POLICE FEDERATION
OF ENGLAND AND WALES

POLICE PERFORMANCE/ ATTENDANCE REGULATIONS GUIDANCE MANUAL 2008

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Contents

STATUTORY INSTRUMENTS

2008 No.

POLICE, ENGLAND AND WALES

The Police (Performance) Regulations 2008

Made - - - -	*2008*
Laid before Parliament	*2008*
Coming into force - -	*2008*

The Secretary of State makes the following Regulations in exercise of the powers conferred by sections 50, 51, 84 and 85 of the Police Act 1996(**a**).

In accordance with section 63(3) of that Act, he has supplied the Police Advisory Board for England and Wales with a draft of these Regulations and has taken into consideration the representations of that Board.

PART 1

Preliminary

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Police (Performance) Regulations 2008 and shall come into force on 2008.

(2) These Regulations extend to England and Wales.

Application

2. These Regulations shall not apply in relation to—

(a) a chief constable or other officer above the rank of chief superintendent;

(b) an officer of the rank of constable who has not completed his period of probation.

Revocation and transitional provisions

3.—(1) Subject to paragraph (2), the following Regulations are revoked—

(a) the Police (Efficiency) Regulations 1999(**b**);

(b) the Police (Efficiency) (Amendment) Regulations 2003(**a**); and

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(**a**) 1996 c.16, as amended by the Police (Northern Ireland) Act 1998 (c.32), Greater London Authority Act 1999 (c.29), the Criminal Justice and Police Act 2001 (c.16), the International Development Act 2002 (c.1), the Police Reform 2002 Act (c.30), the Proceeds of Crime Act 2002 (c.29), the Police Act 1997 (c.50), the Serious Organised Crime and Police Act 2005 (c.15), the Safeguarding Vulnerable Groups Act 2006 (c.47), the Police and Justice Act 2006 (c.48), the Police, Public Order and Criminal Justice (Scotland) Act 2006 (asp. 10) and the Criminal Justice Act 2008 (c.).

(**b**) S.I. 1999/732.

(c) the Police (Efficiency) (Amendment No.2) Regulations 2003(**b**).

(2) Where unsatisfactory performance or attendance by a police officer came to the attention of the line manager for such officer before [ ] nothing in these Regulations shall apply and the Regulations mentioned in paragraph (1) shall continue to have effect.

Interpretation and delegation

4.—(1) In these Regulations—

"appropriate authority" means the chief officer of police of the police force concerned;

"bank holiday" means a day which is a bank holiday under the Banking and Financial Dealings Act 1971(**c**) in England and Wales;

"document" means anything in which information of any description is recorded;

"first stage appeal meeting" has the meaning assigned to it by regulation 15;

"first stage meeting" has the meaning assigned to it by regulation 11;

"gross incompetence" and cognate expressions mean a serious inability or failure of a police officer to perform the duties of the role or rank he is currently undertaking to a satisfactory standard or level, to the extent that dismissal would be justified, except that no account shall be taken of the attendance of a police officer when considering whether he has been grossly incompetent;

"human resources professional" means a police officer or police staff member who has specific responsibility for personnel matters relating to members of a police force;

"interested party" means a person whose involvement in the role could reasonably give rise to a concern as to whether he could act impartially under these Regulations;

"line manager" means the police officer or the police staff member who, in either case, has immediate supervisory responsibility for the officer concerned;

"nominated person" means a person appointed by the senior manager in accordance with regulation 8;

"officer concerned" means the police officer in respect of whom proceedings under these Regulations are, or are proposed to be, taken;

"panel" means a panel appointed by the appropriate authority in accordance with regulation 32 subject to any change to the membership of that panel in accordance with regulation 33 and to the provisions of regulations 39 and 40;

"panel chair" means the chair of the panel;

"police force concerned" means, where the officer concerned is a member of a police force, the police force of which he is a member; and where the officer concerned is a special constable, the police force maintained for the police area for which he is appointed;

"police friend" means a person chosen by the officer concerned in accordance with regulation 5;

"police officer" means a member of a police force or a special constable;

"police staff member" means an employee of a police authority who is under the direction and control of a chief officer of police;

"relevant lawyer" has the same meaning as in section 84(4) of the 1996 Act(**d**), subject to the provisions of paragraph 34 of Schedule 37 to the Criminal Justice and Immigration Act 2008.;

"relevant terms of the final written improvement notice" has the meaning assigned to it by regulation 22;

(**a**) S.I. 2003/528.
(**b**) S.I. 2003/2600.
(**c**) 1971 c.80.
(**d**) Section 84 was substituted by paragraph 7 of Schedule 32 to the Criminal Justice and Immigration Act 2007 (c.XX). "Relevant lawyer" is defined in section 84(4), subject to the transitional provision in paragraph 34 of Schedule 37 to the Criminal Justice and Immigration Act 2008.

"relevant terms of the written improvement notice" has the meaning assigned to it by regulation 15;

"second line manager" means

(a) a member of the police force concerned having supervisory responsibility and who (in a case where the line manager is a member of the force) is senior in rank to the line manager, or

(b) a police staff member who has supervisory responsibility for the line manager;

"second stage appeal meeting" has the meaning assigned to it by regulation 22;

"second stage meeting" has the meaning assigned to it by regulation 18;

"senior manager" means—

(a) the police officer or police staff member who is for the time being the supervisor of the person who is, in relation to the officer concerned, the second line manager; or

(b) the police officer or police staff member nominated by the appropriate authority, being of at least the same rank (or equivalent) as the person who is, in relation to the officer concerned, the second line manager;

"senior officer" means a police officer holding a rank above that of chief superintendent;

"staff association" means, in relation to members of a police force of the rank of chief inspector or below, the Police Federation of England and Wales; and in relation to members of a police force of the rank of superintendent or chief superintendent, the Police Superintendents' Association of England and Wales;

"the 1996 Act" means the Police Act 1996;

"the Police Regulations" means the Police Regulations 2003(**a**);

"third stage meeting" has the meaning assigned to it by regulations 25 and 27;

"unsatisfactory performance procedures" means the procedures set out in these Regulations;

"validity period" has the meaning assigned to it by regulations 14(4), 21(4), 37(6)(d) and (7)(c);

"working day" means any day other than a Saturday or a Sunday or a day which is a bank holiday or a public holiday in England and Wales.

(2) In these Regulations—

(a) references to—

(i) unsatisfactory performance or attendance;

(ii) the performance or attendance of an officer being unsatisfactory,

mean an inability or failure of a police officer to perform the duties of the role or rank he is currently undertaking to a satisfactory standard or level;

(b) "unsatisfactory performance or attendance" may be construed as a reference to unsatisfactory performance and attendance;

(c) "performance or attendance" may be construed as a reference to performance and attendance.

(3) Subject to paragraph (4), the appropriate authority may delegate any of its functions under these Regulations to a member of a police force of at least the rank of chief inspector or to a police staff member who, in the opinion of the appropriate authority is of at least a similar level of seniority to a chief inspector.

(4) Where the appropriate authority delegates its functions under regulation 27, the decisions shall be authorised by a senior officer.

(**a**) S.I. 2003/527.

PART 2

General

Police friend

5.—(1) The officer concerned may choose—

(a) a police officer;

(b) a police staff member; or

(c) where the officer concerned is a member of a police force, a person nominated by his staff association,

who is not otherwise involved in the matter, to act as his police friend.

(2) A police friend may—

(a) advise the officer concerned throughout the proceedings under these Regulations;

(b) unless the officer concerned has the right to be legally represented under regulation 6 and chooses to be so represented, represent the officer concerned at a meeting under these Regulations;

(c) make representations to the appropriate authority concerning any aspect of the proceedings under these Regulations; and

(d) accompany the officer concerned to any meeting which the officer concerned is required to attend under these Regulations.

(3) Where a police friend is a police officer or a police staff member, the chief officer of police of the force of which the police friend is a member shall permit him to use a reasonable amount of duty time for the purposes referred to in paragraph (2).

(4) The reference in paragraph (3) to the force of which the police friend is a member shall include a reference to the force maintained for the police area for which a special constable is appointed and the force in which a police staff member is serving.

Legal representation

6.—(1) Where a police officer is required to attend a third stage meeting under regulation 27, he has the right to be legally represented at such meeting by a relevant lawyer of his choice.

(2) If such an officer chooses not to be legally represented—

(a) such meeting may take place and he may be dismissed or receive any other outcome under regulation 37(2) or (5) without his being legally represented; and

(b) the panel conducting such meeting may nevertheless be advised by a relevant lawyer at the meeting in accordance with regulation 35(4).

(3) Except in a case where the officer concerned has the right to be legally represented and chooses to be so represented, he may be represented at a meeting under these Regulations only by a police friend.

(4) A third stage meeting under regulation 27 shall not take place unless the officer concerned has been notified of the effect of this regulation.

Procedure at meetings under these Regulations

7.—(1) Where the officer concerned does not attend a meeting under these Regulations or where the officer concerned participates in a third stage meeting by video link or other means under regulation 34(4), he may nonetheless be represented at that meeting by his–

(a) police friend; or

(b) where the officer is required to attend the third stage meeting under regulation 27, his relevant lawyer.

(2) Subject to regulation 34, where the officer concerned does not attend a meeting under these Regulations the meeting may be proceeded with and concluded in the absence of the officer concerned whether or not he is so represented.

(3) At any meeting under these Regulations, the person representing the officer concerned may—

(a) address the meeting in order to do any or all of the following–

(i) put the officer concerned's case;

(ii) sum up that case;

(iii) respond on the officer concerned's behalf to any view expressed at the meeting;

(iv) make representations concerning any aspect of proceedings under these Regulations; and

(v) in the case of a third stage meeting only, subject to paragraph (6), ask questions of any witnesses;

(b) if the officer concerned is present at the meeting or participating in it by video link or other means in accordance with regulation 34(4), confer with the officer concerned.

(4) Where the person representing the officer concerned is a relevant lawyer, the police friend of the officer concerned may also confer with the officer concerned in the circumstances mentioned in paragraph (3)(b).

(5) The police friend or relevant lawyer of the officer concerned may not answer any questions asked of the officer concerned during a meeting.

(6) Whether any question should or should not be put to a witness at a third stage meeting shall be determined by the panel chair.

(7) At any meeting under these Regulations, the person or the panel conducting the meeting shall not make a finding of unsatisfactory performance or attendance or gross incompetence unless—

(a) he is or they are satisfied on the balance of probabilities that there has been unsatisfactory performance or attendance or gross incompetence; or

(b) the officer concerned consents to such a finding.

(8) The person conducting or chairing a meeting under these regulations may allow any document to be considered at that meeting notwithstanding that a copy of it has not been—

(a) supplied to him by the officer concerned in accordance with regulation 12(8), 15(6)(b), 19(8), 22(6)(b) or 29(3);

(b) supplied to the officer concerned in accordance with regulation 12(2), 19(2), 26(2) or 28(2); or

(c) made available to each panel member or sent to the officer concerned under regulation 32(11).

Nominated persons

8.—(1) A senior manager may appoint another person (a "nominated person") to carry out any of the functions of the line manager or the second line manager in these Regulations.

(2) Where a person is appointed to carry out any of the functions of the line manager under paragraph (1) he may not also be appointed to carry out any of the functions of the second line manager under that paragraph.

(3) Where a person is appointed to carry out any of the functions of the second line manager under paragraph (1) he may not also be appointed to carry out any of the functions of the line manager under that paragraph.

(4) A nominated person shall be a member of the police force concerned or a police staff member in the police force concerned and shall be, in the opinion of the appropriate authority, of at least the same or equivalent rank or grade as the person whose functions he is carrying out.

(5) Where a nominated person is appointed by the senior manager, references in these Regulations to a line manager or a second line manager, as the case may be, shall be construed as references to the nominated person, in relation to the functions which the nominated person has been appointed to carry out.

References to certain periods

9.—(1) The appropriate authority may, on the application of the officer concerned or otherwise, extend the period specified under any of the regulations mentioned in paragraph (2) if it is satisfied that it is appropriate to do so.

(2) The regulations mentioned in this paragraph are—

(a) regulation 13(6)(c);

(b) regulation 20(6)(c); and

(c) regulation 37(6)(c) and (7)(a).

(3) Unless the appropriate authority is satisfied that there are exceptional circumstances making it appropriate, any such period may not be extended if the extension would result in the total length of that period exceeding 12 months.

(4) Where an extension is granted under paragraph (1) to a period specified under a regulation mentioned in paragraph (2), any reference in these Regulations to such period shall be construed as a reference to that period as so extended.

Suspension of certain periods

10.—(1) Any reference in these Regulations to a period mentioned in paragraph (2) shall not include any time the officer concerned is taking a career break under regulation 33(12) of the Police Regulations and the determination made under that provision or otherwise.

(2) The periods mentioned in this paragraph are—

(a) a period specified under regulation 13(6)(c);

(b) the validity period of a written improvement notice;

(c) a period specified under regulation 20(6)(c);

(d) the validity period of a final written improvement notice;

(e) a period specified under regulation 37(6)(c) or (7)(a);

(f) the validity period of a final written improvement notice extended under regulation 37.

PART 3

First stage

Circumstances in which a first stage meeting may be required

11. Where the line manager for a police officer considers that the performance or attendance of that officer is unsatisfactory, he may require the officer concerned to attend a meeting (in these Regulations referred to as a first stage meeting) to discuss the performance or attendance of the officer concerned.

Arrangement of first stage meeting

12.—(1) If the line manager decides to require a police officer to attend a first stage meeting, he shall as soon as reasonably practicable send a notice in writing to the officer concerned—

(a) requiring him to attend a first stage meeting of the unsatisfactory performance procedures with the line manager;

(b) informing him of the procedures for determining the date and time of the meeting under paragraphs (3) to (6);

(c) summarising the reasons why his performance or attendance is considered unsatisfactory;

(d) informing him of the possible outcomes of a first stage meeting, a second stage meeting and a third stage meeting;

(e) informing him that a human resources professional or a police officer may attend the meeting to advise the line manager on the proceedings;

(f) informing him that, if he consents, any other person specified in the notice may attend the meeting;

(g) where the officer concerned is a member of a police force, informing him that he may seek advice from a representative of his staff association;

(h) informing him that he may be accompanied and represented at the meeting by a police friend; and

(i) informing him that he must provide to the line manager in advance of the meeting a copy of any document he intends to rely on at the meeting.

(2) Such notice shall be accompanied by a copy of any document relied upon by the line manager when coming to his view mentioned in regulation 11 that the performance or attendance of the officer concerned is unsatisfactory.

(3) The line manager shall, if reasonably practicable, agree a date and time for the meeting with the officer concerned.

(4) Where no date and time is agreed under paragraph (3), the line manager shall specify a date and time for the meeting.

(5) Where a date and time is specified under paragraph (4) and—

(a) the officer concerned or his police friend will not be available at that time; and

(b) the officer concerned proposes an alternative time which satisfies paragraph (6),

the meeting must be postponed to the time proposed by the officer concerned.

(6) An alternative time must—

(a) be reasonable; and

(b) fall before the end of the period of five working days beginning with the first working day after the day specified by the line manager under paragraph (4).

(7) The line manager shall send to the officer concerned a notice in writing of the date and time of the first stage meeting determined in accordance with paragraphs (3) to (6) and of the place of the meeting.

(8) In advance of the first stage meeting, the officer concerned shall provide the line manager with a copy of any document he intends to rely on at the meeting.

Procedure at first stage meeting

13.—(1) The following provisions of this regulation apply to the procedure to be followed at the first stage meeting.

(2) The meeting shall be conducted by the line manager.

(3) A human resources professional or a police officer may attend the meeting to advise the line manager on the proceedings.

(4) Any other person specified in the notice referred to in regulation 12(1) may attend the meeting if the officer concerned consents to such attendance.

(5) The line manager shall—

(a) explain to the officer concerned the reasons why the line manager considers that the performance or attendance of the officer concerned is unsatisfactory;

(b) provide the officer concerned with an opportunity to make representations in response;

(c) provide his police friend (if he has one) with an opportunity to make representations in accordance with regulation 7(3).

(6) If, after considering any representations made in accordance with paragraph (5)(b) or (c), the line manager finds that the performance or attendance of the officer concerned has been unsatisfactory, he shall—

(a) inform the officer concerned in what respect his performance or attendance is considered unsatisfactory;

(b) inform the officer concerned of the improvement that is required in his performance or attendance;

(c) inform the officer concerned that, if a sufficient improvement is not made within such reasonable period as the line manager shall specify (being a period not greater than 12 months), he may be required to attend a second stage meeting in accordance with regulation 18;

(d) inform the officer concerned that he will receive a written improvement notice; and

(e) inform the officer concerned that if a sufficient improvement in his performance or attendance is not maintained during the validity period of such notice, he may be required to attend a second stage meeting in accordance with regulation 18.

(7) The line manager may, if he considers it appropriate, recommend that the officer concerned seeks assistance in relation to any matter affecting his health or welfare.

(8) The line manager may postpone or adjourn the meeting to a specified later time or date if it appears to him necessary or expedient to do so.

Procedure following first stage meeting

14.—(1) The line manager shall, as soon as reasonably practicable after the date of the conclusion of the first stage meeting—

(a) cause to be prepared a written record of the meeting; and

(b) where he found at the meeting that the performance or attendance of the officer concerned has been unsatisfactory, cause to be prepared a written improvement notice.

(2) Where the officer concerned has failed to attend a first stage meeting, if the line manager finds that the performance or attendance of the officer has been unsatisfactory, he shall as soon as reasonably practicable—

(a) cause to be prepared a written improvement notice; and

(b) if the officer concerned's police friend attended the meeting, cause to be prepared a written record of the meeting.

(3) A written improvement notice shall—

(a) record the matters of which the officer concerned was informed under sub-paragraphs (a) to (c) and (e) of regulation 13(6);

(b) state the period for which it is valid; and

(c) be signed and dated by the line manager.

(4) A written improvement notice shall be valid for a period of twelve months from the date of the notice (the "validity period").

(5) The line manager shall send a copy of any written record and any written improvement notice to the officer concerned.

(6) Where the line manager found that the performance or attendance of the officer concerned has been unsatisfactory and has caused to be prepared a written improvement notice, he shall, at the same time as sending the documents mentioned in paragraph (5), inform the officer concerned in writing of the matters set out in regulation 15, of the name of the person to whom a written notice of appeal must be sent under that regulation and of his entitlements under paragraphs (7), (8) and (9).

(7) Subject to paragraphs (8) and (9), the officer concerned shall be entitled to submit written comments on any written record to the line manager not later than 7 working days after the date on which the copy is received by the officer concerned.

(8) The line manager may, on the application of the officer concerned, extend the period specified in paragraph (7) if he is satisfied that it is appropriate to do so.

(9) The officer concerned shall not be entitled to submit written comments on the written record if he has exercised his right to appeal under regulation 15.

(10) The line manager shall ensure that any written record, any written improvement notice and any written comments of the officer concerned on the written record are retained together and filed.

Appeal against the finding and outcome of a first stage meeting

15.—(1) This regulation applies where, at the first stage meeting, the line manager found that the performance or attendance of the officer concerned has been unsatisfactory.

(2) Where this regulation applies, the officer concerned may appeal against–

(a) such finding; or

(b) any of the matters specified in paragraph (3) and recorded in the written improvement notice (in these Regulations referred to as the relevant terms of the written improvement notice),

or both.

(3) The matters specified in this paragraph are—

(a) the respect in which the officer concerned's performance or attendance is considered unsatisfactory (of which he was informed at the first stage meeting in accordance with regulation 13(6)(a));

(b) the improvement that is required in his performance or attendance (of which he was informed at the first stage meeting in accordance with regulation 13(6)(b));

(c) the length of the period specified by the line manager at the first stage meeting in accordance with regulation 13(6)(c).

(4) The only grounds of appeal under this regulation are—

(a) that the finding of unsatisfactory performance or attendance was unreasonable;

(b) that any of the relevant terms of the written improvement notice are unreasonable;

(c) that there is critical new evidence that could not reasonably have been considered at the first stage meeting;

(d) that there was a serious breach of the procedures set out in these Regulations or other unfairness which could have materially affected the finding of unsatisfactory performance or attendance or any of the relevant terms of the written improvement notice.

(5) An appeal shall be commenced by the officer concerned giving written notice of appeal to the second line manager not later than 7 working days after receipt of the documents referred to in regulation 14(5).

(6) Such notification must–

(a) set out the officer concerned's grounds of appeal; and

(b) be accompanied by any evidence on which the officer concerned relies.

(7) The second line manager may, on the application of the officer concerned, extend the period specified in paragraph (5) if he is satisfied that it is appropriate to do so.

(8) Subject to paragraph (9), the meeting at which the appeal will be heard (referred to in these Regulations as the first stage appeal meeting) shall take place not later than 7 working days after the date on which the notification under paragraph (5) is received by the second line manager.

(9) A first stage appeal meeting may take place after the period of 7 working days referred to in paragraph (8) if the second line manager considers it necessary or expedient, in which case he shall notify the officer concerned of his reasons in writing.

Arrangement of first stage appeal meeting

16.—(1) As soon as reasonably practicable after receipt by the second line manager of the notification of appeal referred to in regulation 15(5), the second line manager shall send a notice in writing to the officer concerned—

(a) informing him of the procedures for determining the date and time of the meeting under paragraphs (2) to (5);

(b) informing him that a human resources professional or a police officer may attend the meeting to advise the second line manager on the proceedings;

(c) informing him that, if he consents, any other person specified in the notice may attend the meeting;

(d) where the officer concerned is a member of a police force, informing him that he may seek advice from a representative of his staff association; and

(e) informing him that he may be accompanied and represented at the meeting by a police friend.

(2) The second line manager shall, if reasonably practicable, agree a date and time for the meeting with the officer concerned.

(3) Where no date and time is agreed under paragraph (2), the second line manager shall specify a date and time for the meeting.

(4) Where a date and time is specified under paragraph (3) and—

(a) the officer concerned or his police friend will not be available at that time; and

(b) the officer concerned proposes an alternative time which satisfies paragraph (5),

the meeting must be postponed to the time proposed by the officer concerned.

(5) An alternative time must—

(a) be reasonable; and

(b) fall before the end of the period of five working days beginning with the first working day after the day specified by the line manager under paragraph (3).

(6) The second line manager shall send to the officer concerned a notice in writing of the date and time of the first stage appeal meeting determined in accordance with paragraphs (2) to (5) and of the place of the meeting.

Procedure at first stage appeal meeting

17.—(1) The following provisions of this regulation apply to the procedure to be followed at a first stage appeal meeting.

(2) The meeting shall be conducted by the second line manager.

(3) A human resources professional or a police officer may attend the meeting to advise the second line manager on the proceedings.

(4) Any other person specified in the notice referred to in regulation 16(1) may attend the meeting if the officer concerned consents to such attendance.

(5) The second line manager shall—

(a) provide the officer concerned with an opportunity to make representations; and

(b) provide his police friend (if he has one) with an opportunity to make representations in accordance with regulation 7(3).

(6) After considering any representations made in accordance with paragraph (5), the second line manager may—

(a) confirm or reverse the finding of unsatisfactory performance or attendance;

(b) confirm or vary the relevant terms of the written improvement notice appealed against;

(7) The second line manager may only deal with the officer concerned in a manner in which the line manager could have dealt with him under regulation 13 at the first stage meeting.

(8) As soon as reasonably practicable after the conclusion of the meeting, the officer concerned shall be given written notice of the second line manager's decision and a written summary of the reasons for that decision, but in any event, the officer concerned shall be given written notice of the decision within three working days of the conclusion of the meeting.

(9) Where the second line manager has reversed the finding of unsatisfactory performance or attendance or varied any of the relevant terms of the written improvement notice, the decision of the second line manager shall take effect by way of substitution for the finding or the terms appealed against from the date of the first stage meeting.

PART 4

Second stage

Circumstances in which a second stage meeting may be required

18.—(1) Where a police officer has received a written improvement notice, as soon as reasonably practicable after the date on which the period specified under regulation 13(6)(c) ends—

(a) the line manager shall assess the performance or attendance of the officer concerned during that period, in consultation with the second line manager or a human resources professional (or both); and

(b) the line manager shall notify the officer concerned in writing whether the line manager considers that there has been a sufficient improvement in performance or attendance during that period.

(2) If the line manager considers that there has been an insufficient improvement, he shall, at the same time as he gives notification under paragraph (1)(b), also notify the officer concerned in writing that he is required to attend a meeting (in these Regulations referred to as a second stage meeting) to consider his performance or attendance.

(3) Where, in a case not falling within paragraph (2) and subject to paragraph (5), the line manager considers that the officer concerned has, during the validity period of the written improvement notice, failed to maintain a sufficient improvement in his performance or attendance, he shall notify the officer concerned in writing of the matters set out in paragraph (4).

(4) The line manager shall inform the officer concerned—

(a) that he is of the view mentioned in paragraph (3); and

(b) that the officer concerned is required to attend a meeting (in these Regulations referred to as a second stage meeting) to consider his performance or attendance.

(5) Paragraph (3) shall not apply where the period specified under regulation 13(6)(c) has been extended to exceed 12 months under regulation 9.

(6) In a case falling within paragraph (2) or (3), the senior manager shall direct that a second stage meeting be arranged under regulation 19.

(7) Any second stage meeting which a police officer is required to attend must concern unsatisfactory performance or attendance which is similar to or connected with the unsatisfactory performance or attendance referred to in the written improvement notice.

Arrangement of second stage meeting

19.—(1) Where the line manager requires the officer concerned to attend a second stage meeting, the second line manager shall as soon as reasonably practicable send a notice in writing to the officer concerned—

(a) requiring him to attend a second stage meeting of the unsatisfactory performance procedures with the second line manager;

(b) informing him of the procedures for determining the date and time of the meetingunder parargaphs (3) to (6);

(c) summarising the reasons why his performance or attendance is considered unsatisfactory;

(d) informing him of the possible outcomes of a second stage meeting and a third stage meeting;

(e) informing him that the line manager may attend the meeting;

(f) informing him that a human resources professional or a police officer may attend the meeting to advise the second line manager on the proceedings;

(g) informing him that, if he consents, any other person specified in the notice may attend the meeting;

(h) where the officer concerned is a member of a police force, informing him that he may seek advice from a representative of his staff association;

(i) informing him that he may be accompanied and represented at the meeting by a police friend; and

(j) informing him that he must provide to the second line manager in advance of the meeting a copy of any document he intends to rely on at the meeting.

(2) Such notice shall be accompanied by a copy of any document relied upon by the line manager when he formed the view referred to in regulation 18(2) or (3), as the case may be.

(3) The second line manager shall, if reasonably practicable, agree a date and time for the meeting with the officer concerned.

(4) Where no date and time is agreed under paragraph (3), the second line manager shall specify a date and time for the meeting.

(5) Where a date and time is specified under paragraph (4) and—

(a) the officer concerned or his police friend will not be available at that time; and

(b) the officer concerned proposes an alternative time which satisfies paragraph (6),

the meeting must be postponed to the time proposed by the officer concerned.

(6) An alternative time must—

(a) be reasonable; and

(b) fall before the end of the period of five working days beginning with the first working day after the day specified by the second line manager under paragraph (4).

(7) The second line manager shall send to the officer concerned a notice in writing of the date and time of the second stage meeting determined in accordance with paragraphs (3) to (6) and of the place of the meeting.

(8) In advance of the second stage meeting, the officer concerned shall provide the second line manager with a copy of any document he intends to rely on at the meeting.

Procedure at second stage meeting

20.—(1) The following provisions of this regulation shall apply to the procedure to be followed at the second stage meeting.

(2) The meeting shall be conducted by the second line manager and may be attended by the line manager.

(3) A human resources professional or a police officer may attend the meeting to advise the second line manager on the proceedings.

(4) Any other person specified in the notice referred to in regulation 19(1) may attend the meeting if the officer concerned consents to such attendance.

(5) The second line manager shall—

(a) explain to the officer concerned the reasons why he has been required to attend the meeting;

(b) provide the officer concerned with an opportunity to make representations in response;

(c) provide his police friend (if he has one) with an opportunity to make representations in accordance with regulation 7(3).

(6) If, after considering any representations made under paragraph (5)(b) or (c), the second line manager finds that the performance or attendance of the officer concerned has been unsatisfactory either during the period specified by the line manager under regulation 13(6)(c) or during the validity period of the written improvement notice he shall—

(a) inform the officer concerned in what respect his performance or attendance is considered unsatisfactory;

(b) inform the officer concerned of the improvement that is required in his performance or attendance;

(c) inform the officer concerned that, if a sufficient improvement is not made within such reasonable period as the second line manager shall specify (being a period not greater than 12 months), he may be required to attend a third stage meeting in accordance with regulation 25;

(d) inform the officer concerned that he will receive a final written improvement notice; and

(e) inform the officer concerned that if a sufficient improvement in his performance or attendance is not maintained during the validity period of such notice, he may be required to attend a third stage meeting in accordance with regulation 25.

(7) The second line manager may, if he considers it appropriate, recommend that the officer concerned seeks assistance in relation to any matter affecting his health or welfare.

(8) The second line manager may postpone or adjourn the meeting to a specified later time or date if it appears to him necessary or expedient to do so.

Procedure following second stage meeting

21.—(1) The second line manager shall, as soon as reasonably practicable after the date of the conclusion of the second stage meeting—

(a) cause to be prepared a written record of the meeting; and

(b) where he made a finding at the meeting as set out in regulation 20(6), cause to be prepared a final written improvement notice.

(2) Where the officer concerned has failed to attend a second stage meeting, if the second line manager makes a finding as set out in regulation 20(6), he shall as soon as reasonably practicable—

(a) cause to be prepared a final written improvement notice; and

(b) if the officer concerned's police friend attended the meeting, cause to be prepared a written record of the meeting.

(3) A final written improvement notice shall—

(a) record the matters of which the officer concerned was informed under sub-paragraphs (a) to (c) and (e) of regulation 20(6);

(b) state the period for which it is valid; and

(c) be signed and dated by the second line manager.

(4) A final written improvement notice shall be valid for a period of twelve months from the date of the notice (the "validity period").

(5) The second line manager shall send a copy of any written record and any final written improvement notice to the officer concerned.

(6) Where the second line manager made a finding as set out in regulation 20(6) and has caused to be prepared a final written improvement notice, he shall, at the same time as sending the documents mentioned in paragraph (5), inform the officer concerned in writing of the matters set out in regulation 22, of the name of the person to whom a written notice of appeal must be sent under that regulation and of his entitlements under paragraphs (7), (8) and (9).

(7) Subject to paragraphs (8) and (9), the officer concerned shall be entitled to submit written comments on the written record to the second line manager not later than 7 working days after the date on which the copy is received by the officer concerned.

(8) The second line manager may, on the application of the officer concerned, extend the period specified in paragraph (7) if he is satisfied that it is appropriate to do so.

(9) The officer concerned shall not be entitled to submit written comments on the written record if he has exercised his right to appeal under regulation 22.

(10) The second line manager shall ensure that any written record, any final written improvement notice and any written comments of the officer concerned on the written record are retained together and filed.

Appeal against the finding and outcome of a second stage meeting

22.—(1) This regulation applies where, at the second stage meeting, the second line manager found that the performance or attendance of the officer concerned has been unsatisfactory as set out in regulation 20(6).

(2) Where this regulation applies, the officer concerned may appeal against one or more of the following—

(a) such finding;

(b) any of the matters specified in paragraph (3) and recorded in the final written improvement notice (in these Regulations referred to as the relevant terms of the final written improvement notice);

(c) the decision of the line manager to require the officer concerned to attend the second stage meeting.

(3) The matters specified in this paragraph are—

(a) the respect in which the officer concerned's performance or attendance is considered unsatisfactory (of which he was informed at the second stage meeting in accordance with regulation 20(6)(a));

(b) the improvement that is required in his performance or attendance (of which he was informed at the second stage meeting in accordance with regulation 20(6)(b));

(c) the length of the period specified by the second line manager at the second stage meeting in accordance with regulation 20(6)(c).

(4) The only grounds of appeal under this regulation are–

(a) that, in relation to an appeal under paragraph 2(c), the officer concerned should not have been required to attend the second stage meeting as the meeting did not concern unsatisfactory performance or attendance which is similar to or connected with the unsatisfactory performance or attendance referred to in the written improvement notice in accordance with regulation 18(6);

(b) that the finding of unsatisfactory performance or attendance was unreasonable;

(c) that any of the relevant terms of the final written improvement notice are unreasonable;

(d) that there is critical new evidence that could not reasonably have been considered at the second stage meeting;

(e) that there was a serious breach of the procedures set out in these Regulations or other unfairness which could have materially affected the finding of unsatisfactory performance or attendance or any of the relevant terms of the final written improvement notice.

(5) An appeal shall be commenced by the officer concerned giving written notice of appeal to the senior manager not later than 7 working days after receipt of the documents referred to in regulation 21(5).

(6) Such notification must–

(a) set out the officer concerned's grounds of appeal; and

(b) be accompanied by any evidence on which the officer concerned relies.

(7) The senior manager may, on the application of the officer concerned, extend the period specified in paragraph (5) if he is satisfied that it is appropriate to do so.

(8) Subject to paragraph (9), the meeting at which the appeal will be heard (referred to in these Regulations as a second stage appeal meeting) shall take place not later than 7 working days after the date on which the notification under paragraph (5) is received by the senior manager.

(9) A second stage appeal meeting may take place after the period of 7 working days referred to in paragraph (8) if the senior manager considers it necessary or expedient, in which case he shall notify the officer concerned of his reasons in writing.

Arrangement of second stage appeal meeting

23.—(1) As soon as reasonably practicable after receipt by the senior manager of the notification of appeal referred to in regulation 22(5), the senior manager shall send a notice in writing to the officer concerned—

(a) informing him of the procedures for determining the date and time of the meetingunder paragraphs (2) to (5);

(b) informing him that a human resources professional or a police officer may attend the meeting to advise the senior manager on the proceedings;

(c) informing him that, if he consents, any other person specified in the notice may attend the meeting;

(d) where the officer concerned is a member of a police force, informing him that he may seek advice from a representative of his staff association; and

(e) informing him that he may be accompanied and represented at the meeting by a police friend.

(2) The senior manager shall, if reasonably practicable, agree a date and time for the meeting with the officer concerned.

(3) Where no date and time is agreed under paragraph (2), the senior manager shall specify a date and time for the meeting.

(4) Where a date and time is specified under paragraph (3) and—

(a) the officer concerned or his police friend will not be available at that time; and

(b) the officer concerned proposes an alternative time which satisfies paragraph (5),

the meeting must be postponed to the time proposed by the officer concerned.

(5) An alternative time must—

(a) be reasonable; and

(b) fall before the end of the period of five working days beginning with the first working day after the day specified by the senior manager under paragraph (3).

(6) The senior manager shall send to the officer concerned a notice in writing of the date and time of the second stage appeal meeting determined in accordance with paragraphs (2) to (5) and of the place of the meeting.

Procedure at second stage appeal meeting

24.—(1) The following provisions of this regulation apply to the procedure to be followed at a second stage appeal meeting.

(2) The meeting shall be conducted by the senior manager.

(3) A human resources professional or a police officer may attend the meeting to advise the senior manager on the proceedings.

(4) Any other person specified in the notice referred to in regulation 23(1) may attend the meeting if the officer concerned consents to such attendance.

(5) The senior manager shall—

(a) provide the officer concerned with an opportunity to make representations; and

(b) provide his police friend (if he has one) with an opportunity to make representations in accordance with regulation 7(3).

(6) After considering any representations made in accordance with paragraph (5), the senior manager may—

(a) in an appeal under regulation 22(2)(c), make a finding that the officer concerned should not have been required to attend the second stage meeting;

(b) confirm or reverse the finding made as set out in regulation 20(6);

(c) confirm or vary the relevant terms of the final written improvement notice appealed against.

(7) The senior manager may only deal with the officer concerned in a manner in which the second line manager could have dealt with him under regulation 20 at the second stage meeting.

