

**SUBMISSION TO HOME AFFAIRS COMMITTEE INQUIRY  
INTO POLICE AND CRIME COMMISSIONERS**

- from -

**James Berry, barrister and editor of the UK Police Law Blog**

**Introduction**

1. This submission focuses on the following headings in the HAC's call for submissions:
  - (A) The role of commissioners (PCCs) in holding their Chief Constables to account;
  - (B) The role of police and crime panels (PCPs) in holding their PCCs to account.
2. It seeks to identify causes for concern in the operation of the new police governance regime that are worthy of investigation by the HAC, and to outline proposed solutions to those problems.

**Update on litigation between PCCs and Chief Constables since November 2012**

3. In the year since PCCs took office, two disputes between PCCs and Chief Constables have reached Court: *Port v Mountstevens* (Avon & Somerset Police) and *Rhodes v Hardwick* (Lincolnshire Police). The first case concerned the non-extension of a Chief Constable's fixed term appointment and arose out of a dispute that began on the very day the PCC took office. The second case involved the rationality of a PCC's decision to suspend his Chief Constable.<sup>1</sup> Other disputes between PCCs and their Chief Constables have been reported in the press, but none of these have reached Court.

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<sup>1</sup> Under the regulation 10 of the Police (Conduct) Regulations 2012.

**(A) The role of PCCs in holding their Chief Constables to account**

4. This submission focuses on the formal mechanisms PCCs have to hold their Chief Constable to account under the Police Reform and Social Responsibility Act 2011 s.38 and the Police (Conduct) Regulations 2012. It is recognised that this is only one aspect of the broader framework under which PCCs holds their Chief Constables to account, but it is the aspect that has caused the most controversy and interested the HAC.

***The circumstances in which the PCC can remove their Chief Constable remain unclear***

5. Section 38(3) of the Police Reform and Social Responsibility Act 2011 provides that:

“The police and crime commissioner for a police area may call upon the chief constable of the police force for that area to resign or retire.”
6. Section 38(4) requires Chief Constables to retire or resign when they are called upon to do so by their PCC. Part 2 of Schedule 8 sets out a detailed process of scrutiny by the PCP that must be followed by a PCC before s/he invokes the power to remove the Chief Constable under s.38(3).
7. Section 38(3) is entirely silent on the grounds upon which a PCC may remove their Chief Constable. No light is shed on this question by any associated legislation or guidance. This is surprising.
8. Under the previous police governance regime, pursuant to s.11(2) of the Police Act 1996, a Police Authority (acting with the approval of the Secretary of State) was able to remove a Chief Constable: *“in the interests of efficiency or effectiveness.”* That definition, though far from comprehensive, was a useful guide for Police Authorities as to the circumstances in which their power of removal was engaged.

9. Under the old regime, there was also detailed guidance in the form a Protocol (March 2004) agreed by the Home Office, the Association of Police Authorities, the Association of Chief Police Officers and the Chief Police Officers' Staff Association. This dealt with the exercise of the power of removal under s.11(2) of the Police Act 1996 as well as the power of suspension under s.11(3A) (as to which, see below).
  
10. Returning to the Police Reform and Social Responsibility Act 2011, it seems clear that:
  - a. A PCC must exercise his or her power under s.38(3) consistently with public law principles of lawfulness, rationality and non-discrimination;
  - b. A PCC may use s.38(3) where s/he has serious concerns about the Chief Constable's performance. The Police (Performance) Regulations 2012 do not apply to Chief Constables (or other Senior Officers);
  - c. A PCC may not use s.38(3) where s/he has concerns about the Chief Constable's *conduct*. There is a separate and detailed regime for police officer misconduct under the Police (Conduct) Regulations 2012, to which s.38 is expressly subject (see s.38(7)).
  
11. While it may have been Parliament's intention not to circumscribe the grounds upon which a PCC may remove their Chief Constable, the lack of any criteria or guidance means that the question of the proper parameters of the s.38(3) power of removal is likely to be asked in Court. The answer may not be one which the Home Office or Parliament intended. That outcome could be avoided by clarifying the grounds upon which the s.38(3) power of removal may be exercised, whether by amendment to the legislation or in Home Office Guidance or an agreed Protocol.

***The PCC's power to suspend their Chief Constable is unclear and there is no system of safeguards***

12. Section 38(2) of the Police Reform and Social Responsibility Act 2011 provides that:

“The police and crime commissioner for a police area may suspend from duty the chief constable of the police force for that area.”

13. Again, the grounds for suspension are not specified, nor is there any accompanying guidance. There is also no system of safeguards to ensure that suspensions are fair and proportionate.

14. The power to suspend the Chief Constable in “efficiency or effectiveness” cases under the old police governance regime did prescribe clear grounds for suspension. Section 11(3A) of the Police Act 1996 provided:

“A police authority... may suspend from duty the chief constable of that force if-

(a) it is proposing to consider whether to exercise its power under subsection (2) to call upon the chief constable to retire or to resign and is satisfied that, in the light of the proposal, the maintenance of public confidence in that force requires the suspension

...”

