5 just what is expected of chief officers and leaders. It would be prudent for all PCCs to have hard copies of these documents on their shelves.

Responsibilities of the PCC

The PCC is personally responsible for ensuring that the chief officer (in practice, the Chief Constable of the force) meets the Standards of Professional Behaviour. The PCC performs that responsibility in their role as the “appropriate authority” in relation to the chief officer. That role is largely governed by the **Police (Conduct) Regulations 2012** (‘the Regulations’).

The Regulations apply where an allegation comes to the attention of the PCC indicating that the chief officer’s conduct may amount to misconduct or gross misconduct.

Complications may arise where complaints are made about a collection of officers who include the chief officer. In those cases, the PCC will only be the *appropriate authority* for the chief officer, with the chief officer being the *appropriate*

DEFINITIONS

- **Misconduct:** a breach of the Standards of Professional Behaviour
- **Gross misconduct:** a breach of the Standards of Professional Behaviour that is so serious that dismissal would be justified

authority for the officers below him. Those cases may create logistical challenges and decision making should be transparent and well documented.

As the *appropriate authority* where an allegation is made that the chief officer has not met the Standards, the PCC is required to carry out the following steps:

PRE-INVESTIGATION STEPS

- Assess the conduct that is the subject of the allegation
- Decide whether there should be an investigation
- Determine whether the matter is one that must or should involve the IPCC
- Record complaints

INVESTIGATIVE STEPS

- Appoint the investigator (if it is not an independent investigation by the Independent Police Complaints Commission).
- Determine if the chief officer should be suspended (**s.38 Police Reform and Social Responsibility Act 2011** and **Regulation 10**)

POST-INVESTIGATIVE STEPS

- Consider any investigation report
- Determine if the matter should be referred to a misconduct meeting or gross misconduct hearing.
- Consider the appropriate form of disciplinary action if the misconduct meeting or gross misconduct hearing results in a finding of a breach of the Standards

What to do when an allegation is made against a chief officer

If the PCC considers that the allegation is such that it may amount to a breach of one of the standards of professional behaviour, then he/she must determine:

- ◆ Is the allegation one of misconduct, gross misconduct or neither (the severity assessment)?
- ◆ If the allegation is only one of misconduct does it need to be investigated?
- ◆ Is the allegation one that the PCC is required to refer to the IPCC?
- ◆ Is the allegation one that the PCC should voluntarily refer to the IPCC in any event?

Where it appears that the allegation is one that could involve criminal offences the presumption is that action for misconduct should be taken prior to, or in parallel with, any criminal proceedings. If necessary, any disciplinary action can be delayed until criminal proceedings are complete.

When must there be an investigation?

If the PCC considers that the allegation is one of gross misconduct, then the allegation must be investigated.

However, generally if the allegation is one that could properly be considered to be only *simple* misconduct, or could not amount to misconduct at all, then the PCC may decide to either take no action or to take 'management action' (an informal form of discipline). It is open to the PCC to revise this assessment at any point up until the commencement of misconduct proceedings.

The exception to the general rule arises if the chief officer has a live final written warning in place. If so, and if the allegation could amount to misconduct, then it must be investigated as a *gross* misconduct matter.

Unless there is to be an **independent investigation** by the IPCC (when it takes over control of the matter), the PCC, as *appropriate authority*, is responsible for appointing the investigator. This must be a person with "*an appropriate level of knowledge, skills and experience to plan and manage the investigation*" from a different police force. In practice, this is likely to be the chief officer of a different police force.

The Independent Police Complaints Commission

Please note that this organisation is likely to soon be replaced by the Office for Police Conduct.

In certain circumstances, there are **mandatory referrals** which must be made to the IPCC. In brief, those are allegations of serious assaults, serious sexual offences, serious corruption, or conduct which is aggravated by discriminatory behaviour, and "*relevant offences*". A *relevant offence* is essentially any offence for which an adult may be sentenced to imprisonment for seven years or more.

However even if the matter does not fall within one of those categories, the PCC *may* still refer it to the IPCC if he/she thinks it appropriate to do so, by reason of the gravity of the matter or any other exceptional circumstances.

Where allegations are referred to the IPCC, it will then make the decision as to the form of the investigation - these may be independent, managed, supervised or local. Where the IPCC conducts the investigation, this should be overseen by an IPCC Commissioner who has no oversight role for the relevant police area (see **Commissioner Role in Independent Investigations**).

At the conclusion of an independent investigation, the IPCC can recommend to the PCC whether in its view there is a case for the chief officer to answer. Where the PCC disagrees with the IPCC recommendation, he/she can respond and make further representations. This has been one of the principal areas that has generated the need for careful decision making e.g. the interaction between the Staffordshire PCC and the IPCC in relation to **Op. Kalmia**. However, if the IPCC remains of the view that there is a case to answer for (gross) misconduct, it can direct the instigation of misconduct proceedings.

Suspension

Where the PCC determines that there will be an investigation, consideration should also be given to whether or not the chief officer should be suspended. If the IPCC is involved in the investigation it must be consulted for its views. The question of whether or not to suspend a chief officer is not straightforward and is also likely to be the subject of challenge by the chief officer e.g. **R (Rhodes) v PCC for Lincolnshire [2013] EWHC 1009 (Admin)**. For more on suspension, please see the article by Jason Beer QC and Catriona Hodge.

Should misconduct proceedings be brought?

As appropriate authority, the PCC is required to “... determine whether the officer concerned has a case to answer in respect of misconduct or gross misconduct or whether there is no case to answer”. This requires the PCC to decide whether, based upon the evidence before him/her, there is a realistic prospect that the Presenting Officer will be able to establish, on the balance of probabilities, that the chief officer concerned breached one (or more) of the Standards of Professional Behaviour.

This does not call for substantial inquiry and the PCC has only to be satisfied that there is a *realistic or genuine*, as opposed to a *remote or fanciful*, prospect that the Presenting Officer will be able to prove the case.

Unless evidence is clearly unreliable, the PCC must consider it on its face value and “some evidence, however weak” or “only a scintilla of evidence ... to support the [relevant] inference” will establish a case to answer.

When considering the question, it is important to ensure that the issue of whether or not there is a case to answer in gross misconduct or misconduct is not wrongly conflated with the *separate* issue of whether or not there actually was shown to be gross misconduct or misconduct, see **R (Mackaill) v IPCC and Others [2014] EWHC 3170 (Admin)**.

Misconduct proceedings

FORMS OF MISCONDUCT PROCEEDINGS AND OUTCOMES

Misconduct meetings: where there is a case to answer in respect of simple misconduct

Possible outcomes:-

- Misconduct not found
- No further action
- Management advice
- Written warning
- Final written warning

Misconduct hearings: where there is a case to answer in respect of *gross* misconduct

Possible outcomes, as above, *plus*:-

- Dismissal with notice
- Dismissal without notice

The standard of proof in either a misconduct meeting or hearing is the civil standard – the balance of probabilities: i.e. whether any fact in dispute is more likely than not to be true.

At the conclusion of the misconduct proceedings, the PCC will receive a report from those who conducted the misconduct proceedings (a specially constituted panel) and he/she will then hold either a further meeting or hearing (depending on the form of the misconduct proceedings) with the chief officer in order to consider the appropriate disciplinary outcome.

