

Changes to the *Misconduct Regime,* *Appeals and Judicial Review*

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Introduction

1 Recent months have seen significant changes to the police misconduct regime with the demise of legally qualified chairs and increased public and political focus on the efficacy and fairness of police misconduct proceedings. Whilst the number of appeals appears, in our anecdotal experience, to be significantly below the level it once was,¹ a fair number of judicial review challenges have been brought to the conduct and outcomes of Gross Misconduct Hearings. We expect such challenges to continue as the new chief officer chairs assume their roles. We include, at the end of this paper, practical tips for avoiding and defending such challenges if brought.

Recent and proposed changes

Code of Ethics/Code of Practice

2 As of 26 January 2024, there is a 'new' **Code of Ethics**, split into two parts:

- i) **Part 1:** Ethical policing principles – these are a series of “*guiding statements...to help people in policing do the right things, in the right way, for the right reasons*”;²
- ii) **Part 2:** Guidance for ethical and professional behaviour in policing.

3 The Code of Ethics 2024 is **not statutory** and “*has the same status as the other guidance produced by the College*”,³ which generally means there will need to be a “*good reason*” to depart from it.⁴

4 The Code of Ethics, albeit now in two parts, performs a similar function as the previous Code of Ethics (published July 2014) in setting out further explanatory wording, directed to **all** officers (c.f. chief officers) to the Standards of Professional Behaviour within Schedule 2 of the Police (Conduct) Regulations 2020 (“PCR”). Part 1 contains a final section “mapping” the Code of Ethics (2014) policing principles to the ethical policing principles in the 2024 version.

5 There are some important additions to the 2024 version, for example Part 2 contains a new section on “Social media and instant messaging” which includes the following:

“We think about how others may perceive our social media activities, whether at work or at home

- *we use social media responsibly, safely, positively and appropriately, knowing the value it can create for community engagement*
- *we do not post any discriminatory, abusive, oppressive, harassing, bullying, victimising or offensive material, or post material that is otherwise incompatible with the ethical policing principles, whether on-duty or off-duty*
- *we do not post any material that could undermine the reputation of policing or might run the risk of damaging public trust and confidence in our profession*
- *our membership of any social media group does not undermine the reputation of the profession*
- *we recognise that information posted online or in private chats can be shared publicly*
- *we do not disclose information that places ourselves, colleagues or operational tactics at risk*

We recognise that using social media, even when it is out of work and in our private lives, may still breach regulations or the terms of our employment if it discredits the police service as a whole or undermines public confidence in it.”

6 The Code of Ethics can be relied upon in police misconduct proceedings on the basis that it has been disseminated as guidance to “*everyone in policing*”.⁵

- 7 However, the non-statutory basis of the 2024 version (unlike its predecessor)⁶ and the fact that it post-dates the introduction of the PCR 2020⁷ could lead to dispute about its applicability in cases where its contents are said to depart from the Standards themselves and/or the (statutory) Home Office Guidance published in February 2020.⁸ It is notable that, for example, the sections on Equality & Diversity and Confidentiality go well beyond the Standards of Professional Behaviour themselves.
- 8 Likewise, it is unlikely to be appropriate to rely upon the Code of Ethics in relation to conduct pre-dating its publication, i.e. conduct before January 2024.
- 9 The Code of Ethics is supported by the **Code of Practice for Ethical Policing**, first published on 7 December 2023. This is a statutory Code of Practice⁹ which “provides chief officers with direction on promoting and supporting ethical and professional behaviour within their forces”.¹⁰ Because of its statutory footing, a failure to follow the Code of Practice is likely to be unlawful. Notable sections include, inter alia:
- a. Requiring chief officers to promote “*ethical, professional and respectful behaviour through force processes, policies, and reward and recognition systems that promote positive behaviours and actions*” ([4.2]) and “*Through messaging, guidance and training, [provide] absolute clarity that all forms of bullying, harassment and discrimination are completely unacceptable*” ([4.3]).
 - b. A definition of vulnerability: “*a person is vulnerable if, as a result of their situation or circumstances, they are unable to take care of or protect themselves or others from harm or exploitation*” ([4.2]).
 - c. A duty on chief officers to ensure openness and candour, including implementing the Charter for Families Bereaved through Public Tragedy (lessons from Hillsborough; [4.5]) in inquests and public inquiries.
- 10 The Code of Practice is, similarly, forward-looking (it cannot have effect before January 2024) and is likely to be relied upon in proceedings beyond misconduct, such as employment claims and inquests, since it outlines a range of duties on chief officers to ensure that policies and procedures have been complied with.