(8) As soon as reasonably practicable after the conclusion of the meeting, the officer concerned shall be given written notice of the senior manager's decision and a written summary of the reasons for that decision but in any event, the officer concerned shall be given written notice of the decision within three working days of the conclusion of the meeting.

(9) Where the senior manager has reversed the finding made as set out in regulation 20(6) or varied any of the relevant terms of the final written improvement notice, the decision of the senior manager shall take effect by way of substitution for the finding or the terms appealed against from the date of the second stage meeting.

PART 5

Third stage

Assessment following second stage meeting

25.—(1) Where a police officer has received a final written improvement notice, as soon as reasonably practicable after the date on which the period specified under regulation 20(6)(c) ends—

(a) the line manager shall assess the performance or attendance of the officer concerned during that period, in consultation with the second line manager or a human resources professional (or both); and

(b) the line manager shall notify the officer concerned in writing whether the line manager considers that there has been a sufficient improvement in performance or attendance during that period.

(2) If the line manager considers that there has been an insufficient improvement, he shall, at the same time as he gives notification under paragraph (1)(b), also notify the officer concerned in writing that he is required to attend a meeting (in these Regulations referred to as a third stage meeting) to consider his performance or attendance.

(3) Where, in a case not falling within paragraph (2) and subject to paragraph (5), the line manager considers that the officer concerned has, during the validity period of the final written improvement notice, failed to maintain a sufficient improvement in his performance or attendance, he shall notify the officer concerned in writing of the matters set out in paragraph (4).

(4) The line manager shall inform the officer concerned—

(a) that he is of the view mentioned in paragraph (3); and

(b) that the officer concerned is required to attend a meeting (in these Regulations referred to as a third stage meeting) to consider his performance or attendance.

(5) Paragraph (3) shall not apply where the period specified under regulation 20(6)(c) has been extended to exceed 12 months under regulation 9.

(6) In a case falling within paragraph (2) or (3), the senior manager shall direct that a third stage meeting be arranged under regulation 26.

(7) Subject to regulation 27, any third stage meeting which a police officer is required to attend must concern unsatisfactory performance or attendance which is similar to or connected with the unsatisfactory performance or attendance referred to in the final written improvement notice.

Arrangement of a third stage meeting

26.—(1) Where the line manager requires the officer concerned to attend a third stage meeting, the senior manager shall as soon as reasonably practicable send a notice in writing to the officer concerned—

(a) requiring him to attend a third stage meeting of the unsatisfactory performance procedures with a panel appointed by the appropriate authority;

(b) informing him of the procedures for determining the date and time of the meeting under regulation 31;

(c) summarising the reasons why his performance or attendance is considered unsatisfactory;

(d) informing him of the possible outcomes of the meeting;

(e) informing him that a human resources professional and a police officer may attend the meeting to advise the panel on the proceedings;

(f) informing him that a relevant lawyer may attend the meeting to advise the panel on the proceedings and on any question of law that may arise at the meeting;

(g) where the officer concerned is a special constable, informing him that a special constable shall attend the meeting to advise the panel;

(h) informing him that, if he consents, any other person specified in the notice may attend the meeting;

(i) where the officer concerned is a member of a police force, informing him that he may seek advice from a representative of his staff association; and

(j) informing him that he may be accompanied and represented at the meeting by a police friend.

(2) Such notice shall be accompanied by a copy of any document relied upon by the line manager when he formed the view referred to in regulation 25(2) or (3), as the case may be.

(3) A third stage meeting under this regulation shall not take place unless the officer concerned has been notified of his right to representation under paragraph (1)(j).

Circumstances in which a third stage meeting may be required without a prior first or second stage meeting

27.—(1) This regulation applies where the appropriate authority considers that the performance of a police officer constitutes gross incompetence.

(2) Where this regulation applies, the appropriate authority may inform the officer concerned in writing that he is required to attend a meeting to consider his performance.

(3) Such meeting shall be referred to in these Regulations as a third stage meeting, notwithstanding that the officer concerned has not attended a first stage meeting or a second stage meeting in respect of such performance.

(4) Where the appropriate authority informs the officer concerned as mentioned in paragraph (2), the appropriate authority shall direct that a third stage meeting be arranged under regulation 28.

Arrangement of a third stage meeting without a prior first or second stage meeting

28.—(1) Where the appropriate authority has informed the officer concerned under regulation 27(3) that he is required to attend a third stage meeting, the appropriate authority shall as soon as reasonably practicable send to the officer concerned a notice in writing—

(a) requiring him to attend a third stage meeting of the unsatisfactory performance procedures with a panel appointed by the appropriate authority;

(b) informing him of the procedures for determining the date and time of the meeting under regulation 31;

(c) summarising the reasons why his performance is considered to constitute gross incompetence;

(d) informing him of the possible outcomes of the meeting;

(e) informing him that a human resources professional and a police officer may attend the meeting to advise the panel on the proceedings;

(f) informing him that a relevant lawyer may attend the meeting to advise the panel on the proceedings and on any question of law that may arise at the meeting;

(g) where the officer concerned is a special constable, informing him that a special constable shall attend the meeting to act as an advisor to the panel;

(h) informing him that, if he consents, any other person specified in the notice may attend the meeting;

(i) where the officer concerned is a member of a police force, informing him that he may seek advice from a representative of his staff association;

(j) informing him of the effect of regulation 6; and

(k) informing him that he may be accompanied at the meeting by a police friend.

(2) Such notice shall be accompanied by a copy of any document relied upon by the appropriate authority when it formed the view referred to in regulation 27(1).

Procedure on receipt of notice of third stage meeting

29.—(1) Within 14 working days of the date on which a notice has been sent to the officer concerned under regulation 26 or 28 (unless this period is extended by the panel chair for exceptional circumstances), the officer concerned shall comply with paragraphs (2) to (5).

(2) The officer concerned shall provide to the appropriate authority—

(a) written notice of whether or not he accepts that his performance or attendance has been unsatisfactory or that he has been grossly incompetent, as the case may be;

(b) where he accepts that his performance or attendance has been unsatisfactory or that he has been grossly incompetent, any written submission he wishes to make in mitigation;

(c) where he does not accept that his performance or attendance has been unsatisfactory or that he has been grossly incompetent, or where he disputes part of the matters referred to in the notice sent under regulation 26 or 28, written notice of—

(i) the matters he disputes and his account of the relevant events; and

(ii) any arguments on points of law he wishes to be considered by the panel.

(3) The officer concerned shall provide the appropriate authority and the panel with a copy of any document he intends to rely on at the third stage meeting.

(4) Where the officer concerned has proposed witnesses, he shall, if reasonably practicable, agree a list of proposed witnesses with the senior manager.

(5) Where no list of witnesses is agreed under paragraph (4), the officer concerned shall supply to the appropriate authority his list of proposed witnesses and their addresses.

(6) In this regulation and regulation 30, a "proposed witness" means a witness whose attendance at the third stage meeting the officer concerned or the appropriate authority (as the case may be) wishes to request of the panel chair.

Witnesses

30.—(1) As soon as reasonably practicable after any list of proposed witnesses has been—

(a) agreed under regulation 29(4); or

(b) supplied under regulation 29(5),

the appropriate authority shall supply that list to the panel chair together, in the latter case, with a list of its proposed witnesses.

(2) The panel chair shall—

(a) consider the list or lists of proposed witnesses (if any); and

(b) subject to paragraph (3), determine which, if any, witnesses should attend the third stage meeting.

(3) The panel chair may determine that witnesses not named in any list of proposed witnesses should attend the third stage meeting.

(4) No witnesses shall give evidence at a third stage meeting unless the panel chair reasonably believes that it is necessary for the witness to do so, in which case he shall—

(a) where the witness is a police officer, cause that person to be ordered to attend the third stage meeting; and

(b) in any other case, cause the witness to be given notice that his attendance is necessary and of the date, time and place of the meeting.

Timing and notice of third stage meeting

31.—(1) Subject to paragraphs (2) and (6) and regulation 34, the third stage meeting shall take place not later than 30 working days after the date on which on which a notice has been sent to the officer concerned under regulation 26 or 28.

(2) The panel chair may extend the time period specified in paragraph (1) where he considers that it would be in the interests of fairness to do so.

(3) Where the panel chair extends the time period under paragraph (2), he shall provide written notification of his reasons for so doing to the appropriate authority and the officer concerned.

(4) The panel chair shall, if reasonably practicable, agree a date and time for the third stage meeting with the officer concerned.

(5) Where no date and time is agreed under paragraph (4), the panel chair shall specify a date and time for the third stage meeting.

(6) Where a date and time is specified under paragraph (5) and—

(a) the officer concerned or his police friend will not be available at that time; and

(b) the officer concerned proposes an alternative time which satisfies subsection (7),

the third stage meeting shall be postponed to the time proposed by the officer concerned.

(7) An alternative time must—

(a) be reasonable; and

(b) fall before the end of the period of 5 working days beginning with the first working day after the day specified by the panel chair.

(8) The panel chair shall send to the officer concerned a notice in writing of the date and time of the third stage meeting determined in accordance with this regulation and of the place of the meeting.

Appointment of panel members

32.—(1) The third stage meeting shall be conducted by a panel, which shall comprise a panel chair and two other members.

(2) The panel shall be appointed by the appropriate authority.

(3) The panel chair shall be a senior officer or a senior human resources professional.

(4) One panel member shall be either a police officer or a human resources professional of at least the rank of superintendent or (in the opinion of the appropriate authority) equivalent.

(5) One panel member shall be either a police officer or a police staff member of at least the rank of superintendent or (in the opinion of the appropriate authority) equivalent.

(6) At least one panel member shall be a police officer.

(7) At least one panel member shall be a human resources professional.

(8) Each panel member shall be of at least the same rank as or (in the opinion of the appropriate authority) equivalent of the officer concerned.

(9) No panel member shall be an interested party.

(10) As soon as reasonably practicable after the panel members have been appointed, the appropriate authority shall notify in writing the officer concerned of their names.

(11) As soon as the appropriate authority has appointed the panel members, the appropriate authority shall arrange for a copy of any document—

(a) which was available to the line manager in relation to any first stage meeting;

(b) which was available to the second line manager in relation to any second stage meeting; or

(c) which was prepared or submitted under regulation 14, 17, 21, 24, 25, 26, 27 or 28 as the case may be,

to be made available to each panel member; and a copy of any such document shall be sent to the officer concerned.

(12) For the purposes of this regulation, a "senior human resources professional" means a human resources professional who, in the opinion of the appropriate authority, has sufficient seniority, skills and experience to be a panel chair.

Right of officer concerned to object to panel members

33.—(1) The officer concerned may object to the appointment of any of the panel members.

(2) Any such objection must be made in writing to the appropriate authority not later than 3 working days after receipt of the notification referred to in regulation 32(10) and must set out the officer concerned's grounds of objection.

(3) The appropriate authority shall notify the officer concerned in writing whether it upholds or rejects an objection to any panel member.

(4) If the appropriate authority upholds an objection, the appropriate authority shall remove that member from the panel and shall appoint a new member to the panel.

(5) If the appropriate authority appoints a new panel member under paragraph (4), it must ensure that the requirements for the composition of the panel in regulation 32 continue to be met.

(6) As soon as reasonably practicable after any such appointment, the appropriate authority shall notify in writing the officer concerned of the name of the new panel member.

(7) The officer concerned may object to the appointment of a panel member appointed under paragraph (4).

(8) Any such objection must be made in accordance with paragraph (2), provided that it must be made not later than 3 working days after receipt of the notification referred to in paragraph (6); and the appropriate authority shall comply with paragraphs (3) to (6) in relation to the objection.

Postponement and adjournment of a third stage meeting

34.—(1) If the panel chair considers it necessary or expedient, he may direct that the third stage meeting take place at a different time to that specified in the notice sent under regulation 31.

(2) Such direction may specify a time which falls after the period of 30 working days referred to in regulation 31(1).

(3) Where the panel chair makes a direction under paragraph (1) he shall notify in writing the officer concerned, the other panel members and the appropriate authority of his reasons and the revised time and place for the meeting.

(4) Where the officer concerned informs the panel chair in advance that he is unable to attend the third stage meeting on grounds which the panel chair considers reasonable, the panel chair may allow the officer concerned to participate in the meeting by video link or other means.

(5) Where it appears to the panel chair that the officer concerned would not be able to or cannot properly participate in the meeting in the manner permitted under paragraph (4), he may adjourn the meeting.

(6) If the officer concerned informs the panel chair that he will be unable to attend the third stage meeting, or in the absence of such notification does not attend the meeting, and the panel chair is satisfied that a good reason for such non-attendance is given by, or on behalf of, the officer concerned, he may postpone, or as the case may be adjourn, the meeting.

Procedure at a third stage meeting

35.—(1) Subject to the provisions of this regulation, the procedure at the third stage meeting shall be such as the panel chair may determine.

(2) The third stage meeting shall be held in private.

(3) A human resources professional and a police officer may attend the meeting to advise the panel on the proceedings.

(4) A relevant lawyer may attend the meeting to advise the panel on the proceedings and on any question of law that may arise at the meeting.

(5) Where the officer concerned is a special constable, the appropriate authority shall appoint a special constable with sufficient seniority and experience to act as an adviser to the panel, who shall attend the meeting.

(6) Any other person specified in the notice referred to in regulation 26(1) or 28(1) may attend the meeting if the officer concerned consents to such attendance.

(7) Where the officer concerned is required to attend a third stage meeting under regulation 25, the panel chair shall—

(a) provide the officer concerned with an opportunity to make representations in relation to the matters referred to in the notice sent under regulation 26;

(b) provide his police friend (if he has one) with an opportunity to make representations in relation to such matters in accordance with regulation 7(3).

(8) Where the officer concerned is required to attend a third stage meeting under regulation 27, the panel chair shall—

(a) provide the officer concerned with an opportunity to make representations in relation to the matters referred to in the notice sent under regulation 28;

(b) provide the person representing the officer with an opportunity to make representations in relation to such matters in accordance with regulation 7(3).

(9) The panel chair may adjourn the meeting to a specified later time or date if it appears to him necessary or expedient to do so.

(10) A verbatim record of the meeting shall be taken; and the officer concerned shall, on request, be supplied with a copy of such record.

Finding

36.—(1) Following the third stage meeting, the panel shall make a finding whether—

(a) in a case falling within regulation 25(2), the performance or attendance of the officer concerned in the period specified under regulation 20(6)(c) has been satisfactory or not;

(b) in a case falling within regulation 25(3), the performance or attendance of the officer concerned during the validity period of the final written improvement notice has been satisfactory or not; or

(c) in a case falling within regulation 27, the performance of the officer concerned constitutes gross incompetence, unsatisfactory performance or neither.

(2) The panel shall prepare (or shall cause to be prepared) their decision in writing which shall state the finding and, where they have found

(a) that the performance or attendance of the officer concerned has been unsatisfactory during the period specified under regulation 20(6)(c) or during the validity period of the final written improvement notice; or

(b) in a case falling within regulation 27, that his performance constitutes gross incompetence or unsatisfactory performance,

their reasons as well as any outcome which they order under regulation 37.

(3) As soon as reasonably practicable after the conclusion of the meeting, the panel chair shall send a written copy of the decision to—

(a) the officer concerned; and

(b) the line manager,

but in any event, the officer concerned shall be given written notice of the finding within three working days of the conclusion of the meeting.

(4) The copy of the decision sent to the officer concerned shall be accompanied by a notice in writing setting out the circumstances in which a decision may be appealed to a police appeals tribunal under section 85 of the 1996 Act.

(5) Any finding or decision of the panel under this regulation or regulation 37 shall be based on a simple majority but shall not indicate whether it was taken unanimously or by a majority.

Outcomes

37.—(1) If the panel make a finding that, in a case falling within regulation 25(2) or (3), the performance or attendance of the officer concerned has been unsatisfactory they may, subject to paragraph (4), order—

(a) one of the outcomes mentioned in paragraph (3)(a), (c) or (f); or

(b) where the panel are satisfied that there are exceptional circumstances which justify it, the outcome mentioned in paragraph (3)(d).

(2) If the panel make a finding that, in a case falling within regulation 27, the performance of the officer concerned constitutes gross incompetence, they may order one of the outcomes mentioned in paragraph (3)(b), (c), (e) or (f).

(3) The outcomes mentioned in this paragraph are:

(a) dismissal of the officer concerned with notice, the period of such notice to be decided by the panel, subject to a minimum period of 28 days;

(b) dismissal of the officer concerned with immediate effect;

(c) reduction in rank of the officer concerned with immediate effect;

(d) an extension of the final written improvement notice;

(e) the issue of a final written improvement notice;

(f) redeployment to alternative duties (which may involve a reduction of rank) within the police force concerned.

(4) The panel may not order the outcome mentioned in paragraph (3)(c) where–

(a) the officer concerned is a special constable; or

(b) the third stage meeting relates to the attendance of the officer concerned.

(5) If the panel make a finding, in a case falling within regulation 27, of unsatisfactory performance, they shall order the issue of a written improvement notice.

(6) A written improvement notice or a final written improvement notice issued under this regulation shall—

(a) state in what respect the officer concerned's performance or attendance (as the case may be) is considered unsatisfactory or grossly incompetent;

(b) state the improvement that is required in his performance or attendance;

(c) state that, if a sufficient improvement is not made within such reasonable period as the panel shall specify (being a period not greater than 12 months), the officer concerned may be required to attend a second stage meeting (in the case of a written improvement notice) or another third stage meeting (in the case of a final written improvement notice);

(d) state that it shall be valid for a period of twelve months from the date of the notice (the "validity period");

(e) state that, if a sufficient improvement in the officer concerned's performance or attendance is not maintained during the validity period, he may be required to attend a second stage meeting (in the case of a written improvement notice) or another third stage meeting (in the case of a final written improvement notice); and

(f) be signed and dated by the panel chair.

(7) Where the panel orders an extension of the final written improvement notice—

(a) the notice shall be amended to state that if the officer concerned does not make a sufficient improvement within such reasonable period as the panel shall specify (being a period not greater than 12 months) he may be required to attend another third stage meeting;

(b) the panel may vary any of the other matters recorded in the notice;

(c) the notice shall be valid for a further period of twelve months from the date of the extension (the "validity period") and shall state the date on which it expires.

Assessment of performance or attendance following third stage meeting

38.—(1) This regulation applies where a written improvement notice has been issued under regulation 37.

(2) Where this regulation applies, the performance of the officer concerned shall be assessed under regulation 18 as if he had received a written improvement notice under regulation 14.

(3) Where, as a result of such assessment, the officer concerned is required to attend a second stage meeting, these Regulations shall have effect as if he had been required to attend that meeting under regulation 18; and references to the period specified in regulation 13(6)(c) shall be construed as references to the period specified in regulation 37(6)(c).

(4) Where a police officer is required to attend such a second stage meeting, that meeting must concern unsatisfactory performance which is similar to or connected with the unsatisfactory performance referred to in the written improvement notice.

39.—(1) This regulation applies where a final written improvement notice has been issued or extended under regulation 37.

(2) Where this regulation applies, as soon as reasonably practicable after the reasonable period specified by the panel under regulation 37(6)(c) or 37(7)(a) ends—

(a) the panel shall assess the performance or attendance of the officer concerned during that period; and

(b) the panel chair shall notify the officer concerned in writing whether the panel considers that there has been a sufficient improvement in performance or attendance during that period.

(3) If the panel considers that there has been an insufficient improvement, the panel chair shall, at the same time as he gives notification under paragraph (2)(b), also notify the officer concerned in writing that he is required to attend another third stage meeting to consider his performance or attendance.

(4) Where, in a case not falling within paragraph (3), the panel considers that the officer concerned has, during the validity period of the final written improvement notice issued or extended unde regulation 37, failed to maintain a sufficient improvement in his performance or attendance, the panel chair shall notify the officer concerned in writing of the matters set out in paragraph (5).

(5) The panel chair shall inform the officer concerned—

(a) that the panel is of the view mentioned in paragraph (4); and

(b) that the officer concerned is required to attend another third stage meeting to consider his performance or attendance.

(6) In a case falling within paragraph (3) or (4), the appropriate authority shall direct that a third stage meeting be arranged under regulation 26 and shall send the officer concerned the notice referred to in that regulation.

(7) Where the officer concerned is required to attend a third stage meeting under this regulation, these Regulations shall have effect as if the case fell within regulation 25(2) or (3) as the case may be and references to the period specified under regulation 20(6)(c) shall be construed as references to the period specified in regulation 37(6)(c) or 37(7)(a), as the case may be.

(8) Any third stage meeting which a police officer is required to attend under this regulation must concern unsatisfactory performance or attendance which is similar to or connected with the unsatisfactory performance or attendance referred to in the final written improvement notice issued or extended under regulation 37.

(9) References in this regulation to the panel are references to the panel that conducted the initial third stage meeting, subject to paragraph (10).

(10) Where any of the panel members are not able to continue to act as such, the appropriate authority shall remove that member from the panel and shall appoint a new member to the panel.

(11) If the appropriate authority appoints a new panel member under paragraph (10), it must ensure that the requirements for the composition of the panel in regulation 32 continue to be met.

(12) As soon as reasonably practicable after any such appointment, the appropriate authority shall notify in writing the officer concerned of the name of the new panel member.

(13) The officer concerned may object to the appointment of a panel member appointed under paragraph (10).

(14) Any such objection must be made in accordance with regulation 33(2), provided that it must be made not later than 3 working days after receipt of the notification referred to in paragraph (12); and the appropriate authority shall comply with regulation 33(3) to (6) in relation to the objection.

40.—(1) Where an officer is required to attend another third stage meeting under regulation 39—

(a) that meeting shall be conducted by the same panel as conducted the initial third stage meeting (subject to any change in that panel under regulation 39);

(b) the officer concerned shall not have the right to object to panel members under regulation 33, except in accordance with regulation 39(14).

(2) At that third stage meeting, the panel may not order the outcome mentioned in regulation 37(3)(d).

Home Office
Date

Minister of State

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations establish procedures for the taking of proceedings in respect of unsatisfactory performance or attendance of members of police forces of the rank of chief superintendent or below and special constables.

Part 1 deals with preliminary matters. Regulation 3 revokes the Police (Efficiency) Regulations 1999 and the two further sets of regulations which amend those regulations. However, such regulations shall continue to have effect in respect of unsatisfactory performance or attendance which came to the attention of a line manager before the coming into force of these Regulations. Regulation 4 provides definitions of terms used in these Regulations and makes provision in relation to the delegation of the functions of the chief officer of police under these Regulations.

Part 2 deals with general matters. Regulations 5 and 6 make provision about the role of a police friend under these Regulations and the right to legal representation. Regulation 7 contains general provision about the procedure at meetings held in accordance with the Regulations. Regulation 8 makes provision for a senior manager to appoint someone to carry out the functions of a line manager or a second line manager under the Regulations. Regulations 9 and 10 make provision about extensions and suspensions of certain periods specified in the Regulations.

Part 3 deals with the first stage of the procedures under the Regulations. It makes provision about the circumstances in which a first stage meeting may be required; the arrangement of such a meeting and the procedures to be followed at and subsequent to the meeting. If the outcome of the meeting is a finding of unsatisfactory performance or attendance, the police officer will be issued with a written improvement notice under regulation 14. Regulations 15 to 17 make provision for the officer to appeal against such a finding and/or the terms of the notice.

Part 4 makes similar provision in respect of the second stage of the procedures. A police officer can be required to attend a second stage meeting following a first stage meeting if, during specified periods, he has failed to improve his performance or attendance, or if he has failed to maintain an improvement. If the outcome of the second stage meeting is a finding of unsatisfactory performance or attendance, the police officer will be issued with a final written improvement notice under regulation 21. Regulations 22 to 24 make provision for the officer to appeal against such a finding and/or the terms of the notice.

Part 5 makes provision in respect of the third stage of the procedures. A police officer can be required to attend a third stage meeting following a second stage meeting if, during specified periods, he has failed to improve his performance or attendance, or if he has failed to maintain an improvement. A police officer can also be required to attend a third stage meeting, even where he has not attended a first or second stage meeting, if the appropriate authority considers that the performance of the officer constitutes gross incompetence. A third stage meeting is conducted by a panel of three persons appointed by the chief officer of police in accordance with regulation 32. Regulation 33 gives the police officer the right to object to any of the panel members. Regulation 34 makes provision for the decision of the panel at the third stage meeting, which must set out the panel's finding, its reasons and any outcome ordered under regulation 37. Regulations 38 and 39 make provision for the performance or attendance of the officer to be assessed following the third stage meeting where the panel have ordered a written improvement notice, or the issue or renewal of a final written improvement notice. Such an officer may be required to attend a further meeting under these Regulations in connection with his performance or attendance.

Draft Order laid before Parliament under section 84(8) of the Police Act 1996, for approval by resolution of each House of Parliament.

D R A F T S T A T U T O R Y I N S T R U M E N T S

2008 No.

POLICE, ENGLAND AND WALES

The Police (Conduct) Regulations 2008

Made - - -

Coming into force -

The Secretary of State makes the following Regulations in exercise of the powers conferred by sections 50, 51 and 84 of the Police Act 1996(**a**).

In accordance with section 63(3) of the Police Act 1996(**b**), the Secretary of State has supplied the Police Advisory Board of England and Wales with a draft of these Regulations and has taken into consideration the representations of that Board.

In accordance with section 84(8) of that Act(**c**), a draft of these Regulations was laid before Parliament and approved by a resolution of each House of Parliament.

PART 1

Preliminary

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Police (Conduct) Regulations 2008 and shall come into force on [ ].

(2) These Regulations extend to England and Wales.

Revocation and transitional provisions

2.—(1) Subject to paragraph (2), the Police (Conduct) Regulations 2004(**d**) ("the 2004 Regulations") are revoked.

(2) Where an allegation in respect of conduct by a police officer came to the attention of an

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(**a**) 1996 c.16, as amended by the Police (Northern Ireland) Act 1998 (c.32), Greater London Authority Act 1999 (c.29), the Criminal Justice and Police Act 2001 (c.16), the International Development Act 2002 (c.1), the Police Reform Act 2002 (c.30), the Proceeds of Crime Act 2002 (c.29), the Police Act 1997 (c.50), the Serious Organised Crime and Police Act 2005 (c.15), the Safeguarding Vulnerable Groups Act 2006 (c.47), the Police and Justice Act 2006 (c.48), the Police, Public Order and Criminal Justice (Scotland) Act 2006 (asp. 10) and the Criminal Justice and Immigration Act 2008 (c.*).

(**b**) Section 63(3) is amended by paragraph 6 of Schedule 22 to the Criminal Justice and Immigration Act 2008 (c.*)

(**c**) Section 84(8) is inserted by paragraph 7 of Schedule 22 to the Criminal Justice and Immigration Act 2008 (c. *)

(**d**) S.I. 2004/645, as amended by S.I. 2006/549.

appropriate authority before [ ] nothing in these Regulations shall apply and the 2004 Regulations shall continue to have effect.

(3) Before [date 18 months post-commencement], the reference in regulation 19(9)(a) to a final written warning shall be taken to include a reference to a reduction in rank.

Interpretation and delegation

3.—(1) In these Regulations—

"the 1996 Act" means the Police Act 1996;

"the 2002 Act" means the Police Reform Act 2002;

"the Police Regulations" means the Police Regulations 2003(**a**);

"the Complaints Regulations" means the Police (Complaints and Misconduct) Regulations 2004(**b**);

"the Performance Regulations" means the Police (Performance) Regulations 2008(**c**);

"allegation" includes an allegation relating to a complaint or conduct matter;

"appropriate authority" means—

(a) where the officer concerned is a senior officer of any police force, the police authority for the force's area;

(b) in any other case, the chief officer of police of the police force concerned;

"appeal hearing" means an appeal to the police appeals tribunal in accordance with the Police Appeals Tribunal Rules 2008(**d**);

"appeal meeting" means a meeting which the officer concerned, other than a senior officer, requests in accordance with regulation 39 following a misconduct meeting;

"bank holiday" means a day which is a bank holiday under the Banking and Financial Dealings Act 1971(**e**) in England and Wales;

"complainant" means the person referred to at section 12(1)(a) to (c) (as the case may be) of the 2002 Act (complaints, matters and persons to which Part 2 applies);

"complaint" has the meaning given to it by section 12 of the 2002 Act (complaints, matters and persons to which Part 2 applies);

"conduct" includes acts, omissions and statements (whether actual, alleged or inferred);

"conduct matter" has the meaning given to it by section 12 of the 2002 Act (complaints, matters and persons to which Part 2 applies);

"the Commission" means the Independent Police Complaints Commission established under section 9 of the 2002 Act (the Independent Police Complaints Commission);

"criminal proceedings" means—

(a) any prospective criminal proceedings; or

(b) all criminal proceedings brought which have not been brought to a conclusion (apart from the bringing and determination of any appeal other than an appeal against conviction to the Crown Court);

"disciplinary proceedings" means the referral of a case to misconduct proceedings and any proceedings at or in connection with such misconduct proceedings;

"document" means anything in which information of any description is recorded;

"gross misconduct" means a breach of the Standards of Professional Behaviour so serious that dismissal would be justified;

(**a**) S.I.2003/527, as amended by S.I.2005/2834 and S.I.2006/3449.
(**b**) S.I. 2004/643, as amended by S.I.2008/xxx
(**c**) S.I. 2008/xxx
(**d**) S.I. 2008/xxx
(**e**) 1971 c.80.

"HMCIC" means Her Majesty's Chief Inspector of Constabulary appointed under section 54(1) of the 1996 Act (appointment and functions of inspectors of constabulary);

"human resources professional" means a police officer or police staff member who has specific responsibility for personnel matters relating to members of a police force;

"informant" means a person who provides information to an investigation on the basis that his identity is not disclosed during the course of the disciplinary proceedings;

"interested party" means a person whose involvement in the role could reasonably give rise to a concern as to whether he could act impartially under these Regulations;

"interested person" has the meaning given to it by section 21(5) of the 2002 Act (duty to provide information to other persons);

"investigator" means a person—

(a) appointed under regulation 13; or

(b) appointed or designated under paragraph 16, 17, 18 or 19 of Schedule 3 to the 2002 Act (investigations)

as the case may be;

"management action" means action or advice intended to improve the conduct of the officer concerned;

"management advice" means management action imposed following misconduct proceedings or an appeal meeting;

"misconduct" means a breach of the Standards of Professional Behaviour;

"misconduct hearing" means a hearing to which the officer concerned is referred under regulation 19 and at which he may be dealt with by disciplinary action up to and including dismissal;

"misconduct meeting" means a meeting to which the officer concerned is referred under regulation 19 and at which he may be dealt with by disciplinary action up to and including a final written warning;

"misconduct proceedings" means a misconduct meeting or misconduct hearing;

"the officer concerned" means the police officer in relation to whose conduct there has been an allegation;

"personal record" means a personal record kept under regulation 15 of the Police Regulations (contents of personal records);

"police force concerned" means—

(a) where the officer concerned is a member of a police force, the police force of which he is a member; and

(b) where the officer concerned is a special constable, the police force maintained for the police area for which he is appointed;

ìpolice friend" means a person chosen by the officer concerned in accordance with regulation 6;

"police officer" means a member of a police force or special constable;

"police staff member" means an employee of a police authority who is under the direction and control of a chief officer of police;

"relevant lawyer" has the same meaning as in section 84(4) of the 1996 Act(**a**), subject to the provisions of paragraph [7 of Schedule 22] to the Criminal Justice and Immigration Act 2008;

"senior officer" means a police officer holding a rank above that of chief superintendent;

"special case hearing" means a hearing to which the officer concerned is referred under

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(**a**) Section 84 was substituted by paragraph 7 of Schedule 32 to the Criminal Justice and Immigration Act 2008 (c.XX). "Relevant lawyer" is defined in section 84(4) subject to the transitional provision in paragraph 34 of Schedule 37 to the Criminal Justice and Immigration Act 2008.

regulation 41 after the case has been certified as a special case;

"special case proceedings" means the referral of a case to a special case hearing and any proceedings at or in connection with such a hearing;

"staff association" means—

(a) in relation to a member of a police force of the rank of chief inspector or below, the Police Federation of England and Wales;

(b) in relation to a member of a police force of the rank of superintendent or chief superintendent, the Police Superintendents' Association of England and Wales; and

(c) in relation to a member of a police force who is a senior officer, the Chief Police Officers' Staff Association;

"Standards of Professional Behaviour" means the standards of professional behaviour contained in the Schedule; and

"working day" means any day other than a Saturday or Sunday or a day which is a bank holiday or a public holiday in England and Wales.

(2) In these Regulations—

(a) a reference to an officer other than a senior officer shall include a reference to a special constable, regardless of his level of seniority;

(b) a reference to a copy of a statement shall, where it was not made in writing, be construed as a reference to a copy of an account of that statement;

(c) the "special conditions" are that—

(i) there is sufficient evidence, without the need for further evidence, in the form of written statements or other documents, to establish on the balance of probabilities that the conduct of the officer concerned constitutes gross misconduct; and

(ii) it is in the public interest for the officer concerned to cease to be a police officer without delay.

(3) For the purposes of these Regulations—

(a) a written warning shall remain in force for a period of 12 months from the date on which it takes effect; and

(b) subject to regulations 35(6)(b) and 55(2)(b), a final written warning shall remain in force for a period of 18 months from the date on which it takes effect.

(4) The reference to the period of—

(a) 12 months in paragraph (3)(a); and

(b) 18 months in paragraphs (3)(b) and regulations 35(7) and 55(3)

shall not include any time the officer concerned is taking a career break (under regulation 33(12) of the Police Regulations (leave) and the determination made under that provision or otherwise).

(5) Where the appropriate authority is a chief officer of police, he may, subject to paragraph (6), delegate any of his functions under these Regulations to a—

(a) member of a police force of at least the rank of chief inspector; or

(b) police staff member who, in the opinion of the chief officer is of at least a similar level of seniority to a chief inspector.

(6) Where the appropriate authority delegates his functions under regulation 10 or 41, the decisions shall be authorised by a senior officer.

(7) Any proceedings under these Regulations are disciplinary proceedings for the purposes of section 87(5) of the 1996 Act (guidance concerning disciplinary proceedings)(**a**).

(8) Proceedings at or in connection with misconduct proceedings or a special case hearing shall, for the purposes of section 29(1) of the 2002 Act (interpretation of Part 2), be disciplinary

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a) Section 87 of the 1996 Act was amended by section 107(1) of and paragraph 18 of Schedule 7 to the 2002 Act.

proceedings.

The harm test

4.—(1) Information in documents which are stated to be subject to the harm test under these Regulations shall not be supplied to the officer concerned in so far as the appropriate authority considers that preventing disclosure to him is —

(a) necessary for the purpose of preventing the premature or inappropriate disclosure of information that is relevant to, or may be used in, any criminal proceedings;

(b) necessary in the interests of national security;

(c) necessary for the purpose of the prevention or detection of crime, or the apprehension or prosecution of offenders;

(d) necessary for the purpose of the prevention or detection of misconduct by other police officers or police staff members or their apprehension for such matters;

(e) justified on the grounds that providing the information would involve disproportionate effort in comparison to the seriousness of the allegations against the officer concerned;

(f) necessary and proportionate for the protection of the welfare and safety of any informant or witness; or

(g) otherwise in the public interest.

PART 2

General

Application

5. These Regulations apply where an allegation comes to the attention of an appropriate authority which indicates that the conduct of a police officer may amount to misconduct or gross misconduct.

Police Friend

6.—(1) The officer concerned may choose—

(a) a police officer;

(b) a police staff member; or

(c) where the officer concerned is a member of a police force, a person nominated by his staff association,

who is not otherwise involved in the matter, to act as his police friend.