CONTENTS OF REPORT OF MISCONDUCT PROCEEDINGS

- The finding of the persons conducting the proceedings
- The reasons for that finding
- If there is a finding of misconduct or gross misconduct, a recommendation as to any disciplinary action which should be taken
- Any other matter arising out of the proceedings which they desire to bring to the notice of the appropriate authority

Overview

Investigations into misconduct alleged against police officers necessarily attract a great deal of public interest – which has led to misconduct hearings being conducted in public. That interest is inevitably greatly intensified where the investigation involves the chief officer. It is inevitable that chief officers will have very high quality legal representation in such cases and, accordingly, it is vital that the PCC ensures full compliance with the law and that any steps taken can be fully justified. Failures to do so have been costly and embarrassing.

DISCIPLINARY TOOLKIT FOR PCCS

- **Schedule 3 to the Police Reform Act 2002**
- **The Police (Conduct) Regulations 2012**
- **The IPCC's Statutory Guidance**
- Home Office **Guidance** – Police Officer Misconduct, Unsatisfactory Performance and Attendance Management Procedures
- The College of Policing – **Code of Ethics**
- **IPCC – Focus on PCCs and their role in the complaints system**



Fiona Barton QC was called to the Bar in 1986 and took silk in 2011. *"She is one of the finest police law barristers in the country"* (Chambers UK 2016) and has been involved in almost every high profile or complex police law matter during the last decade including the Hillsborough Inquests, the 7/7 London Bombing Inquests, the Madeleine McCann Investigation and the Cumbria Shootings Inquests. Her experience and depth of knowledge is unrivalled (Chambers UK 2014). She is currently representing the Chief Constable of South Yorkshire Police in the Hillsborough Inquests and the National Police Chiefs' Council in Lord Justice Pitchford's Public Inquiry into Covert Policing. She is widely recognised as the counsel of choice in complex matters where reputation and principle are at stake. The professional directories acknowledge Fiona's expertise: *"You know you're getting quality legal advice when she's on your case"; "She is hugely knowledgeable and experienced"; "She has acute attention to detail ... and an innate sense of the right solutions to issues raised by new emerging principles."* (Chambers UK 2016). *"She is trusted with very sensitive cases and provides no-nonsense advice. Her understanding of the law in this area is phenomenal."* (Chambers UK 2014).



Matthew Holdcroft was called to the Bar in 1998. His practice immerses him in all aspects of police law up to Supreme Court level, including public law and public inquiries. He is widely acknowledged as a leading lawyer in the field of police law, appearing in the most high profile and sensitive cases. He is currently appearing, with Fiona Barton QC, for the Chief Constable of South Yorkshire Police in the Hillsborough Inquests and is instructed (also with Fiona) to act for the National Police Chiefs' Council in Lord Justice Pitchford's Public Inquiry into Covert Policing. Comments in recent editions of Chambers UK in respect of both police law and professional discipline recognise not only his undoubted ability but also his excellent client care skills: *"He is very good and his client care skills are particularly impressive"* - (2016); *"He is a very thorough and robust advocate"* - (2015); *"He is very confident and businesslike and he manages the client's expectations appropriately"* - (2015); *"He is a very good jury advocate who pitches it well and is persuasive and thorough"* - (2014); *"Robust advocate...argues his cases fantastically well"* - (2013).

Public Sector Decision Making

Jeremy Johnson QC and Beatrice Collier

THE KEY TO PUBLIC SECTOR DECISION MAKING STRONG REASONS MAKE ROBUST DECISIONS

Introduction

PCCs hold public office. They make important decisions every day. Those decisions can affect individuals, a particular section of the community, commercial organisations, or even the public at large. Some involve extremely difficult one-off judgments balancing matters of high principle. Others involve the routine application of policy. Either way, such decisions are subject to the review of the Court on an application for judicial review. The Court has power to quash unlawful decisions and to require the decision-maker to think again. Win or lose, the process can be time-consuming and costly. Far better to ensure that decisions are lawful, that where possible a legal challenge is averted, and that where that is not possible the decision will withstand scrutiny.

How can a public authority be sure that its decisions are lawful? Many of the steps which should be taken are obvious. Two basic examples. First, before any decision is taken the decision-maker should make sure that they have read all the relevant paperwork, that the information that they are basing their decision on is accurate and up-to-date, and that they have taken all relevant considerations into account. Second, it is really important to keep a good record that demonstrates how a particular decision was reached. It is important as well for those making decisions to remember that whatever they write down may be read later – if for example there is an appeal against their decision or a Court case challenging it. So any recorded reasons for a decision, even if for internal use only, should be written with care and should set out the relevant factors that were taken into account.

We set out below a summary of some key considerations that any public sector decision-maker should bear in mind when exercising their powers.

Power

It is fundamental that a public authority must only make decisions that it has been given the power to take. PCCs are created by statute: **s.1 Police Reform and Social Responsibility Act 2011**. They only have those powers that are given by statute (see e.g. **Schedule 1 to the 2011 Act**). A useful general power is that contained in para 14 of schedule 1 to the 2011 Act: a PCC may do anything which is calculated to facilitate, or is conducive or incidental to, the exercise of the functions of the PCC. But this, like all powers, is subject to limitation. See para 14(3): it is subject to the other provisions of the 2011 Act and to any other enactment about the powers of PCCs. A good example is the prohibition on interference with the operational independence of chief constables. But where does the boundary lie between independent operational decision making for the chief constable and the PCC's function of securing an efficient and effective police force? In some cases it is obvious.

Whether to carry out an arrest is a decision for an individual officer, under the direction and control of his/her chief constable. Whether to prioritise the investigation and detection of certain types of offence is a matter for the PCC when formulating the police and crime plan – see **s7(1)(a) of the 2011 Act**. But operational decision making by the chief constable is dependent on resource provision and strategic policy setting by the PCC. Where the one shades into the other is often a broad grey boundary, rather than a crisp bright line.

Purpose

Obviously, decision-makers should not act in bad faith or with an improper or ulterior motive. But the “proper purpose” rule also requires decisions to be made for the purpose that underlies the statutory provision that prescribes the power to make the particular decision. That means decision-makers must have a good understanding of what Parliament intended when giving them the power in question. Often this can be done by reading carefully the statutory provisions in context. But sometimes Parliament does not spell out its purpose. Then it’s necessary to dig deeper. For example, there may be explanatory notes to the Act, or court cases in which an enactment’s purpose is discussed, or even the record of the Parliamentary debates in Hansard. If a decision-maker makes a decision which is not consistent with the purpose of the underlying statutory power, then the decision is ultra vires (or outside the power of the decision-maker) and is, for that reason, unlawful.

CASE EXAMPLE

A Minister declined to exercise a power to set up an inquiry because he was concerned that if he did so he would be obliged to give effect to the inquiry’s recommendations. The House of Lords quashed the decision, holding that it was made for a purpose which would frustrate the policy of the relevant legislation.

See **Padfield v Minister of Agriculture, Fisheries and Food** [1968] AC 997.

Independence

Decision-makers should have no personal interest in the issues about which they are making decisions. This means, for example, that the decision-maker should not have any financial interest in the outcome of a decision and should not have any affiliations to any group lobbying or campaigning for a particular outcome. These are two obvious examples but sometimes there are less clear and more indirect interests in the outcome of a particular decision – perhaps the decision-maker’s spouse volunteers for a charity in a related field, or maybe one of their in-laws is a shareholder of an organisation that has an interest in the decision.

It is always best to err on the side of caution: even if the connection will not in fact have any impact on the decision, account should be taken of the risk that there will be a perception of bias.

Any potential interest should be declared, and if there is a risk of a perception of bias then consideration should be given to delegating the decision.