Composition of panels

- 11 As of 7 May 2024 the composition of the Panel at a Gross Misconduct Hearing (“GMH”) under the PCR has changed:
- a. From a legally qualified chair (“LQC”), a police member and an independent member;
 - b. To a senior officer or staff equivalent – i.e. police-chair¹¹ and two independent members, one with “*qualifications or experience relevant for the purpose of disciplinary proceedings*” (likely to mean senior leadership, HR or GMH experience) and one purely lay member.¹²
- 12 In senior officer cases:
- a. the police chair must be a senior officer of a different police force to that of the accused officer, who is more senior than the accused officer; ¹³
 - b. for Chief Constables (and Deputy/Assistant Commissioners of the Metropolitan Police) the chair must be HM Chief Inspector of Constabulary (“HMCIC”) or an inspector nominated by HMCIC, appointed by the local policing body. ¹⁴

- 13 The Panel in all GMHs, and the chair in all senior officer accelerated misconduct hearings (“AMHs”) is now advised by a ‘legally qualified person’ (“LQP”)¹⁵ – some of whom are former LQCs. LQPs have no decision-making role: they advise the Panel (or chair) on legal and procedural issues at the GMH and any misconduct pre-hearing and the panel is required to have regard to their advice, Reg 28(5C)–(5D). Although the chair may delegate responsibility for preparing the Reg. 43 outcome report to the LQP, the chair must satisfy him/herself with the content of the report before it is finalised, Reg 43(1B)–(1C). It is important for LQPs to put any advice they provide to the Panel/chair on the record – i.e. to provide it, publicly, in the hearing – in the interests of transparency and so that any objections to the advice provided, by the officer or the presenting side, can be addressed: see Reg 41(14A).¹⁶
- 14 Objections may be taken by the officer to the LQP as well as to the panel members¹⁷ and there are now provisions dealing expressly with conflicts of interest for panel members and LQPs, reflecting common law principles of bias (new Reg. 12A).¹⁸
- 15 Because the Reg. 30 notice must contain details of the panel and LQP,¹⁹ service of the Reg 30 notice determines which provisions apply (pre or post May 2024). Currently, cases are being heard under both regimes.

16 It seems highly likely that misconduct hearings, which determine the (former) officer’s ability to pursue his/her chosen profession in policing (whether as a police officer or otherwise) as a result of the officer’s name being placed on the barred list for at least 5 years following dismissal (or the cognate finding for a former officer), constitute the determination of their civil rights or obligations and which therefore engage the right, pursuant to Article 6 ECHR, to an independent and impartial tribunal.²⁰ Officers facing misconduct hearings may now argue that the police members of the panel will not be independent and impartial unless the officers (or equivalent) are selected from an unconnected force, as will now happen in senior officer cases. However, it is arguable, viewing the misconduct scheme overall i.e. including the officer’s right of appeal to an (independent) Police Appeals Tribunal, that compliance with Article 6 ECHR is still achieved.

Planned reforms

- 17 On 24 October 2024 the Home Secretary, Yvette Cooper MP, outlined a package of planned reforms (some though not all of which had been suggested by the previous Government) including:²¹
- a. a presumption of anonymity for firearms officers facing criminal proceedings following police shootings, until the point of a conviction;
 - b. raising the threshold for the Independent Office for Police Conduct (“IOPC”) to refer police officers to the Crown Prosecution Service “so that only cases that have a reasonable prospect of conviction are referred – as is already the test for members of the public suspected of committing a crime”²² and placing the IOPC victims’ right to review policy on a statutory footing;
 - c. a “rapid independent review” to consider the legal test for use of force in misconduct proceedings and the threshold for unlawful killing in inquests, currently the civil standard²³ – the review is to be chaired by Tim Godwin OBE QPM and Sir Adrian Fulford PC and to report by the end of January 2025;²⁴
 - d. the creation of a national “lessons-learned” database for deaths or serious injuries following police contact or pursuits “to ensure findings are incorporated into future training and guidance”;
 - e. placing vetting standards on a statutory footing and “empowering Chief Constables to promptly dismiss officers who fail their vetting”;