(2) A police friend may—

(a) advise the officer concerned throughout the proceedings under these Regulations;

(b) unless the officer concerned has the right to be legally represented and chooses to be so represented, represent the officer concerned at the misconduct proceedings or special case hearing or appeal meeting;

(c) make representations to the appropriate authority concerning any aspect of the proceedings under these Regulations; and

(d) accompany the officer concerned to any interview, meeting or hearing which forms part of any proceedings under these Regulations.

(3) Where a police friend is a police officer or a police staff member, the chief officer of police of the force of which the police friend is a member shall permit him to use a reasonable amount of

duty time for the purposes referred to in paragraph (2).

(4) The reference in paragraph (3) to the force of which the police friend is a member shall include a reference to the force maintained for the police area for which a special constable is appointed and the force in which a police staff member is serving.

Legal and other representation

7.—(1) The officer concerned has the right to be legally represented, by a relevant lawyer of his choice, at a misconduct hearing or a special case hearing.

(2) If the officer concerned chooses not to be legally represented at such a hearing he may be dismissed or receive any other outcome under regulation 35 or 55 without his being so represented.

(3) Except in a case where the officer concerned has the right to be legally represented and chooses to be so represented, he may be represented at misconduct proceedings or a special case hearing or an appeal meeting only by a police friend.

(4) The appropriate authority may be represented at misconduct proceedings or a special case hearing or an appeal meeting by—

(a) a police officer or police staff member of the police force concerned; or

(b) at a misconduct hearing or a special case hearing only, a relevant lawyer (whether or not the officer concerned chooses to be legally represented).

(5) Subject to paragraph (6), the appropriate authority may appoint a person to advise the person or persons conducting the misconduct proceedings or special case hearing or appeal meeting.

(6) At a misconduct meeting or an appeal meeting, the person appointed under paragraph (5) shall not be a relevant lawyer.

General procedure

8. Where any written notice or document is to be given or supplied to the officer concerned under these Regulations, it shall be—

(a) given to him in person;

(b) left with some person at, or sent by recorded delivery to, his last known address; or

(c) in respect of a written notice under regulation 15(1), given to him in person by his police friend where the police friend has agreed with the appropriate authority to deliver the notice.

Outstanding or possible criminal proceedings

9.—(1) Subject to the provisions of this regulation, proceedings under these Regulations shall proceed without delay.

(2) Before referring a case to misconduct proceedings or a special case hearing, the appropriate authority shall decide whether disciplinary proceedings or special case proceedings would prejudice any criminal proceedings.

(3) For any period during which the appropriate authority considers any disciplinary proceedings or special case proceedings would prejudice any criminal proceedings, no such disciplinary or special case proceedings shall take place.

(4) Where a witness who is or may be a witness in any criminal proceedings is to be or may be asked to attend misconduct proceedings, the appropriate authority shall consult the relevant prosecutor (and when doing so must inform him of the names and addresses of all such witnesses) before making its decision under paragraph (2).

(5) For the purposes of this regulation "relevant prosecutor" means the Director of Public Prosecutions or any other person who has or is likely to have responsibility for the criminal proceedings.

Suspension

10.—(1) The appropriate authority may, subject to the provisions of this regulation, suspend the officer concerned from his office as constable and (in the case of a member of a police force) from membership of the force.

(2) An officer concerned who is suspended under this regulation remains a police officer for the purposes of these Regulations.

(3) A suspension under this regulation shall be with pay.

(4) The appropriate authority shall not suspend a police officer under this regulation unless the following conditions ("the suspension conditions") are satisfied—

(a) having considered temporary redeployment to alternative duties or an alternative location as an alternative to suspension, the appropriate authority has determined that such redeployment is not appropriate in all the circumstances of the case; and

(b) it appears to the appropriate authority that either—

(i) the effective investigation of the case may be prejudiced unless the officer concerned is so suspended; or

(ii) having regard to the nature of the allegation and any other relevant considerations, the public interest requires that he should be so suspended.

(5) The appropriate authority may exercise the power to suspend the officer concerned under this regulation at any time from the date these regulations apply to the officer concerned in accordance with regulation 5 until—

(a) it is decided that the conduct of the officer concerned shall not be referred to misconduct proceedings or a special case hearing; or

(b) such proceedings have concluded.

(6) The appropriate authority may suspend the officer concerned with effect from the date and time of notification which shall be given either—

(a) in writing with a summary of the reasons; or

(b) orally, in which case the appropriate authority shall within 3 working days following the suspension, confirm the suspension in writing with a summary of the reasons.

(7) The officer concerned (or his police friend) may make representations against his suspension to the appropriate authority—

(a) within 7 working days of his being suspended;

(b) at any time during the suspension if he reasonably believes that circumstances relevant to the suspension conditions have changed.

(8) The appropriate authority shall review the suspension conditions—

(a) on receipt of any representations under paragraph (7)(a);

(b) if there has been no previous review, within 4 weeks of the suspension; and

(c) in any other case—

(i) on being notified that circumstances relevant to the suspension conditions may have changed (whether by means of representations made under paragraph (7)(b) or otherwise); or

(ii) within 4 weeks of the previous review.

(9) Where, following a review under paragraph (8), the suspension conditions remain satisfied and the appropriate authority decides the suspension should continue, it shall, within 3 working days of the review, so notify the officer concerned in writing with a summary of the reasons.

(10) Subject to paragraph (12), where the officer concerned is suspended under this regulation, he shall remain so suspended until whichever of the following occurs first—

(a) the suspension conditions are no longer satisfied;

(b) either of the events mentioned in paragraph (5)(a) and, subject to paragraph (11), (5)(b).

(11) Where an officer concerned who is suspended is dismissed with notice under regulation 35 he shall remain suspended until the end of the notice period.

(12) In a case to which paragraph 17, 18 or 19 of Schedule 3 to the 2002 Act (investigations) applies, the appropriate authority must consult with the Commission—

(a) in deciding whether or not to suspend the officer concerned under this regulation; and

(b) before a suspension under this regulation is brought to an end by virtue of paragraph (10)(a).

PART 3

Investigations

Application of this Part

11. This Part shall not apply to a case to which paragraph 16, 17, 18 or 19 of Schedule 3 to the 2002 Act (investigations) applies.

Assessment of conduct

12.—(1) Subject to paragraph (6) the appropriate authority shall assess whether the conduct which is the subject matter of the allegation, if proved, would amount to misconduct or gross misconduct or neither.

(2) Where the appropriate authority assesses that the conduct, if proved, would amount to neither misconduct nor gross misconduct, it may—

(a) take no action;

(b) take management action against the officer concerned; or

(c) refer the matter to be dealt with under the Performance Regulations.

(3) Where the appropriate authority assesses that the conduct, if proved, would amount to misconduct, it shall determine whether or not it is necessary for the matter to be investigated and—

(a) if so, the appropriate authority shall further determine whether, if the matter were to be referred to misconduct proceedings, those would be likely to be a misconduct meeting or a misconduct hearing;

(b) if not, the appropriate authority may—

(i) take no action; or

(ii) take management action against the officer concerned.

(4) Where the appropriate authority determines that the conduct, if proved, would amount to gross misconduct, the matter shall be investigated.

(5) At any time before the start of misconduct proceedings, the appropriate authority may revise its assessment of the conduct under paragraph (1) if it considers it appropriate to do so.

(6) Where the appropriate authority decides under this regulation to take no action, take management action or to refer the matter to be dealt with under the Performance Regulations, it shall so notify the officer concerned in writing as soon as practicable.

Appointment of investigator

13.—(1) This regulation applies where the matter is to be investigated in accordance with regulation 12.

(2) The appropriate authority shall, subject to paragraph (3), appoint a person to investigate the matter.

(3) If the officer concerned is the Commissioner of Police of the Metropolis or the Deputy

Commissioner of the Police of the Metropolis—

(a) the appropriate authority shall notify the Secretary of State; and

(b) the Secretary of State shall appoint a person to investigate the matter.

(4) No person shall be appointed to investigate the matter under this regulation—

(a) unless he has an appropriate level of knowledge, skills and experience to plan and manage the investigation;

(b) if he is an interested party;

(c) if he works, directly or indirectly, under the management of the officer concerned;

(d) in a case where the officer concerned is a senior officer, if he is—

(i) the chief officer of police of the police force concerned;

(ii) a member of the same police force as the officer concerned, or where the officer concerned is a member of the metropolitan police force, serving in the same command as the officer concerned.

(5) The reference in paragraph (4)(d)(ii) to a member of the police force shall include a reference to a special constable appointed for the area of that force and a police staff member serving in that force.

Investigation

14.—(1) The purpose of the investigation is to—

(a) gather evidence to establish the facts and circumstances of the alleged misconduct or gross misconduct;

(b) assist the appropriate authority to establish whether there is a case to answer in respect of misconduct or gross misconduct or whether there is no case to answer.

Written notices

15.—(1) The investigator shall as soon as is reasonably practicable after being appointed, and subject to paragraph (3), cause the officer concerned to be given written notice—

(a) describing the conduct that is the subject matter of the allegation and how that conduct is alleged to fall below the Standards of Professional Behaviour;

(b) of the appropriate authority's assessment of whether that conduct, if proved, would amount to misconduct or gross misconduct;

(c) that there is to be an investigation into the matter and the identity of the investigator;

(d) of whether, if the matter were to be referred to misconduct proceedings, those would be likely to be a misconduct meeting or a misconduct hearing;

(e) that if the likely form of any misconduct proceedings to be held changes, further notice (with reasons) will be given;

(f) informing him that he has the right to seek advice from his staff association or any other body and of the effect of regulation 6(1);

(g) of the effect of regulations 7(1) to (3) and 16;

(h) informing him that whilst he does not have to say anything it may harm his case if he does not mention when interviewed or when providing any information under regulations 16(1) or 22(2) or (3) something which he later relies on in any misconduct proceedings or special case hearing or at an appeal meeting or appeal hearing.

(2) If following service of the notice under paragraph (1), the appropriate authority revises its assessment of the conduct in accordance with regulation 12(5) or its determination of the likely form of any misconduct proceedings to be taken, the appropriate authority shall, as soon as practicable, give the officer concerned further written notice of—

(a) the assessment of whether the conduct, if proved, would amount to misconduct or gross

misconduct as the case may be and the reason for that assessment;

(b) whether, if the case were to be referred to misconduct proceedings, those would be likely to be a misconduct meeting or a misconduct hearing and the reason for this.

(3) Paragraph (1) does not apply for so long as the investigator considers that giving the notice under paragraph (1) might prejudice the investigation or any other investigation (including, in particular, a criminal investigation).

(4) The investigator shall notify the officer concerned of the progress of the investigation—

(a) if there has been no previous notification, within 4 weeks of the start of the investigation; and

(b) in any other case, within 4 weeks of the previous notification.

Representations to the investigator

16.—(1) Within 10 working days starting with the day after which the notice is given under regulation 15(1), (unless this period is extended by the investigator)—

(a) the officer concerned may provide a written or oral statement relating to any matter under investigation to the investigator; and

(b) the officer concerned or his police friend may provide any relevant documents to the investigator.

(2) The investigator shall, as part of his investigation, consider any such statement or document and shall make a record of having received it.

(3) In this regulation "relevant document"—

(a) means a document relating to any matter under investigation, and

(b) includes such a document containing suggestions as to lines of inquiry to be pursued or witnesses to be interviewed.

Interviews during investigation

17.—(1) Where an investigator wishes to interview the officer concerned as part of his investigation, he shall, if reasonably practicable, agree a date and time for the interview with the officer concerned.

(2) Where no date and time is agreed under paragraph (1), the investigator shall specify a date and time for the interview.

(3) Where a date and time is specified under paragraph (2) and—

(a) the officer concerned or his police friend will not be available at that time; and

(b) the officer concerned proposes an alternative time which satisfies subsection (4),

the interview shall be postponed to the time proposed by the officer concerned.

(4) An alternative time must—

(a) be reasonable; and

(b) fall before the end of the period of 5 working days beginning with the first working day after the day specified by the investigator.

(5) The officer concerned shall be given written notice of the date, time and place of the interview.

(6) The investigator shall, in advance of the interview, provide the officer concerned with such information as the investigator considers appropriate in the circumstances of the case to enable the officer concerned to prepare for the interview.

(7) The officer concerned shall attend the interview.

(8) A police friend may not answer any questions asked of the officer concerned during the interview.

Report of investigation

18.—(1) On completion of his investigation the investigator shall as soon as practicable submit a written report on his investigation to the appropriate authority.

(2) The written report shall—

(a) provide an accurate summary of the evidence;

(b) attach or refer to any relevant documents; and

(c) indicate the investigator's opinion as to whether there is a case to answer in respect of misconduct or gross misconduct or whether there is no case to answer.

(3) If at any time during his investigation the investigator believes that the appropriate authority would, on consideration of the matter, be likely to determine that the special conditions are satisfied, he shall, whether or not the investigation is complete, submit to the appropriate authority—

(a) a statement of his belief and the grounds for it; and

(b) a written report on his investigation to that point.

PART 4

Misconduct Proceedings

Referral of case to misconduct proceedings

19.—(1) Subject to regulation 41 and paragraph (6)—

(a) on receipt of the investigator's written report; and

(b) in the case of such a report submitted under paragraph 22 of Schedule 3 to the 2002 Act (final reports on investigations), in making a determination under paragraph 23(7) or 24(6) of Schedule 3 to the 2002 Act (action in response to an investigation report) as to what action to take in respect of matters dealt with in that report,

the appropriate authority shall, as soon as practicable, 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.

(2) Subject to paragraph (6), in a case where the disciplinary proceedings have been delayed by virtue of regulation 9(3), as soon as practicable after the appropriate authority considers that such proceedings would no longer prejudice any criminal proceedings, it shall, subject to regulation 41(3), make a further determination as to whether the officer concerned has a case to answer in respect of misconduct or gross misconduct or whether there is no case to answer.

(3) Where the appropriate authority determines there is no case to answer, it may—

(a) take no further action against the officer concerned; or

(b) take management action against the officer concerned.

(4) Where the appropriate authority determines that there is a case to answer in respect of gross misconduct, it shall, subject to regulation 9(3) and paragraph (2), refer the case to a misconduct hearing.

(5) Where the appropriate authority determines that there is a case to answer in respect of misconduct, it may—

(a) subject to regulation 9(3) and paragraph (2), refer the case to misconduct proceedings; or

(b) take management action against the officer concerned.

(6) Where the appropriate authority—

(a) accepts a recommendation under paragraph 27(3) of Schedule 3 to the 2002 Act (duties with respect to disciplinary proceedings) that proceedings are brought at a misconduct meeting or a misconduct hearing; or

(b) has a duty under paragraph 27(4) (duties with respect to disciplinary proceedings) of that Schedule to comply with a direction to give effect to such a recommendation

it shall, subject to regulation 9(3), refer the case to such a meeting or hearing.

(7) Where the appropriate authority fails to—

(a) make the determination referred to in paragraph (1); and

(b) where appropriate, decide what action to take under paragraph (5)

within 15 working days of receipt of the investigator's written report, it shall notify the officer concerned of the reason for this.

(8) Where under paragraph (5) the appropriate authority determines to take management action, it shall give the officer concerned written notice of this as soon as practicable.

(9) Where the appropriate authority determines under paragraph (5) to refer the case to misconduct proceedings—

(a) where the officer concerned had a final written warning in force at the date of the assessment of conduct under regulation 12(1) or regulation 14A of the Complaints Regulations (as the case may be), those proceedings shall be a misconduct hearing; and

(b) in all other cases it shall be a misconduct meeting.

Withdrawal of case

20.—(1) Subject to paragraph (3), at any time before the beginning of the misconduct proceedings, the appropriate authority may direct that the case be withdrawn.

(2) Where a direction is given under paragraph (1)—

(a) the appropriate authority may—

(i) take no further action against the officer concerned;

(ii) take management action against the officer concerned; or

(iii) refer the matter to be dealt with under the Performance Regulations; and

(b) the appropriate authority shall as soon as practicable give the officer concerned—

(i) written notice of the direction, indicating whether any action will be taken under paragraph (2)(a); and

(ii) where the investigation has been completed, on request and subject to the harm test, a copy of the investigator's report or such parts of that report as relate to the officer concerned.

(3) This regulation shall not apply to a case to which paragraph 16, 17, 18, or 19 of Schedule 3 to the 2002 Act (investigations) applies.

Notice of referral to misconduct proceedings and panel membership

21.—(1) Where a case is referred to misconduct proceedings, the appropriate authority shall as soon as practicable give the officer concerned—

(a) written notice of—

(i) the referral;

(ii) the conduct that is the subject matter of the case and how that conduct is alleged to amount to misconduct or gross misconduct as the case may be;

(iii) the name of the person appointed to (in the case of a misconduct meeting for an officer other than a senior officer) conduct or (in any other case) chair the misconduct proceedings and of the effect of paragraphs (3) to (5) of this regulation; and

(iv) the effect of regulation 7(1) to (3) in relation to the form of misconduct proceedings to which the case is being referred;

(b) a copy of any statement he may have made to the investigator during the course of the

investigation; and

(c) subject to the harm test, a copy of —

(i) the investigator's report or such parts of that report (together with any document attached to or referred to in that report) as relate to him ; and

(ii) any other relevant document gathered during the course of the investigation.

(2) As soon as practicable after—

(a) any person has been appointed under regulation 7(5) to advise the person or persons conducting the misconduct proceedings; and

(b) where the misconduct proceedings are to be conducted by a panel, the person or persons comprising that panel (other than the chair) have been determined,

the appropriate authority shall give the officer concerned written notice of the names of such persons and of the effect of paragraphs (3) to (6) of this regulation.

(3) The officer concerned may object to any person whom he is notified under this regulation is to—

(a) conduct (including chair) his misconduct proceedings; or

(b) advise the person or persons conducting those proceedings.

(4) Any such objection must be made in writing to the appropriate authority not later than 3 working days after the officer concerned is notified of the person's name and must set out the officer concerned's grounds of objection.

(5) The appropriate authority shall notify the officer concerned in writing whether it upholds or rejects an objection to any panel member or to any person appointed under regulation 7(5) to advise the person or persons conducting the misconduct proceedings.

(6) If the appropriate authority upholds the objection, the person to whom the officer concerned objects shall be replaced (in accordance with regulations 7(5) and (6) or 25 to 27 as appropriate).

(7) As soon as reasonably practicable after any such appointment, the appropriate authority shall notify in writing the officer concerned of the name of the new panel member, or the adviser to the person or persons conducting the misconduct proceedings, as the case may be.

(8) The officer concerned may object to the appointment of a person appointed under paragraph (6).

(9) Any such objection must be made in accordance with paragraph (4), provided that it must be made no later than 3 working days after receipt of the notification referred to in paragraph (7); and the appropriate authority shall comply with paragraphs (5) to (7) in relation to that objection.

(10) In this regulation "relevant document" means a document which, in the opinion of the appropriate authority, is relevant to the case the officer concerned has to answer.

Procedure on receipt of notice

22.—(1) Within 14 working days of the date on which the documents have been supplied to the officer concerned under regulation 21(1) (unless this period is extended by the person conducting or chairing the misconduct proceedings for exceptional circumstances), the officer concerned shall comply with paragraphs (2) to (5).

(2) The officer concerned shall provide to the appropriate authority—

(a) written notice of whether or not he accepts that his conduct amounts to misconduct or gross misconduct as the case may be;

(b) where he accepts that his conduct amounts to misconduct or gross misconduct as the case may be, any written submission he wishes to make in mitigation;

(c) where he does not accept that his conduct amounts to misconduct or gross misconduct as the case may be, or he disputes part of the case against him, written notice of—

(i) the allegations he disputes and his account of the relevant events; and

(ii) any arguments on points of law he wishes to be considered by the person or persons

conducting the misconduct proceedings.

(3) The officer concerned shall provide the appropriate authority and the person conducting or chairing the misconduct proceedings with a copy of any document he intends to rely on at the misconduct proceedings.

(4) Where the officer concerned has proposed witnesses, he shall, if reasonably practicable, agree a list of proposed witnesses with the appropriate authority.

(5) Where no list of witnesses is agreed under paragraph (4), the officer concerned shall supply to the appropriate authority his list of proposed witnesses including brief details of the evidence they are able to provide and (except where the investigator has interviewed those witnesses) their addresses.

(6) In this regulation and regulation 23, "proposed witness" means a witness whose attendance at the misconduct proceedings the officer concerned or the appropriate authority (as the case may be) wishes to request of the person conducting or chairing those proceedings.

Witnesses

23.—(1) As soon as practicable after any list of proposed witnesses has been—

(a) agreed under regulation 22(4); or

(b) supplied under regulation 22(5),

the appropriate authority shall supply that list to the person conducting or chairing the misconduct proceedings together, in the latter case, with a list of its proposed witnesses including brief details of the evidence they are able to provide.

(2) The person conducting or chairing the misconduct proceedings shall—

(a) consider the list or lists of proposed witnesses (if any); and

(b) subject to paragraph (3), determine which, if any, witnesses should attend the misconduct proceedings.

(3) No witnesses shall give evidence at misconduct proceedings unless the person conducting or chairing those proceedings reasonably believes that it is necessary for the witness to do so, in which case he shall—

(a) where the witness is a police officer, cause that person to be ordered to attend the misconduct proceedings; and

(b) in any other case, cause the witness to be given notice that his attendance is necessary and of the date, time and place of the proceedings.

Timing and notice of misconduct proceedings

24.—(1) Subject to paragraphs (2) and (6), the misconduct proceedings shall take place—

(a) in the case of a misconduct meeting, not later than 20 working days; or

(b) in the case of a misconduct hearing, not later than 30 working days

after the date on which the documents have been supplied to the officer concerned under regulation 21(1).

(2) The person conducting or chairing the misconduct proceedings may extend the time period specified in paragraph (1) where he considers that it would be in the interests of justice to do so.

(3) Where the person conducting or chairing the misconduct proceedings decides to extend the time period under paragraph (2), or decides not to do so following representations from the officer concerned or the appropriate authority, he shall provide written notification of his reasons for that decision to the appropriate authority and the officer concerned.

(4) The person conducting or chairing the misconduct proceedings shall, if reasonably practicable, agree a date and time for the misconduct proceedings with the officer concerned.

(5) Where no date and time is agreed under paragraph (4), the person conducting or chairing the misconduct proceedings shall specify a date and time for those proceedings.

(6) Where a date and time is specified under paragraph (5) and—

(a) the officer concerned or his police friend will not be available at that time; and

(b) the officer concerned proposes an alternative time which satisfies subsection (7),

the misconduct proceedings shall be postponed to the time proposed by the officer concerned.

(7) An alternative time must—

(a) be reasonable; and

(b) fall before the end of the period of 5 working days beginning with the first working day after the day specified by the person conducting or chairing the misconduct proceedings.

(8) The officer concerned shall be given written notice of the date, time and place of the misconduct proceedings.

Persons conducting misconduct proceedings: officers other than senior officers

25.—(1) This regulation applies where the officer concerned is an officer other than a senior officer.

(2) The misconduct meeting shall be conducted by a person appointed by the appropriate authority who is not an interested party and who satisfies paragraph (3).

(3) The person shall be—

(a) (i) where the officer concerned is a member of a police force, another member of a police force of at least one rank higher than the officer concerned;

(ii) where the officer concerned is a special constable, a member of a police force; or

(b) unless the case substantially involves operational policing matters, a police staff member who, in the opinion of the appropriate authority, is more senior than the officer concerned.

(4) Where the case is referred to a misconduct hearing, that hearing shall be conducted by a panel of 3 persons appointed by the appropriate authority, comprising—

(a) a senior officer or a senior human resources professional, who shall be the chair;

(b) (i) where the chair is a senior officer, a member of a police force of the rank of superintendent or above or a human resources professional;

(ii) where the chair is a senior human resources professional, a member of a police force of the rank of superintendent or above; and

(c) a person selected by the appropriate authority from a list of candidates maintained by a police authority for the purposes of these Regulations.

(5) For the purposes of this regulation, a "senior human resources professional" means a human resources professional who, in the opinion of the appropriate authority, has sufficient seniority, skills and experience to conduct the misconduct hearing.

Persons conducting misconduct proceedings: chief constables etc.

26.—(1) Where the officer concerned is—

(a) a chief constable;

(b) in the case of the Metropolitan Police Force—

(i) the commissioner;

(ii) the deputy commissioner; or

(iii) an assistant commissioner; or

(c) in the case of the City of London police force, the commissioner,

the misconduct proceedings shall be conducted by a panel of persons as specified in paragraph (2) or (3) as appropriate, appointed by the appropriate authority.

(2) For a misconduct meeting, those persons are—

(a) the chair of the police authority for the police force concerned, or another member of that police authority nominated by him, who shall be the chair; and

(b) HMCIC or an inspector of constabulary nominated by him.

(3) For a misconduct hearing, those persons are—

(a) a senior counsel selected by the appropriate authority from a list of candidates nominated by the Lord Chancellor for the purposes of these Regulations, who shall be the chair;

(b) the chair of the police authority for the police force concerned or another member of that police authority nominated by him;

(c) HMCIC or an inspector of constabulary nominated by him; and

(d) a person selected by the appropriate authority from a list of candidates maintained by a police authority for the purposes of these Regulations.

Persons conducting misconduct proceedings: other senior officers

27.—(1) Where the officer concerned is a senior officer other than one mentioned in regulation 26(1), those proceedings shall be conducted by a panel of persons as specified in paragraph (2) or (3) as appropriate, appointed by the appropriate authority.

(2) For a misconduct meeting, those persons are—

(a) (i) where the officer concerned is a member of the Metropolitan Police Force, an assistant commissioner or a senior officer of at least one rank above that of the officer concerned nominated by an assistant commissioner, who shall be the chair; or

(ii) where the officer concerned is a member of the City of London police, the commissioner or a senior officer of at least one rank above that of the officer concerned nominated by that commissioner, who shall be the chair; or

(iii) in any other case, the chief officer of police of the police force concerned or a senior officer of at least one rank above that of the officer concerned nominated by that chief officer of police, who shall be the chair; and

(b) the chair of the police authority for the police force concerned or another member of that police authority nominated by him.

(3) For a misconduct hearing, those persons are—

(a) HMCIC or an inspector of constabulary nominated by him, who shall be the chair;

(b) the chief officer of police of the police force concerned or a senior officer of at least one rank above that of the officer concerned nominated by that chief officer of police;

(c) the chair of the police authority for the police force concerned or another member of that police authority nominated by him; and

(d) a person selected by the appropriate authority from a list of candidates maintained by a police authority for the purposes of these Regulations.

Documents to be supplied to any person conducting the misconduct proceedings

28.—(1) The person or persons conducting the misconduct proceedings shall be supplied with a copy of—

(a) the documents given to the officer concerned under regulation 21(1)(a) to (c)(i);

(b) the documents provided by the officer concerned under—

(i) regulation 22(2) and (3); and

(ii) where paragraph (2) applies, regulation 45; and

(c) where the officer concerned does not accept that his conduct amounts to misconduct or gross misconduct as the case may be or where he disputes any part of the case against him, any other documents that, in the opinion of the appropriate authority, should be

considered at the misconduct proceedings.

(2) This paragraph applies where the appropriate authority has directed, in accordance with regulation 42(1), that the case be dealt with under this Part.

(3) The officer concerned shall be supplied with a list of the documents supplied under paragraph (1) and a copy of any such document of which he has not already been supplied with a copy.

Attendance of officer concerned at misconduct proceedings

29.—(1) Subject to paragraph (2), the officer concerned shall attend the misconduct proceedings.

(2) Where the officer concerned informs the person conducting or chairing the misconduct proceedings in advance that he is unable to attend on grounds which the person conducting or chairing those proceedings considers reasonable, that person may allow the officer concerned to participate in the proceedings by video link or other means.

(3) Where the officer concerned is allowed to and does so participate in the misconduct proceedings or where the officer concerned does not attend the misconduct proceedings—

(a) he may nonetheless be represented at those proceedings by his—

(i) police friend; or

(ii) in the case of a misconduct hearing, his relevant lawyer (in which case the police friend may also attend); and

(b) the proceedings may be proceeded with and concluded in the absence of the officer concerned whether or not he is so represented.

Participation of Commission and investigator at misconduct proceedings

30.—(1) In any case where—

(a) paragraph 18 or 19 of Schedule 3 to the 2002 Act (managed and independent investigations) applied ; or

(b) paragraph 16 or 17 of Schedule 3 to the 2002 Act (investigations by the appropriate authority or supervised investigations) applied and the Commission—

(i) made a recommendation under paragraph 27(3) of that Schedule (duties with respect to disciplinary proceedings) which the appropriate authority accepted; or

(ii) gave a direction under paragraph 27(4)(a) of that Schedule (duties with respect to disciplinary proceedings),

the Commission may attend the misconduct proceedings to make representations.

(2) Where the Commission so attends the misconduct proceedings—

(a) if it is a misconduct hearing it may instruct a relevant lawyer to represent it;

(b) it shall notify the complainant or any interested person prior to the hearing; and

(c) the person conducting or chairing the misconduct proceedings shall notify the officer concerned prior to the hearing.

(3) The investigator or a nominated person shall attend the misconduct proceedings on the request of the person conducting or chairing those proceedings to answer questions.

(4) For the purposes of this regulation, a "nominated person" is a person who, in the opinion of—

(a) the appropriate authority; or

(b) in a case to which paragraph 18 or 19 of Schedule 3 to the 2002 Act (managed and independent investigations) applied, the Commission,

has sufficient knowledge of the investigation of the case to be able to assist the person or persons conducting the misconduct proceedings.

Attendance of complainant or interested person at misconduct proceedings

31.—(1) This regulation shall apply in the case of misconduct proceedings arising from a—

(a) conduct matter to which paragraph 16, 17, 18 or 19 of Schedule 3 to the 2002 Act (investigations) applied; or

(b) complaint which was certified as subject to special requirements under paragraph 19A(1)(**a**) of that Schedule (assessment of seriousness of conduct).

(2) The appropriate authority shall notify in advance the complainant or any interested person of the date, time and place of the misconduct proceedings.

(3) Subject to the provisions of this regulation, regulation 33 and any conditions imposed under regulation 32(7), the complainant or any interested person may attend the misconduct proceedings as an observer up to but not including the point at which the person conducting or chairing those proceedings considers the question of disciplinary action.

(4) Subject to paragraph (5), regulation 33 and any conditions imposed under regulation 32(7), a complainant or interested person may be accompanied by one other person, and if the complainant or interested person has a special need, by one further person to accommodate that need.

(5) Where a complainant or interested person or any person accompanying him is to give evidence as a witness at the misconduct proceedings, none of those persons shall be allowed to attend the proceedings before that evidence is given.

(6) The person conducting or chairing the misconduct proceedings may, at his discretion, put any questions to the officer concerned that the complainant or interested person may request be put to him.

Attendance of others at misconduct proceedings

32.—(1) Subject to regulation 31 and the provisions of this regulation, the misconduct proceedings shall be in private.

(2) A person nominated by the Commission may, as an observer, attend misconduct proceedings which arise from a case to which—

(a) paragraph 17, 18 or 19 of Schedule 3 to the 2002 Act (supervised, managed and independent investigations) applied; or

(b) paragraph 16 of Schedule 3 to the 2002 Act (investigations by the appropriate authority) applied and in relation to which the Commission—

(i) made a recommendation under paragraph 27(3) of that Schedule (duties with respect to disciplinary proceedings) which the appropriate authority accepted; or

(ii) gave a direction under paragraph 27(4)(a) of that Schedule (duties with respect to disciplinary proceedings).

(3) The person conducting or chairing the misconduct proceedings may, at his discretion, permit a witness in the misconduct proceedings to be accompanied at those proceedings by one other person.

(4) Where a misconduct hearing arises from a case to which paragraph 19 of Schedule 3 to the 2002 Act (investigations by the Commission) applied and the Commission considers that because of the gravity of the case or other exceptional circumstances it would be in the public interest to do so, the Commission may, having consulted with—

(a) the appropriate authority;

(b) the officer concerned;

(c) the complainant or interested person; and

(d) any witnesses,

direct that the whole or part of the misconduct hearing be held in public.

(**a**) Paragraph 19A was inserted into the 2002 Act by the Criminal Justice Act 2007 (c.).

(5) It shall be the duty of the persons conducting the misconduct hearing to comply with a direction given under paragraph (4).

(6) A direction under paragraph (4), together with the reasons for it, shall be notified as soon as practicable, and in any event within 5 working days, to the persons consulted under that paragraph.

(7) The person conducting or chairing the misconduct proceedings may impose such conditions as he sees fit relating to the attendance under regulation 31 or this regulation of persons at the misconduct proceedings (including circumstances in which they may be excluded) in order to facilitate the proper conduct of the proceedings.

Exclusion from misconduct proceedings

33. Where it appears to the person conducting or chairing the misconduct proceedings that any person may, in giving evidence, disclose information which, under the harm test, ought not to be disclosed to any person attending the proceedings, he shall require such attendees to withdraw while the evidence is given.

Procedure at misconduct proceedings

34.—(1) Subject to these Regulations, the person conducting or chairing the misconduct proceedings shall determine his own procedure at those proceedings.

(2) The misconduct proceedings shall not proceed unless the officer concerned has been notified of the effect of regulation 7(1) to (3) in relation to the form of misconduct proceedings taking place.

(3) Subject to paragraph (4), the person conducting or chairing the misconduct proceedings may from time to time adjourn the proceedings if it appears to him to be necessary or expedient to do so.

(4) The misconduct proceedings shall not, except in exceptional circumstances, be adjourned solely to allow the complainant or any witness or interested person to attend.

(5) The person representing the officer concerned may—

(a) address the proceedings in order to do any or all of the following—

(i) put the officer concerned's case;

(ii) sum up that case;

(iii) respond on the officer concerned's behalf to any view expressed at the proceedings;

(iv) make representations concerning any aspect of proceedings under these Regulations; and

(v) in the case of a misconduct hearing or misconduct meeting subject to paragraph (8), ask questions of any witnesses; and

(b) if the officer concerned is present at the proceedings or participating in them by video link or other means in accordance with regulation 29(3), confer with the officer concerned.

(6) Where (at a misconduct hearing) the person representing the officer concerned is a relevant lawyer, the police friend of the officer concerned may also confer with the officer concerned in the circumstances mentioned at paragraph (5)(b).

(7) The police friend or relevant lawyer of the officer concerned may not answer any questions asked of the officer concerned during the misconduct proceedings.

(8) Whether any question should or should not be put to a witness shall be determined by the person conducting or chairing the misconduct proceedings.

(9) The person conducting or chairing the misconduct proceedings may allow any document to be considered at those proceedings notwithstanding that a copy of it has not been supplied—

(a) to him by the officer concerned in accordance with regulation 22(3); or

(b) to the officer concerned in accordance with regulation 21(1).

(10) Where evidence is given at the misconduct proceedings that the officer concerned, at any time after he was given written notice under regulation 15(1), on being questioned by an investigator or in submitting any information under regulations 16(1), 22(2) or (3) (or, where paragraph (12) applies, regulation 45), failed to mention any fact relied on in his case at the misconduct proceedings, being a fact which in the circumstances existing at the time, the officer concerned could reasonably have been expected to mention when so questioned or when providing such information, paragraph (11) applies.

(11) Where this paragraph applies, the person or persons conducting the misconduct proceedings may draw such inferences from the failure as appear proper.

(12) This paragraph applies where the appropriate authority has directed, in accordance with regulation 42(1), that the case be dealt with under this Part.

(13) The person or persons conducting the misconduct proceedings shall review the facts of the case and decide whether the conduct of the officer concerned amounts to misconduct or gross misconduct or neither.

(14) The person or persons conducting the misconduct proceedings shall not find that the conduct of the officer concerned amounts to misconduct or gross misconduct unless—

(a) he is or they are satisfied on the balance of probabilities that this is the case; or

(b) the officer concerned admits it is the case.

(15) At misconduct proceedings conducted by a panel, any decision shall be based on a majority (with, where there is a panel of two or four, the chair having the casting vote if necessary) but shall not indicate whether it was taken unanimously or by a majority.