BIAS

Bias automatically leads to a decision being quashed.

The test is “*whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the [decision-maker] was biased.*”

See **Magill v Porter** [2002] AC 357 per Lord Hope at [103].

Policy vs Fettering

Often, it is good practice to formulate written policy to underpin decision making. Where the policy is published, it also ensures that those affected can more accurately foresee the approach that is likely to be taken. Sometimes, a court will require decision-makers to formulate or publish a policy. A published policy promotes consistency, transparency and accountability.

But an overly rigid policy might unduly fetter a decision-maker’s discretion. PCCs are not elected in order slavishly to follow prescriptive policies. They exercise their judgment to make good decisions. It is important that they consider each decision on its own merits. So policies should be sufficiently flexible to enable account

to be taken of the particular circumstances of each case. And decision-makers should be prepared to consider making exceptions to a policy if there are good reasons for doing so.

Proportionality

This concept is important where public sector decisions affect certain human rights. **The Human Rights Act 1998** makes it unlawful (by virtue of **s.6(1)**) for public authorities to act in a way that violates human rights. But many such rights are qualified. Decisions might lawfully interfere with a qualified right so long as the interference is *proportionate* to a legitimate aim. The law recognises that in some cases there are good reasons for limiting a person's human rights. So what it requires is that the decision pursues a legitimate aim, such as the prevention of crime. And that the level of the interference with the right in issue is proportionate to the importance of the aim that is sought to be achieved.

If the aim can be achieved in some other way that does not interfere with the right in issue then the interference will not be proportionate. So too if the aim could be achieved in a way that involves a less intrusive interference. So too if the interference is out of all proportion to the aim that is sought to be achieved ('sledge-hammer to crack a nut').

Relevant vs Irrelevant considerations

Decision-makers must be able to show that they have taken into account all the considerations which are relevant, but that they have not been affected by any irrelevant consideration. What would be regarded as relevant and irrelevant?

That depends very much on the context: the underlying statutory framework, the policy context, the subject of the decision and the views of relevant stakeholders. Some typical examples of relevant considerations can include:

- (a) Any factors which the statute expressly says are relevant;
- (b) The human rights of any individual involved;
- (c) The outcome of an equality impact assessment;
- (d) Any consultation and consultation responses;
- (e) The potential effects of a particular outcome;
- (f) The public good;
- (g) Efficient use of public resources.

THE TEST

1. Is the objective sufficiently important to justify the limitation of a protected right?
2. Is the measure rationally connected to the objective?
3. Could a less intrusive measure have been used without unacceptably compromising the achievement of the objective?
4. Is the impact of the rights infringement disproportionate to the likely benefit of the impugned decision?

See **Bank Mellat v HM Treasury** [2013] UKSC 39 per Lord Reed at [74].

WEDNESBURY UNREASONABLENESS

"The court is entitled to [decide] whether they have taken into account matters which they ought not to take into account, or, conversely, have ... neglected to take into account matters which they ought to take into account. ... [or whether the decision-maker has] come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case... the court can interfere. The power of the court to interfere in each case is not as an appellate authority... but as a judicial authority which is concerned, and concerned only, to see whether the [decision-maker has] contravened the law by acting in excess of the powers which Parliament has confided in them."

See **Associated Provincial Picture Houses Ltd v Wednesbury Corpn** [1948] 1 KB 223 per Lord Greene MR at 234A.

If a PCC takes account of all relevant matters, and disregards all irrelevant matters, a Court will be very slow to intervene. Decision-making has been allocated by Parliament to PCCs, who hold a democratic mandate. It is not for the Courts to second-guess a PCC. It is not enough that a Judge would have made a different decision, or even that he/she thinks the decision is unreasonable.

If, however, a decision is irrational then the Court will intervene. A decision is irrational if it is so unreasonable that no reasonable person properly directing him/herself could have taken it.

Finally

Hundreds of decisions are made by public authorities every day. The overwhelming majority go unchallenged. When a particular decision is challenged it is always worth going back and taking another look. There may be an error that is easily corrected. It may even be that it is decided that the decision will be reversed. Far better to do it quickly with minimal loss of face and cost. Or it may be that the decision-maker maintains that the correct decision was made, for the right reasons, and that it has been sufficiently well communicated already. The simplest and cheapest way for a public authority to deal with many complaints about a decision is to have another look. They will then either be in a position to change the decision quickly, cheaply and easily. Or else they will be confident about defending it in Court.



Jeremy Johnson QC was called in 1994 and took silk in 2011. He regularly advises and acts for Police and Crime Commissioners. He has been involved in many of the leading police cases including, in the last 2 years, the Supreme Court decisions of *Catt and T* (retention of data by police), *Roberts* (stop and search), *Michael* (liability in negligence) and the forthcoming appeal in *DSD* (the black cab rapist). He has also acted in many of the major inquests and inquiries in the last 20 years, including the inquests into the deaths of Diana, Princess of Wales, and Dodi Al Fayed (for the intelligence agencies), the Hutton Inquiry (for the family of David Kelly), the Billy Wright Inquiry (for the Northern Ireland Office), the Al Sweady Inquiry (for the Ministry of Defence) and the Hillsborough Inquests (for West Midlands Police). He is currently acting for West Midlands Police in relation to the applications to resume the inquests into those who died as a result of the 1974 pub bombings, for South Wales Police in the Lynette White litigation, and for the Metropolitan Police in the Daniel Morgan litigation. Comments in the legal directories include *"He is renowned as a hugely talented lawyer and safe pair of hands."* *"He is well prepared, polished and understated."* *"He dominates [police] law from the defendant side."* *"He has a formidable intellect and is well tipped for the judiciary when the time comes."* *"He lives up to his reputation as a very good and knowledgeable barrister."* *"He is very able. He has a huge appetite for work and a practical insight that is appreciated by clients."* *"He is clever, sensible and a good advocate."* *"When you ask him a very complicated legal question his response is quick and impeccable. He can tackle huge and very complex cases, and sometimes breaks new law."* *"He is a tireless forensic analyst who has a capacity to turn around paperwork in the shortest of timescales."*



Beatrice Collier is a barrister of 10 years' standing whose impressive and wide-ranging practice covers all areas of police law, from civil actions to inquests to judicial review, as well as employment law. She has recently returned from maternity leave to act as junior counsel in the Lynette White litigation, one of the largest civil actions ever to be brought. Her competence and expertise is reflected in recent comments in the main legal directories, which note that she *"is an effective advocate"*, has *"an excellent grasp of employment law"* and is *"careful and conscientious"*. In addition to her police law practice, Beatrice advises and represents the Government as a member of the Attorney General's panel of counsel.

4 Years On: Lessons Learned

Richard Oulton and Aaron Moss

“... in 2012, you could be forgiven for thinking that we were creating a monster. And I’d be lying if I said there weren’t times over the last three and a half years when I thought we might have done just that ...”

The Rt. Hon. Theresa May MP, Home Secretary, **speaking** at the Policy Exchange on 4th February 2016

In the end, there have been very few monsters and a great many maestros. In the speech quoted above, the Home Secretary explained that her doubts had been short-lived, and she went on to list the considerable achievements of the first set of Police and Crime Commissioners, noting that there was now political consensus that PCCs were *“valuable and here to stay”*.

For those standing for election for the first time in May (and for those seeking re-election), we offer some thoughts on the lessons learned from the past 4 years, and on the way forward.