- f. strengthening requirements relating to the suspension of officers under investigation for violence against women and girls;
- g. ensuring that officers convicted of certain criminal offences²⁵ are automatically found to have committed Gross Misconduct; and
- h. creating a presumption of dismissal in Gross Misconduct cases.

18 The precise content and overall timescales for these planned reforms remain uncertain.

Appeals

19 The previous Government's proposed reforms included the introduction of a right of appeal on behalf of the presenting side (the Appropriate Authority ("AA") under the PCR) to counter-balance the officer's automatic right of appeal under rule 4 of the Police Appeals Tribunals Rules 2020.²⁶

20 In the absence of any such right, the AA's remedies at the conclusion of proceedings under the PCR, which do not culminate in the officer's dismissal, are confined to:

- a. Judicial review of the conduct or outcome of the GMH (or AMH);
- b. Resisting any appeal by the officer to the Police Appeals Tribunal ("PAT");
- c. Judicial review of the decision of the PAT.

21 A number of judicial review challenges have been brought by Chief Constables to the reasoning and/or decisions of PATs to substitute lesser outcomes, some of which have been successful (e.g. on the basis that the PAT failed to follow the College of Policing Guidance on Outcomes²⁷ or on the basis that the PAT misdirected itself in law)²⁸ but some of which have not.²⁹ These cases demonstrate the importance of 'getting it right first time' so that any appeal to the PAT can be resisted, including on the papers³⁰ or, better still, avoided altogether, without recourse to judicial review.³¹

22 However, where a PAT's decision does fall to be challenged, the following considerations arise.

23 In *R (on the application of Commissioner of the Police of the Metropolis) v PAT* [2024] EWHC 2348 (Admin) the Administrative Court (Lieven J) agreed with the Commissioner that the PAT had erred in deciding that a Panel's finding of Gross Misconduct, and the officer's subsequent dismissal, was unreasonable. The facts, briefly stated, were that:

- a. K had been appointed the officer in charge of an investigation concerning domestic abuse allegations made by a woman (B). Two weeks after K had been moved to another role within the force, B's husband set fire to B's home. B died nine days later and her husband was convicted of murder.
- b. Following an IOPC investigation, K was notified of allegations that she had failed adequately to investigate domestic violence offences reported by B and had wrongly and knowingly assured her superior officer that instructions in an action plan had been carried out.
- c. K provided a written response, but in May 2022 was dismissed for Gross Misconduct. In March 2023, the PAT set aside that decision on the basis that the Panel had not dealt with K's 'legal argument', which was essentially that her defaults were attributable to her dyslexia and dyspraxia disabilities and were therefore a matter of 'performance' and not 'conduct'. The PAT remitted the matter to a fresh Panel.

24 The Administrative Court accepted the Commissioner's submission that the Panel's key finding – that K had deliberately misled the Panel on important issues – was a matter which could

reasonably lead to a finding of Gross Misconduct. K had, fundamentally, changed her case before the PAT, as compared to her case before the Panel, by advancing her medical conditions as reasons for why she might have been muddled or mistaken in her evidence to the Panel, whereas before the Panel her case had been that the allegations were simply untrue – evidence which the Panel had rejected, finding that K had deliberately lied to the investigator and deliberately misled the Panel on the key factual issues in order to “*muddy the waters*” (see [151] to [156]). Importantly, there was no evidence before the PAT to explain how K’s disabilities had any causative link to the findings the Panel had made against her, and neither dyslexia nor dyspraxia had any obvious causative link to K being untruthful in her account of events (at [157]–[161]).