Outcome of misconduct proceedings

35.—(1) Subject to the provisions of this regulation, the person or persons conducting the misconduct proceedings may—

(a) impose any of the disciplinary action in paragraph (2)(a) or (b) or (6)(b) as appropriate; or

(b) where he or they find the conduct amounts to misconduct but not gross misconduct following a misconduct meeting or hearing, record a finding of misconduct but take no further action.

(2) The disciplinary action is—

(a) at a misconduct meeting—

(i) management advice;

(ii) written warning; or

(iii) final written warning;

(b) at a misconduct hearing—

(i) management advice;

(ii) written warning;

(iii) final written warning;

(iv) dismissal with notice; or

(v) dismissal without notice.

(3) The disciplinary action referred to in paragraph (2) shall have effect from the date on which it is notified to the officer concerned and in the case of dismissal with notice, the person or persons conducting the misconduct hearing shall decide the period of notice to be given, subject to a minimum period of 28 days.

(4) Where the person or persons conducting the misconduct proceedings finds that the conduct of the officer concerned amounts to misconduct but not gross misconduct following a misconduct hearing, unless the officer concerned had a final written warning in force on the date of the assessment of the conduct under regulation 12(1) or regulation 14A of the Complaints Regulations

(as the case may be), the officer concerned may not be dismissed whether with or without notice.

(5) Where the officer concerned had a written warning in force on the date of the assessment of the conduct under regulation 12(1) or regulation 14A of the Complaints Regulations (as the case may be), a written warning shall not be given.

(6) Where the officer concerned had a final written warning in force on the date of the assessment of the conduct under regulation 12(1) or regulation 14A of the Complaints Regulations (as the case may be)—

(a) neither a written warning nor a final written warning shall be given; but

(b) subject to paragraph (7), in exceptional circumstances, the final written warning may be extended.

(7) Where a final written warning is extended under paragraph (6)(b), that warning shall remain in force for a period of 18 months from the date on which it would otherwise expire.

(8) A final written warning may be extended on one occasion only.

(9) Where there is a finding of gross misconduct and the persons conducting the misconduct hearing decide that the officer concerned shall be dismissed, the dismissal shall be without notice.

(10) Where the question of disciplinary action is being considered, the person or persons conducting the misconduct proceedings—

(a) shall have regard to the record of police service of the officer concerned as shown on his personal record;

(b) may receive evidence from any witness whose evidence would, in his or their opinion, assist him or them in determining the question; and

(c) shall give—

(i) the officer concerned, his police friend or, at a misconduct hearing, his relevant lawyer; and

(ii) the appropriate authority or person appointed to represent the appropriate authority in accordance with regulation 7(4);

an opportunity to make oral or written representations.

Notification of outcome

36.—(1) The officer concerned shall be informed of—

(a) the finding of the person or persons conducting the misconduct proceedings; and

(b) any disciplinary action imposed

as soon as practicable and in any event shall be provided with written notice of these matters and a summary of the reasons within 5 working days of the conclusion of the misconduct proceedings.

(2) A written notice under this regulation shall include—

(a) where the officer concerned is an officer other than a senior officer—

(i) if the case was decided at a misconduct meeting, notice of his right of appeal under regulation 38; or

(ii) if the case was decided at a misconduct hearing, notice of his right of appeal to a police appeals tribunal;

(b) where the officer concerned is a senior officer, notice of his right of appeal to a police appeals tribunal.

(3) In all cases referred to in paragraph (2) a written notice under this regulation shall include the name of the person to whom an appeal should be sent.

Record of misconduct proceedings

37.—(1) A record of the proceedings at the misconduct proceedings shall be taken and in the

case of a misconduct hearing that record shall be verbatim.

(2) The officer concerned shall, on request, be supplied with a copy of the record of the proceedings at the misconduct proceedings.

Appeal from misconduct meeting: officers other than senior officers

38.—(1) Where the officer concerned is an officer other than a senior officer whose case was decided at a misconduct meeting, he may, subject to the provisions of this regulation, appeal—

(a) if he admitted his conduct amounted to misconduct, against any disciplinary action imposed under regulation 35; or

(b) if (after he denied misconduct) the person conducting the misconduct meeting found that his conduct amounted to misconduct, against that finding or any disciplinary action imposed under regulation 35.

(2) The only grounds of appeal under this regulation are that—

(a) the finding or disciplinary action imposed was unreasonable;

(b) there is critical new evidence that could not reasonably have been considered at the misconduct meeting; or

(c) there was a serious breach of the procedures set out in these Regulations or other unfairness which could have materially affected the finding or decision on disciplinary action.

(3) An appeal under this regulation shall be commenced by the officer concerned giving written notice of appeal to the appropriate authority—

(a) within 7 working days of receipt of the written notice and summary of reasons under regulation 36 (unless this period is extended by the appropriate authority for exceptional circumstances);

(b) stating the grounds of appeal (with details) and whether a meeting is requested.

(4) An appeal under this regulation shall be determined—

(a) where the person who conducted the misconduct meeting was a member of a police force, by—

(i) a member of a police force of at least one rank higher than that person; or

(ii) unless the case substantially involves operational policing matters, a police staff member who, in the opinion of the appropriate authority, is more senior than that person;

(b) where the person who conducted the misconduct meeting was a police staff member, by—

(i) a member of a police force who, in the opinion of the appropriate authority is more senior than that person; or

(ii) a more senior police staff member;

who is not an interested party, appointed by the appropriate authority.

(5) The appropriate authority shall as soon as practicable give the officer concerned written notice of—

(i) the name of the person appointed to conduct the appeal meeting under paragraph (4); and

(ii) any person appointed under regulation 7(5) to advise the person conducting the appeal meeting.

(6) The officer concerned may object to any person whom he is notified under this regulation is to—

(a) conduct the appeal meeting; or

(b) advise the person conducting the appeal meeting.

(7) Any such objection must be made in writing to the appropriate authority not later than 3 working days after the officer concerned is notified of the person's name and must set out the officer concerned's grounds of objection.

(8) The appropriate authority shall notify the officer concerned in writing whether it upholds or rejects an objection to the person appointed to conduct the appeal meeting or to any person appointed under regulation 7(5) to advise the person conducting the appeal meeting.

(9) If the appropriate authority upholds the objection, the person to whom the officer concerned objects shall be replaced (in accordance with regulation 7(5) or (6) or paragraph (4) as appropriate).

(10) As soon as reasonably practicable after any such appointment, the appropriate authority shall notify in writing the officer concerned of the name of the new person appointed to conduct the appeal meeting or the advisor to the person conducting the appeal meeting as the case may be.

(11) The officer concerned may object to the appointment of a person appointed under regulation (9).

(12) Any such objection must be made in accordance with paragraph (7), provided that it must be made no later than 3 working days after receipt of the notification referred to in paragraph (10); and the appropriate authority shall comply with paragraphs (8) to (10) in relation to that objection.

Appeal meeting

39.—(1) This regulation applies where the officer concerned requests a meeting in his written notice of appeal under regulation 38(3).

(2) The person determining the appeal shall determine whether the notice of appeal sets out arguable grounds of appeal and—

(a) if he determines that it does he shall hold an appeal meeting with the officer concerned, subject to paragraphs (3) and (5), within 5 working days of that determination; and

(b) if he determines that it does not, he shall dismiss the appeal.

(3) The person determining the appeal may extend the time period specified in paragraph (2)(a) where he considers that it would be in the interests of justice to do so.

(4) The person determining the appeal shall specify a date and time for the appeal meeting.

(5) Where—

(a) the officer concerned or his police friend will not be available at that time; and

(b) the officer concerned proposes an alternative time which satisfies subsection (6),

the appeal meeting shall be postponed to the time proposed by the officer concerned.

(6) An alternative time must—

(a) be reasonable; and

(b) fall before the end of the period of 5 working days beginning with the first working day after the day specified by the person determining the appeal.

(7) Written notice of the date, time and place of the appeal meeting shall be given to—

(a) the officer concerned;

(b) where the misconduct meeting arose from a complaint which was certified as subject to special requirements under paragraph 19A(1) of Schedule 3 to the 2002 Act (assessment of seriousness of conduct), the complainant; and

(c) where the misconduct meeting arose from a conduct matter to which paragraph 16, 17, 18 or 19 of Schedule 3 to the 2002 Act (investigations) applied, any interested person.

(8) The person determining the appeal shall be supplied with a copy of—

(a) the documents given to the person who held the misconduct meeting as specified in regulation 28(1);

(b) the notice of appeal given by the officer concerned under regulation 38(3);

(c) the record of the misconduct meeting taken under regulation 37(1); and

(d) any critical new evidence in accordance with regulation 38(2)(b) that the officer concerned wishes to submit in support of his appeal that was not considered at the misconduct meeting.

Procedure and finding of the appeal

40.—(1) Subject to the provisions of this regulation, the person determining the appeal shall determine his own procedure at the appeal meeting.

(2) Subject to paragraph (3), any interested person or complainant given notice of the appeal meeting under regulation 39(7) may attend the appeal meeting as an observer up to but not including the point at which the person determining the appeal considers the question of disciplinary action.

(3) The person determining the appeal may impose such conditions as he sees fit relating to the attendance of persons under paragraph (2) at the appeal meeting (including circumstances in which they may be excluded) in order to facilitate the proper conduct of the appeal meeting.

(4) The person determining the appeal may—

(a) confirm or reverse the decision appealed against;

(b) deal with the officer concerned in any manner in which the person conducting the misconduct meeting could have dealt with him under regulation 35.

(5) Within 3 working days of the determination of the appeal, the officer concerned shall be given written notice of that determination with a summary of the reasons.

(6) The decision of the person determining the appeal shall take effect by way of substitution for the decision of the person conducting the misconduct meeting and as from the date of the written notice of the outcome of that meeting.

(7) In a case where—

(a) paragraph 18 or 19 of Schedule 3 to the 2002 Act applied (managed and independent investigations); or

(b) paragraph 16 or 17 of Schedule 3 to the 2002 Act (investigation by appropriate authority and supervised investigations) applied and the Commission—

(i) made a recommendation under paragraph 27(3) of that Schedule (duties with respect to disciplinary proceedings) which the appropriate authority accepted; or

(ii) gave a direction to the appropriate authority under paragraph 27(4) of that Schedule (duties with respect to disciplinary proceedings),

the appropriate authority shall give the Commission written notice of the determination of the appeal with a summary of the reasons.

PART 5

Fast track procedure for special cases

Referral of case to special case hearing

41.—(1) On receipt of a statement submitted by the investigator under regulation 18(3), the appropriate authority shall determine whether the special conditions are satisfied.

(2) In a case where special case proceedings have been delayed by virtue of regulation 9(3), as soon as practicable after the appropriate authority considers that such proceedings would no longer prejudice any criminal proceedings, it shall make a further determination as to whether the special conditions are satisfied.

(3) In a case where disciplinary proceedings have been delayed by virtue of regulation 9(3), it may, as soon as practicable after the appropriate authority considers that such proceedings would

no longer prejudice any criminal proceedings, determine whether the special conditions are satisfied.

(4) Where the appropriate authority determines that the special conditions are satisfied, unless it considers that the circumstances are such as to make it inappropriate to do so, it shall certify the case as a special case and, subject to regulation 9(3) and paragraph (2), refer it to a special case hearing.

(5) Where the appropriate authority determines—

(a) that the special conditions are not satisfied; or

(b) that, although those conditions are satisfied, the circumstances are such as to make such certification inappropriate,

it shall if making the determination under paragraph (1) and the investigation was incomplete, return the case to the investigator to complete the investigation and, in any other case, proceed in accordance with Part 4.

(6) Where the appropriate authority is to proceed in accordance with Part 4, regulation 19(1) shall be read as if the following are omitted—

(a) the words "regulation 41 and"; and

(b) sub-paragraphs (a) and (b).

Remission of case

42.—(1) Subject to paragraph (4), at any time after the case has been referred to a special case hearing but before the beginning of that hearing the appropriate authority may direct that the case be dealt with under Part 4 if it considers that the special conditions are no longer satisfied.

(2) Where a direction is made under paragraph (1) the officer concerned shall be notified immediately and the appropriate authority shall proceed in accordance with Part 4.

(3) Where the appropriate authority is to proceed in accordance with Part 4, regulation 19(1) shall be read as if the following are omitted—

(a) the words "regulation 41 and"; and

(b) sub-paragraphs (a) and (b).

(4) Paragraph (1) shall not apply to a case where the Commission has given a direction under paragraph 20H(7) of Schedule 3 to the 2002 Act(**a**) (special cases: recommendation or direction of Commission).

Notice of referral to special case hearing

43.—(1) Where a case is certified as a special case and referred to a special case hearing, the appropriate authority shall as soon as practicable give the officer concerned written notice of these matters and shall supply him with a copy of—

(a) the certificate issued under regulation 41(4);

(b) any statement he may have made to the investigator during the course of the investigation; and

(c) subject to the harm test—

(i) the investigator's report or such parts of that report (together with any document attached to or referred to in that report) as relate to him ; and

(ii) any other relevant document gathered during the course of the investigation.

(2) The notice given under paragraph (1) shall describe the conduct that is the subject matter of the case and how that conduct is alleged to amount to gross misconduct.

(**a**) Paragraph 20H of the 2002 Act was inserted by section 159 of and paragraphs 1 and 3 of Schedule 11 to the Serious Organised Crime and Police Act 2005.

(3) For the purposes of this regulation "relevant document" means a document which, in the opinion of the appropriate authority, is relevant to the officer concerned's case.

Notice of special case hearing

44. The appropriate authority shall specify a date for the special case hearing which shall be not less than 10 and not more than 15 working days from the date on which notice is given under regulation 43(1) and shall immediately notify the officer concerned of—

(a) the date, time and place of that hearing; and

(b) the effect of regulation 7(1) to (3) in relation to a special case hearing.

Procedure on receipt of notice

45.—(1) Within 7 working days of the date on which the written notice and documents are supplied to the officer concerned under regulation 43(1), the officer concerned shall provide to the appropriate authority—

(a) written notice of whether or not he accepts that his conduct amounts to gross misconduct;

(b) where he accepts that his conduct amounts to gross misconduct, any written submission he wishes to make in mitigation;

(c) where he does not accept that his conduct amounts to gross misconduct, written notice of—

(i) the allegations he disputes and his account of the relevant events; and

(ii) any arguments on points of law he wishes to be considered by the person or persons conducting the special case hearing.

(2) At the same time, the officer concerned shall provide the appropriate authority and the person conducting or chairing the special case hearing with a copy of any document he intends to rely on at the hearing.

Person conducting special case hearing: officers other than senior officers

46.—(1) This regulation applies where the officer concerned is an officer other than a senior officer.

(2) The special case hearing shall be conducted by—

(a) where the police force concerned is the metropolitan police force, an assistant commissioner;

(b) in any other case, subject to paragraph (3), the chief officer of police of the police force concerned.

(3) Where the chief officer of police of the police force concerned is an interested party or is unavailable, the special case hearing shall be conducted by the chief officer of police of another police force or an assistant commissioner.

Persons conducting special case hearing: chief constables etc.

47.—(1) This regulation applies where the officer concerned is—

(a) a chief constable;

(b) in the case of the metropolitan police force—

(i) the commissioner;

(ii) the deputy commissioner; or

(iii) an assistant commissioner; or

(c) in the case of the City of London police force, the commissioner.

(2) The special case hearing shall be conducted by a panel of 4 persons appointed by the

appropriate authority, comprising—

(a) a senior counsel selected by the appropriate authority from a list of candidates nominated by the Lord Chancellor for the purposes of these Regulations, who shall be the chair;

(b) the chair of the police authority for the police force concerned or another member of that police authority nominated by him;

(c) HMCIC or an inspector of constabulary nominated by him; and

(d) a person selected by the appropriate authority from a list of candidates maintained by a police authority for the purposes of these Regulations.

Persons conducting special case hearing: other senior officers

48. Where the officer concerned is a senior officer other than an officer mentioned in regulation 47(1), the special case hearing shall be conducted by a panel of 4 persons appointed by the appropriate authority, comprising—

(a) HMCIC or an inspector of constabulary nominated by him, who shall be the chair;

(b) the chief officer of police of the police force concerned or a senior officer of at least one rank above that of the officer concerned, nominated by that chief officer of police;

(c) the chair of the police authority for the police force concerned or another member of that police authority nominated by him; and

(d) a person selected by the appropriate authority from a list of candidates maintained by a police authority for the purposes of these Regulations.

Documents to be supplied to any person conducting the hearing

49.—(1) The person or persons conducting the special case hearing shall be supplied with a copy of—

(a) the notice given to the officer concerned under regulation 43(1);

(b) the other documents given to the officer concerned under regulation 43(1)(a) to (c)(i)(ii);

(c) the documents provided by the officer concerned under—

(i) regulation 45; and

(ii) where paragraph (2) applies, regulation 22(2) and (3);

(d) where the officer concerned does not accept that his conduct amounts to gross misconduct, any other documents that, in the opinion of the appropriate authority, should be considered at the hearing.

(2) This paragraph applies where the case was certified as a special case following a determination made under regulation 41(3).

(3) The officer concerned shall be supplied with a list of the documents supplied under paragraph (1) and a copy of any of such document of which he has not already been supplied with a copy.

Attendance of officer concerned at special case hearing

50.—(1) Subject to paragraph (2), the officer concerned shall attend the special case hearing.

(2) Where the officer concerned informs the person conducting or chairing the special case hearing in advance that he is unable to attend on grounds which the person conducting or chairing the hearing considers reasonable, that person may allow the officer concerned to participate in the hearing by video link or other means.

(3) Where the officer concerned is allowed to and does so participate in the special case hearing, or where the officer concerned does not attend the special case hearing—

(a) he may nonetheless be represented at that hearing by his—

(i) police friend; or

(ii) relevant lawyer (in which case the police friend may also attend); and

(b) the hearing may be proceeded with and concluded in the absence of the officer concerned whether or not he is so represented.

Participation of Commission and investigator at special case hearing

51.—(1) In any case where—

(a) paragraph 18 or 19 of Schedule 3 to the 2002 Act (managed and independent investigations) applied; or

(b) paragraph 16 or 17 of Schedule 3 to the 2002 Act (investigations by the appropriate authority and supervised investigations) applied and the Commission—

(i) made a recommendation under paragraph 20H(1) of that Schedule (special cases: recommendation or direction of Commission) which the appropriate authority accepted; or

(ii) gave a direction under paragraph 20H(7) of that Schedule (special cases: recommendation or direction of Commission),

the Commission may attend the special case hearing to make representations.

(2) Where the Commission intends to attend the special case hearing—

(a) it may instruct a relevant lawyer to represent it;

(b) it shall notify the complainant or any interested person prior to the hearing; and

(c) the person conducting or chairing the special case hearing shall notify the officer concerned prior to the hearing.

(3) The investigator or a nominated person shall attend the special case hearing on the request of the person conducting or chairing the hearing to answer questions.

(4) For the purposes of this regulation, a "nominated person" is a person who, in the opinion of—

(a) the appropriate authority; or

(b) in a case to which paragraph 18 or 19 of Schedule 3 to the 2002 Act (managed and independent investigations) applied, the Commission,

has sufficient knowledge of the investigation of the case to be able to assist the person or persons conducting the special case hearing.

Attendance of complainant and interested persons at special case hearing

52.—(1) This regulation shall apply in the case of a special case hearing arising from a—

(a) conduct matter to which paragraph 16, 17, 18 or 19 of Schedule 3 to the 2002 Act (investigations) applied; or

(b) complaint which was certified as subject to special requirements under paragraph 19A(1) of that Schedule (assessment of seriousness of conduct).

(2) The appropriate authority shall notify in advance the complainant or any interested person of the date, time and place of the special case hearing.

(3) Subject to any conditions imposed under regulation 53(3), the complainant or any interested person may—

(a) attend the special case hearing as an observer up to but not including the point at which the person conducting or chairing the hearing considers the question of disciplinary action; and

(b) be accompanied by one other person, and if the complainant or interested person has a special need, by one further person to accommodate that need.

Attendance of others at special case hearing

53.—(1) Subject to regulation 52 and this regulation, the special case hearing shall be in private.

(2) A person nominated by the Commission may attend a special case hearing which arises from a case to which—

(a) paragraph 17, 18 or 19 of Schedule 3 to the 2002 Act (supervised, managed and independent investigations) applied; or

(b) paragraph 16 of Schedule 3 to the 2002 Act (investigations by the appropriate authority) applied and in relation to which the Commission—

(i) made a recommendation under paragraph 20H(1) of that Schedule (special cases: recommendation or direction of Commission) which the appropriate authority accepted; or

(ii) gave a direction under paragraph 20H(7) of that Schedule (special cases: recommendation or direction of Commission).

(3) The person conducting or chairing the special case hearing may impose such conditions as he sees fit relating to the attendance of persons under regulation 52 or this regulation at the special case hearing (including circumstances in which they may be excluded) in order to facilitate the proper conduct of the hearing.

Procedure at special case hearing

54.—(1)Subject to these Regulations, the person conducting or chairing the special case hearing shall determine his own procedure.

(2) The special case hearing shall not proceed unless the officer concerned has been notified of the effect of regulation 7(1) to (3) in relation to a special case hearing.

(3) Subject to paragraph (4), the person conducting or chairing the special case hearing may from time to time adjourn the hearing if it appears to him to be necessary or expedient to do so.

(4) The special case hearing shall not, except in exceptional circumstances, be adjourned solely to allow the complainant or any interested person to attend.

(5) No witnesses other than the officer concerned shall give evidence at the special case hearing.

(6) The person representing the officer concerned may—

(a) address the hearing in order to do any or all of the following—

(i) put the officer concerned's case;

(ii) sum up that case;

(iii) respond on the officer concerned's behalf to any view expressed at the proceedings; and

(iv) make representations concerning any aspect of proceedings under these Regulations; and

(b) if the officer concerned is present at the proceedings or is participating in them by video link or other means in accordance with regulation 50(2), confer with the officer concerned.

(7) Where the person representing the officer concerned is a relevant lawyer, the police friend of the officer concerned may also confer with the officer concerned in the circumstances mentioned at paragraph (6)(b).

(8) The police friend or relevant lawyer of the officer concerned may not answer any questions asked of the officer concerned during the special case hearing.

(9) The person conducting or chairing the special case hearing may allow any document to be considered at the hearing notwithstanding that a copy of it has not been supplied—

(a) to him by the officer concerned in accordance with regulation 45(2); or

(b) to the officer concerned in accordance with regulation 43(1).

(10) Where evidence is given at the special case hearing that the officer concerned, at any time after he was given written notice under regulation 15(1), on being questioned by an investigator or in submitting any information under regulation 45 (or, where paragraph (12) applies, regulations 16(1), 22(2) or (3)), failed to mention any fact relied on in his case at the special case hearing, being a fact which in the circumstances existing at the time, the officer concerned could reasonably have been expected to mention when so questioned or when providing such information, paragraph (11) applies.

(11) Where this paragraph applies, the person or persons conducting the special case hearing may draw such inferences from the failure as appear proper.

(12) This paragraph applies where the case was certified as a special case following a determination made under regulation 41(3).

(13) The person or persons conducting the special case hearing shall review the facts of the case and decide whether or not the conduct of the officer concerned amounts to gross misconduct.

(14) The person or persons conducting the special case hearing shall not find that the conduct of the officer concerned amounts to gross misconduct unless—

(a) he is or they are satisfied on the balance of probabilities that this is the case; or

(b) the officer concerned admits it is the case.

(15) At a special case hearing conducted by a panel, any decision shall be based on a majority (with the chair having the casting vote if necessary), but shall not indicate whether it was taken unanimously or by a majority.

Outcome of special case hearing

55.—(1) Where the person or persons conducting the special case hearing find that the conduct of the officer concerned amounts to gross misconduct, he or they shall impose disciplinary action, which may be—

(a) subject to paragraph (2), a final written warning;

(b) extension of a final written warning in accordance with paragraph (2); or

(c) dismissal without notice.

(2) Where the officer concerned had a final written warning in force on the date of the assessment of the conduct under regulation 12(1) or regulation 14A of the Complaints Regulations (as the case may be)—

(a) a final written warning shall not be given; but

(b) subject to paragraph (4), in exceptional circumstances, the final written warning may be extended.

(3) Where a final written warning is extended under paragraph (2), that warning shall remain in force for a period of 18 months from the date on which it would otherwise expire.

(4) A final written warning may be extended on one occasion only.

(5) Where the person or persons conducting the special case hearing find that the conduct of the officer concerned does not amount to gross misconduct, he or they may—

(a) dismiss the case; or

(b) return the case to the appropriate authority to deal with in accordance with Part 4 at a misconduct meeting or, if the officer concerned had a final written warning in force at the date of the assessment of conduct under regulation 12(1) or regulation 14A of the Complaints Regulations (as the case may be), at a misconduct hearing .

(6) Where the case is returned to the appropriate authority under paragraph (5)(b), the appropriate authority shall proceed in accordance with Part 4, subject to regulation 19(1) being read as if the following are omitted—

(a) the words “regulation 41 and”; and

(b) sub-paragraphs (a) and (b).

(7) Except in the case of extending a final written warning, the disciplinary action will have effect from the date on which it is notified to the officer concerned.

(8) Where the question of disciplinary action is being considered, the person or persons conducting the special case hearing—

(a) shall have regard to the record of police service of the officer concerned as shown on his personal record;

(b) may consider such documentary evidence as would, in his or their opinion, assist him or them in determining the question; and

(c) shall give—

(i) the officer concerned; and

(ii) his police friend or his relevant lawyer

an opportunity to make oral or written representations.

Notification of outcome

56.—(1) The officer concerned shall be informed of—

(a) the finding; and

(b) any disciplinary action imposed under regulation 55(1) or any action taken under regulation 55(5) as the case may be

as soon as practicable and in any event shall be provided with written notice of these matters and a summary of the reasons within 5 working days of the conclusion of the special case hearing.

(2) A written notice under this regulation shall include notice of the officer concerned's right to an appeal hearing.

Record of special case hearing

57.—(1) A verbatim record of the proceedings at the special case hearing shall be taken.

(2) The officer concerned shall, on request, be supplied with a copy of the record of the proceedings at the special case hearing.

Record of disciplinary proceedings

58.—(1) Subject to paragraph (2), the chief officer of police of the police force concerned shall cause a record to be kept of disciplinary proceedings and special case proceedings brought against every officer concerned, together with the finding and decision on disciplinary action and the decision in any appeal by the officer concerned.

(2) Where the officer concerned is a chief officer of police, the police authority of the police force concerned shall cause such a record to be kept.

Tony McNulty
Minister of State

Home Office
Date

SCHEDULE

Regulation 3

Standards of Professional Behaviour

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, 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.

EXPLANATORY NOTE

(This note is not part of the Order)

These Regulations establish procedures for the taking of disciplinary proceedings in respect of the conduct of members of police forces and special constables ("police officers"). They apply to all police officers, although for senior officers (a police officer above the rank of chief superintendent), the persons dealing with some of the proceedings differ. For the purposes of these Regulations, special constables are treated as if they are non-senior officers regardless of their actual level of seniority. These Regulations also make provision in relation to the representation of police officers by a police friend, and by a lawyer at proceedings at which the officer concerned may be dismissed, and in relation to the right of appeal to a police appeals tribunal.

These Regulations apply where an allegation comes to the attention of an appropriate authority (as defined in regulation 3) which indicates that the conduct of a police officer may amount to misconduct or gross misconduct (as defined in regulation 3). This includes an allegation contained within a complaint or conduct matter referred to the Independent Police Complaints Commission ("IPCC") in accordance with the Police Reform Act 2002 ("the 2002 Act"), except that Part 3 of these Regulations (Investigations) does not apply in such cases as Schedule 3 to the 2002 Act deals with the investigation of such cases.

Part 1 deals with preliminary matters. Regulation 2 revokes the Police (Conduct) Regulations 2004 save in relation to proceedings outstanding at [ ] 2008. Regulation 3 provides definitions of terms used in these Regulations, including the 'special conditions' which trigger the fast track procedure set out in Part 5; make provision in relation to the delegation of the functions of the chief officer of police under these Regulations and provide that guidance may be made under section 87(5) of the Police Act 1996 (guidance) in respect of any of the procedures in these Regulations. Regulation 4 sets out the harm test, which mirrors provisions in the Police (Complaints and Misconduct) Regulations 2004, placing restrictions on the disclosure of information in the public interest.

Part 2 deals with general matters. Regulations 6 and 7 make provision about the role of a police friend under these Regulations and the right to legal representation. Regulation 9 provides that disciplinary or special case proceedings should proceed notwithstanding any criminal proceedings unless the appropriate authority considers they would prejudice such criminal proceedings. Regulation 10 makes provision in relation to the suspension of a police officer.

Part 3 deals with the investigation of conduct allegations other than those dealt with under Schedule 3 to the 2002 Act. Regulation 12 provides that the appropriate authority must make a preliminary assessment as to whether the conduct, if proved, would amount to misconduct, gross misconduct or neither, and sets out what action must or may be taken as a consequence of that assessment. Regulation 13 deals with the appointment of an investigator who, subject to conditions, may be a police officer, a police staff member or any other person. Regulation 14 sets out the purpose of the investigation. Regulation 15 provides for notice to be given to the officer concerned that there is to be an investigation and describes what must be set out in that notice. Regulation 16 provides that the investigator shall consider any suggestions as to lines of inquiry made by the officer concerned within the given time limit. Regulation 17 deals with interviews and regulation 18 with the investigation report.

Part 4 relates to misconduct proceedings. Regulation 19 provides that on receipt of the investigator's report (under these Regulations or Schedule 3 to the 2002 Act) the appropriate authority must determine whether there is a case to answer in respect of misconduct or gross misconduct or neither and makes provision about the referral of a case to a misconduct meeting or misconduct hearing. Regulation 21 provides that notice must be given to the officer concerned of the referral of their case to misconduct proceedings and provides that he may object to the persons appointed to deal with his case. Regulation 22 sets out the information the officer concerned must and may provide on receipt of such notice. Regulation 23 provides that the person conducting or chairing the misconduct proceedings will decide whether any witnesses will attend the

proceedings, and that a witness may only attend where he reasonably believes this to be necessary. Regulations 25 to 27 set out the person(s) who will conduct the misconduct proceedings. Regulations 29 to 33 deal with who shall and may attend those proceedings. Regulation 34 covers the procedure at the proceedings and regulation 35 deals with outcomes. At a misconduct meeting the disciplinary action that may be imposed is management advice, a written warning or a final written warning. Such action is also available at a misconduct hearing, along with dismissal with or without notice or, in exceptional circumstances, the extension of a final written warning. The Police Appeals Tribunal Rules 2008 set out separately the right of appeal to a police appeals tribunal from misconduct proceedings but regulations 38 to 40 deal with an appeal by a non senior officer from a misconduct meeting.

Part 5 deals with the procedures for special case hearings for those cases where there is written evidence to establish gross misconduct on the balance of probabilities and it is in the public interest for the officer concerned to cease to be a police officer without delay. Procedures for these cases are fast tracked and there are no witnesses at the hearing. Regulation 58 requires a record to be kept of all proceedings under these Regulations and appeals.

The Schedule sets out the standards of professional behaviour expected of police officers, breach of which constitutes misconduct and a breach of which so serious that dismissal would be justified, constitutes gross misconduct.

Home Office Guidance

Police Officer Misconduct, Unsatisfactory Performance and Attendance Management Procedures

TABLE OF CONTENTS

Chapter 2

Guidance on Police Officer Misconduct Procedures

INTRODUCTION

(a) This guidance covers the Standards of Professional Behaviour for police officers, including special constables, and sets out the procedures for dealing with misconduct, unsatisfactory performance and attendance and for appeals to the Police Appeals Tribunal. The procedures described in this guidance are designed to accord with the principles of natural justice and the basic principles of fairness, and should be administered accordingly.

(b) The guidance is issued by the Secretary of State in accordance with the provisions of section 87(1) of the Police Act 1996. As such, those who are responsible for administering the procedures described in this guidance are reminded that they are required to take its provisions fully into account when discharging their functions. Whilst it is not necessary to follow its terms exactly in all cases, the guidance should not be departed from without good reason. This guidance is not a definitive interpretation of the relevant legislation. Interpretation is ultimately a matter for the courts. Where examples are given in this guidance they are not intended to be exclusive or exhaustive.

(c) The guidance on the individual procedures is designed to further the aims of being fair to the individual police officer and of arriving at a correct assessment of the matter in question and providing confidence in the system.

(d) The misconduct procedures set out in this guidance apply to all police officers, including special constables.

e) The unsatisfactory performance procedures described in this guidance apply to all police officers (except student police officers in their probationary period) up to and including the rank of Chief Superintendent and all special constables. These unsatisfactory performance procedures do not apply to senior officers.

f) The Police (Promotions) Regulations 1996 make provision for the chief officer of police, where he or she considers that a person, who is on probation in the rank of sergeant, is unlikely to perform the duties of that rank satisfactorily, to reduce the sergeant to the rank of constable. It is therefore important that in such cases the Promotion Regulations are used and not the Conduct or Performance Regulations.

g) Where a misconduct allegation is made against a senior officer, then the matter will fall to be dealt with under the misconduct procedures and not under sections 11 or 42 of the Police Act 1996.

h) Guidance on dealing with issues of misconduct or unsatisfactory performance regarding police officers on secondment under section 97 of the Police Act 1996 or as part of force collaborative arrangements can be found at Annex D.

Delegated authority

(i) Where reference is made to 'the appropriate authority' and the appropriate authority is a chief officer of police, he or she may delegate any of his or her functions to a police officer of at least the rank of chief inspector or a police staff member who is, in the opinion of the chief officer, of at least a similar level of seniority to a chief inspector.

(j) However any decision regarding the suspension of a police officer, a decision whether to refer a misconduct matter to a special case hearing or in the case of the Performance Regulations the decision to refer a matter direct to a stage 3 meeting for gross incompetence, shall be authorised by a senior officer.

(k) The misconduct and performance procedures are designed to be dealt with at the lowest appropriate managerial level having regard to all the circumstances of the particular matter.

Glossary

(l) Throughout the guidance the following terms will be used: -

(a) "2002 Act" means the Police Reform Act 2002

(b) "Conduct Regulations" means the Police (Conduct) Regulations 2008

(c) "Performance Regulations" means the Police (Performance) Regulations 2008

(d) "Complaint Regulations" means the Police (Complaint and Misconduct) Regulations 2004 as amended by the Police (Complaint and Misconduct) (Amendment) Regulations 2008

(e) "IPCC statutory guidance" means the Independent Police Complaints Commission Statutory Guidance 'Making the new complaints system work better'

(f) "misconduct proceedings" means misconduct meeting or misconduct hearing

(g) The Conduct Regulations and the Performance Regulations use the term 'relevant lawyer'. 'Relevant lawyer' includes a solicitor or counsel and therefore these terms are used throughout this guidance.

Police Friend

Police officers have the right to consult with, and be accompanied by, a police friend at any misconduct investigatory interview and at all stages of the misconduct or performance proceedings.

The police officer concerned may choose a police officer, a police staff member or (where the police officer is a member of a police force) a person nominated by the police officer's staff association to act as his or her police friend. A person approached to be a police friend is entitled to decline to act as such.

A police friend cannot be appointed to act as such if he or she has had some involvement in that particular case e.g. he or she is a witness etc.

The police friend can:

- Advise the police officer concerned throughout the proceedings under the Police (Conduct) Regulations 2008 or Police (Performance) Regulations 2008.
- Unless the police officer concerned has the right to be legally represented and chooses to be so represented, represent the police officer concerned at the misconduct proceedings, performance proceedings, appeal meeting or a special case hearing.
- Make representations to the appropriate authority concerning any aspect of the proceedings under the Conduct or Performance Regulations; and
- Accompany the police officer concerned to any interview, meeting or hearing which forms part of any proceedings under the Conduct or Performance Regulations.