Successes and Strengths

First, and most importantly perhaps, it has become ever clearer that the role of PCC has enormous potential, not only in fulfilling its primary function of holding the local chief constable to account, but also in terms of working more efficiently and effectively in collaboration with other organisations, including other police forces, other blue light services, local authorities, and the NHS, in order to save money and increase efficiency.

The role of a PCC is not restricted to policing. Pointing out that the clue lies in the title, Theresa May referred in her recent speech, for example, to her desire to explore what role PCCs could play in the wider criminal justice system, noting the *“significant opportunity for PCCs to lead the same type of reform they have delivered in emergency services in the wider criminal justice system”*.

Second, and closely linked to the first point, PCCs are of course both publicly recognisable and democratically accountable figures whose role can bring enormous personal satisfaction. One PCC has spoken to us of his pride and satisfaction in helping to reduce young offender levels in his local community (with re-offending down by 90%) and thereby turning around the lives of many young, disenfranchised people living in his area.

It is also hard, for example, to imagine meetings between a police authority, comprising 17 members, and its chief constable, being broadcast by live webcast, or anyone bothering to tune in if they were. Yet one PCC reports viewing figures of 500 for her regular webcast accountability meetings with her chief constable.

Although much still remains to be done in raising public levels of awareness of the work done by PCCs, things appear to be moving fast in the right direction. We can confidently expect a far higher turnout than the strikingly low number (only 15% on average across England & Wales) who turned out to vote in the first PCC elections on 15th November 2012.

STANDOUT SUCCESSES

- Police cadets introduced into a school for special needs children
- White Ribbon status awarded to a Force for its Domestic Violence work
- Public scrutiny meetings broadcast online, with questions asked through Twitter
- New collaborative links between neighbouring forces
- Increased use of renewable fuels, and lower emission levels

Collaboration and Partnerships

With the current budgetary constraints on policing and the need to continue to deliver more for less, the need for working in partnership with others has never been greater. Looking across the UK, it is plain that many PCCs have wholeheartedly embraced collaboration agreements and the benefits that come from working in partnership with others.

Most obviously, this has included PCCs working with each other, but also PCCs working with local authorities, the Health Service (particularly mental health) and the third sector.

With the proposed expansion of the PCC role to include other blue light services such as the fire service, and a political appetite to involve PCCs in other aspects of criminal justice, the need to work collaboratively or in partnership is likely to increase significantly.

Oversight

A key part of the PCC role is oversight. In order to achieve this effectively, it is vital for the PCC to know, upon taking office, precisely what arrangements and contracts are in place. Consideration may need to be given to renegotiating, renewing or, in some cases, ending contractual arrangements. Newly elected PCCs will be well-advised to request copies of existing contracts and to study them in their early days in office. As in any economic activity, it will be necessary to know when contracts are due for renewal or where there are break clauses that provide an opportunity to renegotiate.

Downsides and Difficulties

First, there is the inevitable media scrutiny which accompanies a high-profile role of this nature, particularly given that most PCCs are aligned to a political party. It is clear that PCCs are considered to be a fair source of tabloid fodder, whether justified or not. This is something which was recognised by the Government in its December 2014 progress report, noting that PCCs “*operate in the full gaze of the media*” and that “*public awareness of commissioners has increased significantly, albeit not always for the right reasons*”.

To give just two examples, no-one wants to be hauled before the **High Court** to have his decision to suspend a chief constable described as “*irrational and perverse*”; or to have a performance on a television documentary described as “*a disaster from start to finish*”. But that is part of the price to be paid for taking on a high profile role such as this. Those filling this role have been equal to the challenge.

Second, the successful candidates at the forthcoming elections will be embarking on an expedition into only recently explored territory. One PCC told us that the lack of a “blueprint” in 2012 had caused difficulties when starting in office. With only about half of incumbent PCCs standing for re-election, by definition, at least half of all PCCs elected in May 2016 will have had no experience in that role at all.

The Home Affairs (Select) Committee said in its May 2014 **report** on PCCs that “*the role of commissioner is a complex one requiring an understanding of local government finance, legal issues, and crime statistics, among many others*”. The Committee recommended a transition period of one month between election and taking office to allow time for intensive training for newly elected PCCs. The Government rejected that recommendation and newly elected PCCs will have to self-brief or arrange their own training within the current transition period of just one week.

Staff and Training

It will be very helpful to have an experienced chief executive, working for the new PCC and protecting him/her from the risk of mistakes. Unlike their predecessors, those PCCs who are newly elected will take office with an existing chief executive in place, with up to four years' experience. At the very least, they will be able to equip new PCCs to know more about the Rumsfeldian 'unknown unknowns'.

Incumbent PCCs have reported that it is worth spending money on good staff. Whilst their cost will be subject to scrutiny by the PCC Panel, the media and the public, excellent staff are a worthwhile investment.

Legal Action

Legal challenges are very much the lot of those in public service. Carefully considered and consulted upon, well advised and properly recorded decisions are usually the easiest to justify and defend. It is sometimes worth imagining how one would explain a particular decision if asked about it in a court or tribunal.

CHALLENGING TIMES

- Initial refusal of PCC for South Yorkshire to resign in the wake of the Rotherham Child Sexual Abuse scandal
- Appointment of a 'youth commissioner' with no background checks, who had to resign when old offensive tweets she had posted surfaced
- The public disagreement between the PCC and former Chief Constable of Surrey
- Unsympathetic TV documentary coverage

Conclusion

An interesting challenge beckons for those who have put themselves forward as candidates for election to the office of PCC. A piece of advice offered by an incumbent PCC stands out: As the profile of the office of PCC has increased, so too has the work load, with PCCs frequently working a 7 day week and unsocial hours. The PCC for Staffordshire told the Home Affairs Committee that he had engaged face-to-face with over 12,000 people. PCCs are now truly the face and future of modern policing.



Richard Oulton is a specialist in Employment and Commercial law of over 30 years' standing. He took a First in Classics at Oxford and qualified as a solicitor in 1985, becoming a partner in the Commercial Litigation department of City law firm, Travers Smith, before transferring to the Bar in 1995. He is a co-author of *'Disability Discrimination in Employment'* (Oxford University Press, 2009).



Aaron Moss was called to the Bar in 2013 and has a busy practice acting for police forces and police organisations throughout England and Wales. He is currently second junior counsel to the 'Tunisia' Inquests. In 2015, he was awarded the (Mr. Justice) James Hunt Prize for Advocacy by Gray's Inn. Before coming to the Bar, Aaron served for 5 years as a special constable in the Metropolitan Police Force, latterly in the rank of sergeant. This has given him a unique inside perspective into operational policing.

Police and Crime Commissioners As Employers

Victoria von Wachter and Claire Palmer

Newly elected PCCs will be made aware of their statutory functions and they will, no doubt, have many ideas, including substantial changes that they will wish to make and projects they wish to undertake. We explore here some of the areas of their new role where they will find themselves grappling with employment law.

Who are my employees?

Most obviously, a PCC's staff will be those civilian staff already employed in the Office of the PCC ("OPCC") and whose employer the new PCC will become on 12th May 2016. The precise numbers and functions of these staff vary across the country as will the terms on which they are engaged. It is worth setting out the history to how the separation of employees between the PCCs and chief constables came about.