25 The learning to draw from this case is that the Administrative Court is not very well-equipped to adjudicate judicial review claims arising from police misconduct proceedings. In this case, the deputy judge who dealt with permission to seek judicial review appeared not to have got to grips with the legal issues and adjourned the question of permission into Court. The judge by whom permission was then heard also had difficulty with the police misconduct regime. The judge who heard the substantive claim candidly explained that she had no experience in this area and needed considerable assistance from the parties.

26 This problem illustrates the advantage of allowing the Chief Constable a right of appeal to a (specialist) PAT against an adverse misconduct hearing panel’s decision, rather than making a claim for judicial review.

27 The officer has applied to the Court of Appeal for permission to appeal.

Judicial review

28 In our anecdotal experience, judicial reviews by the AA of decisions of the Panel at a GMH have gradually risen in the past 5 years; whether this trend continues with the re-introduction of chief officer chairs remains to be seen.

29 Most reported cases have involved ‘severity’ challenges to the imposition of final written warnings, i.e. an outcome short of dismissal, based on alleged failures by the Panel to apply the structured approach to seriousness and sanction outlined in the College of Policing Guidance on Outcomes.³² A recent – successful – challenge to the decision of a Panel to impose a final written warning on an officer who had misused his police warrant card, and used racist language about a black doorman at a nightclub, on the basis of inadequate reasoning, demonstrates that some Panels are still not showing, in a sufficiently detailed way, that they have in fact applied the structured approach outlined in the Guidance on Outcomes.³³

30 In ***R (on the application of the Chief Constable of the British Transport Police) v Police Misconduct Panel*** [2023] EWHC 589 (Admin) Charles Bagot KC (sitting as a Deputy High Court Judge) allowed the Chief Constable’s application for judicial review on the basis that the Panel had failed to grasp the significance of a police officer’s conduct in sexually harassing a lone female member of the public. In concluding that the final written warning imposed had not reflected the seriousness of the behaviour found proven, the Court:

a. Confirmed “*the centrality of maintaining the trust and confidence of the wider public as an objective of a properly functioning police disciplinary regime*” (at [103]).

b. Indicated that part of the reason for the Panel’s error in that case had been the Panel’s “*outmoded and discredited attitude to interpreting a complainant’s demeanour and reactions to a*

stressful encounter” and failure “*to grasp the power imbalance*”, adding “*It would be quite wrong to put the onus on a complainant to react in a particular way*” (at [114]–[115]).

c. Agreed with the Chief Constable that the misconduct proceedings captured a real and present national concern about male police officers’ conduct towards lone women, and a lawful approach, in that case to Outcome, involved consideration of wider factors including the central importance of upholding public confidence in the police. Reference was made (at [62]) to HMCIC’s report, ‘An inspection of vetting, misconduct, and misogyny in the police service’, published November 2022, which stated at 104–105: “*During the inspection, we heard numerous examples, mainly from female police officers and staff, of such behaviour towards them. This was usually, but not exclusively, from their male colleagues. When police officers ... don’t treat colleagues with respect and courtesy, it suggests that they may behave in a similar way towards the public, and towards vulnerable women*”.

31 This case provides a timely reminder of the importance of maintaining public trust and confidence in the Police Service and the need for Panels to keep this central purpose in mind when considering the appropriate Outcome to impose.

Practical take-aways

32 The replacement of LQCs with police chairs appears to have been designed to increase dismissals at GMHs, in line with the (current and previous) Government’s stated intention to introduce a presumption of dismissal where Gross Misconduct is proven.

33 Whether this intended effect is achieved or not, there is a risk that police chairs could be more likely to fall into legal error than their legally qualified predecessors, notwithstanding the role of the LQP. In complex and contested cases, there is clearly scope for the advice provided by the LQP, which should always be delivered on record, to be the subject of significant challenge by counsel for the officer and/or AA.

34 As has always been the case, significant responsibility will lie with counsel for the AA to ensure that the case against the officer is presented fairly, comprehensively, and in a manner capable of withstanding subsequent scrutiny on appeal or judicial review. The reported cases considered above demonstrate the kinds of legal error into which Panels and PATs may stray if not properly directed at first instance.