It is good practice to allow the police friend to participate as fully as possible, but at an interview, meeting or hearing the police friend is not there to answer questions on the police officer's behalf. It is for the police officer concerned to speak for himself or herself when asked questions.

A police friend who has agreed to accompany a police officer is entitled to take a reasonable amount of duty time to fulfil his or her responsibilities as a police friend and should be considered to be on duty when attending interviews, meetings or hearings.

Subject to any timescales set out in the Conduct or Performance Regulations, at any stage of a case, up to and including a misconduct meeting or hearing or an unsatisfactory performance meeting, the police officer concerned or his or her police friend may submit that there are insufficient grounds upon which to base the case and/or that the correct procedures have not been followed, clearly setting out the reasons and submitting any supporting evidence. It will be for the person responsible for the relevant stage of the case to consider any such submission and determine how best to respond to it, bearing in mind the need to ensure fairness to the police officer concerned.

At a meeting, hearing or special case hearing under the Conduct Regulations or the Performance Regulations where the police friend attends, he or she may –

i) put the police officer concerned's case

ii) sum up that case

iii) respond on the police officer concerned's behalf to any view expressed at the meeting

iv) make representations concerning any aspect of the proceedings

v) confer with the police officer concerned

vi) in a misconduct meeting or hearing, ask questions of any witness, subject to the discretion of the person(s) conducting that hearing.

A police officer is entitled to be legally represented at a misconduct hearing or special case hearing (in cases that fall to be dealt with under the Conduct Regulations) or a 3rd stage Performance meeting (for dealing with an issue of gross incompetence under the Performance Regulations). Where he decides to be so represented, the police friend can also attend and may consult with the police officer concerned, but will not carry out functions i)-iv) and vi) described above.

Where a police officer is arrested or interviewed in connection with a criminal offence committed whilst off duty that has no connection with his or her role as a serving police officer, then the police friend has no right to attend the criminal interview(s) of that police officer.

It is not the role of the police friend to conduct his or her own investigation into the matter. (See paragraph 2.117 regarding the opportunity to provide information to the investigator)

Where a police friend is acting as such for a colleague from another force, then the appropriate authority for the police friend should pay the reasonable expenses of the police friend.

CHAPTER 1

Guidance on Standards of Professional Behaviour

Introduction

1.1 Public confidence in the police is crucial in a system that rests on the principle of policing by consent. Public confidence in the police depends on police officers demonstrating the highest level of personal and professional standards of behaviour. The standards set out below reflect the expectations that the police service and the public have of how police officers should behave. They are not intended to describe every situation but rather to set a framework which everyone can easily understand. They enable everybody to know what type of conduct by a police officer is acceptable and what is unacceptable**.** The standards should be read and applied having regard to this guidance.

1.2 The standards of professional behaviour also reflect relevant principles enshrined in the European Convention on Human Rights and the Council of Europe Code of Police Ethics. They apply to police officers of all ranks from Chief Constable to Constable, Special Constables and to those subject to suspension.

1.3 The standards set out below do not restrict police officers' discretion; rather they define the parameters of conduct within which that discretion should be exercised. A breach of these high standards may damage confidence in the police service and could lead to action for misconduct, which in serious cases could involve dismissal.

1.4 The public have the right to expect the police service to protect them by upholding the law and providing a professional police service. Police officers have the right to a working environment free of harassment or discrimination from others within the service.

1.5 Those entrusted to supervise and manage others are role models for delivering a professional, impartial and effective policing service. They have a particular responsibility to maintain standards of professional behaviour by demonstrating strong leadership and by dealing with conduct which has fallen below these standards in an appropriate way, such as by management action or the formal misconduct process. Above all else police managers should lead by example.

1.6 In carrying out their duties in accordance with these standards, police officers have the right to receive the full support of the police service. It is recognised that the ability of police officers to carry out their duties to the highest professional standards may depend on the provision of appropriate training, equipment and management support.

1.7 The police service has a responsibility to keep police officers informed of changes to police regulations, local policies, laws and procedures. Police officers have a duty to keep themselves up to date on the basis of the information provided.

1.8 Where these Standards of Professional Behaviour are being applied in any decision or misconduct meeting/hearing, they shall be applied in a reasonable, transparent, objective and proportionate manner. Due regard shall be paid to the nature and circumstances of a police officer's conduct, including whether his or her actions or omissions were reasonable at the time of the conduct under scrutiny.

1.9 This guidance gives examples to help police officers interpret the standards expected in a consistent way. They are not intended to be an exclusive or exhaustive list.

1.10 Where the misconduct procedure is being applied, it is important to identify the actual behaviour that is alleged to have fallen below the standard expected of a police officer, with clear particulars describing that behaviour.

1.11 It should be remembered that the unsatisfactory performance procedures exist to deal with unsatisfactory performance, attendance and issues of capability.

Honesty and Integrity

1.12 **Police officers are honest, act with integrity and do not compromise or abuse their position.**

1.13 Police officers act with integrity and are open and truthful in their dealings with the public and their colleagues, so that confidence in the police service is secured and maintained.

1.14 Police officers do not knowingly make any false, misleading or inaccurate oral or written statements or entries in any record or document kept or made in connection with any police activity.

1.15 Police officers never accept any gift or gratuity that could compromise their impartiality. During the course of their duties police officers may be offered hospitality (e.g. refreshments) and this may be acceptable as part of their role. However, police officers always consider carefully the motivation of the person offering a gift or gratuity of any type and the risk of becoming improperly beholden to a person or organisation.

1.16 It is not anticipated that inexpensive gifts would compromise the integrity of a police officer, such as those from conferences (e.g. promotional products) or discounts aimed at the entire police force (e.g. advertised discounts through police publications). However, all gifts and gratuities must be declared in accordance with local force policy where authorisation may be required from a manager, Chief Officer or Police Authority to accept a gift or hospitality.

If a police officer is in any doubt then they should seek advice from their manager.

1.17 Police officers never use their position or warrant card to gain an unauthorised advantage (financial or otherwise) that could give rise to the impression that the police officer is abusing his or her position. A warrant card is only to confirm identity or to express authority.

Authority, Respect and Courtesy

1.18 **Police officers act with self-control and tolerance, treating members of the public and colleagues with respect and courtesy.**

1.19 **Police officers do not abuse their powers or authority and respect the rights of all individuals.**

1.20 In exercising their duties, police officers never abuse their authority or the powers entrusted to them. Police officers are well placed to protect individuals and groups within society. They have been given important powers and responsibilities due to the complex and difficult situations they deal with. The public have the right to expect that such powers are used professionally, impartially and with integrity, irrespective of an individual's status.

1.21 Police officers do not harass or bully colleagues or members of the public. Challenging conduct or unsatisfactory performance or attendance in an appropriate manner would not constitute bullying.

1.22 Police officers do not, under any circumstances inflict, instigate or tolerate any act of inhuman or degrading treatment (as enshrined in Article 3 of the European Convention on Human Rights).

1.23 Police officers, recognise that some individuals who come into contact with the police, such as victims, witnesses or suspects, may be vulnerable and therefore may require additional support and assistance.

1.24 Police officers use appropriate language and behaviour in their dealings with their colleagues and the public. They do not use any language or behave in a way that is offensive or is likely to cause offence.

1.25 Like all professionals, police officers have special knowledge and experience that many others do not possess (for example what may or may not constitute an offence). Police officers do not take unfair advantage of the inequality that arises from a member of the public being ill-equipped to make an informed judgement about a matter in respect of which he or she does not have the special knowledge of the police officer.

Equality and Diversity

1.26 **Police officers act with fairness and impartiality. They do not discriminate unlawfully or unfairly.**

1.27 Police officers carry out their duties with fairness and impartiality and in accordance with current equality legislation. In protecting others' human rights, they act in accordance with Article 14 of the European Convention on Human Rights.

1.28 Police officers need to retain the confidence of all communities and therefore respect all individuals and their traditions, beliefs and lifestyles provided that such are compatible with the rule of law. In particular police officers do not discriminate unlawfully or unfairly when exercising any of their duties, discretion or authority.

1.29 Police officers pay due regard to the need to eliminate unlawful discrimination and promote equality of opportunity and good relations between persons of different groups.

1.30 Police managers have a particular responsibility to support the promotion of equality and by their actions to set a positive example.

1.31 Different treatment of individuals which has an objective justification may not amount to discrimination.

Use of Force

1.32 **Police officers only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances.**

1.33 There will be occasions when police officers may need to use force in carrying out their duties, for example to effect an arrest or prevent harm to others.

1.34 It is for the police officer to justify his or her use of force but when assessing whether this was necessary, proportionate and reasonable all of the circumstances should be taken into account and especially the situation which the police officer faced at the time. Police officers use force only if other means are or may be ineffective in achieving the intended result.

1.35 As far as it is reasonable in the circumstances police officers act in accordance with their training in the use of force to decide what force may be necessary, proportionate and reasonable. Section 3 of the Criminal Law Act 1967, section 117 of the Police and Criminal Evidence Act 1984 and common law make it clear that force may only be used when it is reasonable in the circumstances.

1.36 Article 2 (2) of the European Convention on Human Rights provides a stricter test for the use of lethal force. The use of such force must be no more

than is absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or (c) in action lawfully undertaken to quell a riot or insurrection.

1.37 Police officers respect everyone's right to life (as enshrined in Article 2 of the European Convention on Human Rights) and do not, under any circumstances, inflict, instigate or tolerate any act of torture, inhuman or degrading treatment or punishment (Article 3).

Orders and Instructions

1.38 **Police officers only give and carry out lawful orders and instructions.**

1.39 **Police officers abide by police regulations, force policies and lawful orders.**

1.40 The police service is a disciplined body and therefore any decision not to follow an order or instruction will need to be fully justified.

1.41 There may however be instances when failure to follow an order or instruction does not amount to misconduct. This may be for example where the police officer reasonably believed that a lawful order was in fact unlawful or where a police officer had good and sufficient reason not to comply having regard to all the circumstances and possible consequences.

1.42 Police officers do not give orders or instructions which they do not reasonably believe are lawful.

1.43 Police officers, to the best of their ability, support their colleagues in the execution of their lawful duty.

1.44 Police officers abide by police regulations and force policies and accept the restrictions on their private lives as described in police regulations.

Duties and Responsibilities

1.45 **Police officers are diligent in the exercise of their duties and responsibilities.**

1.46 Police officers do not neglect their duties or responsibilities.

1.47 When deciding if a police officer has neglected his or her duties all of the circumstances should be taken into account. Police officers have wide discretion and may have to prioritise the demands on their time and resources. This may involve leaving a task to do a different one, which in their judgement is more important. This is accepted and in many cases essential for good policing.

1.48 Police officers ensure that accurate records are kept of the exercise of their duties and powers as required by relevant legislation, force policies and procedures.

1.49 In carrying out their duties police officers have a responsibility to exercise reasonable care to prevent loss of life or loss or damage to the property of others (including police property).

Confidentiality

1.50 **Police officers treat information with respect and access or disclose it only in the proper course of police duties.**

1.51 The police service shares information with other agencies and the public as part of its legitimate policing business. Police officers never access or disclose any information that is not in the proper course of police duties and do not access information for personal reasons. Police officers who are unsure if they should access or disclose information always consult with their manager or department that deals with data protection or freedom of information before accessing or disclosing it.

1.52 Police officers do not provide information to third parties who are not entitled to it. This includes for example, requests from family or friends, approaches by private investigators and unauthorised disclosure to the media.

1.53 Where a police officer provides any reference in a private as opposed to professional capacity, then he or she will make this clear to the intended recipient and will emphasise that it is being provided in a private capacity and no police information has been accessed or disclosed in giving such a reference.

Fitness for Duty

1.54 **Police officers when on duty or presenting themselves for duty are fit to carry out their duties and responsibilities.**

1.55 Police officers do not make themselves unfit or impaired for duty as a result of drinking alcohol, using an illegal drug or using a substance for non-medical purposes or intentionally misusing a prescription drug.

1.56 Police officers who present themselves to their force with a drink or drugs misuse problem will be supported if they demonstrate an intention to address the problem and take steps to overcome it. However, the use of illegal drugs will not be condoned. A self declaration made after a police officer is notified of the requirement to take a test for possible substance misuse cannot be used to frustrate action being taken for misconduct that may follow a positive test result.

1.57 Police officers who are aware of any health concerns that may impair their ability to perform their duties should seek guidance from the occupational health department and if appropriate reasonable adjustments can be made.

1.58 A police officer who is unexpectedly called to attend for duty and considers that he or she is not fit to perform such duty should say that this is the case.

1.59 Police officers when absent from duty, on account of sickness or injury, do not engage in activities that are likely to impair their return to duty. Police officers will engage with the force medical officer or other member of the occupational health team if required and follow any advice given unless there are reasonable grounds not to do so.

Discreditable Conduct

1.60 **Police officers behave in a manner which does not discredit the police service or undermine public confidence, whether on or off duty.**

1.61 **Police officers report any action taken against them for a criminal offence, conditions imposed by a court or the receipt of any penalty notice.**

1.62 Discredit can be brought on the police service by an act itself or because public confidence in the police is undermined. In general, it should be the actual underlying conduct of the police officer that is considered under the misconduct procedures, whether the conduct occurred on or off duty. However where a police officer has been convicted of a criminal offence that alone may lead to misconduct action irrespective of the nature of the conduct itself. In all cases it must be clearly articulated how the conduct or conviction discredits the police service.

1.63 In the interests of fairness, consistency and reasonableness the test is not solely about media coverage but has regard to all the circumstances.

1.64 Police officers are required to report as soon as reasonably practicable to their force any occasion in the UK or elsewhere where they have been subject to arrest, a summons for an offence, a penalty notice for disorder, an endorsable fixed penalty notice for a road traffic offence, or a charge or caution for an offence by any enforcement agency.

1.65 They must also report as soon as reasonably practicable all convictions and sentences and conditions imposed by any court, whether criminal or civil (excluding matrimonial proceedings (but including non-molestation orders or occupation orders)). ‘Conditions imposed by a court’ would include, for example, the issue of an Anti-Social Behaviour Order, a restraining order, or a bind-over.

1.66 A police officer being subject to any of these measures could discredit the police service and may result in action being taken for misconduct against him or her depending on the circumstances of the particular matter.

1.67 Police officers do not purchase or consume alcohol when on duty, unless specifically authorised to do so or it becomes necessary for the proper discharge of a particular police duty.

1.68 Police officers on duty whether in uniform or in plain-clothes, display a positive image of the police service in the standard of their appearance which is appropriate to their operational role.

1.69 Police officers attend punctually when rostered for duty or other commitment (e.g. attendance at court).

Off-duty conduct

1.70 Police officers have some restrictions on their private life. These restrictions are laid down in various Police Regulations. These restrictions have to be balanced against the right to a private life. Therefore, in considering whether a police officer has acted in a way which falls below these standards while off-duty, due regard should be given to that balance and any action should be proportionate taking into account all of the circumstances.

1.71 Even when off duty, police officers do not behave in a manner that discredits the police service or undermines public confidence.

1.72 In determining whether a police officer's off-duty conduct discredits the police service, the test is not whether the police officer discredits herself or himself but the police service as a whole.

1.73 Police officers are particularly aware of the image that they portray when representing the police service in an official capacity even though they may be off-duty (e.g. at a conference).

1.74 When police officers produce their warrant card (other than for identification purposes only) or act in a way to suggest that they are acting in their capacity as a police officer (e.g. declaring that they are a police officer) they are demonstrating that they are exercising their authority and have therefore put themselves on duty and will act in a way which conforms to these standards. For example, during a dispute with a neighbour a police officer who decides to produce a warrant card would be considered to be on duty.

1.75 An approved business interest should always be carried out in a way that does not compromise or give the impression of compromising the police officer's impartiality and is not incompatible with membership of a police force (as set out in Regulation 7 of Police Regulations 2003)

1.76 All forms of management action and formal outcomes for misconduct are available in response to off-duty conduct

Challenging and Reporting Improper Conduct

1.77 **Police officers report, challenge or take action against the conduct of colleagues which has fallen below the standards of professional behaviour expected.**

1.78 Police officers are expected to uphold the standards of professional behaviour in the police service by taking appropriate action if they come across the conduct of a colleague which has fallen below these standards. They never ignore such conduct.

1.79 Police officers who in the circumstances feel they cannot challenge a colleague directly, for example if they are a more junior rank and are not confident, report their concerns, preferably to a line manager. If they do not feel able to approach a line manager with their concerns, they may report the matter through the force's confidential reporting mechanism, or to the Police Authority or Independent Police Complaints Commission (IPCC).

1.80 Police officers are supported by the police service if they report conduct by a police officer which has fallen below the standards expected unless such a report is found to be malicious or otherwise made in bad faith.

1.81 It is accepted that the circumstances may make immediate action difficult but police managers are expected to challenge or take action as soon as possible.

1.82 It is accepted however that it will not always be necessary to report a police officer's conduct if the matter has been dealt with appropriately by a manager in the police service.

CHAPTER 2

Guidance on Police Officer Misconduct Procedures

2. General

2.1 This procedure applies to all police officers (including special constables) and underpins the Standards of Professional Behaviour which set out the high standards of behaviour that the police service and the public expect. Any failure to meet these standards may undermine the important work of the police service and public confidence in it.

2.2 This guidance applies to the handling of misconduct cases that have come to notice on or after the date the Police (Conduct) Regulations 2008 came into force.

2.3 The misconduct procedures aim to provide a fair, open and proportionate method of dealing with alleged misconduct. The procedures are intended to encourage a culture of learning and development for individuals and/ or the organisation.

2.4 Disciplinary action has a part, when circumstances require this, but improvement will always be an integral dimension of any outcome (even in the case where an individual has been dismissed there can be learning opportunities for the Police Service).

2.5 The misconduct procedure has been prepared by the Home Office in consultation with the Association of Chief Police Officers (ACPO), the Police Federation of England and Wales (PFEW), the Police Superintendents' Association of England and Wales (PSAEW), the Chief Police Officers' Staff Association (CPOSA), the Association of Police Authorities (APA), Her Majesty's Inspectorate of Constabulary (HMIC) and the Independent Police Complaints Commission (IPCC).

2.6 The police misconduct procedures are designed to reflect what is considered to be best practice in other fields of employment while recognising that police officers have a special status as holders of the Office of Constable. The Police Service is committed to ensuring that the procedure is applied fairly to everyone.

2.7 It is important that managers understand their responsibility to respond to, and deal promptly, and effectively with, unsatisfactory behaviour and complaints about police conduct from members of the public and/or colleagues. It is a key responsibility of all managers to understand and apply the procedure in a fair, proportionate and timely manner.

2.8 The police service will support any manager who has exercised his or her judgement reasonably and adhered to the guidance provided.

2.9 Where the conduct is linked to a complaint or conduct matter, the appropriate authority is required to follow the provisions in the Police Reform Act 2002 (the 2002 Act), the accompanying Police (Complaints and Misconduct) Regulations 2004 (the "Complaint Regulations") and the IPCC statutory guidance which set out how complaints by members of the public are to be dealt with.

2.10 The misconduct procedures should not be used as a means of dealing with unsatisfactory performance (see assessment stage at paragraph 2.71). The unsatisfactory performance procedures (see chapter 3) exist to deal with issues of individual unsatisfactory performance and attendance.

Student Officers

2.11 Student police officers (probationary constables) are not subject to the procedures for dealing with unsatisfactory performance, since there are separately established procedures for dealing with the performance of student police officers. However, student police officers are subject to the misconduct procedures. The chief officer has discretion whether to use the misconduct procedures or the procedures set out at Regulation 13 of the Police Regulations 2003 (Discharge of probationer) as the most appropriate means of dealing with a misconduct matter. In exercising this discretion due regard should be had to whether the student police officer admits to the conduct or not. Where the misconduct in question is not admitted by the student police officer then, in most, if not all cases the matter will fall to be determined under the misconduct procedures. If the Regulation 13 procedure is used, the student police officer should be given a fair hearing (i.e. an opportunity to comment and present mitigation) under that procedure.

Suspension, restricted or change of duty

2.12 The decision to suspend a police officer will only be taken where there is an allegation of misconduct/gross misconduct and:

- An effective investigation may be prejudiced unless the police officer is suspended; or

- The public interest, having regard to the nature of the allegation and any other relevant considerations, requires that the police officer should be suspended; and

- A temporary move to a new location or role has been considered but is not appropriate in the circumstances.

2.13 A temporary move to a new location or role must always be considered first as an alternative to suspension.

2.14 While suspended, a police officer ceases to hold the office of constable and, in the case of a member of a police force, ceases to be a member of a police force, save for the purposes of the misconduct proceedings.

2.15 Where it is decided that the police officer will be suspended from duty or moved to alternative duties, this will be with pay. The rate of any pay will be that which applied to the police officer at the time of suspension. Therefore if the police officer concerned was in receipt of a Special Priority Payment or a Competency Related Threshold Payment at the time of his or her suspension or temporary move to a new location or role as an alternative to suspension, those payments will continue to apply. This is subject to Schedule 2 to the Police Regulations 2003.

2.16 Paragraph 1 of Schedule 2 to the Police Regulations 2003 provide for pay to be withheld when a police officer who is suspended: -

(i) is detained in pursuance of a sentence of a court in a prison or other institution to which the Prison Act 1952 applies, or is in custody (whether in prison or elsewhere) between conviction by a court and sentence, or

(ii) has absented him or herself from duty and whose whereabouts are unknown to the chief officer (or an assistant chief officer acting as chief officer).

2.17 The police officer or his or her police friend may make representations against the initial decision to suspend (within 7 working days) and at any time during the course of the suspension if they believe circumstances have changed and that suspension is no longer appropriate.

2.18 Suspension is not a formal misconduct outcome and does not suggest any prejudgement..

2.19 The period of suspension should be as short as possible and any investigation into the conduct of a suspended police officer should be made a priority.

2.20 The police officer should be told exactly why he or she is being suspended, or being moved to other duties and this should be confirmed in writing. If suspension is on public interest grounds, it should be clearly explained, so far as possible, what those grounds are.

2.21 The use of suspension must be reviewed at least every 4 weeks, and sooner where facts have become known which suggest that suspension is no longer appropriate. In cases where the suspension has been reviewed and a decision has been made to continue that suspension, the police officer must be informed in writing of the reasons why.

2.22 Suspension must be authorised by a senior officer although the decision can be communicated to the police officer by an appropriate manager. The relevant Police Authority is responsible for dealing with the suspension of a senior officer.

2.23 In cases where the IPCC are supervising, managing or independently investigating a matter, the appropriate authority will consult with the IPCC before making a decision whether to suspend or not. It is the appropriate authority's decision whether to suspend a police officer or not. The appropriate authority must also consult the IPCC before making the decision to allow a police officer to resume his or her duties following suspension (unless the suspension ends because there will be no misconduct or special case proceedings or because these have concluded) in cases where the IPCC are supervising, managing or independently investigating a case involving that police officer.

2. 24 In cases where the 2002 Act applies, the investigator will be responsible for ensuring that the appropriate authority is supplied with sufficient information to enable it to effectively review the need for continuing the suspension.

2. 25 The Standards of Professional Behaviour continue to apply to police officers who are suspended from duty. The appropriate authority can impose such conditions or restrictions on the police officer concerned as it considers reasonable e.g. restricting access to police premises or police social functions.

2.26 Police officers who are suspended from duty are still allowed to take their annual leave entitlement in the normal way whilst so suspended, providing they seek permission from the appropriate authority. The appropriate authority should not unreasonably withhold permission to annual leave. Any annual leave not taken by the police officer concerned within a year will still be subject to the rules governing the maximum number of days that may be carried over.

Conducting investigations where there are possible or outstanding criminal proceedings

2.27 Where there are possible or outstanding criminal proceedings against a police officer, these will not normally delay the misconduct procedure. They will only delay proceedings under the Conduct Regulations where the appropriate authority considers such action would prejudice the outcome of the criminal case. The presumption is that action for misconduct should be taken prior to, or in parallel with, any criminal proceedings. Where it is determined that prejudice to the outcome of the criminal case would result, then this decision shall be kept under regular review to avoid any unreasonable delay to the misconduct proceedings.

2.28 Where potential prejudice is identified, the proceedings under the Conduct Regulations will proceed as normal up until the referral of a case to misconduct proceedings or a special case hearing. So the matter will be investigated under the Conduct Regulations or Complaint Regulations and the investigation report submitted. The appropriate authority will then decide whether there is a case to answer in respect of misconduct or gross misconduct or neither. Where the decision is made that the matter amounts

to misconduct and that management action is appropriate, then this can be taken without the need to refer the matter to misconduct proceedings. In other cases where there is a case to answer, no referral to misconduct proceedings or a special case hearing will take place if this would prejudice the criminal proceedings.

2.29 As soon as it appears to the appropriate authority that there is no longer any potential prejudice (because, for example, a witness drops out, the trial has concluded or any other circumstances change), the appropriate authority must take action. Where misconduct proceedings were delayed, the appropriate authority shall make a determination whether to continue with the misconduct proceedings. This determination will include consideration as to whether the special conditions exist for using the fast track procedures (see Annex A).

2.30 The appropriate authority should always consider whether in proceeding with a misconduct meeting or hearing in advance of any potential criminal trial, there is a real risk of prejudice to that trial. If there is any doubt then advice should be sought from the Crown Prosecution Service (CPS) or other prosecuting authority.

2.31 In a case where a witness is to appear at a misconduct meeting or hearing and is also a witness or potentially a witness at the criminal trial then the appropriate authority must first consult with the CPS (or other prosecuting authority). Having carefully considered the views of the CPS the appropriate authority must then decide whether there is a real risk of prejudice to a criminal trial if the misconduct meeting or hearing proceeds.

2.32 It is important to note that a misconduct meeting/hearing is concerned with whether the police officer concerned breached the Standards of Professional Behaviour and not whether the police officer has or has not committed a criminal offence.

2.33 The decision as to when to proceed with a misconduct meeting/hearing rests with the appropriate authority.

2.34 At the end of a misconduct meeting/hearing, where there are also outstanding or possible criminal proceedings involving the police officer concerned, the CPS or other prosecuting authority shall be informed of the outcome of the meeting/hearing as soon as practicable.

Misconduct action following criminal proceedings

2.35 Subject to the guidance above, where misconduct proceedings have not been taken prior to criminal proceedings and the police officer is acquitted, consideration will then need to be given as to whether instigating misconduct proceedings or a special case hearing is a reasonable exercise of discretion in the light of the acquittal.

2.36 A previous acquittal in criminal proceedings in respect of an allegation which is the subject of misconduct or special case proceedings is a relevant factor which should be taken into account in deciding whether to continue with those proceedings.

2.37 Relevant factors in deciding whether to proceed with disciplinary or special case proceedings include the following, non-exhaustive, list:

(a) Whether the allegation is in substance the same as that which was determined during criminal proceedings;
(b) Whether the acquittal was the result of a substantive decision on the merits of the charge (whether by the judge or jury) after the hearing of evidence; and
(c) Whether significant further evidence is available to the misconduct meeting/hearing, either because it was excluded from consideration in criminal proceedings or because it has become available since.

2.38 Each case will fall to be determined on its merits and an overly-prescriptive formula should not be adopted.

2.39 It may further be unfair to proceed with misconduct proceedings in circumstances where there has been a substantial delay in hearing disciplinary or special case proceedings by virtue of the prior criminal proceedings.

2.40 Regard should be had in this respect to such factors as:

- the impact of the delay on the police officer (including the impact on his or her health and career);
- whether the delay has prejudiced his or her case in any disciplinary or special case proceedings; and
- whether there will be a further substantial delay whilst disciplinary or special case proceedings are heard (including the impact on the police officer of that delay).

Fast track procedures (special cases)

2.41 Guidance on dealing with special cases where the fast track procedures can be used can be found at Annex A.

Link between Misconduct Procedures and complaints, conduct matters and Death or Serious Injury cases to which the Police Reform Act 2002 (the 2002 Act) applies

2.42 The 2002 Act and the Complaint Regulations set out how complaints, conduct matters and death or serious injury (DSI) matters must be handled. All other cases are dealt with solely under the Conduct Regulations.

2.43The 2002 Act and the Complaint Regulations also set out the matters that are required to be referred to the Independent Police Complaints Commission (IPCC).

Complaints – Local Resolution

2.44 The 2002 Act, Complaint Regulations and IPCC statutory guidance set out when complaints are suitable for Local Resolution and these procedures will continue to apply. It may be appropriate in dealing with a complaint using Local Resolution for a manager to take management action in addition and this is perfectly acceptable. However this will not be considered as formal disciplinary action although it does not prevent a manager from making a note of the action taken and recording this on the police officer's PDR (if appropriate). (See paragraph 2.96)

Complaints – Investigation

2.45 Where a complaint about the conduct of a police officer or special constable is not suitable to be resolved using the Local Resolution procedure or that procedure fails then the matter will need to be investigated under the provisions of the 2002 Act and the Complaint Regulations.

2.46 The investigation into the complaint must be proportionate having regard to the nature of the allegation and any likely outcome (see also IPCC statutory guidance).

2.47 An investigation into a complaint is not automatically an investigation into whether a police officer or a special constable has breached the standards of professional behaviour but rather an investigation into the circumstances that led to the dissatisfaction being expressed by the complainant of the actions of one or more persons serving with the police.

2.48 The 2002 Act and the Complaint Regulations set out the appointment of the person to investigate the complaint and in addition set out: -

i) When a complaint is subject of special requirements (see paragraph 2.49);

ii) when a severity assessment must be made;

iii) the information required to be notified to the police officer concerned;

iv) the duty of the investigator to consider relevant statements and documents;

v) arrangements for interviewing the person whose conduct is being investigated; and

vi) the matters to be included in the investigation report.

Special requirements

2.49 If, during an investigation into a complaint, it appears to the person investigating that there is an indication that a person to whose conduct the investigation relates may have –

a) committed a criminal offence, or

b) behaved in a manner which would justify the bringing of disciplinary proceedings,

the person investigating (the investigator) must certify the investigation as one subject to special requirements (paragraph 19A of Schedule 3 to the 2002 Act). Conduct matters, by definition, are subject to the special requirements.

2.50 Where the person investigating does not consider that the conduct subject of the investigation either amounts to a criminal offence or (even if proven or admitted) would (in the investigator's judgement) be referred to a misconduct meeting or hearing, the matter will not be subject of the special requirements and no Regulation 14A (Complaint Regulations) notice will be served on the police officer concerned and no severity assessment will be required. If the person investigating the complaint does certify the investigation as one subject of special requirements, the investigator must, as soon as is reasonably practicable after doing so, make a severity assessment in relation to the conduct (see below).

Severity assessment

2.51 The severity assessment means an assessment as to –

a) whether the conduct of the police officer concerned, if proved, would amount to misconduct or gross misconduct, and

b) if misconduct, the form (i.e. misconduct meeting or hearing) which disciplinary proceedings would be likely to take if the conduct were to become subject of such proceedings.

2.52 The severity assessment may only be made after consultation with the appropriate authority. The investigator shall ensure that a written notice is provided to the police officer concerned informing him or her that his or her conduct is being investigated unless the person investigating the complaint considers that giving the notification might prejudice –

a) the investigation, or

b) any other investigation (including, in particular, a criminal investigation).

(See paragraph 2.103 regarding written notices).

2.53 The written notice may indicate that although the conduct would amount to misconduct rather than gross misconduct, the fact that the police officer concerned has an outstanding live final written warning will mean that should the matter proceed to misconduct proceedings, those proceedings would take the form of a misconduct hearing.

2.54 Where the person investigating the complaint determines that the special requirements are not met (as there is no indication that the matter amounts to a criminal offence or the matter would not justify referring the matter to misconduct proceedings) then there is no requirement for a severity assessment and therefore no requirement to serve a written notice on the police officer concerned.

2.55 If, during the course of the investigation the investigator determines that the severity assessment should change due to the initial assessment being incorrect or new information being found that affects the original assessment, then a fresh assessment can be made and the police officer concerned informed accordingly. Considerable care should be taken in making the severity assessment or revising the assessment in order to avoid any unfairness to the police officer concerned. All decisions in determining or revising the severity assessment should be documented with reasons for the decision.

Investigation of Conduct matters

2.56 A conduct matter is defined in the Police Reform Act 2002 as: -

'any matter which is not and has not been the subject of a complaint but in the case of which there is an indication (whether from the circumstances or otherwise) that a person serving with the police may have-

a) committed a criminal offence; or

b) behaved in a manner which would justify the bringing of disciplinary proceedings'.

2.57 Paragraphs 10 & 11 of Schedule 3 to the 2002 Act and regulation 5 to the Complaint Regulations set out the conduct matters that are required to be recorded by the appropriate authority (recordable conduct matters).

2.58 Paragraph 13 of Schedule 3 to the 2002 Act and regulation 5 to the Complaint Regulations set out the categories of recordable conduct matters that are required to be referred to the IPCC.

2.59 Conduct matters that are not required to be recorded or referred to the IPCC may be dealt with by the appropriate authority. Where the appropriate authority determines that the conduct matter should be investigated then this will be conducted under the provisions of the Conduct Regulations.

2.60 Recordable conduct matters are subject to the special requirements mentioned at paragraph 2.49 above and therefore the person investigating the matter will be required to undertake a severity assessment (see paragraphs 2.51 to 2.55 above) and comply with the special requirements.

Investigation report following complaint/recordable conduct matter investigation.

2.61 At the conclusion of an investigation into a complaint where the matter has been subject to the special requirements or constitutes a recordable conduct matter, the investigator, in addition to setting out his or her conclusions on the facts of the matter, will indicate whether he or she determines on the facts of the case that there is a case to answer in respect of misconduct or gross misconduct or that there is no case to answer.

2.62 The action that an appropriate authority proposes or does not propose to take in response to an investigation of a complaint may be subject to an appeal by a complainant. The IPCC also have the power in certain cases to recommend and direct that particular misconduct proceedings are held in respect of complaint and recordable conduct investigations.

Referring a matter to misconduct proceedings following investigation of a complaint or recordable conduct matter.

2.63 Where, following the investigation into a complaint subject to the special requirements or a recordable conduct matter, it is determined that there is a case to answer in respect of misconduct or gross misconduct then the appropriate authority will determine whether the matter should be referred to a misconduct meeting or hearing.

2.64 Where the appropriate authority determines that there is a case to answer in respect of misconduct but not gross misconduct it may determine that management action is an appropriate and proportionate response to the misconduct.

2.65 Where it is determined that there is a case to answer in respect of misconduct and management action is not appropriate, the appropriate authority shall refer the matter to a misconduct meeting (unless the police officer concerned has an outstanding final written warning which was live when the severity assessment was made, in which case the matter will be referred to a misconduct hearing).

2.66 In cases where there is a case to answer in respect of gross misconduct then the matter shall be referred to a misconduct hearing (or if the special conditions are satisfied a special case (fast track) hearing).

2.67 Referral to misconduct proceedings and the procedures to be followed thereafter are made under Part 4 (and Part 5 if appropriate) of the Police (Conduct) Regulations 2008 (regulation 19 onwards).

Death or Serious Injury matters (DSI)

2.68 Where there is an investigation into a death or serious injury case (DSI), where there is no complaint or indication of any conduct matter, then the investigation will focus on the circumstances of the incident (see also IPCC statutory guidance).

2.69 However, where during the course of the investigation into the DSI matter there is an indication that a person serving with the police may have committed a criminal offence or behaved in a manner that would justify the bringing of disciplinary proceedings then the DSI matter will be reclassified as a recordable conduct matter (or complaint if appropriate) and dealt with accordingly.

Misconduct Procedures

Assessment of conduct – (Is the case one of misconduct?)

2.70 Where an allegation is made against the conduct of a police officer or special constable, being a matter that does not involve a complaint, a recordable conduct matter or a death or serious injury (see paragraph 2.42 above), the matter will be dealt with under the Conduct Regulations from the outset. However, in the same way as described in paragraph 2.51 above, the appropriate authority must formally assess whether the conduct alleged, if proved, would amount to misconduct or gross misconduct.