Consequent upon the creation of PCCs in the Police Reform and Social Responsibility Act 2011 ("PRSRA"), a number of changes were made to the identity of the designated employer of certain staff. In November 2012, all police staff (non-officers) moved by operation of law to the employment of the PCC (with the chief constable retaining the line management of some employees for operational reasons) (Stage 1). Additionally, staff who had been employed by the Police Authority were transferred under TUPE¹ across to the PCC. PCCs were then required to submit draft transfer schemes (Stage 2) to the Home Secretary to respond to the requirement for a division of police staff between the OPCC and the chief constable. In effect, this created two separate bodies. Draft statutory transfer schemes were submitted for approval by each police force and brought into force before 1 April 2014. That document will confirm for each new PCC which civilian staff remained under the control of the PCC in their local area and is a good starting point on 12th May.

It appears that it was anticipated that those staff who had less public visibility would be under the control of the PCC, with the frontline police officers and staff (which the public consider include call handlers and custody officers) remaining under the control of the chief constable. However, from our understanding, a far more limited number of individuals have in practice remained under the control of the PCC. Indeed, most areas have retained no more than 30 employees.

If I have fewer than 30 staff, will employment law be a big issue?

Whilst it is important for a new PCC to ascertain which staff they directly employ, their decisions and the implementation of their policies will also impact more widely on both police staff and police officers. Those decisions may lead to challenges in the courts by affected individuals, or to claims against the chief constable, which may have financial and budgetary consequences for the force, as well as reputational consequences.

In holding the chief constable to account, the PCC will be considering functions performed by the individuals he/she is responsible for. The chief constable will normally be responsible for all police officers as well as some civilian staff. Different provisions and regulations apply to civilian staff and police officers: for example, police

FIRST STEPS

- Know who your current employees are
- Check who you can appoint and who you can retain
- Check your procedures for compliance with current statutory requirements
- Identify what collaboration agreements are already in place
- Investigate nature and extent of any collective agreements
- Identify any ongoing legal issues e.g. grievances or disciplinarys

¹ The Transfer of Undertakings (Protection of Employment) 2006

officers are not employees and therefore cannot (usually) claim unfair dismissal, nor can they claim for unlawful deduction of wages in the Employment Tribunal. Their conduct is regulated by the Police (Conduct) Regulations 2012 and the chief constable will be responsible for their discipline.

PCCs will also need to have in mind the 'employee relations' implications of their decisions. Additionally, in their new role, they will be considering the roles of volunteers who traditionally have limited employment rights, but who will require significant management time and resource.

Finally, PCCs will need to consider whether they have responsibility for staff in other police forces as a consequence of any existing collaboration agreements. Any collaboration projects are likely to give rise to significant employment issues both in terms of impacts on existing staff but also in negotiating and agreeing any staffing structure for your joint enterprises. Outgoing PCCs have confirmed that "employment law issues" in the broadest sense have taken up a significant amount of their time.

WHO IS AFFECTED?

Your decisions will affect more than just your direct employees, make sure you consider:

- The chief constable;
- Police officers and civilian staff reporting to chief constable;
- Staff / officers from other forces or public or voluntary sector organisations where collaboration agreements exist or are proposed;
- Volunteers.

Be aware of the different legal rights of different people.

Can I appoint my own team?

Newly elected PCCs may wish to appoint their own team. However, whether they can appoint their own senior team will depend upon the type of contracts issued to the team by their predecessors. It is likely that those already appointed are not on fixed-term contracts, but are ordinary employees with more than 2 years' service. In such circumstances, they will have acquired full employment rights including the right not to be dismissed without a fair reason **and** following a fair procedure. They may also have significant contractual notice periods. Whilst a new PCC may be able to reach settlement terms with such individuals, such a decision is likely to be expensive or lead to potential litigation. It will therefore be vital to understand the terms on which existing staff are engaged.

YOUR TEAM

- Check the contracts of employment of the existing chief executive and chief financial officer;
- Consider employment rights;
- You have the right to appoint your own deputy PCC;
- Senior appointments are subject to scrutiny by police and crime panel.

Under **Schedule 1 of the PRSRA**, PCCs are required to appoint (i) a chief executive (head of their staff) and (ii) the chief finance officer (responsible for financial affairs) and (iii) a deputy police and crime commissioner.

The PRSRA provides that the deputy PCC's appointment may not be any longer than the term of the current PCC. A new PCC will therefore be able to appoint his/her own deputy PCC. However, the obligation to make an appointment to the other two posts only arises "*if, and for as long as the post is vacant, or the holder of that post is, in the [PCC's] opinion, unable to carry out the duties of that post*".

Any new appointments to those three senior positions will be subject to scrutiny by the relevant police and crime panel. Specific requirements are set out and will need to be followed.

Collaboration agreements

As an organisational point, and with financial pressures, new PCCs will be using creative thinking to work out how to reduce costs. This will include the consideration of collaboration agreements with other forces or PCCs and partnerships with other public sector bodies (local authorities and the health service particularly mental health) and with third sector organisations. Historically, these have covered areas such as call centres, custody

suites and traffic or other specialist areas. These are covered in more detail in a separate article by Georgina Wolfe and Jonathan Dixey. When considering such an agreement from an employment perspective, the PCC will need to consider: who is going to run it; who is the employer; what impact will TUPE (for civilian staff) or the transfer provisions (for police officers) have on the proposal. Additionally, you may find issues of equal pay arising as staff will have a broader range of individuals with whom to compare themselves.

There may already be collaboration agreements in place that provide that the PCC or chief constable is responsible for staff or police officers from a different police force. Any decisions the PCC makes will potentially impact on staff and officers further afield.

WHAT TO CONSIDER

- Duty to collaborate;
- Existing arrangements;
- Who is going to run it?
- Who is the employer?
- What impact will TUPE / transfer provisions have?
- Equal pay issues?

Trade unions

The PCC's role will necessarily involve engaging with, or the chief constable engaging with, trade unions such as UNISON or UNITE as well as smaller unions. Before making any decisions, they will need to consider whether and to what extent collective bargaining is required and what sort of formal arrangements and recognitions exist or are being sought. A sensible early step is to take the temperature of the local union officials in order to understand how easy new plans will be to implement.

Given the proposed extension to the responsibilities of a PCC to include the fire services (as well as other blue light services), the ability to negotiate with the Union or staff association (both informally and formally) is likely to become more important.

Diversity

An analysis conducted by ITV news in January 2016 found that less than 5% of staff employed by PCCs are from black, Asian and minority ethnic backgrounds (compared to 12% in the general workforce). New PCCs should ask themselves: *"Am I aware of the demographics in my areas and what steps do I need to take to increase diversity in the PCC staff?"*

EQUALITY

- Check demographics in your area;
- Does your office reflect this?
- Review policies and training;
- Have 'due regard' to the public sector equality duty.

What happens if it goes wrong?

If a person for whom a PCC is legally responsible is aggrieved, the PCC may find him/herself the subject of a complaint to the Employment Tribunal or of a claim brought in the County Court. Before bringing a Tribunal claim, claimants are required to approach ACAS and consider early conciliation (although there is no obligation actually to undertake it). They are also required to pay a fee. In circumstances where there is union backing of a claim, the union will often pay this fee for the claimant.

A PCC will not be personally liable in respect of any act done unless it is shown to have been done otherwise than in good faith: paragraph 15 of Schedule 1 to the PRSRA. This does not mean that the PCC as a corporation sole (as opposed to in his/her personal capacity) cannot be a respondent in a claim.

In circumstances where a police officer or member of civilian staff makes allegations of discrimination or whistleblowing by the PCC personally, or by a member of his/her team, the PCC may find him/herself a party to the claim even though he/she is not the direct employer of the person concerned.

Some OPCCs monitor Tribunal claims on a six-monthly basis, considering whether there have been any claims as well as any lessons learned. This may well be a good way of managing future risks of litigation and ensuring that any obligations are being complied with going forward.