35 Where an appeal or judicial review is brought, the reported cases demonstrate that the Administrative Court will carefully consider:

- a. whether the PAT has erred in any material legal sense (as opposed to whether the Administrative Court would take a different view of the case); and
- b. whether, in an appropriate case, the Panel has properly taken into account the central purpose of police misconduct proceedings, namely to maintain trust and confidence in the Police Service.

Footnotes

- 1 According to official data there were only 22 appeals in the year ending 2023, of 438 officers referred to a GMH or AMH: <https://www.gov.uk/government/statistics/police-misconduct-england-and-wales-year-ending-31-march-2023/police-misconduct-england-and-wales-year-ending-31-march-2023#chapter3>.
- 2 <https://www.college.police.uk/ethics/code-of-ethics/principles>
- 3 <https://www.college.police.uk/ethics/code-of-ethics>
- 4 **R (J) v Chief Constable of West Mercia Police** [2022] EWHC 26 (Admin), per Steyn J at [86]: “*The APP Guidance is guidance, not legislation, but there would need to be a good reason not to follow it ...*” referring to the College of Policing APP on Vetting (2019, since replaced in 2021).
- 5 Defined, in Part 2, as police officers, police staff, PCSOs, those with designated powers, members of the Special Constabulary, police support volunteers and cadets, police officers and staff on secondment or overseas deployment and designated contract managers, contractors and staff employed by suppliers providing services on behalf of forces.
- 6 The Code of Ethics published in July 2014 was statutory, presented to Parliament and issued as a code of practice under s39A of the Police Act 1996, as amended: https://assets.publishing.service.gov.uk/media/5a7d867140f0b65084e75b94/Code_of_Ethics_2014_Web_Accessible.pdf see [1.2.1]–[1.2.2].
- 7 In **R (Officer W80) v Director General of the Independent Office for Police Conduct** [2023] UKSC 24 the Supreme Court concluded “*the true interpretation of the Standard of Professional Behaviour as to the use of force in 2008 [Conduct] Regulations cannot be informed by the Code of Ethics published six years later by the College of Policing in 2014*”, see [101]. However, the Court added: “*In addition, the scope of the Code of Ethics is limited to the discharge of their functions by chief officers*”; the same is not true of the 2024 Code of Ethics, see below.
- 8 https://assets.publishing.service.gov.uk/media/5e3ae3efed915d09378bf705/Home_Office_Statutory_Guidance_0502.pdf
- 9 Issued pursuant to section 39A(5) of the Police Act 1996, as amended.
- 10 <https://www.college.police.uk/ethics/code-of-practice>
- 11 Regulations 28(1)(b) and (4)(a), read with Regulations 2(4A)–(4C) of the PCR: the chief officer may delegate to a senior officer (ACC or MPS Commander), a former senior officer who last served as such within 5 years, or police staff member who, in the opinion of the chief officer, is of “*at least a similar level of seniority to a senior officer*” (i.e. ACC or above) save in a case which “*substantially involves operational policing matters*”.
- 12 Regulation 28(4)(b)–(c) and (4A) PCR.
- 13 Regulation 28(5) PCR.
- 14 Regulation 28(5A) PCR.
- 15 LQPs to be appointed by the local policing body “*as an advisor to the chair and panel*” for a GMH under Reg 28(5B); and for an AMH in a senior officer case under Reg 55(4A) PCR.
- 16 This states: “*The advice provided by the [LQP] under [Reg 28(5D)] must be given to all parties to the misconduct hearing.*” Reg 61(14A) makes the same provision for senior officer AMHs.
- 17 See Reg. 30(3) PCR.
- 18 These common law principles were encapsulated in the case of **Porter v Magill** [2001] UKHL 67, per Lord Hope at [103], namely that in a case of actual or apparent bias, “*whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*”.
- 19 Reg 30(2) and (2A) PCR.
- 20 See **R (on the application of Shane Wheeler) v Police Appeals Tribunal** [2022] EWHC 117 (Admin) in which the Administrative Court (Knowles J) recorded it being “*common ground that common law fairness and the civil limb of Article 6 of the ECHR applies to proceedings before Police Misconduct Panels and the PAT*”, [59].
- 21 <https://www.gov.uk/government/news/new-reforms-to-boost-confidence-in-police-accountability-system>
- 22 Whereas, for police officers, the IOPC determines whether a criminal offence “*may have been committed*” and whether the circumstances of the case are such that it is appropriate for the CPS to consider it, or the case falls within a prescribed category, in which case the IOPC must refer to the CPS: paras 24–26 of Schedule 3 to the Police Reform Act 2002.
- 23 Further to the Supreme Court decisions in **W80** (2023) cited above, and **R (on the application of Maughan) v HM Senior Coroner for Oxfordshire** [2020] UKSC 46.
- 24 <https://hansard.parliament.uk/commons/2024-10-23/debates/487296CD-DEF6-4E75-A3F2-642025CCEDF1/PoliceAccountability>
- 25 The suggestion by the previous Government was that these would be indictable offences.
- 26 The right of appeal applies save where the finding sought to be appealed has been made following acceptance by the officer that his/her conduct amounted to Misconduct or Gross Misconduct.
- 27 **R (on the application of the Chief Constable of Nottinghamshire) v Police Appeals Tribunal** [2021] EWHC 1248 (Admin) in which the Administrative Court (Steyn J) concluded that although the PAT had been entitled to re-make the sanction of dismissal imposed by a Panel, its decision to substitute a final written warning fell to be quashed because the PAT had not followed the 3 stage approach outlined in the Guidance on Outcomes, derived from **Fuglers LLP v SRA** [2014] EWHC 179 (Admin).