2.71 The assessment may determine that the conduct alleged amounts to an allegation of unsatisfactory performance rather than one of misconduct. In such circumstances the matter should be referred to be dealt with under the UPPs. (See chapter 3).

2.72 The assessment may determine that the matter is more suitable to be dealt with through the grievance procedure or may be an issue of direction and control (see HO Circular 19/2005). In such cases the procedures for dealing with such matters should be used.

2.73 The purpose of the initial assessment is to:

- Ensure a timely response to an allegation or an issue relating to conduct
- Identify the police officer subject to the allegation and to eliminate those not involved.
- Ensure that the most appropriate procedures are used.

2.74 The assessment should be made by the appropriate authority (see delegation of authority in Introduction). The person making the assessment should always consider consulting the Professional Standards Department (PSD) or Human Resources Department for assistance.

2.75 If it is not possible to make an immediate assessment a process of fact finding should be conducted but only to the extent that it is necessary to determine which procedure should be used. It is perfectly acceptable to ask questions to seek to establish which police officers may have been involved in a particular incident and therefore to eliminate those police officers who are not involved.

2.76 A formal investigation into a particular police officer's conduct affords the police officer certain safeguards in the interests of fairness such as the service of a notice informing the police officer that his or her conduct is subject to investigation and notifying the police officer of his or her right to consult with a police friend. The initial assessment and in particular fact finding should therefore not go so far as to undermine these safeguards.

2.77 Even if the person making the assessment has decided that the matter is not potentially one of misconduct he or she should consider whether there are any developmental or organisational issues which may need to be addressed by the individual or the organisation.

Definitions

2.78 For the purposes of making the assessment and any decision on the seriousness of the conduct the following definitions will be applied.

Misconduct

2.79 Misconduct is a breach of the Standards of Professional Behaviour (see chapter 1).

Gross Misconduct

2.80 Gross misconduct means a breach of the Standards of Professional Behaviour so serious that dismissal would be justified.

Unsatisfactory Performance/Attendance

2.81 Unsatisfactory performance or unsatisfactory attendance mean an inability or failure of a police officer to perform the duties of the role or rank he or she is currently undertaking to a satisfactory standard or level (see chapter 3).

Severity assessment – Is the matter potentially misconduct or gross misconduct?

2.82 The purpose of assessing whether a matter is potentially misconduct or gross misconduct is to:

- Allow the police officer subject to the misconduct procedures to have an early indication of the possible outcome if the allegation is proven or admitted.

- Give an indication of how the matter should be handled (for example, locally or by the force Professional Standards Department).

2.83 Where an allegation is made which indicates that the conduct of a police officer did not meet the standards set out in the Standards of Professional Behaviour, the appropriate authority must decide whether, if proven or admitted, the allegation would amount to misconduct or gross misconduct.

2.84 Where it is determined that the conduct, if proved, would constitute misconduct, it must further be determined whether it is necessary for the matter to be investigated or whether management action is the appropriate and proportionate response to the allegation. If the appropriate authority decides to take no action or management action, this should be notified to the police officer concerned.

2.85 Where it is determined that the conduct if proved, would constitute gross misconduct then the matter will be investigated (unless the assessment is subsequently changed to misconduct in which case, if appropriate, no further investigation may be required).

2.86 The assessment will also determine whether, if the matter was referred to misconduct proceedings, those proceedings would be likely to be a misconduct meeting (for cases of misconduct) or a misconduct hearing (for cases of gross misconduct or if the police officer concerned has a live final written warning at the time of the assessment and there is a further allegation of misconduct).

2.87 If the initial assessment has been made incorrectly or if new evidence emerges, then a fresh assessment can be made. The matter may be moved up to a level of gross misconduct or down to a level of misconduct. In the interests of fairness to the police officer, where a further severity assessment is made which alters the original assessment then the police officer will be informed and will be provided with the reasons for the change in the assessment.

2.88 The same principle applies where the initial assessment suggests that the matter is one of misconduct or gross misconduct but subsequent investigation reveals that it is not, and may be, for example, one of unsatisfactory performance. In such cases the police officer will be informed that the matter is now not being considered as a matter of misconduct.

Dealing with misconduct

2.89 Unless there are good reasons to take no action, there are two ways by which line managers can deal with matters which have been assessed as potential misconduct:

- Management action

- Disciplinary action for misconduct – where it is felt that the matter should be investigated

2.90 A decision on which action will be appropriate will be made on the basis of the information available following the severity assessment.

Management action

2.91 The purpose of management action is to:

- Deal with misconduct in a timely, proportionate and effective way that will command the confidence of staff, police officers, the police service and the public.

- Identify any underlying causes or welfare considerations.

- Improve conduct and to prevent a similar situation arising in the future.

2.92 When appropriate, managers in the police service are expected and encouraged to intervene at the earliest opportunity to prevent misconduct occurring and to deal with cases of misconduct in a proportionate and timely way through management action. Even if the police officer does not agree to the management action it can still be imposed by the manager providing such action is reasonable and proportionate.

2.93 Management action may include:

- Pointing out how the behaviour fell short of the expectations set out in the Standards of Professional Behaviour

- Identifying expectations for future conduct.

- Establishing an improvement plan.

- Addressing any underlying causes of misconduct.

2.94 The police officer may in some cases be advised that if the misconduct is repeated or if there is further misconduct of a different type then this may lead to disciplinary action for misconduct.

2.95 The manager may draft an improvement plan with the police officer. This should include timescales for improvement in the conduct. A written record should be made of any improvement action and placed on the police officer's PDR. Any such note should be agreed as an accurate record with the police officer concerned and copied to him or her. Where the police officer does not agree with the record then his or her comments will be recorded and kept with the record. Managers should ensure that any improvement plan recorded on the police officer's PDR is regularly reviewed and comment made as to the improvement or otherwise of the police officer.

2.96 Management action is not a disciplinary outcome but is considered to be part of the normal managerial responsibility of managers in the police service. Management action is always available, including during or after the process of resolving a complaint using Local Resolution. Management action does not have to be revealed to the CPS as it does not constitute a disciplinary outcome.

2.97 Where an appropriate manager decides at the severity assessment that management action is the most appropriate and proportionate way to deal with an issue of misconduct, there will be no requirement to conduct a formal investigation and therefore no requirement to give a written notice to the police officer concerned in accordance with the provisions in the Conduct Regulations. Where at a later stage, either following the investigation or on withdrawal of the case (under regulation 20 of the Conduct Regulations or Regulation 7 of the Complaint Regulations), an appropriate manager decides to take management action, written notice of this will be given to the police officer as soon as possible.

2.98 Management action is not to be confused with management advice. Management advice is a disciplinary outcome that can only be imposed following a misconduct meeting or hearing.

Taking disciplinary action

2.99 Where it is felt that management action is not appropriate to deal with the alleged breach of the Standards of Professional Behaviour then disciplinary action for misconduct may be necessary. Where in cases of potential misconduct, management action is not considered appropriate, there will be an investigation under the Conduct Regulations and in cases where the allegation amounts to one of gross misconduct, then the matter will always be investigated.

2.100 The purpose of disciplinary action is to:

- Establish the facts underlying the allegation.
- Deal with cases of misconduct in a timely, proportionate, fair and effective way such as will command the confidence of the police service and the public.
- Identify any underlying causes or welfare considerations.
- Identify any learning opportunities for the individual or the organisation.

2.101 The guidance set out above deals with the requirements for severity assessments to be conducted in cases to which the 2002 Act applies and those cases dealt with under the Conduct Regulations.

2.102 The following provisions apply to both types of cases with the requirements set out in either the Complaint Regulations for cases being dealt

with under the 2002 Act or the Conduct Regulations for other cases. Once cases have been referred to misconduct proceedings, in all cases, the relevant regulations are the Conduct Regulations (Regulation 19 onwards).

Written notification to officer concerned

2.103 Written notification will be given to the police officer concerned (by the investigator in cases dealt with under the 2002 Act and the appropriate authority in cases dealt with under the Conduct Regulations) advising him or her that his or her conduct is under investigation – either under Regulation 15 of the Conduct Regulations or under Regulation 14A of the Complaint Regulations (in the case of complaints subject to special requirements (see paragraph 2.49) and recordable conduct investigations). The notice will:

- Inform the police officer that there is to be an investigation of his or her potential breach of the Standards of Professional Behaviour and inform the police officer of the name of the investigator who will investigate the matter.
- Describe the conduct that is the subject of the investigation and how that conduct is alleged to have fallen below the Standards of Professional Behaviour
- Inform the police officer concerned of the appropriate authority's (investigator in a matter dealt with under the 2002 Act) assessment of whether the conduct alleged, if proved, would amount to misconduct or gross misconduct
- Inform the police officer of whether, if the case were to be referred to misconduct proceedings, those would be likely to be a misconduct meeting or misconduct hearing
- Inform the police officer that if the likely form of any misconduct proceedings changes the police officer will be notified of this together with the reasons for that change
- Inform the police officer of his or her right to seek advice from his or her staff association or any other body and who the police officer may choose to act as his or her police friend.
- Inform the police officer that if his or her case is referred to a misconduct hearing or special case hearing, he or she has the right to be legally represented by counsel or a solicitor. If the police officer elects not to be so represented then he or she may be represented by a police friend. The notice will also make clear that if he or she elects not to be legally represented then he or she may be dismissed or receive any other disciplinary outcome without being so represented.
- Inform the police officer that he or she may provide, within 10 working days of receipt of the notice (unless this period is extended by the investigator) a written or oral statement relating to any matter under investigation and he or she (or his or her police friend) may provide any relevant documents to the investigator within this time.
- Inform the police officer that whilst he or she does not have to say anything, it may harm his or her case if he or she does not mention when interviewed or when providing any information within the

relevant time limits something which he or she later relies on in any misconduct proceedings or special case hearing or at an appeal meeting or Police Appeals Tribunal.

2.104 The notice should clearly describe in unambiguous language the particulars of the conduct that it is alleged fell below the standards expected of a police officer.

2.105 The terms of reference for the investigation, or the part of the terms of reference for the investigation relating to the individual's conduct, should, subject to there being no prejudice to that or any other investigation, be supplied to the police officer and to his or her police friend on request, and they should both be informed if the terms of reference change.

2.106 The written notification may be e-mailed to a manager to give to the police officer concerned or where appropriate and with the agreement of the police friend the notice may be given to the police friend to give to the police officer concerned. The responsibility for ensuring that the notice is served rests with the investigator (in cases dealt with under the 2002 Act) or the appropriate authority. In both cases the notice must be given to the police officer in person. Alternatively, the notice can be posted by recorded delivery to his or her last known address.

2.107 The investigator should ensure that the police officer subject to investigation shall, as soon as practicable, be provided with this written notification unless to do so would prejudice the investigation or any other investigation (including a criminal one). Any decision not to inform the police officer will be recorded and kept under regular review in order to avoid unreasonable delay in notifying the police officer concerned.

2.108 Where the IPCC is conducting an independent or managed investigation then the responsibility for ensuring that the police officer is provided with the written notification as soon as practicable rests with the investigator appointed or designated to conduct that investigation.

2.109 In the interests of fairness, care must be taken when an incident is being investigated to ensure that the notification is given to the police officer as soon as practicable when a potential issue of misconduct is identified (subject to any prejudice to that or any other investigation).

Appointment of investigator

2.110 Where the appropriate authority has assessed the allegation as being one of misconduct or gross misconduct and in the case of misconduct, has determined that the matter is not suitable for immediate management action then the appropriate authority will appoint an investigator. The investigator can be a police officer, police staff member or some other person and should be the most appropriate person having regard to all of the circumstances and the requirements set out in regulation 13 of the Conduct Regulations.

2.111 In cases falling under paragraphs 17 or 18 of Schedule 3 to the Police Reform Act 2002 the appropriate authority must follow the appropriate provisions regarding the approval of the investigator by the IPCC. The appropriate authority will also need to ensure that an investigator appointed under paragraphs 16, 17 or 18 of the 2002 Act has the necessary skills and experience as set out in regulation 18 of the Complaint Regulations. (see IPCC Statutory Guidance).

2.112 The force Professional Standards Department should be consulted before an investigation is commenced to ensure that there are no other matters that need to be considered prior to any investigation (for example other investigations that may be ongoing into the conduct of the police officer concerned, or outstanding written warnings that are still live).

Investigation

2. 113 The purpose of an investigation is to:

- Gather evidence to establish the facts and circumstances of the alleged misconduct

- Assist the appropriate authority to establish on the balance of probabilities, based on the evidence and taking into account all of the circumstances, whether there is a case to answer in respect of either misconduct or gross misconduct or that there is no case to answer.

- Identify any learning for the individual or the organisation.

2.114 The appropriate authority should ensure that a proportionate and balanced investigation is carried out as soon as possible after any alleged misconduct comes to the appropriate authority's attention and that the investigation is carried out as quickly as possible allowing for the complexity of the case. A frequent criticism of previous misconduct investigations was that they were lengthy, disproportionate and not always focussed on the relevant issue(s).It is therefore crucial that any investigation is kept proportionate to ensure that an overly lengthy investigation does not lead to grounds for challenge. Where the investigation identifies that the issue is one of performance rather than misconduct, the police officer should be informed as soon as possible that the matter is now being treated as an issue of performance.

2.115 In cases which do not fall under the 2002 Act, the appropriate authority can discontinue an investigation if there is a change in circumstances which makes it appropriate to do so. Similarly, in cases which do fall under the 2002 Act, the appropriate authority can apply to the IPCC to discontinue an investigation (see IPCC statutory guidance).

2.116 The investigator must ensure that the police officer is kept informed of the progress of the investigation. It is also good practice to keep the police

friend informed of progress at the same time. The investigator is required to notify the police officer of the progress of the investigation within 4 weeks of the start of the investigation (if there has been no previous notification) and then within 4 weeks of any previous notification. The requirement under the Police Reform Act 2002 to keep the complainant or an interested person informed will also apply in relevant cases (See IPCC Statutory Guidance).

2.117 The police officer or his or her police friend, acting on the police officer concerned's instructions, is encouraged to suggest at an early stage any line of enquiry that would assist the investigation and to pass to the investigator any material they consider relevant to the enquiry. (See regulation 16 of the Conduct Regulations and paragraphs19A (7) (c) and 19B of Schedule 3 to the 2002 Act and Regulation 14C of the Complaint Regulations).

2.118 The investigator (under the Conduct Regulations or the 2002 Act) has a duty to consider the suggestions submitted to him or her. The investigator should consider and document reasons for following or not following any submissions made by the police officer or his or her police friend with a view to ensuring that the investigation is as fair as possible. The suggestions may involve a further suggested line of investigation or further examination of a particular witness. The purpose is to enable a fair and balanced investigation report to be prepared and where appropriate made available for consideration at a misconduct meeting/hearing and to negate the need (except where necessary) for witnesses to attend a meeting/hearing.

Interviews during investigation

2.119 It will not always be necessary to conduct a formal interview with the police officer subject to the investigation. In some cases, particularly involving low level misconduct cases, it may be more appropriate, proportionate and timely to request a written account from the police officer.

2.120 Where a formal interview is felt to be necessary, the investigator should try and agree a time and date for the interview with the police officer concerned and his or her police friend if appropriate. The police officer will be given written notice of the date, time and place of the interview. The police officer must attend the interview when required to do so and it may be a further misconduct matter to fail to attend.

2.121 If the police officer concerned or his or her police friend is not available at the date or time specified by the investigator, the police officer may propose an alternative time. Provided that the alternative time is reasonable and falls within a period of 5 working days beginning with the first working day after that proposed by the investigator the interview must be postponed to that time.

2.122 Where a police officer is on certificated sick leave, the investigator should seek to establish when the police officer will be fit for interview. It may be that the police officer is not fit for ordinary police duty but is perfectly capable of being interviewed. Alternatively the police officer concerned may be invited to provide a written response to the allegations within a specified

period and may be sent the questions that the investigator wishes to be answered.

2.123 It is important that there is a balance between the welfare of the police officer concerned and the need for the investigation to progress as quickly as possible in the interests of natural justice, the police service and the police officer subject to investigation.

2.124 Where an police officer is alleged or appears to have committed a criminal offence a normal criminal investigation will take place, with the police officer being cautioned in accordance with the PACE Code of Practice . Where the matter to be investigated involves both criminal and misconduct allegations, it should be made clear to the police officer concerned at the start of the interview whether he or she is being interviewed in respect of the criminal or misconduct allegations.

2.125 This may be achieved by conducting two separate interviews, although this does not prevent the responses given in respect of the criminal interview being used in the misconduct investigation and therefore a separate misconduct interview may not be required.

2.126 Care should be taken when conducting a misconduct interview where the police officer is also subject of a criminal investigation in respect of the same behaviour, as anything said by the police officer concerned in the misconduct interview when not under caution and used in the criminal investigation could be subject to an inadmissibility ruling by the court at any subsequent trial. If necessary, appropriate legal advice should be obtained.

2.127 At the beginning of a misconduct interview or when asking an police officer to provide a written response to an allegation, the police officer shall be reminded of the warning contained in regulation 15(1)(h) of the Conduct Regulations (or regulation 14A(h) of the Complaint Regulations 2008 for cases dealt with under the 2002 Act) namely informing the police officer that whilst he or she does not have to say anything it may harm his or her case if he or she does not mention when interviewed or when providing any information under regulation 16 or regulation 22(2) or (3) of the Conduct Regulations (or paragraph 19B of Schedule 3 to the 2002 Act) something which he or she later relies on in any misconduct proceedings or special case hearing or appeal meeting or appeal hearing.

2.128 Prior to an interview with a police officer who is the subject of a misconduct investigation, the investigator must ensure that the police officer is provided with sufficient information and time to prepare for the interview. The information provided should always include full details of the allegations made against the police officer including the relevant date(s) and place(s) of the alleged misconduct. The investigator should consider whether there are good reasons for withholding certain evidence obtained prior to the interview and if there are no such reasons then the police officer should normally be provided with all the relevant evidence obtained. The police officer will then have the opportunity to provide his or her version of the events together with any

supporting evidence he or she may wish to provide. Examples of when there may be good reasons to withhold information include on the grounds of national security or to protect sources of information such as witnesses or informants. The police officer will be reminded that failure to provide any account or response to any questions at this stage of the investigation may lead to an adverse inference being drawn at a later stage.

2.129 Interviews may be electronically recorded but if they are then the person being interviewed shall be given a copy upon request. If the interview is not electronically recorded then a written record or summary of the discussion must be given to the person being interviewed. The police officer concerned should be given the opportunity to check and sign that he or she agrees with the summary as an accurate record of what was said and should sign and return a copy to the investigator. Where a police officer refuses or fails to exercise his or her right to agree and sign a copy then this will be noted by the investigator. The police officer may make a note of the changes he or she wants to make to the record and a copy of this will be given to the person(s) conducting the hearing/meeting along with the investigator's account of the record.

2.130 Other than for a joint criminal/misconduct investigation interview it will not be necessary for criminal style witness statements to be taken. In misconduct investigations an agreed and signed written record of the information supplied will be sufficient.

Moving between Misconduct and UPP

2.131 It may not be apparent at the outset of an investigation whether the matter is one of misconduct or unsatisfactory performance or attendance. It should be established as soon as possible which procedure is the more appropriate. In some cases it may be that it is not clear which procedure should be used until there has been some investigation of the matter.

2.132 Assessing a matter as misconduct or a matter of performance or attendance is an important distinction to make. It is normally possible to distinguish between matters of unsatisfactory performance or attendance by a particular police officer and that of personal misconduct.

2.133 A matter that appears initially to relate to misconduct may, on investigation, turn out to be a matter relating to unsatisfactory performance or attendance and should be transferred to the unsatisfactory performance procedure (UPP), if appropriate, at the earliest opportunity. This can be done at any time before a misconduct meeting or hearing, in relation to a matter not dealt with under the 2002 Act, by withdrawing the case against the police officer concerned under regulation 20 of the Conduct Regulations and referring the matter to be dealt with under the UPPs. The police officer concerned shall be informed that the matter is no longer being investigated as a misconduct case.

2.134 It may be that the outcome of an investigation into an allegation is that an issue of unsatisfactory performance or attendance has been identified against one or more police officers who were the subject of the investigation rather than any issue of misconduct. In such cases the outcome of the allegation may be that the appropriate authority will determine that there is no case to answer in respect of misconduct or gross misconduct but it may be appropriate to take action under the UPPs in order that the police officer concerned may learn and improve his or her performance.

2.135 There may be very rare occasions when the matter proceeds under the misconduct procedure to a misconduct meeting or hearing and the person(s) conducting the proceedings find that the conduct of the police officer amounts to unsatisfactory performance or attendance as opposed to one of misconduct. In such cases, a finding on the facts of the case by the person(s) conducting the meeting or hearing can be used for the purposes of the UPPs. The person(s) conducting the meeting/hearing should in such cases make a finding that the conduct did not amount to misconduct and refer the matter to the appropriate authority.

2.136 The appropriate authority in such cases should then decide if taking action against the police officer concerned using the UPPs is a fair and reasonable exercise of discretion taking into account all of the circumstances of the case and in particular the same principles set out at paragraphs 2.39 and 2.40.

2.137 Material gathered under the UPP should not be used for the purposes of the misconduct procedure if this means that the safeguards for police officers provided in the misconduct procedure, such as provision for formal notification, are thereby undermined.

Investigation report and supporting documents

2.138 At the conclusion of the investigation the investigator must as soon as practicable submit his or her report of the investigation setting out an accurate summary of the evidence that has been gathered (regulation 18 of the Conduct Regulations and regulation 14E of the Complaint Regulations). The report shall also attach or refer to any relevant documents. It will also include a recommendation whether in the opinion of the investigator there is a case to answer in respect of misconduct or gross misconduct or whether there is no case to answer.

2.139 In cases where the investigation was conducted under paragraphs, 16 (local), 17 (supervised), 18 (managed) or 19 (independent) then the investigator will submit his or her report with recommendations in accordance with paragraph 22 of schedule 3 of the 2002 Act.

2.140 The appropriate authority shall make a decision based on the report. The appropriate authority shall determine whether there is a case to answer in respect of misconduct or gross misconduct or that there is no case of misconduct to answer (regulation 19 of Conduct Regulations).

2.141 If it is decided that there is no case of misconduct to answer then management action may still be appropriate. In matters involving a complaint, where the complaint was subject to a local or supervised investigation under the 2002 Act, the decision of the appropriate authority may be subject to an appeal by the complainant to the IPCC (see IPCC Statutory Guidance). Similarly in cases where an investigation into a complaint has been conducted under paragraph 18 (managed) or 19 (independent) or certain matters involving a recordable conduct matter, the IPCC has the power to make recommendations and give directions as to whether there is a case to answer.

2.142 If no further action is to be taken then it is good practice that the investigation report or part of the investigation report that is relevant to the police officer should be given, subject to the harm test, to the police officer on request.

2.143 The investigation report will also highlight any learning opportunities for either an individual or the organisation.

Action prior to misconduct meetings/hearings

2.144 In cases where it is decided that there is a misconduct case to answer, the appropriate authority will need to determine whether the matter can be dealt with by means of immediate management action without the need to refer the case to a misconduct meeting. This will be particularly appropriate in cases where the police officer concerned has accepted that his or her conduct fell below the standards expected of a police officer and demonstrates a commitment to improve his or her conduct in the future and to learn from that particular case. In addition the appropriate authority will need to be satisfied that this is the case and that management action is an adequate and sufficient outcome having regard to all the circumstances of the case.

2.145 Where the appropriate authority consider that there is a case to answer in respect of misconduct and that management action would not be appropriate or sufficient (for example because the police officer has a live Superintendent's warning issued under the previous procedures or the misconduct is serious enough to justify a written warning being given) then a misconduct meeting/hearing should be arranged and the police officer shall, subject to the harm test, be given a copy of the investigation report (or the part of the report which is relevant to him or her) and all relevant documents that will be relied upon at the misconduct meeting/hearing.

2.146 In determining which documents are relevant, the test to be applied will be that under the Criminal Procedure and Investigations Act 1996, namely whether any document or other material undermines the case against the police officer concerned or would assist the police officer's case.

2.147 Where a determination has been made that the conduct amounts to gross misconduct then the case shall be referred to a misconduct hearing (or special case hearing if appropriate).

2.148 The appropriate authority will also provide the police officer with a notice clearly setting out the particulars of the behaviour that is alleged to have fallen below the standards in the Standards of Professional Behaviour.

2.149 It is not necessary to state under which heading of the Standards of Professional Behaviour the conduct falls but rather to describe the actual behaviour of the police officer that is considered to amount to misconduct or gross misconduct and the reasons it is thought the behaviour amounts to such.

2.150 It is important to note that in cases where the misconduct to be considered was identified as a direct result of a complaint, then any decision by the appropriate authority to hold or not to hold a particular misconduct proceeding may be subject to an appeal by the complainant. The appropriate authority, having made its decision on the outcome of the investigation into the complaint and whether there is a case to answer in respect of misconduct or gross misconduct will notify the complainant of its determination and inform the complainant of their right of appeal. The police officer subject of the investigation into his or her conduct should be informed of the determination of the appropriate authority but also informed that the appropriate authority's decision could be subject of an appeal by the complainant to the IPCC. The appropriate authority should then wait until either the 28 + 2 days[1] period that the complainant may appeal has elapsed or an appeal has been received and decided by the IPCC before taking any disciplinary action.

2.151 There is no requirement to wait until the period the complainant has to appeal has elapsed in cases where the appropriate authority has determined that the case should be dealt with at a misconduct hearing or a special case hearing.

2.152 No final decision can be taken by the appropriate authority in the case of a recordable conduct matter where the IPCC are considering whether to recommend or direct that an appropriate authority take particular misconduct proceedings unless the appropriate authority intends to refer the matter to a misconduct hearing or special case hearing.

2.153 Within 14 working days (unless this period is extended by the person(s) conducting the misconduct meeting/hearing for exceptional circumstances) of the receipt of the investigator's report and relevant documents and the particulars setting out the alleged misconduct, the police officer will be required to submit in writing: -

- whether or not he or she accepts that the behaviour described in the particulars amounts to misconduct or gross misconduct as the case may be

[1] The statutory period for a complainant to appeal is 28 days. However the 2 extra days are provided for the IPCC to process and inform the appropriate authority that an appeal has been received.

- where he or she accepts that his or her conduct amounts to misconduct or gross misconduct as the case may be, any written submission he or she wishes to make in mitigation
- where he or she does not accept that his or her conduct amounts to misconduct or gross misconduct as the case may be, or he or she disputes part of the case, written notice of the particulars of the allegation(s) he or she disputes and his or her account of the relevant events and any arguments on points of law he or she wishes the person(s) conducting the meeting or hearing to consider.

2.154 The police officer concerned will also (within the same time limit) provide the appropriate authority and the person(s) conducting the misconduct meeting or hearing with a copy of any document he or she intends to rely on at the misconduct proceedings. If such documents involve submissions on points of law then the person(s) conducting or chairing a meeting/hearing may take legal advice in advance of the meeting/hearing. In addition, at a misconduct hearing the persons conducting that hearing have the right to have counsel or a solicitor available to them for advice at the hearing.

2.155 The police officer shall be informed of the name of the person(s) holding the meeting/hearing together with the name of any person appointed to advise the person(s) conducting the meeting/hearing as soon as reasonably practicable after they have been appointed. The police officer may object to any person hearing or advising at a misconduct meeting or hearing. In doing so the police officer concerned will need to set out clear and reasonable objections as to why a particular person(s) should not conduct or advise at the meeting/hearing.

2.156 If the police officer concerned submits a compelling reason why such a person should not be involved in the meeting/hearing then, in the interests of fairness, a replacement should be found and the police officer will be notified of the name of the replacement and the police officer concerned will have the same right to object to that person.

2.157 The police officer concerned may object to a person(s) conducting a misconduct meeting or hearing or advising at such proceedings if, for example, the person(s) have been involved in the case in a way that would make it difficult to make an objective and impartial assessment of the facts of the case.

Documents for the meeting/hearing

2.158 The person(s) conducting the misconduct meeting/hearing shall be supplied (in accordance with regulation 28) with: -

- A copy of the notice supplied to the police officer that set out the fact that the case was to be referred to a misconduct meeting/hearing and details of the alleged misconduct etc.

- A copy of the investigator's report or such parts of the report that relate to the police officer concerned.
- The notice provided by the police officer setting out whether or not the police officer accepts that his or her conduct amounts to misconduct or gross misconduct, any submission he or she wishes to make in mitigation where the conduct is accepted, and where he or she does not accept that the alleged conduct amounts to misconduct or gross misconduct or he or she disputes part of the case, the allegations he or she disputes and his or her account of the relevant events; and any arguments on points of law submitted by the police officer concerned.
- Where the police officer concerned does not accept that the alleged conduct amounts to misconduct or gross misconduct as the case may be or where he or she disputes any part of the case, any other documents that in the opinion of the appropriate authority should be considered at the meeting/hearing.
- Any other documents that the person(s) conducting the meeting/hearing request that are relevant to the case

2.159 The documents for the meeting/hearing should be given to the person(s) conducting the meeting/hearing as soon as practicable after he, she or they have been appointed to conduct the meeting/hearing.

Witnesses

2.160 Generally speaking misconduct meetings and hearings will be conducted without witnesses. A witness will only be required to attend a misconduct meeting/hearing if the person conducting or chairing the meeting/hearing reasonably believes his or her attendance is necessary to resolve disputed issues in that case. The appropriate authority should meet the reasonable expenses of witness (es).

2.161 In cases where the police officer denies the behaviour alleged and the police officer concerned believes that it is necessary for a particular witness(es) to attend the misconduct meeting or hearing, then the police officer should agree with the appropriate authority which witness(es) are necessary to deal with the issue(s) in dispute. Where no agreement is reached between the appropriate authority and the police officer concerned, then the police officer shall supply to the appropriate authority his or her list of witnesses and (except where the investigator has interviewed those witnesses) their addresses.

2.162 The appropriate authority may then prepare a list of witnesses it would like to attend. Once the police officer concerned and the appropriate authority have agreed which witness (es) (if any) should attend, or in the absence of agreement, prepared separate lists, then the person conducting a misconduct meeting or the chair of a misconduct hearing will decide whether to allow such witness (es). The person conducting or chairing the misconduct proceedings may also decide that a witness other than one on such lists should be required to attend (if their attendance is considered necessary).

2.163 Where the person conducting a misconduct meeting or the chair of a misconduct hearing rejects the request for a particular witness(es) to attend then the reasons for refusing to allow the attendance of the witness(es) will be given to the police officer concerned and the appropriate authority.

2.164 Whilst the person conducting the misconduct meeting or the chair of a misconduct hearing will decide whether a particular witness(es) are required, the appropriate authority will be responsible for arranging the attendance of any witness.

2.165 In special cases (fast track) no witnesses will attend the hearing. (See Annex A)

Misconduct meetings/hearings

Types of misconduct proceedings

2.166 There are two types of misconduct proceedings:

- A Misconduct Meeting for cases where there is a case to answer in respect of misconduct and where the maximum outcome would be a final written warning.

- A Misconduct Hearing for cases where there is a case to answer in respect of gross misconduct or where the police officer has a live final written warning and there is a case to answer in respect of a further act of misconduct. The maximum outcome at this hearing would be dismissal from the police service.

2.167 It is important that misconduct hearings are only used for those matters where the police officer has a live final written warning and has potentially committed a further act of misconduct that warrants misconduct proceedings or the misconduct alleged is so serious that it is genuinely considered that if proven or admitted dismissal from the police service would be justified.

Timing for holding meetings/hearings

2.168 A misconduct meeting shall take place not later than 20 working days from the date on which the documents and material for the meeting have been supplied to the police officer under Regulation 21 of the Conduct Regulations. Misconduct hearings shall take place not later than 30 working days from the date the documents for the hearing have been supplied to the police officer concerned.

2.169 The time limit for holding a misconduct meeting or a misconduct hearing can be extended if in the interests of justice and fairness the person conducting or chairing the misconduct proceedings considers it appropriate to extend beyond that period. Any decision to extend or not to extend the time limit for a meeting/hearing and the reasons for it will be documented by that person and communicated to the appropriate authority and the police officer

concerned. It is also good practice to inform the police friend of the police officer concerned (if applicable).

2.170 In order to maintain confidence in the misconduct procedures it is important that the misconduct meetings/hearings are held as soon as practicable and extensions to the timescales should be an exception rather than the rule. To that end, managers appointed to conduct or chair misconduct meetings/hearings are to ensure that a robust stance is taken in managing the process whilst ensuring the fairness of the proceedings. Extensions may be appropriate for example if the case is particularly complex. It would not be considered appropriate to extend the timescale on the grounds that the police officer concerned wishes to be represented by a particular counsel or solicitor.

Purpose of misconduct meeting/hearing

2.171 The purpose of a formal misconduct meeting/hearing is to:

- Give the police officer a fair opportunity to make his or her case having considered the investigation report including supporting documents. In cases where misconduct has been proven or admitted, the misconduct meeting/hearing will allow the opportunity to put forward any factors the police officer wishes to be considered in mitigation (in addition to the submission which must be sent in advance to the person(s) conducting or chairing the meeting/hearing for his, her or their consideration).

- Decide if the conduct of the police officer fell below the standards set out in the Standards of Professional Behaviour based on the balance of probabilities and having regard to all of the evidence and circumstances.

- Consider what the outcome should be if misconduct is proven or admitted. Consideration will be given to any live written warnings or final written warnings (and any sanctions on the police officer's personal record under the Police (Conduct) Regulations 2004 during the transitional period that have not expired) and any early admission of the conduct by the police officer.

Person(s) appointed to hold misconduct meetings/hearings

Misconduct meeting - Non senior officers (regulation 25)

2.172 A misconduct meeting for non senior officers (police officers up to and including the rank of Chief Superintendent and all special constables) will be heard by:

a) a manager who is a police officer (or other member of a police force) of at least one rank above the police officer concerned. However, in the case of a special constable, the manager may be a manager of any rank; or

b) a manager who is a police staff member and, in the opinion of the appropriate authority, is a grade above that of the police officer concerned. A police staff manager must not be appointed to conduct a misconduct meeting if the case substantially involves operational policing matters.

2.173 An appropriate manager (whether a police officer or police staff manager) may also be appointed as an adviser to the person appointed to hold the meeting if the appropriate authority considers it appropriate in the circumstances. The adviser's role is solely to advise on the procedure to be adopted and not as a decision maker. The manager appointed to conduct the meeting and (where appropriate) the adviser must be sufficiently independent in relation to the matter concerned (for example without any previous involvement in the matter) as to avoid any suggestion of unfairness.

Misconduct hearing - Non senior officers (regulation 25)

2174 A misconduct hearing for non senior officers will consist of a 3 person panel.

2.175 The chair will be either a senior officer or a senior Human Resources Professional. A senior Human Resources Professional means a human resources professional who in the opinion of the appropriate authority has sufficient seniority, skills and experience to conduct the misconduct hearing.

2.176 Where the senior Human Resources Professional is the chair then he or she will be accompanied by an independent member (appointed from the list held by the police authority) and a police officer of the rank of superintendent or above.

2.177 Where the senior officer is the chair then he or she will be accompanied by an independent member (appointed from the list held by the police authority) and a police officer of the rank of superintendent or above or a Human Resources Professional who is considered by the appropriate authority to be of sufficient grade to sit on the panel. The grade required for the Human Resources professional will depend on the rank of the police officer concerned.

2.178 The appropriate authority may appoint a person to advise the persons conducting the misconduct hearing and the adviser may be counsel or a solicitor if required.