In defending such claims, the tribunals have particular regard to what policies and procedures are in place and what training (particularly in relation to discrimination claims) has been provided. It is significantly easier to defend claims where such policies and training are robust, followed in practice, and regularly updated.

Training

Whilst some people ask: what do you do if you train someone up and they leave? The better question is: what do you do if you don't train someone and they stay? It is vital to ensure that your staff are adequately trained and that there are formal appraisal mechanisms that are in place and used. Training on equality and diversity is particularly important, such issues never being far from policing.

Some PCCs have been successfully adopting a formal appraisal procedure for their chief constable. If an employee, or a chief constable, is doing well, the process allows for recognition and reward. If they are not, problems can be identified and worked on, and training given. If they are still not performing, any termination will carry significantly less litigation risk.

TRAINING

- Train your staff;
- Review, update and follow policies and procedures;
- Use the appraisal procedure.

Have there been many claims to date?

There are no specific figures on litigation against PCCs, and this will vary across areas, and depend on the approach to litigation including whether a commercial approach was taken to settle the claim. So far there are only 3 cases that have been reported (these are cases that have been heard on appeal at the Employment Appeal Tribunal). Those bringing those claims include a PCSO, an accredited financial investigator, and a head of training and development.

As the role of PCC becomes more embedded and as PCCs take more decisions affecting the employee relations of its staff, they may find themselves a party to litigation more frequently.

REDUCING THE RISK

- Only a few claims so far;
- Review tribunal claims and lessons learned;
- Visibility and approachability;
- It's not what you do, but how you do it;
- Communication is key.

How to avoid claims – in a nutshell

There is little anyone can do to avoid a determined litigant, even if the respondent is entirely blameless. Nevertheless, and it may sound trite, it is worth remembering that communication is absolutely critical to reducing the risk of employment litigation. Fundamentally, working relationships are often less about the law and more about managing people and their expectations. Visibility and an ability to engage with officers and civilian staff will significantly reduce the risks of litigation.



Victoria von Wachter is a specialist in employment and police law as well as having a niche practice in equine matters. She holds degrees in both Biochemistry and Law as well as an M. Phil. in Biochemical Genetics. A barrister of 20 years' call, she enjoyed a career in industry before coming to the Bar and brings this organisational experience to enhance her legal work. She represents both claimants and respondents in employment matters and is retained employment counsel for a number of large multinational companies. She has represented a variety of Home Office and other police forces in employment matters and also advises them on policies and procedures. She was described as a leading barrister by Chambers UK legal directory, in both 2014 and 2015.



Claire Palmer is a specialist employment and civil litigation barrister with 13 years' experience at the Bar with a particular emphasis on defending the Government and Police. She was appointed to the Attorney General's Panel of Counsel, B Panel, in March 2014, and regularly represents the Government in a variety of civil, public and employment claims including on national security cases. Claire's employment experience spans representing claimants and respondents from small family employers to multinational PLCs and political and sporting clients. Claire was on the London Board of Crimestoppers for three years and is the resident Chair of her local Police ward Panel.

The Election Campaign

Dijen Basu QC and Robert Cohen

This time is different

The PCC elections may well turn out to be rather less genteel affairs than their inaugural predecessor.

About half of the 40 or so current PCCs, who have served for 3½ years, will be standing for re-election. Some have been controversial. The main political parties will wish to take control of police areas from their opponents and from the dozen independents who were elected in November 2012. The notoriously low turnout (15%) for the previous election is very unlikely to be repeated, with this election taking place in a warmer month, with twice as many daylight hours, at the same time as 127 local council elections and 3 mayoral elections in England and Wales (excluding London) and with the election of the members of the National Assembly for Wales.

Publicity during the campaign

S.2 of the Local Government Act 1986 has the effect of prohibiting PCCs and local authorities from (arranging) the publication of any material which appears to be designed to affect public support for a political party. This will not affect campaigning by PCCs in their private capacity.

The statutory **Code of Recommended Practice on Local Authority Publicity**¹, dated 30th March 2011, should be followed by PCCs. It reminds local authorities (and PCCs) that they should not publish any material on controversial issues or report views or proposals in such a way that identifies them with any individual members or groups of members. The need for care is particularly acute where the current PCC is standing for re-election or holds a political allegiance with one of the candidates.

As the late Bob Crow found when he sued Boris Johnson for libel arising out of the contents of a mayoral election leaflet (**Crow v Johnson** [2012] EWHC 1982 (QB)), a particularly wide latitude for freedom of expression is allowed when considering election leaflets, particularly where their target is a political or trade union figure.

But there are limits on how far a candidate may go in attacking his/her opponents.

KEY FACTS

- There are 40 PCC elections
- Half of the first PCCs are standing for re-election
- Turnout in November 2012 was only 15.1%
- On 5th May 2016, there will be twice as many daylight hours, 127 local council elections, Welsh Assembly elections and 3 mayoral contests
- The average Parliamentary constituency has 71,500 electors
- The West Midlands PCC election has 2,000,000 electors
- Dyfed-Powys has the smallest number, at 400,000, but the largest area, at 4,287 square miles
- 12 independent PCCs were elected in 2012

Spending limits:-

- West Midlands £357,435
- Dyfed-Powys £72,622

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5670/1878324.pdf

Personal smears

Article 61 of the Police and Crime Commissioner Elections Order 2012 renders the maker or publisher of a **false statement of fact** in relation to a PCC candidate's **personal character or conduct** before or during a PCC election and for the purpose of affecting the election guilty of an **illegal practice**, unless he can show that he had reasonable grounds for believing, and did believe, the statement to be true.

Note that statements about a candidate's **political** conduct are not caught by this provision, the electorate being thought to be able to see through political attacks, no matter how unfair or baseless, presumably, with the help of a political counter-attack by the original victim.

The High Court or County Court may restrain the repetition of such a statement by means of an injunction (including on an interim basis, during the election). An election court is the forum for determining a claim that a person is guilty of such an illegal practice (or indeed of a corrupt practice) and declaring the election of the successful PCC void.

Publications and social media

It is an offence to publish by any means, before the polls close, a statement in any form relating to the way in which voters have voted at the election, or forecast of the result, if the statement/forecast is based on information given by voters after they have voted or if it might reasonably be taken to be so based (even if it is not). There is a real danger of over-enthusiastic social media posts on polling day having this effect.

The aim of this prohibition is to prevent electors from being induced to change their vote, or their decision whether to cast a vote, depending on which candidate they think is winning.

The conventional media

Broadcasters are subject to impartiality requirements in relation to matters of political controversy. In the case of the BBC, this obligation arises under its (Royal) Charter and its Agreement with the Culture Secretary. The latter requires **due** accuracy and **impartiality**. It has published its Election Guidelines 2016 which apply to the May 2016 elections.

S.320(1)(b) of the Communications Act 2003 requires commercial television and national radio services to preserve the broadcaster's **due impartiality** on matters of political controversy. Obviously, a series of programmes, focusing on each of the main candidates in an election, is to be judged as a whole for impartiality.

In the case of local radio services, many of which are traditionally more controversial than their national counterparts, the requirement is softened (in s.320(1)(c)) to the prevention of the giving of undue prominence to the views and opinions of particular persons. Sitting PCCs standing for re-election and candidates with political 'baggage' may wish to scrutinise local broadcasts for balance.