15. The absence of any grounds or safeguards for a suspension under s.38(2) is stark, especially when compared with the provision for suspension of police officers (of all ranks) in misconduct cases under regulation 10 of Police (Conduct) Regulations 2012. Regulation 10 offers:

- a. **Clear grounds** upon which an officer may be suspended – including that *“having regard to the nature of the allegation and any other relevant considerations, the public interest requires that he should be so suspended”*; and
- b. **A system of clear safeguards** including the need to supply the suspended officer with written reasons for his or her suspension, to consider any submissions by the officer as to whether the suspension should continue and to review the suspension on a monthly basis.

16. Not only does s.38(2) contain no grounds or safeguards for suspension, but also there is no supporting guidance to assist PCCs who are considering whether to exercise their power to suspend the Chief Constable. By contrast, pp.19-21 of the *Home Office Guidance on police officer misconduct, unsatisfactory performance and attendance management procedures* (2012) offers guidance for PCCs considering whether to suspend the Chief Constable under the misconduct regime. Under the old police governance regime, guidance was provided on suspension of Chief Officers in non-misconduct cases in the March 2004 Protocol.
17. Suspension is often described in both the employment and regulatory fields as a “neutral act”, but the person suspended and the public are unlikely to perceive it that way. Chief Constables are rightly under public scrutiny. As a result, a suspension is highly likely to be damaging to a Chief Constable’s professional reputation and to public confidence in the police. This may be so even if the suspension is eventually revoked. There is ample justification for clear grounds for suspension and safeguards in the suspension process to be specified by amendment to the s.38(2) (or in guidance or a protocol).
18. In conclusion:
  - a. There is a strong case to be made that the power to suspend under s.38(2) requires **amendment** to specify both the grounds upon which a Chief Constable can be suspended and a system of safeguards similar to that under regulation 10 of the Police (Conduct) Regulations.
  - b. There is an equally strong case for **guidance**, be it Home Office Guidance or an agreed Protocol, as to the operation of the PCC’s power to remove the Chief Constable (under s.38(3)) and the PCC’s associated power to suspend the Chief Constable (under s.38(2)).

The nebulous nature of both of these powers leaves them open to misapplication or, worse still, abuse; and in either case they are likely to be tested in the Courts, which is not the mark of satisfactory legislation.

## **(B) The role of PCPs in holding their PCCs to account**

19. PCPs have been criticised, including by the HAC, for not holding their PCCs to account. It is important to note, however, that the PCP's powers to hold their PCC to account are very limited. There is no Code of Conduct for PCCs and the PCP has no power to discipline, less still dismiss their PCC.
20. Although the PCP's powers are limited, they are important. They need to be understood by PCPs which are constituted largely, if not exclusively, by volunteers. It seems to be the case that PCPs would benefit from a single, clear, Home Office Guidance document setting out the extent of their powers and how and when they can and should be applied.<sup>2</sup>

### ***Involvement of the PCP in decisions about extensions to the Chief Constable's fixed term appointment***

21. The HAC might wish to explore the possibility of extending the remit of the PCP to scrutiny of their PCC's decision to extend (or not to extend) the Chief Constable's fixed term appointment.
22. Chief Constables serve for fixed terms (eg. 5 years) pursuant to regulation 11(2) of the Police Regulations 2003. At the expiry of a Chief Constable's fixed term, it can be extended by mutual consent. If the PCC does not extend the Chief Constable's fixed term appointment, it expires and s/he simply ceases to hold the office of Chief Constable.
23. Schedule 8 of the Police Reform and Social Responsibility Act 2011 gives the PCP a significant role in scrutinising their PCC's decisions both in respect of the appointment and the removal of a Chief Constable. It would

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<sup>2</sup> The Home Office has already produced useful guidance to PCPs on the specific issue of handling non-serious complaints against PCCs.

be consistent with these powers if PCPs were also given the role of scrutinising the PCC's decision to extend or not to extend a Chief Constable's fixed term appointment.

24. Under the old police governance regime, a Police Authority's decision to extend a Chief Constable's fixed term appointment was scrutinised by the Home Office Senior Appointments Panel. While this would not be consistent with the aim of "localising" police governance, scrutiny by the PCP (with the option of advice from HMIC where necessary) would be in step with the philosophy of the new governance regime. It would also help to guard against capricious decisions by a PCC to refuse to extend a Chief Constable's fixed term appointment.
25. It is likely that the detailed scrutiny processes for appointment and removal of Chief Constables under Schedule 8 would have to be truncated to create an efficient procedure for scrutiny of fixed term appointment decisions by the PCP.

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### **Declaration of Interest**

I am a barrister specialising in public and police law. I edit the UK Police Law Blog. I am co-author of the forthcoming second edition of *Police Misconduct, Complaints and Public Regulation* (OUP). I have been involved in the two cases involving PCCs that have reached Court (*Port v Mountstevens* and *Rhodes v Hardwick*) and I advise Chief Constables and PCCs on a variety of legal issues.