Misconduct meetings/hearings - Senior officers (regulations 26 and 27)

2.179 The persons who will hear misconduct meetings/hearings for senior officers are set out at Annex B.

Misconduct Hearings in Public

2.180 Where a misconduct hearing (not misconduct meetings) arises from a case where the IPCC have conducted an independent investigation (in

accordance with paragraph 19 of Schedule 3 to the 2002 Act) and the IPCC considers that because of its gravity or other exceptional circumstances it would be in the public interest to do so, the IPCC may, having consulted with the appropriate authority, the police officer concerned, the complainant and any witnesses, direct that the whole or part of the misconduct hearing will be held in public.

2.181 The IPCC have published criteria for deciding when such cases will be held in public and a copy of this is available from the IPCC or the IPCC website at www.ipcc.gov.uk.

Joint meetings/hearings

2.182 Cases will arise where two or more police officers are to appear before a misconduct meeting or hearing in relation to apparent failures to meet the standards set out in the Standards of Professional Behaviour stemming from the same incident. In such cases, each police officer may have played a different part and any alleged misconduct may be different for each police officer involved. It will normally be considered necessary to deal with all the matters together in order to disentangle the various strands of action, and therefore a single meeting/hearing will normally be appropriate.

2.183 A police officer may request a separate meeting/hearing if he or she can demonstrate that there would be a real risk of unfairness to that police officer if his or her case was dealt with in a joint meeting/hearing. It is for the person conducting the meeting or the chair of a misconduct hearing to decide if a separate meeting or hearing is appropriate.

2.184 Where a joint meeting/hearing is held it will be the duty of the person(s) conducting the meeting/hearing to consider the case against each police officer and where a breach of the Standards of Professional Behaviour is found or admitted, to deal with each police officer's mitigation and circumstances individually and decide on the outcome accordingly. The person(s) conducting the meeting/hearing have the discretion to exclude the other officer(s) subject of the meeting/hearing if he, she or they determine it appropriate to do so.

Meeting/hearing in absence of officer concerned

2.185 It is in the interests of fairness to ensure that the misconduct meeting/hearing is held as soon as possible. A meeting/hearing may take place if the police officer fails to attend.

2.186 In cases where the police officer is absent (for example through illness or injury) a short delay may be reasonable to allow him or her to attend. If this is not possible or any delay is considered not appropriate in the circumstances then the person(s) conducting the meeting/hearing may allow the police officer to participate by telephone or video link. In these circumstances a police friend will always be permitted to attend the meeting/hearing to represent the police officer in the normal way (and in the

case of a misconduct hearing the police officer's legal representative where appointed).

2.187 If a police officer is detained in prison or other institution by order of a court, there is no requirement on the appropriate authority to have the officer concerned produced for the purposes of the misconduct meeting/hearing.

Conduct of misconduct meeting/hearing

2.188 It will be for the person(s) conducting the meeting/hearing to determine the course of the meeting/hearing in accordance with the principles of natural justice and fairness.

2.189 The person(s) conducting the meeting/hearing will have read the investigator's report together with any account given by the police officer concerned during the investigation or when submitting his or her response under regulation 22 of the Conduct Regulations and any representations made by the police officer concerned or his or her police friend (or in the case of a misconduct hearing the police officer's legal representative where appointed). The person(s) conducting the meeting/hearing will also have had the opportunity to read the relevant documents attached to the investigator's report and any documents that the police officer concerned has submitted.

2.190 Where there is evidence at the meeting or hearing that the police officer concerned, at any time after being given written notice under regulation 15 of the Conduct Regulations (or regulation 14A(h) of the Complaint Regulations), failed to mention orally or in writing any fact relied on in his or her defence at the meeting/hearing, being a fact which in the circumstances existing at the time the police officer concerned could reasonably have been expected to mention when questioned or providing a written response, the person(s) conducting the meeting/hearing may draw such inferences from this failure as appear appropriate.

2.191 Any document or other material that was not submitted in advance of the meeting/hearing by the appropriate authority or the police officer concerned may still be considered at the meeting/hearing at the discretion of the person(s) conducting the meeting/hearing. However the presumption should be that such documents will not be permitted unless it can be shown that they were not previously available to be submitted in advance.

2.192 Where any such document or other material is permitted to be considered, a short adjournment may be necessary to enable the appropriate authority or police officer concerned,, as the case may be, to read or consider the document or other material and consider its implications.

2.193 Material that will be allowed, although not submitted in advance, will include mitigation where the police officer concerned denied the conduct alleged but the person(s) conducting the meeting/hearing found that the conduct had amounted to misconduct or gross misconduct and are to decide on outcome.

2.194 Where a witness (es) does attend to give evidence then any questions to that witness should be made through the person conducting the meeting or in the case of a misconduct hearing the chair. This does not prevent the person conducting the meeting or the chair in a misconduct hearing allowing questions to be asked directly if they feel that is appropriate. It is for the person(s) conducting the meeting/hearing to control the proceedings and focus on the issues to ensure a fair meeting/hearing.

2.195 Misconduct meetings/hearings will consider the facts of the case and will lead to a decision on the balance of probabilities as to whether the police officer's conduct amounted to misconduct, gross misconduct (in the case of a misconduct hearing) or neither. If the meeting decides that the police officer's conduct did not fall below the standards expected then as soon as reasonably practicable the police officer shall be informed and no entry will be made on his or her personal record.

2.196 A record of the proceedings at the meeting/hearing must be taken. In the case of a misconduct hearing this will be by means of a verbatim record whether by tape recording or any other recording method.

Standard of proof

2.197 In deciding matters of fact the misconduct meeting/hearing must apply the standard of proof required in civil cases, that is, the balance of probabilities. Conduct will be proved on the balance of probabilities if the person(s) conducting the meeting/hearing is/are satisfied by the evidence that it is more likely than not that the conduct occurred. The more serious the allegation of misconduct that is made or the more serious the consequences for the individual which flow from a finding against him or her, the more persuasive (cogent) the evidence will need to be in order to meet that standard.

2.198 Misconduct meeting/hearings should bear in mind the fact that police officers may be required to deal with some people who may have a particular motive for making false or misleading allegations against the police officer.

2.199 Therefore in making a decision whether the alleged conduct of a police officer is found or not, the person(s) conducting the misconduct meeting/hearing will need to exercise reasonable judgement having regard to all the circumstances of the case.

Outcomes of meetings/hearings

2.200 If the person(s) conducting the misconduct meeting/hearing find that the police officer's conduct did fail to meet the Standards of Professional Behaviour, then the person(s) conducting the meeting/hearing will then determine the most appropriate outcome.

2.201 In considering the question of outcome the person(s) conducting the meeting/hearing will need to take into account any previous written warnings

(imposed under the Police (Conduct) Regulations 2008 but not Superintendent's warnings issued under the previous procedures) that were live at the time of the initial assessment of the conduct in question, any aggravating or mitigating factors and have regard to the police officer's record of service, including any previous disciplinary outcomes (imposed under the Police (Conduct) Regulations 2004) that have not been expunged in accordance with Regulation 15 of the Police Regulations 2003 (as amended). The person(s) conducting the meeting/hearing may (only if deemed necessary and at the person(s) conducting the meeting/hearings discretion) receive evidence from any witness whose evidence would in their opinion assist them in this regard.

2.202 The person(s) conducting the meeting/hearing are also entitled to take account of any early admission of the conduct on behalf of the police officer concerned and attach whatever weight to this as he, she or they consider appropriate in the circumstances of the case.

2. 203 In addition, the police officer concerned and his or her 'police friend' (or where appropriate legal representative) will be given the opportunity to make representations on the question of the most appropriate outcome of the case.

2.204 The appropriate authority also has the opportunity to make representations as to the most appropriate outcome.

Outcomes available at misconduct meetings/hearings

2.205 The person(s) conducting the meeting/hearing may record a finding that the conduct of the police officer concerned amounted to misconduct and take no further action or impose one of the following outcomes:

a) Management advice

The police officer will be told:

- The reason for the advice
- That he or she has a right of appeal and the name of the person to whom the appeal should be sent.

b) Written warning

The police officer will be told:

- The reason for the warning.
- That he or she has a right to appeal and the name of the person to whom the appeal should be sent.
- That the warning will be put on his or her personal file and will remain live for twelve months from the date the warning is given. This means

that any misconduct in the next 12 months is likely to lead to (at least) a final written warning.

c) Final written warning

The police officer will be told:

- The reason for the warning.
- That any future misconduct may result in dismissal
- That he or she has a right to appeal and the name of the person to whom the appeal should be sent.
- That the final written warning will be put on his or her personal file and will remain live for eighteen months from the date the warning is given. This means that only in exceptional circumstances will further misconduct (that justifies more than management advice) not result in dismissal. (In exceptional circumstances only, the final written warning may be extended for a further 18 months on one occasion only.)

At a misconduct hearing, in addition to the outcomes available at a), b) and c) above the persons conducting the hearing will also have available the outcomes of:

d) Dismissal with notice – The notice period will be determined by the persons conducting the meeting subject to a minimum of 28 days.

e) Dismissal without notice.

Dismissal without notice will mean that the police officer is dismissed from the police service with immediate effect.

2.206 Where the persons conducting a misconduct hearing find that the police officer's conduct amounted to gross misconduct and decide that the police officer should be dismissed from the police service, then that dismissal will be without notice and without payment. Where a police officer appears before a misconduct hearing for an alleged act of gross misconduct, and the person(s) conducting the hearing find that the conduct amounts to misconduct rather than gross misconduct, then (unless the police officer already has a live final written warning) the disciplinary outcomes available to the panel are those that are available at a misconduct meeting only.

2.207 Where a case is referred to a misconduct meeting and the police officer concerned has a live written warning[2] and the police officer either admits or is

[2] A written warning or final written warning is live if at the time the latest allegation of misconduct was assessed (under regulation 12 of the Conduct Regulations or paragraph 19A of the 2002 Act) the officer concerned had an outstanding written warning or final written warning that had not expired.

found at the meeting to have committed a further act of misconduct, then the person conducting the misconduct meeting cannot impose another written warning. The person conducting the meeting will need to decide whether to take no action, give management advice or if he or she determines that either type of written warning is appropriate shall impose a final written warning.

2.208 Where a case is referred to a misconduct hearing on the grounds that the police officer concerned has a live final written warning and at the hearing the police officer either admits or is found to have committed a further act of misconduct, then the persons conducting the misconduct hearing cannot impose another written or a final written warning.

2.209 The persons conducting the hearing may give management advice. However if the persons conducting the hearing determine that the misconduct admitted or found should attract a further written or final written warning they will dismiss the police officer unless they are satisfied that there are exceptional circumstances that warrant the police officer concerned remaining in the police service.

2.210 Where the persons conducting the misconduct hearing determine that such exceptional circumstances exist, they will extend the current final written warning that the police officer has for a further 18 months from the date the warning would otherwise expire (so that the original final written warning will last for 36 months in total). An extension to a final written warning can only be given on one occasion. In other words, if a further act of misconduct comes before a misconduct hearing after an extension has been imposed, unless it is sufficiently minor to justify management advice, the police officer will be dismissed.

2.211 The exceptional circumstances may include where the misconduct which is subject of the latest hearing pre-dates the misconduct for which the police officer received his or her original final written warning or the misconduct in the latest case is significantly less serious than the conduct that led to the current final written warning being given.

Notification of the outcome

2. 212 In all cases the police officer will be informed in writing of the outcome of the misconduct meeting/hearing. This will be done as soon as practicable and in any case within 5 working days of the misconduct meeting/hearing.

2.213 The notification in the case of a misconduct meeting will include notification to the police officer concerned of his or her right to appeal against the finding and/or outcome and the name of the person to whom any appeal should be sent.

2.214 In the case of a police officer who has attended a misconduct hearing, the notification will include his or her right of appeal to a Police Appeals Tribunal against any finding and/or outcome imposed.

2. 215 In cases involving a complainant, the appropriate authority will be responsible for informing the complainant of the outcome.

Expiry of Warnings

2.216 Notification of written warnings issued, including the date issued and expiry date will be recorded on the police officer's personal record, along with a copy of the written notification of the outcome and a summary of the matter.

2.217 Where a police officer has a live written warning and transfers from one force to another, then the live warning will transfer with the police officer and will remain live until the expiry of the warning and should be referred to as part of any reference before the police officer transfers.

2.218 Where a police officer who has a live written warning or final written warning takes a career break in accordance with Police Regulations then any time on such a break will not count towards the 12 months (in the case of a written warning) or 18 months (in the case of a final written warning) or 36 months (in the case of an extended final written warning) that the warning is live.

2.219 For example if a police officer has a written warning that has been live for six months and then goes on a career break for 12 months and then returns to the force, he or she will still have six months before the written warning expires on rejoining the force.

Special Priority Payment/Competency Related Threshold Payment

2.220 A finding or admission of misconduct at a misconduct meeting or hearing will not automatically result in the removal of a police officer's special priority payment or competency related threshold payment. Where a police officer has received a written warning or a final written warning this may trigger a review of the appropriateness of that police officer continuing to receive such payments. However the misconduct is to be considered alongside the other criteria for receiving the payments in reaching a decision as to whether it is appropriate and justified to remove such payments.

Attendance of complainant or interested person at misconduct proceedings

2.221 Where a misconduct meeting/hearing is being held as a direct result of a public complaint, the complainant or interested person will have the right to attend the meeting/hearing as an observer up until the point at which disciplinary action is considered (in addition to attending as a witness if required to do so). He or she may be accompanied by one other person plus (in the case of a particular need e.g. an interpreter, sign language expert etc.) a second person. The appropriate authority will therefore be responsible for notifying the complainant or interested person of the date, time and place of the misconduct meeting/hearing.

2.222 The misconduct meeting/hearing shall not be delayed solely in order to facilitate a complainant or interested person attending the meeting/hearing, although consideration will need to be given to whether the complainant or interested person is also a witness in the matter.

2.223 The complainant or interested person may at the discretion of the person conducting or chairing the meeting/hearing put questions through the person conducting or chairing the meeting or hearing. [Note: Complainants will not be permitted to put questions to the police officer in a special case hearing. See Annex A]

2. 224 Where the complainant is required to attend a meeting/hearing to give evidence, he or she will not be permitted to be present in the meeting/hearing before giving his or her evidence. Any person accompanying the complainant and/or the person assisting the complainant due to a special need will not be permitted to be present in the meeting/hearing before the complainant has given evidence (if applicable).

2.225 A complainant and any person accompanying the complainant will be permitted to remain in the meeting/hearing up to and including any finding by the person(s) conducting the meeting/hearing, after having given evidence (if appropriate). The complainant and any person accompanying the complainant will not be permitted to remain in the meeting/hearing whilst character references or mitigation are being given or the decision of the panel as to the outcome. However, the appropriate authority will have a duty to inform the complainant of the outcome of any misconduct meeting/hearing whether the complainant attends or not.

2.226 The person(s) conducting a misconduct meeting/hearing will have the discretion to allow a witness who has attended and given evidence at the meeting/hearing to remain or to ask him or her to leave the proceedings after giving his or her evidence (subject to the right of complainants to be present. See paragraph 2.221).

IPCC direction and attendance at meetings/hearings

2.227 Where the IPCC exercises its power (under paragraph 27 of Schedule 3 to the 2002 Act) to direct an appropriate authority to hold a misconduct meeting/hearing, this will also include a direction as to whether the proceedings will be a misconduct meeting or hearing. In making such a direction the IPCC will have regard to the severity assessment that has been made in the case and been notified to the police officer concerned.

2.228 Where a misconduct meeting/hearing is to be held following: -

- an investigation managed or independently investigated by the IPCC; or
- a local or supervised investigation where the IPCC has made a recommendation under paragraph 27(3) of Schedule 3 of Police Reform Act 2002 that misconduct proceedings should be taken and

the recommendation has been accepted by the appropriate authority; or

- the IPCC has given a direction under paragraph 27(4) of that Schedule that misconduct proceedings shall be taken

then the Commission may attend the misconduct meeting/hearing to make representations. Such representations may be an explanation why the IPCC has directed particular misconduct proceedings to be brought or to comment on the investigation.

2.229 Where the Commission is to attend a misconduct hearing, it may instruct counsel or a solicitor to represent it.

Right of appeal

2.230 A police officer has a right of appeal against the finding and/or the outcome imposed at a misconduct meeting.

2.231 The appeal is commenced by the police officer concerned giving written notice of appeal to the appropriate authority, clearly setting out the grounds for the appeal within 7 working days of the receipt of the notification of the outcome of the misconduct meeting(unless this period is extended by the appropriate authority for exceptional circumstances).

2.232 The police officer has the right to be accompanied by a police friend.

2.233 The police officer concerned may only appeal on the grounds that: -

a) the finding or disciplinary action imposed was unreasonable;

b) there is critical new evidence that could not reasonably have been considered at the misconduct meeting; or

c) there was a serious breach of the procedures or other unfairness which could have materially affected the finding or outcome on disciplinary action.

Appeal following misconduct meeting – non senior officers (regulations 38 to 40 of the Conduct Regulations)

2.234 An appeal against the finding and/or the outcome from a misconduct meeting will be heard by a member of the police service of a higher rank or a police staff manager who is considered to be of a higher grade than the person who conducted the misconduct meeting. A police staff manager should not be appointed to conduct the appeal if the case substantially involves operational policing matters.

2. 235 A police officer or police staff member may be present to advise the person conducting the appeal on procedural matters.

2.236 The person determining the appeal will be provided with the following documents: -

a) The notice of appeal from the police officer concerned setting out his or her grounds of appeal.

b) The record of the original misconduct meeting

c) The documents that were given to the person who held the original misconduct meeting.

d) Any critical new evidence that the police officer concerned wishes to submit in support of his or her appeal that was not considered at the misconduct meeting.

2.237 The person appointed to deal with the appeal must first decide whether the notice of appeal sets out arguable grounds of appeal. If he or she determines that there are no arguable grounds then he or she shall dismiss the appeal and inform the police officer concerned accordingly setting out his or her reasons. There are no further avenues of appeal.

2.238 Where the person appointed to hear the appeal determines that there are arguable grounds of appeal and the police officer concerned has requested to be present at the appeal meeting, the manager will hold a meeting with the police officer concerned. Where the police officer fails to attend the meeting, the person conducting the appeal may proceed in the absence of the police officer concerned.

2.239 The person conducting the appeal may consider:

- Whether the finding of the original misconduct meeting was unreasonable having regard to all the evidence considered or if the finding could now be in doubt due to critical new evidence which has emerged since the meeting.

- Any outcome imposed by the misconduct meeting which may be considered as too severe or too lenient having regard to all the circumstances of the case.

- Whether the finding or outcome could be unsafe due to procedural unfairness and prejudice to the police officer (although the person conducting the appeal must also take into account whether the unfairness or prejudice could have materially influenced the outcome).

2.240 The person determining the appeal may confirm or reverse the decision appealed against. Where the person determining the appeal decides that the original disciplinary action imposed was too lenient then he or she may increase the outcome up to a maximum of a final written warning.

2.241 An appeal is not a repeat of the misconduct meeting. It is to examine a particular part(s) of the misconduct case which is under question and which may affect the finding or the outcome.

2.242 The appeal will normally be heard within 5 working days of the determination that the grounds for appeal have been met**.** If the police officer concerned or his or her police friend is not available at the date or time specified by the person conducting the appeal, the police officer may propose an alternative time. Provided that the alternative time is reasonable and falls within a period of 5 working days beginning with the first working day after that proposed by the person conducting the appeal the appeal must be postponed to that time.

Appeal following misconduct hearing – non senior officers

2.243 Where a police officer has appeared before a misconduct hearing then any appeal against the finding or outcome is to the Police Appeals Tribunal (see Annex C). The police officer should be informed that the Police Appeal Tribunal can increase any outcome imposed as well as reduce or overturn the decision of the misconduct hearing or special case hearing.

Appeals against misconduct meetings/hearings – senior officers

2. 244 Senior officers have the right to appeal against the finding and/or outcome of a misconduct meeting or hearing. The appeal in both cases will be made to the Police Appeals Tribunal. The police officer should be informed that the Police Appeal Tribunal can increase any outcome imposed as well as reduce or overturn the decision of the misconduct hearing or special case hearing.

CHAPTER 3

Guidance on Unsatisfactory Performance and Attendance Procedures (UPPs)

Contents

6. The Second Stage

7. The Third Stage

8. Other Matters

1. General

Introduction

1. 1 The formal procedures to deal with unsatisfactory performance and attendance are set out in the Police (Performance) Regulations 2008 and are referred to in this guidance as UPPs.

1.2 The purpose of this guidance is to help managers to decide how and when to use the formal procedures in the Police (Performance) Regulations 2008 to manage unsatisfactory performance or unsatisfactory attendance on the part of police officers. Guidance focussing specifically on attendance management can be found at Paragraph 3.1.

1.3 The underlying principle of the procedures is to provide a fair, open and proportionate method of dealing with performance and attendance issues and to encourage a culture of learning and development for individuals and the organisation.

1.4 The procedures in the Police (Performance) Regulations 2008 are largely the same whether applied to unsatisfactory performance or attendance. However the issues that arise in attendance cases may be different from those in performance cases. This guidance therefore contains separate sections dealing with performance and attendance before a section on the procedures.

1.5 The primary aim of the procedures is to improve performance and attendance in the police service. It is envisaged that early intervention via management action should achieve the desired effect of improving and maintaining a police officer's performance or attendance to an acceptable level.

1.6 There will, however, be cases where it will be appropriate for managers to take formal action under the procedures. Where performance or attendance does not improve to acceptable levels or, in the case of attendance, where there is no realistic prospect of return to work in a reasonable timeframe, a police officer's service may be terminated.

1.7 The UPPs have been prepared by the Home Office in consultation with the Association of Chief Police Officers (ACPO), the Police Federation of England and Wales (PFEW), the Police Superintendents' Association of England and Wales (PSAEW), the Chief Police Officers Staff Association (CPOSA), the Association of Police Authorities (APA), Her Majesty's Inspectorate of Constabulary (HMIC), the Independent Police Complaints Commission (IPCC) and the National Policing Improvement Agency (NPIA).

Scope

1.8 The procedures apply to police officers up to and including the rank of chief superintendent.

1.9 The procedures apply to all special constables. However, given the nature of special constables as unpaid volunteers, cases where the procedures are initiated for special constables may be limited to those where the special constable either contests that his or her performance or attendance is unsatisfactory or agrees that it is unsatisfactory but expresses a desire to continue with his or her special constable duties. In other cases the special constable may choose to resign from his or her role as a special constable. In setting meeting dates and establishing panels, regard should be had to the nature of special constables as volunteers who may have other work or personal commitments.

1.10 The procedures do not apply to student police officers during their probationary period. The procedures governing performance and attendance issues in respect of police students are determined locally by each force. These procedures are underpinned by regulation 13 of the Police Regulations 2003.

Principles

1.11 Performance and attendance management in the police service are intended to be positive and supportive processes, with the aim being to improve performance or attendance.

1.12 All unsatisfactory performance and attendance matters should be handled in a timely manner while maintaining confidence in the process. UPPs should be applied fairly in both a non-discriminatory and non-adversarial way and matters must be handled in the strictest confidence.

1.13 Where the UPPs are used, line managers in the police service and others involved in the process must act in a way which an objective observer would consider reasonable. Examples include:

- being clear about the grounds for believing that a police officer's performance or attendance is unsatisfactory;
- ensuring that the police officer is aware of his or her right to be accompanied by a police friend at UPP meetings;
- conducting the UPPs in accordance with the Performance Regulations and this guidance;
- ensuring that the level of any outcome imposed and any related remedial action, taking into account all the circumstances (including the nature of the working environment) is proportionate and fair in the circumstances; and,
- timeliness.

1.14 The importance of challenging unsatisfactory performance or attendance of individual police officers in the context of overall unit/ force performance

and the police officer's personal development should not be underestimated. Dealing sensitively and appropriately with unsatisfactory performance or attendance issues does not constitute bullying. If a police officer believes that he or she is being unfairly treated, there are avenues of appeal against both the decision and the outcome at each stage of the UPPs.

1.15 A police officer may seek legal advice at any time although legal representation is confined to third stage meetings where the procedure has been initiated at this stage (see paragraph 7.8 on "gross incompetence"). Police officers other than special constables can seek advice from their staff association and all police officers can be advised and represented by their police friend in accordance with the principles described in section [TBC] of the guidance.

1.16 In deciding matters of fact the person(s) conducting the UPP meeting must apply the standard of proof required in civil cases, that is, the balance of probabilities. Unsatisfactory performance or attendance will be proved on the balance of probabilities if the person(s) conducting the meeting is/are satisfied by the evidence that it is more likely than not that the performance or attendance of the police officer is unsatisfactory. The more serious the allegation of poor performance that is made or the more serious the consequences for the individual which flow from a finding against him or her, the more persuasive (cogent) the evidence will need to be in order to meet that standard.

Ongoing performance assessment and review

1.17 Every police officer should have some form of performance appraisal, or what is commonly referred to as a "performance and development review" (PDR). The PDR should be the principal method by which the police officer's performance and attendance is monitored and assessed. It is the responsibility of the line manager to set objectives for his or her staff and it is the responsibility of all police officers, with appropriate support from management, to ensure that they both understand and meet those objectives. Objectives set by the line manager should be specific, measurable, achievable, relevant and time-related (SMART).

1.18 The activities and behaviours expected of a police officer in order to achieve his or her objectives should be in accordance with the relevant national framework which will form the basis of the police officer's role profile.

1.19 Any shortfall in performance or attendance should be pointed out at the earliest opportunity by the line manager and consideration given as to whether this is due to inadequate instruction, training, supervision or some other reason.

1.20 For national guidance on PDR implementation and improvement see:

http://www.skillsforjustice.com/websitefiles/PDRguide.pdf

Sources of information

1.21 Unsatisfactory performance or attendance will often be identified by the immediate line manager of the police officer as part of his or her normal management responsibilities.

1.22 Where the police officer currently works to a manager who has no line management responsibility for him or her, it is the responsibility of that manager to inform the police officer's line manager of any performance or attendance issues he or she has identified.

1.23 Line managers may be police officers or police staff members.

1.24 It is also possible that line managers may be alerted to unsatisfactory performance or attendance on the part of one of their police officers as a result of information from a member of the public. The information from a member of the public may take the form of a formal complaint. Such cases must be dealt with in accordance with the established procedures for the handling of complaints.[1] Appropriate use of the Local Resolution procedure offers an opportunity to deal speedily with a complainant's concerns and to address any performance issues.

1.25 It may be that the outcome of an investigation into a complaint alleging misconduct is that an issue of unsatisfactory performance or attendance has been identified involving one or more police officers. In such cases the outcome of the investigation may be that the appropriate authority will determine that there is no case to answer in respect of misconduct or gross misconduct but it may be appropriate to take action under the UPPs in order that the police officer may learn and improve his or her performance or attendance.

1.26 A single complaint from a member of the public about a police officer's performance will not normally trigger the UPPs, which are designed to deal with a pattern of unsatisfactory performance (except where there is a single incident of gross incompetence). However, where the complaint adds to existing indications of unsatisfactory performance, it may be appropriate to initiate the UPPs or, if the police officer is already subject to these, to continue to the next stage of the process.

1.27 Whilst the unsatisfactory performance and attendance procedures are internal management procedures, it may be necessary at times to inform public complainants of action taken with respect to the police officer to whom the complaint relates. In explaining the outcome of a complaint a force may inform the complainant that the police officer may be subject to the statutory procedures for improving his or her performance.

[1] See link: http://statguidance.ipcc.gov.uk/docs/Timescale%20for%20handling%20complaints.pdf

Management action

1.28 Managers are expected to deal with unsatisfactory performance or attendance issues in the light of their knowledge of the individual and the circumstances giving rise to these concerns.

1.29 There are, however, some generally well understood principles which should apply in such circumstances:

(a) the line manager must discuss any shortcoming (s) or concern (s) with the individual at the earliest possible opportunity. It would be quite wrong for the line manager to accumulate a list of concerns about the performance or attendance of an individual and delay telling him or her about them until the occasion of the police officer's annual or mid-term PDR meetings;

(b) the reason for dissatisfaction must be made clear to the individual as soon as possible and there must be a factual basis for discussing the issues i.e. the discussion must relate to specific incidents or omissions that have occurred;

(c) line managers should seek to establish whether there are any underlying reasons for the unsatisfactory performance or attendance . For example, in the context of performance, a failure to perform a task correctly may be because the individual was never told how to do it or was affected by personal circumstances. In that case it may be appropriate for the line manager to arrange further instruction or guidance;

(d) consideration should be given as to whether there is any health or welfare issue that is or may be affecting performance or attendance. If a police officer has or may have a disability within the scope of the Disability Discrimination Act this needs to be taken into account;

(e) in cases where the difficulty appears to stem from a personality clash with a colleague or line manager, or where for other reasons a change of duties might be appropriate, the police officer's line management may, in consultation with the appropriate HR adviser, consider re-deployment if this provides an opportunity for the police officer to improve his or her performance or attendance. Where a police officer is re-deployed in this way, the police officer and his or her new line management should be informed of the reasons for the move and of the assessment of his or her performance or attendance in the previous role;

(f) the line manager must make it clear to the police officer that he or she is available to give further advice and guidance if needed;

(g) depending on the circumstances, it may be appropriate to indicate to the police officer that if there is no, or insufficient, improvement, then the matter will be dealt with under the UPPs;

(h) line managers are expected to gather relevant evidence and keep a contemporaneous note of interactions with the police officer;

(i) challenging unsatisfactory performance or attendance in an appropriate manner does not constitute bullying. In considering whether action constitutes bullying, forces should have regard to their local policy on bullying.

1.30 The principles outlined above cover the position when a line manager first becomes aware of some unsatisfactory aspect(s) of the police officer's performance or attendance and is dealing with the issue as an integral part of normal line management responsibilities.

1.31 Management action taken as a result of identifying unsatisfactory performance or attendance should be put on record which may be the police officer's PDR. In particular, the line manager should record the nature of the performance or attendance issue; the advice given and steps taken to address the problems identified. Placing matters on record is important to ensure continuity in circumstances where one or more members of the management chain may move on to other duties or the police officer concerned moves to new duties. It is also important to put on record when improvement has been made in his or her performance or attendance.

1.32 Ideally, as a result of management action, performance or attendance will improve and continue to an acceptable level.

1.33 Where there is no improvement, insufficient improvement, or the improvement is not sustained over a reasonable period of time (preferably agreed between the line manager and the police officer), it will then be appropriate to use the UPPs.

1.34 The period of time agreed or determined by the line manager for the police officer concerned to improve his or her performance or attendance prior to using the UPPs must be sufficient to provide a reasonable opportunity for the desired improvement or attendance to take place and must be time limited.

1.35 Throughout these procedures, the period of time in which an improvement in performance or attendance is expected may be extended if, due to some unforeseen circumstance (e.g. certified sickness absence in the context of performance issues) the police officer is unable to demonstrate whether or not the required improvement has been achieved.

2. Performance Issues

Introduction

2.1 The performance of individual police officers is a key element in the delivery of a quality policing service. Police officers should know what

standard of performance is required of them and be given appropriate support to attain that standard.

2.2 Performance management is an integral part of a line manager's responsibilities. Managers should let a police officer know when he or she is doing well or, if the circumstances arise, when there are the first signs that there is a need for improvement in his or her performance. An essential part of effective line management is that managers should be aware of the contribution being made to meeting the aims and objectives of the team by each of the individuals they manage.

"Unsatisfactory performance"

2.3 Unsatisfactory performance is defined in Regulation 4 of the Police (Performance) Regulations 2008 as:

"an inability or failure of a police officer to perform the duties of the role or rank he [or she] is currently undertaking to a satisfactory standard or level."

Framework for action

2.4 There is no single formula for determining the point at which a concern about a police officer's performance should lead to formal procedures under the Police (Performance) Regulations being taken. Each case must be considered on its merits. However the following points need to be emphasised:

- the intention of performance management including formal action under the Police (Performance) Regulations is to improve performance;
- occasional lapses below acceptable standards should be dealt with in the course of normal management activity and should not involve the application of the UPPs, which are designed to cover either repeated failures to meet such standards or more serious cases of unsatisfactory performance ;
- managers should be able to demonstrate that they have considered whether management action is appropriate before using the UPPs.

3. Attendance Issues

Introduction

3.1 This part of the guidance should be read in conjunction with the guidance on developing attendance management policies (see chapter TBC). All forces are required to have an attendance management policy in place. Failure to do so or to adhere to the terms of that policy will be taken into account under these procedures.

3.2 The Police Service is committed to providing, as far as is reasonably practicable, a healthy and safe working environment for its police officers. It recognises that the health and welfare of police officers is a key element in

the delivery of quality services, as well as in maintaining career satisfaction and staff morale.

3.3 The key objective of attendance management policies within forces and the appropriate use of the Police (Performance) Regulations 2008 insofar as they relate to managing unsatisfactory attendance, is to encourage an attendance culture within forces.

3.4 Managing sickness absence is vitally important both in terms of demonstrating a supportive attitude towards police officers and for the efficiency of the organisation. Managing attendance is about creating a culture where all parties take ownership of the policy and act reasonably in the operation of the scheme with managers being proactive in managing sickness.

3.5 The primary aim of the procedures is to improve attendance in the police service. It is envisaged that supportive action will in most cases achieve the desired effect of improving and maintaining a police officer's attendance to an acceptable level.

3.6 There may however be cases where it will be appropriate for managers to take formal action under the Performance Regulations. Where attendance does not improve to acceptable levels or where there is no realistic prospect of a return to work in a reasonable timeframe, then termination of service may be appropriate.

3.7 Where the UPPs are used in relation to attendance matters, such matters will normally relate to periods of sickness absence such that the ability of the police officer to perform his or her duties is compromised.

3.8 Other forms of absence not related to genuine sickness would normally be dealt with under the misconduct procedures e.g. where a police officer's absence is unauthorised.

Framework for action

3.9 Attendance management in the police service is intended to be a positive and supportive process to improve attendance. In all cases, the starting point is supportive action. Except where a police officer fails to co-operate, appropriate supportive action must be taken before formal action is taken under the Performance Regulations. A failure by a police officer to co-operate will not prevent formal action being taken or continued.

3.10 If supportive action is taken, the police officer co-operates and the attendance improves and is maintained at a satisfactory level, then there will be no need to take formal action under the Performance Regulations.

3.11 There is no single formula for determining the point at which concern about a police officer's attendance should lead to formal procedures under the Performance Regulations being invoked. Each case must be considered on its merits. However the following points need to be emphasised:

- The intention of attendance management including formal action under the Police (Performance) Regulations is to improve attendance.

- Where police officers are injured or ill they should be treated fairly and compassionately.
- Managers should be able to demonstrate that they have acted reasonably in all actions taken at all stages of the attendance management process, including any action under the Police (Performance) Regulations.
- In cases where a decision is made at a third stage meeting to impose an outcome, including dismissal from the service, then the police officer will have the right to appeal to a police appeals tribunal.

Monitoring attendance

3.12 All forces must ensure that arrangements are in place for the effective monitoring of sickness absences (and the reasons for them).

3.13 It is the responsibility of line managers, in conjunction with the force's Human Resources (HR) department if necessary, to monitor a police officer's attendance record. A formal record of a police officer's attendance will be kept.

3.14 HR managers should be consulted when line managers are deciding whether it might be appropriate to use the UPPs.

Occupational health

3.15 The force Occupational Health Service is an essential part of effective attendance management and should be involved as soon as any concerns about a police officer's attendance are identified.

3.16 Where action is taken under the UPPs in respect of a police officer's attendance, the police officer may be referred to the Occupational Health Service for up to date information and advice at any stage within the procedure. This should enable the force to make an informed decision about an police officer's attendance. Where police officers do not attend appointments or otherwise fail to co-operate with the force's Occupational Health Service, an assessment will be made on the information available.