CORRUPT PRACTICES

- Disqualification from voting or holding elective office for 5 years
- ≤ 2 years' imprisonment

ILLEGAL PRACTICES

- If an attack on a candidate infringes Article 61, the maker or publisher is guilty of an illegal practice
- A person guilty of an illegal practice:-
 - may be reported to the Director of Public Prosecutions
 - may be prosecuted and fined
 - may neither vote in an election nor (continue to) hold any elective office for 3 years
 - if he was elected as PCC, he must vacate that office

BROADCAST AND PRINT RESTRICTIONS

- Television and national radio services must preserve **due impartiality** with the views of all candidates with significant support being reflected
- Slightly less control on local radio – prohibition of **undue prominence**
- No specific statutory controls on the Press. Editors Code of Practice policed by IPSO.
- Most, but not all, titles have agreed to be regulated by IPSO

There is no requirement for the Press to be impartial, the reverse long being its tradition. The Independent Press Standards Organisation (IPSO) administers the Editors' Code of Practice, which applies to the majority of the print and online titles which have agreed to be regulated by it. That Code requires accuracy but not political impartiality.

Spending and donations

The rules on spending by and donations to candidates are complicated. No more than 70 days after the election, the candidate must send a spending and donations return to the Police Area Returning Officer (PARO).

A candidate who fails to put in a return is disqualified from being elected or being a PCC but he may apply to the Court for relief (see later). The candidates' returns and declarations are open to public inspection for 2 years and those elected can expect scrutiny.

Every police area has a vastly larger population than any parliamentary constituency. Welsh Parliamentary constituencies average 54,000 electors and those in England average 70,000. This contrasts with the smallest police area by population, Dyfed-Powys, with an electorate of just under 400,000. The West Midlands police area has about 2,000,000 electors – the largest PCC electorate in May 2016 – though a size of only 348 square miles. This compares with Dyfed-Powys again, which covers an area of 4,287 square miles – over half of Wales. Such a constituency will be very hard to cover.

The spending limits vary vastly too with that of West Midlands being £357,435, dwarfing that of Dyfed-Powys at only £72,622.

Items and services provided to candidates free of charge or at a greater than 10% discount (also being greater than £50) count in full, but unpaid volunteers' time (as opposed to time when they are provided by their employers) and the use of a person's main residence or personal means of transport does not count. The use of school rooms for meetings, free of charge, to which candidates are entitled, do not count as expenses or donations. Candidates must keep receipts or invoices for expenditure exceeding £20.

All invoices must be received by the candidate no later than 21 days after declaration of the result and they must be paid within 28 days of the result. Election expenses which are invoiced later than 21 days after declaration of the result, or which remain unpaid more than 28 days after declaration, cannot be paid by the candidate without a court order permitting payment.

Donations in excess of £50 must be reported. They include non-commercial rate loans and greater than 10%/£50 discounts from the cost of goods or services (which are therefore reportable as both expenses and donations). In general, permissible donations will be from a UK source. Candidates must police the source of their donations themselves, having 30 days in which to decide whether the donation comes from a permissible source or to return it.

Candidates will be well advised to keep very careful records of expenditure and donations and to ensure that their election agent is *au fait* with the rules. Although a candidate may be his own election agent, the financial rules alone show why this is likely to be unwise.

KEY TAKEAWAYS

- Spending and donations return is due within 70 days of the election
- The return is open to public inspection for 2 years
- Donations in excess of £50 must be reported
- Candidates are responsible for ascertaining the source of such donations
- They include loans, goods or services discounted by more than 10%, where the discount is above £50
- All election expenditure other than the use of a person's main residence and personal transport must be reported
- Goods and services discounted by more than 10% and above £50 must be reported at full value, but unpaid volunteers need not be
- Invoices for election expenses must be received within 21 days, and paid within 28 days, of the election result
- Late invoices, and those not paid within 28 days of the result, cannot be paid without a court order

Convictions

Despite the slightly oddly framed job title, if taken literally (“Police and Crime Commissioner”), this is not an office for either cops or robbers. Both police officers (including special constables) and those convicted (at any time or age) of offences for which an adult offender may be imprisoned are disqualified from standing for election. Many a youthful indiscretion, e.g. a conviction of a minor shoplifting offence, will suffice – no matter how old. Falklands War veteran Simon Weston was unable to stand as PCC for his local police force because of minor offences committed when he was aged 14 years. Mr. Weston’s brush with the law apparently set him on his path to active military service which resulted in his enduring great suffering with dignity. Many would say that he is exactly the sort of person who should be able to serve his local community as PCC. But the legislation is clear.

WHICH CONVICTIONS CAUSE DISQUALIFICATION?

- Any UK, Channel Islands or Isle of Man conviction for which an adult could be imprisoned
- Probably not foreign convictions
- Age at conviction or of conviction is irrelevant, as is the actual sentence served
- Convictions for offences now abolished probably do not count

The wording of the disqualification provision (s.66(3)(c) & (4)(a) of the Police Reform and Social Responsibility Act 2011 (“PRSRA”)) appears not to catch those convicted of old offences now abolished (e.g. the criminal libels, homosexual offences, attempted suicide, etc.). It does not bar those imprisoned for contempt of court, no matter how serious, or those convicted of offences outside the UK, Channel Islands and Isle of Man.

A convicted criminal serving a sentence of imprisonment is not entitled to vote during the time he is in prison. This is said to lead to odd results: the murderer of a police officer, released the day before polling day, can vote in the PCC (or any) elections, whereas a shoplifter, serving a 3-day sentence keeping him in prison on polling day, cannot. The European Court of Human Rights has controversially ruled that this blanket ban violates the European Convention on Human Rights (Article 3 of Protocol 1) ([Hirst v United Kingdom](#) (2006) 42 EHRR 41).

Court proceedings

Court proceedings can arise in three ways following a PCC election: 1) By a candidate applying for relief having been responsible for an illegal practice, payment, employment or hiring; 2) by an unsuccessful candidate **or** 4 or more voters presenting an election petition alleging that the elected party was disqualified or not duly elected; or 3) by **any person** applying for a declaration that the elected PCC is, or at any time since being elected **has been**, disqualified.

Applications for relief

S.167 of the Representation of the People Act 1983 applies to PCC elections. This allows a person to apply to a court for relief if they have been responsible for an act or omission which would amount to an illegal practice, payment, employment or hiring. Obviously, it is not possible to seek relief for a corrupt practice.

An application for relief is normally made to the High Court or to an Election Court. Upon making the application the applicant must notify the Director of Public Prosecutions who is entitled to be represented at the hearing of the application (although experience suggests that she will usually not exercise this entitlement).

KEY FACTS

- A successful candidate can claim relief having been responsible for an illegal practice.
- It is not possible to claim relief for a ‘corrupt practice’.
- Others can start court action to question the result of an election or the entitlement of a PCC to remain in office.

To gain relief the applicant must show that *“the act or omission arose from inadvertence or from accidental miscalculation or from some other reasonable cause of a like nature, and in any case did not arise from any want of good faith”*. The Court must also consider that it would be just that the election should not be voided (and the applicant not subject to sanction). Unusually this is an area in which ignorance of the law **can be** a defence. In **Finch v Richardson** [2009] 1 WLR 1338, the successful candidate in a local government election (who had previously been the senior partner in a multi-national law firm and had participated in countless previous elections) incorrectly completed his return of expenses. He explained that he had not been aware of the rules for accounting for certain costs and successfully argued that his ignorance demonstrated inadvertence.