28 R (on the application of the Commissioner of Police for the Metropolis) v PAT v PC Max Michel, PC Shaun Charnock [2022] EWHC 2711 (Admin) in which the Admin Court (Heather Williams J) concluded that the PAT had failed to apply the correct test when it concluded that the Panel's findings of Gross Misconduct, which related to a road traffic collision involving a marked police vehicle in which the two accused officers were the driver and operator, were "unreasonable" within the meaning of rule 4(4)(a) of the PAT Rules 2012, namely that a finding of Gross Misconduct was not within the range of reasonable findings open to the Panel. The Admin Court substituted the decision that the officers' appeals were dismissed, see [118] and [121].

29 R (on the application of the Commissioner of Police of the Metropolis) v Police Appeals Tribunal [2022] EWHC 1950 (Admin) in which the Admin Court (Heather Williams J) held that no basis had been shown for overturning the PAT's decision to impose a FWW c.f. dismissal upon an officer with a conviction for assault by beating against her then partner, which was made after the officer was dismissed at a special case hearing/AMH, successfully appealed to the PAT (which ordered a re-hearing on the basis of medical evidence culminating in a second SCH/AMH) and again dismissed but successfully appealed to the PAT which re-took the decision on sanction.

30 Under Rule 11 of the PAT Rules, as upheld by the Admin Court (Lang J) in **R (on the application of Dalton) v Chair of the PAT** [2024] EWHC 1116 (Admin).

31 See, for example, **R (on the application of Humpherson) v Police Appeals Tribunal** [2022] EWHC 2424 (Admin) in which the Administrative Court (Henshaw J) upheld the PAT's decision to uphold the officer's dismissal following a sexual encounter in uniform/on duty and recklessly sending an explicit photograph, thereby threatening the reputation of the Police Service.

32 R (on the application of O'Connor) v Police Misconduct Panel [2023] EWHC 2892 (Admin) – Swift J declined the CC's application for judicial review (alleged discrimination in the handling of a woman's complaint about a robbery); **Chief Constable of Thames Valley v Police Misconduct Panel** [2023] EWHC 2693 (KB) – Jay J allowed the CC's application and remitted the case to a fresh Panel for further consideration of the appropriate sanction (allegation of sexual touching).

33 R (on the application of Director General of the IOPC) v Police Misconduct Panel [2024] EWHC 2796 (Admin) – Jonathan Moffett KC, sitting as a Deputy High Court Judge, concluded that although the Panel had referred to the 4 factors relevant to seriousness (namely 1. the officer's culpability, 2. any harm caused, 3. any aggravating factors and 4. any mitigating factors) the decision on sanction had not explained how the Panel had evaluated those factors or how it had reached its overall conclusion on seriousness, see [79] to [82].