Before an application for relief is determined, the Court will give directions requiring notification of the application ‘in the police area’. In practice it is likely that an applicant will be required to notify the returning officer, the other candidates and their agents and any political parties who participated in the election. It is also possible that the Court will direct that advertisements are placed in the local press. The Court **must** be satisfied that such notification has been given before granting relief and the costs of notification will be borne by the applicant.

The Court will hear the applicant and can also hear unsuccessful participants in the election. It is possible for a defeated candidate to argue that relief should not be given.

Election petitions

An unsuccessful candidate or four or more electors can present a petition alleging either that the elected candidate was disqualified or that they were not duly elected.

The time limits for presenting a petition are strict: usually it must be submitted within 21 days of the election, however different time limits exist if it is alleged that there was a corrupt or illegal payment after the election took place.

The petition itself must be in the form specified by the Election Petition Rules 1960. It is **vital** important that the detail of these rules is appreciated. Courts can and do strike out election petitions which are formally invalid.

After the petition is presented, a series of obligations on the petitioner become live. For instance, three days after the petition is presented, the petitioner must apply to a Queen’s Bench Master for a direction fixing the sum of money he is required to set down by way of security for costs (which cannot exceed £5,000). After the petition has been presented it is open to others concerned in the election to object.

At the trial of the petition the burden of proof is on the petitioner and the standard of proof is the balance of probabilities in relation to specific allegations of corrupt and/or illegal practices. However, if a petitioner seeks to argue that the election should be voided on the basis of ‘general corruption’ (contrary to s.164 of the **Representation of the People Act 1983**) then it must be proved beyond reasonable doubt (see **Ali v Bashir** [2013] EWHC 2572 (QB)).

The trial of an election petition will take place in the police area in question and will usually be heard by a senior lawyer appointed to act as a ‘Commissioner’. Before the petition is heard the court may give directions for a ‘scrutiny’, at which the retained ballots are unsealed and examined under conditions of

TRAPS FOR THE UNWARY

- Election petitions can be struck out including for technical failures. It is vital that the terms of the Election Petition Rules are followed.
- A petitioner must apply for a direction as to the security for costs to be provided. A third party can stand surety for the petitioner but this should be arranged in advance.
- Allegations of ‘general corruption’ must be proved to a higher standard.

IN A NUTSHELL: ELECTION PETITIONS

- Election petitions can be presented in order to argue that the election was invalid or the candidate disqualified.
- There are strict time limits for the presentation of a petition and detailed requirements for the form of the petition.
- If corrupt or illegal practices are proved, or if there was ‘general corruption’, the election will be void.

secrecy (but with the parties in attendance) to analyse whether any corrupt or illegal practices have occurred.

If the trial of the petition confirms corrupt or illegal practices then the election will be voided, and a fresh poll held. Anyone found to have committed corrupt or illegal practices is barred from participating in that poll (and other elections), whether as a voter or as a candidate, for 5 or 3 years respectively.

Declarations of disqualification

S.71 of the **Police Reform and Social Responsibility Act 2011** provides that any person claiming that a PCC is, or at any time since being elected has been, disqualified can apply for a declaration from the High Court to that effect.

This power cannot be exercised if an election petition is pending. Instead it is a wider jurisdiction (which can be deployed by **anyone** and not just electors or rival candidates) to test whether a PCC is disqualified.

Rather like the trial of an election petition, an applicant under section 71 must provide security for costs (in an amount not exceeding £5,000).

The terms of s.71 provide that a decision on this ground is 'final', meaning that there is no right of appeal, nor any possibility of challenge by way of judicial review (because the High Court is a court of unlimited jurisdiction which is not susceptible to judicial review). It follows that a PCC threatened with such an application should proceed with considerable caution. That said, to date the s.71 jurisdiction has never been invoked.



Dijen Basu QC is a barrister of over 21 years' standing, specialising in police and public law. He has represented police forces in a number of important cases, such as *Koraou* (one of the first two cases to jointly reach the Court of Appeal concerning the investigatory duty arising under Article 3 ECHR) and *Mackaill* (a judicial review concerning the IPCC's approach to the conduct of Police Federation officials following 'Plebgate'). He is currently representing the Chief Constable of Surrey (with Robert Cohen) in the inquest into the death of Alexander Perepilichnyy (a wealthy Russian whistleblower whose death while jogging in November 2012 remains unexplained). The main legal directories describe Dijen thus: "*first-rate*", "*has sound judgement*" and "*is a real expert on police law*" (Chambers UK 2014); "*knows his stuff*" and is "*spot on in his analysis*" (Chambers UK 2013); "*Well regarded for cases involving the medical profession and police*" (Legal 500 UK 2015); "*He is very pleasant to work with and conveys confidence.*" (Chambers UK 2016). Dijen is also a doctor of medicine and has a helicopter licence.



Robert Cohen was called to the Bar in 2009. He has specialised in police law since 2012, having previously been a legal adviser to the Speaker of the House of Commons. He has successfully represented the police in the Court of Appeal and has acted in a number of high profile inquests, including that relating to the death of Frances Andrade (a victim of childhood sexual abuse who killed herself after giving evidence against her attacker). Robert is currently involved in defending a number of complex civil actions against the police and is junior counsel for the Chief Constable of Surrey in the high profile inquest into the death of Alexander Perepilichnyy.

5 Essex Court

5 Essex Court has a strong reputation in all areas of police and public law. Our members have a formidable and unrivalled record of appearance in almost every recent case or inquiry of substance concerning the police.

Examples include:

- | | | |
|--|----------------------------------|-------------------------------|
| ◆ Stephen Lawrence Inquiry | ◆ Hutton Inquiry | ◆ Bichard Inquiry |
| ◆ Leveson Inquiry | ◆ '7/7' London bombings Inquests | ◆ Hillsborough Inquests |
| ◆ The recent terrorist attack in Tunisia | ◆ Goddard Inquiry | ◆ Undercover Policing Inquiry |

Members of Chambers have considerable experience in advising and acting for PCCs. Examples include:

- ◆ The removal of a chief constable found guilty of sexual harassment
- ◆ Proposed disciplinary action against a chief constable arising out of a murder investigation
- ◆ Advising a PCC on a joint venture with another public authority to pool vehicle maintenance services
- ◆ Requiring a chief constable to move his current headquarters to a more cost-effective location
- ◆ Advising the PCC on potential civil claims arising out of a large inquest
- ◆ Where responsibilities lie as between the PCC and the chief constable for asset sale and purchases
- ◆ The appointment of an acting PCC
- ◆ Advising and acting for a Police and Crime Panel in the course of a scrutiny hearing
- ◆ The powers and role of the chief executive
- ◆ Defending a PCC against a claim by a football club for overcharging for special police services
- ◆ A claim by a PCC to recover the cost of a police escort for vehicles delivering wind turbines

Our specialist set of chambers comprises 6 Queen's Counsel and 36 barristers. We are uniquely placed to provide advice and guidance to PCCs across the broad range of legal issues which they may face when discharging their duties. Many members of Chambers are able to be instructed by clients on a 'direct access' basis, without requiring a solicitor, and this may prove suitable for PCCs.

As a chambers, we pride ourselves on being approachable and client-focused. We have a first class clerking team, led by our senior clerk, Mark Waller. They will be delighted to assist with any enquiry, however small, about the services we can provide. Where necessary, Mark will be able to suggest the names of solicitors, experienced in police law, to assist PCCs.

CHAMBERS UK BAR
GUIDE 2016 RANKS
5 ESSEX COURT AS:

*“the premier police
law defendant set”*