3.17 The role of the Force's Occupational Health Service is to advise on medical issues affecting an police officer's performance and attendance. Where the force has concerns about a police officer's health and the effect it has on his or her work and attendance, it may decide to seek medical advice on a range of issues, including but not limited to:

(i) the nature and extent of the police officer's medical problems;

(ii) when the medical problem is likely to be resolved;

(iii) whether the police officer will be fit to carry out his/her duties on his or her return to work;

(iv) the duties that the police officer may be fit to undertake;

(v) whether the police officer is a disabled person within the meaning of the Disability Discrimination Act;

(vi) whether there are any adjustments or adaptations to the work, equipment or workplace that might assist in improving attendance;

(vii) the likelihood of the illness recurring or of some other illness emerging;

(viii) any concerns raised by the police officer about their health and/or working environment;

(ix) whether the police officer may be permanently disabled.

Disability Discrimination Act 1995 (as amended) (DDA) and other statutory obligations

3.18 In any unsatisfactory attendance case it is essential that managers and the force ensure compliance with their obligations under the Disability Discrimination Act. (See Home Office circular 063/2003):

http://www.knowledgenetwork.gov.uk/HO/circular.nsf/1cc4f3413a62d1de80256c5b005101e4/5bab74ebdf5db31880256dff00575887?OpenDocument

3.19 Compliance with other statutory obligations including the Data Protection Act 1998 must also be ensured.

Action under the Police (Performance) Regulations 2008

3.20 Formal action under the Performance Regulations may be taken in cases of both unacceptable levels of persistent short-term absences and long-term absences due to sickness and/or injury. It should however be noted that it is not possible to be prescriptive about all circumstances where action under the Regulations may be appropriate.

3.21 In deciding whether to take action under the procedures managers must treat each case on its merits and consider all of the pertinent facts available to them, including:

(i) the nature of the illness, injury or condition

(ii) the likelihood of the illness, injury or condition (or some other related illness, injury or condition) recurring;

(iii) the pattern and length of absence(s) and the period of good health between them;

(iv) the need for the work to be done i.e. what impact on the force's performance and workload is the absence having;

(v) the extent to which an police officer has co-operated with supportive management action;

(vi) whether the police officer was made aware, in the earlier supportive action, that unless an improvement was made, action under the Performance Regulations might be used;

(vii) whether the selected medical practitioner (SMP) has been asked by the Police Authority to consider the issue of permanent disablement and/or the Police Authority is considering medical retirement;

(viii) the impact of the Disability Discrimination Act.

3.22 Action under the Police (Performance) Regulations 2008 should not be invoked unless:

(i) earlier supportive action was offered but the police officer either declined it or failed to co-operate and as a result there has not been the necessary improvement in the police officer's performance or attendance; and/or

(ii) the police officer is absent due to long-term sickness and, notwithstanding supportive management action having been taken, there is no realistic prospect of return to work in a reasonable timeframe.

3.23 Whether it is appropriate to take formal action in any particular case will depend on the known merits and facts of that case.

4. The UPP Process

Stages

4.1 There are potentially three stages to the UPPs, each of which involves a different meeting composition and possible outcomes.

4.2 A line manager can ask a HR professional or police officer (with experience of UPPs and who is independent of the line management chain) to attend a UPP meeting to advise him or her on the proceedings. A line manager may also obtain advice from HR prior to a UPP meeting if he or she

is in any doubt about the process. The second line manager may also have an advisor (as above) in respect of the second stage meeting. For stage three meetings, an HR professional, police officer, counsel or solicitor may attend the meeting to advise the panel on the proceedings.

Improvement notices and action plans

4.3 At the first and second stages, if it is found that the police officer's performance or attendance is unsatisfactory, an improvement notice will be issued. Improvement notices require a police officer to improve on his or her performance or attendance and must state:

- in what respect the police officer's performance or attendance is considered unsatisfactory;[2]
- the improvement in performance or attendance required to bring the police officer to an acceptable standard;
- a "specified period" (see paragraph 4.5, below) within which improvement is expected to be made; and
- the "validity period" (see paragraph 4.6, below) of the written improvement notice;

4.4 The improvement notice should also inform the police officer of the possible consequences if improvement is not made or maintained within the period specified by the appropriate manager or panel (as applicable) or within the 12 month validity period.

4.5 The "specified period" of an improvement notice is a period specified by the line manager (having considered any representations made by or on behalf of the police officer) within which the police officer must improve his or her performance or attendance. It is expected that the specified period for improvement would not normally exceed 3 months. However, depending on the nature and circumstances of the matter, it may be appropriate to specify a longer or shorter period for improvement (but which should not exceed 12 months).

4.6 The "validity period" of an improvement notice describes the period of 12 months from the date of the notice within which performance or attendance must be maintained (assuming improvement is made during the specified period). If the improvement is not maintained within this period then the next stage of the procedures may be used (see also paragraph 4.12).

4.7 Improvement notices must be accompanied by the written record of the meeting and a notice informing the police officer of his or her right to appeal against the finding, outcome or terms of the improvement notice (or all or any of these). Where applicable, that documentation must also inform the police officer of his or her right to appeal against the decision to require him or her to attend the meeting. Any such appeal can only be made on the ground that the meeting did not concern unsatisfactory performance or attendance which was

[2] Where a panel issues a final written improvement notice after a finding of gross incompetence, this should state in what respect the police officer's performance is considered grossly incompetent.

similar to or connected with that referred to in the last issued improvement notice.

4.8 Written improvement notices must be signed and dated by the person responsible for issuing the notice e.g. in the case of an improvement notice issued following a second stage meeting, by the second line manager.

4.9 An improvement notice would normally be followed by an action plan. An action plan describes what action(s) the police officer should take which should help him or her achieve and maintain the improvement required and would normally be formulated and agreed by both the police officer (and his or her police friend if desired) and his or her line manager. In particular, the action plan should:

- identify any weaknesses which may be the cause of unsatisfactory performance or attendance;
- describe what steps the police officer must take to improve performance and/or attendance and what support is available from the organisation e.g. training and support;
- specify a period within which actions identified should be followed up; and
- set a date (s) for a staged review (s) of the police officer's performance or attendance.

Improvement notice extensions and suspensions

4.10 On the application of the police officer or otherwise (e.g. at the suggestion of his or her line manager), the appropriate authority may extend the improvement period originally specified if it considers it appropriate to do so. This provision is intended to deal with situations that were not foreseen at the time of the issue of the improvement notice. For example, where the police officer has not had sufficient time to improve due to an emergency deployment to other duties.

4.11 In setting an extension to the specified period, consideration should be given to any known periods of extended absence from the police officer's normal role e.g. if the police officer is going to be on long periods of pre-planned holiday leave, study leave, or is due to undergo an operation. The extension should not lead to the improvement period exceeding 12 months unless the appropriate authority is satisfied that there are exceptional circumstances making this appropriate. These circumstances should be recorded.

4.12 The period for improvement under an improvement notice and the validity period of an improvement notice do not include any time that the police officer is taking a career break. For example, if a police officer is issued with an improvement notice with a specified period of 3 months and then takes career leave two months into the notice, whenever the police officer returns, he or she will have one month left of the 3 month specified period and ten months of the validity period of the notice.

Initiation of procedures at stage three

4.13 In very limited circumstances, explained in more detail in paragraph 7.8, it is possible to commence the UPPs at the third stage. This is to allow for cases of a degree of severity such that initiation at this stage is the only appropriate option.

4.14 In these cases only the police officer is entitled to choose to be legally represented by counsel or a solicitor.

Multiple instances of unsatisfactory performance

4.15 An police officer can move to a later stage of the UPPs only in relation to unsatisfactory performance or attendance that is similar to or connected with the unsatisfactory performance or attendance referred to in any previous written improvement notice. Where failings relate to different forms of unsatisfactory performance or attendance it will be necessary to commence the UPPs at the first stage (unless the failing constitutes gross incompetence). If more than one UPP is commenced, then, given that the procedures will relate to different failings and will have been identified at different times, the finding and outcome of each should be without prejudice to the other(s).

4.16 However, there may be circumstances where procedures have been initiated for a particular failing and an additional failing comes to light prior to the first stage meeting. In such circumstances it is possible to consolidate the two issues at the first stage meeting provided that there is sufficient time prior to the meeting to comply with the notification requirements explained in more detail below. If this is not possible, the first stage meeting should either be rearranged to a date which allows the requirements to be met or a separate first stage meeting should be held in relation to the additional matter.

Relationship between UPPs and the Misconduct Procedures

4.17 The misconduct and unsatisfactory performance procedures are separate but complementary. They should ensure that both misconduct and unsatisfactory performance or attendance on the part of police officers are dealt with effectively, having regard to the public interest, the interests of the police service and the interests of individual police officers. (For further details see paragraph 2.131 of chapter 2.)

5. The First Stage

Preparation and purpose

5.1 Having considered the use of management action (see paragraph 1.27), where a line manager considers that an police officer's performance or attendance is unsatisfactory and decides that the UPPs are the most appropriate way of addressing the matter(s), he or she will, as soon as

reasonably practicable, notify the police officer in writing that he or she is required to attend a first stage meeting to discuss these issues and include in that notification the following details:

- details of the procedures for determining the date and time of the meeting (see paragraph 5.7);
- a summary of the reasons why the line manager considers the police officer's performance or attendance unsatisfactory;
- the possible outcomes of a first stage, second stage and third stage meeting;
- that a human resources professional or a police officer (with experience of UPPs and who is independent from the line management chain) may attend the meeting to advise the line manager on the proceedings;
- that if the police officer agrees, any other person specified in the notice may attend the meeting;
- that prior to the meeting the police officer must provide the line manager with any documentation he or she intends to rely on in the meeting; and,
- the police officer's rights i.e. his or her right to seek advice from a representative of his or her staff association (in the case of a member of the police force) and to be accompanied and represented at the meeting by a police friend.

5.2 The notice shall be accompanied by copies of related documentation relied upon by the line manager in support of the view that the police officer's performance or attendance is unsatisfactory.

5.3 In advance of the meeting, the police officer shall provide the line manager with any documents on which he or she intends to rely in support of his or her case.

5.4 Any document or other material that was not submitted in advance of the meeting may be considered at the meeting at the discretion of the line manager. The purpose of allowing this discretion is to ensure fairness to all parties. However the presumption should be that such documents or material will not be permitted unless it can be shown that they were not previously available to be submitted in advance. Where such a document or other material is permitted to be considered, a short adjournment may be necessary to enable the line manager or the police officer, as the case may be, to read or consider the document or other material and consider its implications. The length of the adjournment will depend upon the case. A longer adjournment may be necessary if the material in question is complex.

5.5 The purpose of the meeting is to hear the evidence of the unsatisfactory performance or attendance and to give the police officer the opportunity to put forward his or her views. It will also be an opportunity to hear of any factors that are affecting the police officer's performance or attendance and what the police officer considers can be done to address them.

5.6 The line manager will explain that there are potentially three stages to the procedures and that the maximum outcome of a stage one meeting is an improvement notice and the maximum outcome of a stage two meeting is a final improvement notice. The line manager will also explain that if the procedure is followed to the final stage, dismissal, a reduction in rank (in performance cases only) or an extended improvement notice (in exceptional circumstances) are possible outcomes.

5.7 Wherever possible, the meeting date and time should be agreed between the line manager and the police officer. However, where agreement cannot be reached the line manager may specify a time and date without agreement. If the police officer or his or her police friend is not available at the date or time specified by the line manager, the police officer may propose an alternative time. Provided that the alternative time is reasonable and falls within a period of 5 working days beginning with the first working day after that proposed by the line manager, the meeting must be postponed to that time.

5.8 As soon as a date for the meeting is fixed, the line manager should send to the police officer a notice in writing of the date, time and place of the first stage meeting.

At the First Stage meeting

5.9 At the first stage meeting the line manager will:

a. explain to the police officer the reasons why the line manager considers that the performance or attendance of the police officer is unsatisfactory;
b. provide the police officer with the opportunity to make representations in response;
c. provide his or her police friend (if he or she has one) with an opportunity to make representations (see Role of Police Friend);
d. listen to what the police officer (and/or his or her police friend) has to say, ask questions and comment as appropriate.

5.10 The line manager may adjourn the meeting at any time if he or she considers it is appropriate to do so. An adjournment may be appropriate where information which needs to be checked by the line manager emerges during the course of the meeting or the manager decides that he or she wishes to adjourn the meeting whilst he or she makes a decision.

5.11 Where the line manager finds that the performance or attendance of the police officer has been satisfactory during the period in question, he or she will inform the police officer that no further action will be taken.

5.12 Where having considered any representations by either the police officer and/ or his or her police friend, the line manager finds that the performance or attendance of the police officer has been unsatisfactory he or she shall:

a. inform the police officer in what respect (s) his or her performance or attendance is considered unsatisfactory;

b. inform him or her of the improvement that is required in his or her performance or attendance;
c. inform the police officer that, if a sufficient improvement is not made within the period specified by the line manager, he or she may be required to attend a second stage meeting.
d. inform the police officer that he or she will receive a written improvement notice.
e. inform the police officer that if a sufficient improvement in his or her performance or attendance is not maintained during the validity period of such notice he or she may be required to attend a second stage meeting.

5.13 It is expected that the specified period for improvement would not normally exceed 3 months. However, depending on the nature and circumstances of the matter, it may be appropriate to specify a longer or shorter period for improvement (but which should not exceed 12 months).In determining the specified period of an improvement notice, consideration should also be given to any periods of known extended absence from the police officer's normal role.

Procedure following the First Stage meeting

5.14 As soon as reasonably practicable, following the meeting, the line manager will send the police officer a written record of the meeting and, where he or she found at the meeting that the performance or attendance of the police officer was unsatisfactory, provide the police officer with a signed and dated (by the line manager) written improvement notice. The written record supplied to the police officer should comprise a summary of the proceedings at that meeting.

5.15 The written improvement notice must set out the information conveyed to the police officer in paragraph 5.12 and be accompanied by a notice informing the police officer of his or her right to appeal, the appeal procedure, and the name of the person to whom the appeal should be sent. The notice must also inform the police officer of his or her right to submit written comments on the written record of the meeting and of the procedure for doing so.

5.16 The police officer may submit written comments on the written record not later than 7 working days after the date that he or she received it (unless an extension has been granted by the line manager following an application by the police officer). Any written comments provided by the police officer should be retained with the note. However, if the police officer has exercised his or her right to appeal against the finding or outcome of the first stage meeting, the police officer may not submit comments on the written record.

5.17 It is the responsibility of the line manager to ensure that the written record, written improvement notice and any written comments of the police officer regarding the written record are retained together and filed in accordance with force policies.

5.18 Normally it will be appropriate to agree an action plan (see paragraph 4.9) setting out the actions which should assist the police officer to perform his or her

duties to an acceptable standard. This may be agreed at the UPP meeting or at a later time specified by the line manager. It is expected that the police officer will co-operate with implementation of the action plan and take responsibility for his or her own development or improvement. Equally, the police officer's managers must ensure that any actions to support the police officer to improve are implemented.

Assessment of Performance or Attendance

5.19 It is expected that the police officer's performance or attendance will be actively monitored against the improvement notice and, where applicable, the action plan by the line manager throughout the specified period of the improvement notice. The line manager should discuss with the police officer any concerns that the line manager has during this period as regards his or her performance or attendance and offer advice and guidance where appropriate.

5.20 As soon as the specified period of the improvement notice comes to an end, the line manager, in consultation with the second line manager or an HR professional (or both), should formally assess the performance or attendance of the police officer during that period.

5.21 If the line manager considers that the police officer's performance or attendance is satisfactory, the line manager should notify the police officer in writing of this. The notification should also inform the police officer that whilst the performance or attendance of the police officer is now satisfactory, the improvement notice is valid for a period of 12 months from the date printed on the notice so that it is possible for the second stage of the procedures to be initiated if the performance or attendance of the police officer falls below an acceptable level within the remaining period.

5.22 If the line manager considers that the police officer's performance or attendance is still unsatisfactory, the line manager should notify the police officer in writing of this. This notification should also inform the police officer that he or she is required to attend a second stage meeting to consider these ongoing performance or attendance issues.

5. 23 If the police officer has improved his or her performance or attendance to an acceptable standard within the specified improvement period, but then fails to maintain that standard within the 12 month validity period, it is open to the line manager to initiate stage two of the procedures.

5.24 In such circumstances the line manager should notify the police officer in writing of his or her view that the police officer's performance or attendance is unsatisfactory and that as a consequence the police officer is required to attend a second stage meeting to discuss his or her failure to maintain a satisfactory standard of performance or attendance.

5.25 In cases where the line manager, in consultation with the second line manager and/ or the HR professional, decides that a second stage meeting is

the appropriate course of action, the senior manager should direct that a second stage meeting be arranged.

First Stage appeals

5.26 A police officer has a right of appeal against the finding and the outcome imposed at stage one of the UPPs. However, any finding and outcome of this first stage meeting will continue to apply up to the date that the appeal is determined. Therefore where the police officer contests the finding or outcome, he or she should continue to follow the terms of the improvement notice and any accompanying action plan pending the determination of the appeal.

5.27 Any appeal should be made in writing to the second line manager within 7 working days of the receipt of the improvement notice and written record of the meeting (unless the period is extended by the second line manager following an application by the police officer). The notice of appeal must clearly set out the grounds and evidence for the appeal.

Appeal grounds

5.28 The grounds for appeal are:

- that the finding of unsatisfactory performance or attendance is unreasonable;
- that any of the terms of the improvement notice are unreasonable;
- that there is critical new evidence that could not reasonably have been considered at the first stage meeting;
- that there was a serious breach of the procedures set out in the Police (Performance) Regulations or other unfairness which could have materially affected the finding of unsatisfactory performance or attendance or the terms of the improvement notice.

5.29 On the basis of the above grounds of appeal, the police officer may appeal against the finding of unsatisfactory performance or attendance or the terms of the written improvement notice, those being:

- the respect in which the police officer's performance or attendance is considered unsatisfactory;
- the improvement which is required of the police officer; and/ or
- the length of the period specified for improvement by the line manager at the first stage meeting.

5.30 The police officer has the right to be accompanied and represented by a police friend at the first stage appeal meeting.

5.31 Wherever possible, the meeting date and time should be agreed between the second line manager and the police officer. However, where agreement cannot be reached the second line manager may specify a time and date without agreement. If the police officer or his or her police friend is

not available at the date or time specified by the second line manager, the police officer may propose an alternative time. Provided that the alternative time is reasonable and falls within a period of 5 working days beginning with the first working day after that proposed by the second line manager, the meeting must be postponed to that time.

5.32 As soon as a date for the meeting is fixed, the second line manager should send to the police officer a notice in writing of the date, time and place of the first stage appeal meeting.

At the first stage appeal meeting

5.33 At this meeting the second line manager will:

- provide the police officer with the opportunity to make representations;
- provide his or her police friend (if he or she has one) with an opportunity to make representations (see Role of Police Friend [TBC];

5.34 Having considered any representations by either the police officer and/ or his or her police friend, the second line manager may:

- confirm or reverse the finding of unsatisfactory performance or attendance;
- endorse or vary the terms of the improvement notice;

5.35 The second line manager may deal with the police officer in any manner in which the line manager could have dealt with him or her at the first stage meeting.

5.36 Within 3 working days of the conclusion of the appeal meeting, the police officer will be given written notice of the second line manager's decision. If the second line manager is in a position to send a written summary of the reasons for that decision, then this may also accompany the written notice of the decision.

5.37 However, where the second line manager sends only the written notice of the decision to the police officer, as soon as reasonably practicable after the conclusion of the meeting, he or she will send a written summary of reasons for that decision.

5.38 Any decision made that changes the finding or outcome of the first stage meeting will take effect by way of substitution for the finding or terms appealed against and as from the date of the first stage meeting.

6. The second stage

Preparation and purpose

6.1 Initiation of the second stage must be for matters similar to or connected with the unsatisfactory performance or attendance referred to in the improvement notice issued at the first stage.

6.2 Where, at the end of the period specified in an improvement notice, the line manager finds that the police officer's performance or attendance has not improved to an acceptable standard during that period or that the police officer has not maintained an acceptable level of performance or attendance during the validity period of the notice, then the second line manager will notify the police officer in writing that he or she is required to attend a second stage meeting. The notification will state:

- the details of the procedures for determining the date and time of the meeting (see paragraph 6.8);
- a summary of the reasons why the line manager considers the police officer's performance or attendance unsatisfactory;
- the possible outcomes of a second stage and third stage meeting;
- that the line manager may attend the meeting;
- that a human resources professional or a police officer (with experience of UPPs and who is independent from the line management chain) may attend the meeting to advise the second line manager on the proceedings;
- that if the police officer agrees, any other person specified in the notice may attend the meeting;
- that prior to the meeting the police officer must provide the second line manager with any documentation he or she intends to rely on in the meeting; and
- the police officer's rights i.e. his or her right to seek advice from a representative of his or her staff association (in the case of a member of the police force) and to be accompanied and represented at the meeting by a police friend.

6.3 The notice must also include copies of related documentation relied upon by the line manager in support of the view that the police officer's performance or attendance continues to be unsatisfactory.

6.4 In advance of the meeting, the police officer shall provide the second line manager with any documents on which he or she intends to rely on in support of his or her case.

6.5 Any document or other material that was not submitted in advance of the meeting may be considered at the meeting at the discretion of the second line manager. The purpose of allowing this discretion is to ensure fairness to all parties. However the presumption should be that such documents or other material will not be permitted unless it can be shown that they were not previously available to be submitted in advance. Where such a document or other material is permitted to be considered, a short adjournment may be necessary to enable the second line manager or the police officer, as the case may be, to read or consider the document or other material and consider its

implications. The length of the adjournment will depend upon the case. A longer adjournment may be necessary if the material in question is complex.

6.6 The purpose of the meeting is to hear the evidence of the unsatisfactory performance or attendance and to give the police officer the opportunity to put forward his or her views. It will also be an opportunity to hear of any factors that are continuing to affect the police officer's performance or attendance and what the police officer considers can be done to address them.

6.7 The second line manager will explain that there is potentially a further stage to the procedures and that the maximum outcome of stage two is a final improvement notice. The second line manager will also explain that if the procedure is followed to the final stage, dismissal, a reduction in rank (in performance cases only) or an extended improvement notice (in exceptional circumstances) are possible outcomes.

6.8 Wherever possible, the meeting date and time should be agreed between the second line manager and the police officer. However, where agreement cannot be reached the second line manager may specify a time and date without agreement. If the police officer or his or her police friend is not available at the date or time specified by the second line manager, the police officer may propose an alternative time. Provided that the alternative time is reasonable and falls within a period of 5 working days beginning with the first working day after that proposed by the second line manager, the meeting must be postponed to that time.

6.9 As soon as a date for the meeting is fixed, the second line manager should send to the police officer a notice in writing of the date, time and place of the second stage meeting.

At the second stage meeting

6.10 At the second stage meeting the second line manager will:

a. explain to the police officer the reasons why he or she has been required to attend a second stage meeting;
b. provide the police officer with the opportunity to make representations in response;
c. provide the police officer's police friend (if he or she has one) with an opportunity to make representations (see Role of Police Friend);
d. listen to what the police officer (and/or his or her police friend) has to say, ask questions and comment as appropriate;

6.11 The second line manager may adjourn the meeting at any time if he or she considers it is appropriate to do so. An adjournment may be appropriate where information which needs to be checked by the line manager emerges during the course of the meeting or the manager decides that he or she wishes to adjourn the meeting whilst he or she makes a decision.

6.12 Where the line manager finds that the performance or attendance of the police officer has been satisfactory during the period in question, he or she will inform the police officer that no further action will be taken.

6.13 Where, having considered any representations by either the police officer and/ or his or her police friend, the second line manager finds that the performance or attendance of the police officer has been unsatisfactory (either during the period specified in the written improvement notice or during the validity period of the written improvement notice) he or she shall:

a. inform the police officer in what respect (s) his or her performance or attendance is considered unsatisfactory;
b. inform the police officer of the improvement that is required in his or her performance or attendance;
c. inform the police officer that, if a sufficient improvement is not made within the period specified by the second line manager , he or she may be required to attend a third stage meeting.
d. inform the police officer that he or she will receive a final written improvement notice; and
e. inform the police officer that if a sufficient improvement in his or her performance or attendance is not maintained during the validity period of such notice, he or she may be required to attend a third stage meeting.

6.14 It is expected that the specified period for improvement would not normally exceed 3 months. However, depending on the nature and circumstances of the matter, it may be appropriate to specify a longer or shorter period for improvement (but which should not exceed 12 months). In determining the specified period of an improvement notice, consideration should also be given to any periods of known extended absence from the police officer's normal role.

Procedure following the second stage meeting

6.15 As soon as reasonably practicable following the meeting, the second line manager will send the police officer a written record of the meeting and, where he or she found at the meeting that the performance or attendance of the police officer was unsatisfactory, provide the police officer with a dated and signed (by the second line manager) final written improvement notice. The written record supplied to the police officer should comprise a summary of the proceedings at that meeting.

6.16 The written improvement notice must set out the information conveyed to the police officer in paragraph 6.13 and be accompanied by a notice informing the police officer of his or her right to appeal, the appeal procedure and the name of the person to whom the appeal should be sent. The notice must also inform the police officer of his or her right to submit written comments on the written record of the meeting and of the procedure for doing so.

6.17 The police officer may submit written comments on the written record not later than 7 working days after the date that he or she received it (unless an

extension has been granted by the second line manager following an application by the police officer). Any written comments provided by the police officer should be retained with the note. However, if the police officer has exercised his or her right to appeal against the finding or outcome of the second stage meeting, the police officer may not submit comments on the written record.

6.18 It is the responsibility of the second line manager to ensure that the written record, written improvement notice and any written comments of the police officer on the written record are retained together and filed in accordance with force policies.

6.19 Normally it will also be appropriate to agree an action plan (see paragraph 4.9) setting out the actions which may assist the police officer to perform his or her duties to an acceptable standard e.g. attending training courses or a recommendation that the police officer seek welfare or medical advice. It is expected that the police officer will co-operate with implementation of the action plan and take responsibility for his or her own development or improvement. Equally, the police officer's managers must ensure that any actions to support the police officer to improve are implemented.

Assessment of performance or attendance

6.20 It is expected that the police officer's performance or attendance will be actively monitored against the improvement notice and, where applicable, the action plan by the line manager throughout the specified period of the final improvement notice. The line manager should discuss with the police officer any concerns that the line manager has during this period as regards his or her performance or attendance and offer advice and guidance where appropriate.

6.21 As soon as the specified period of the improvement notice comes to an end, the line manager, in consultation with the second line manager or an HR professional (or both), should formally assess the performance or attendance of the police officer during that period.

6.22 If the line manager considers that the police officer's performance or attendance is satisfactory, the line manager should notify the police officer in writing of this. The notification should also inform the police officer that whilst the performance or attendance of the police officer is now satisfactory, the final improvement notice is valid for a period of 12 months from the date printed on the notice so that it is possible for stage three of the procedures to be initiated if the performance or attendance of the police officer falls below an acceptable level within the remaining period.

6.23 If the line manager considers that the police officer's performance or attendance is still unsatisfactory, the line manager should notify the police officer in writing of this. The notification should also inform the police officer that he or she is required to attend a third stage meeting to consider these ongoing performance or attendance issues.

6.24 If the police officer has improved his or her performance or attendance to an acceptable standard within the specified improvement period, but then fails to maintain that standard within the 12 month validity period, it is open to the line manager to initiate stage three of the procedures.

6.25 In such circumstances the line manager should notify the police officer in writing of his or her view that the police officer's performance or attendance is unsatisfactory and that as a consequence the police officer is required to attend a third stage meeting to discuss this failure to maintain a satisfactory standard of performance or attendance.

6.26 In cases where the line manager, in consultation with the second line manager and/or the HR professional, decides that a third stage meeting is the appropriate course of action, the senior manager shall direct that a third stage meeting be arranged.

Second stage appeals

6.27 A police officer has a right of appeal against the finding and the outcome imposed at stage two of the UPPs and against the decision to require him to attend the meeting. However, any finding and outcome of this second stage meeting will continue to apply up to the date that the appeal is determined. Therefore where the police officer contests the finding or outcome, he or she should continue to follow the terms of the improvement notice and any accompanying action plan pending the determination of the appeal.

6.28 Any appeal should be made in writing to the senior manager within 7 working days of the receipt of the improvement notice (unless the period is extended by the senior manager following an application by the police officer). The notice of appeal must clearly set out the grounds and evidence for the appeal.

Appeal grounds

6.29 The grounds for appeal are as follows:

- that the finding of unsatisfactory performance or attendance is unreasonable;
- that any of the terms of the improvement notice are unreasonable;
- that there is critical new evidence that could not reasonably have been considered at the second stage meeting;
- that there was a serious breach of the procedures set out in the Police (Performance) Regulations or other unfairness which could have materially affected the finding of unsatisfactory performance or attendance or the terms of the written improvement notice.
- that the police officer should not have been required to attend the second stage meeting as the meeting did not concern unsatisfactory performance or attendance which was similar to or connected with the unsatisfactory performance or attendance referred to in the written improvement notice that followed the first stage meeting.

6.30 On the basis of the above grounds of appeal, the police officer may appeal against the finding of unsatisfactory performance or attendance or the terms of the written improvement notice, those being:

- the respect in which the police officer's performance or attendance is considered unsatisfactory;
- the improvement which is required of the police officer;
- the length of the period specified for improvement by the second line manager at the second stage meeting.

6.31 The police officer has the right to be accompanied and represented by a police friend at the second stage appeal meeting.

6.32 Wherever possible, the meeting date and time should be agreed between the senior manager and the police officer. However, where agreement cannot be reached the senior manager may specify a time and date without agreement. If the police officer or his or her police friend is not available at the date or time specified by the manager, the police officer may propose an alternative time. Provided that the alternative time is reasonable and falls within a period of 5 working days beginning with the first working day after that proposed by the senior manager, the meeting must be postponed to that time.

6.33 As soon as a date for the meeting is fixed, the senior manager should send to the police officer a notice in writing of the date, time and place of the second stage appeal meeting.

At the second stage appeal meeting

6.34 At this meeting the senior manager will:

- provide the police officer with the opportunity to make representations;
- provide his or her police friend (if he or she has one) with an opportunity to make representations (See Role of Police Friend).

6.35 Having considered any representations by either the police officer and/ or his or her police friend, the senior manager may:

- confirm or reverse the finding of unsatisfactory performance or attendance;
- endorse or vary the terms of the improvement notice.

6.36 The senior manager may deal with the police officer in any manner in which the second line manager could have dealt with him or her at the second stage meeting.

6.37 Within 3 working days of the conclusion of the appeal meeting, the police officer will be given written notice of the senior manager's decision. If the senior

manager is in a position to send a written summary of the reasons for that decision, then this may also accompany the written notice of the decision.

6.38 However, where the senior manager sends only the written notice of the decision to the police officer, as soon as reasonably practicable after the conclusion of the meeting, he or she will send a written summary of reasons for that decision.

6.39 Any decision made that changes the finding or outcome of the second stage meeting will take effect by way of substitution for the finding or terms appealed against and as from the date of the second stage meeting.

7. The third stage

Preparation and purpose

7.1 With the exception of gross incompetence cases (see paragraph 7.8), initiation of the third stage must be for matters similar to or connected with the unsatisfactory performance or attendance referred to in the final improvement notice.

7.2 Where, at the end of the period specified in an improvement notice, the line manager finds that the police officer's performance or attendance has not improved to an acceptable standard during that period or that the police officer has not maintained an acceptable level of performance or attendance during the validity period of the notice, then the senior manager must, as soon as reasonably practicable, notify the police officer in writing that he or she is required to attend a third stage meeting to discuss these issues and include in that notification the following details:

- that the meeting will be with a panel appointed by the appropriate authority;
- the procedures for determining the date and time of the meeting (see paragraphs 7.31 and 7.32);
- a summary of the reasons why the police officer's performance or attendance is considered unsatisfactory;
- the possible outcomes of a third stage meeting (see paragraph 7.6)
- that an HR professional or a police officer (with experience of UPPs and who is independent from the line management chain) may attend to advise the panel on the proceedings;
- that counsel or a solicitor may attend the meeting to advise the panel on the proceedings and on any question of law that may arise at the meeting;
- where the police officer is a special constable, inform him or her that a member of the special constabulary will attend the meeting to advise the panel (see paragraphs 7.27 to 7.30);
- that if the police officer agrees, any other person specified in the notice may attend e.g. a person attending for development reasons; and

- the police officer's rights i.e. his or her right to seek advice from a representative of his or her staff association (in the case of a member of the police force) and to be accompanied and represented at the meeting by a police friend.[3]

7.3 The notice must also include copies of related documentation relied upon by the line manager in support of the view that the police officer's performance or attendance continues to be unsatisfactory.

7.4 The notice does not at this stage need to give the names of the panel members as these may not be known at the time of issue. However, as soon as the panel has been appointed by the appropriate authority, the appropriate authority should notify the police officer of the members' names. (For details of panel membership and procedures, see paragraphs 7.16 to 7.22).

7.5 The purpose of the meeting is for the panel to hear the evidence of the unsatisfactory performance or attendance and to give the police officer the opportunity to put forward his or her views. It will also be an opportunity to hear of any factors that are continuing to affect the police officer's performance or attendance and what the police officer considers can be done to address them.

7.6 Where the police officer has reached stage three following stages one and two (i.e. not a gross incompetence meeting), the possible outcomes of this stage three meeting are as follows:

- redeployment;
- reduction in rank (in the case of performance only);
- dismissal (with a minimum of 28 days' notice); or
- extension of a final improvement notice (in exceptional circumstances)

7.7 Where the panel grants an extension to the final improvement notice, they will specify a new period within which improvement to performance or attendance must be made. The 12 month validity period of the extended final improvement notice will apply in full from the date of extension.

Gross incompetence third stage meetings

7.8 There may be exceptional circumstances where the appropriate authority[4] considers the performance (not attendance) of the police officer to be so unsatisfactory as to warrant the procedures being initiated at the third stage. This could be as a result of a single incident of "gross incompetence". It is not envisaged that an appropriate authority would initiate the procedures at the third stage in respect of a series of acts over a period of time.

[3] A third stage meeting cannot not take place unless the police officer concerned has been notified of his or her right to be represented by a police friend.

[4] It should be noted that if the decision to initiate the gross incompetence part of the procedures is delegated by the appropriate authority, that decision must be authorised by a senior police officer. See chapter xxx for definition of "senior police officer".

7.9 “Gross incompetence” is defined in the Police (Performance) Regulations 2008 as:

“…a serious inability or failure of a police officer to perform the duties of the role or rank he is currently undertaking to a satisfactory standard or level, to the extent that dismissal would be justified, except that no account shall be taken of the attendance of a police officer when considering whether he has been grossly incompetent.”

7.10 Where the appropriate authority determines it is appropriate to initiate the procedures at this stage, then as soon as is reasonably practicable, the police officer must be informed in writing that he or she is required to attend a third stage meeting to discuss his or her performance.

7.11 Where the appropriate authority has informed the police officer that he or she is to attend a third stage only meeting, it must, as soon as reasonably practicable, send the police officer a notice in writing which will include the following details:

- that the meeting will be with a panel appointed by the appropriate authority;
- the procedure for determining the date and time of the meeting;
- a summary of the reasons why the police officer’s performance is considered to constitute gross incompetence;
- the possible outcomes of a third stage only meeting (see paragraph 7.15);
- that an HR professional and a police officer (with experience of UPPs and who is independent from the line management chain) may attend to advise the panel on the proceedings;
- that counsel or a solicitor may attend the meeting to advise the panel on the proceedings and on any question of law that may arise at the meeting;
- where the police officer is a special constable, inform him that a ,member of the special constabulary will attend the meeting to advise the panel (see paragraphs 7.27 to 7.30);
- if the police officer agrees, any other person specified in the notice may attend e.g. a person attending for development reasons; and
- the police officer’s rights: his or her right to seek advice from a representative of his or her staff association (in the case of a member of the police force), to be accompanied at the meeting by a police friend, and to be legally represented by counsel or a solicitor.

7.12 The notice must be accompanied by the documentation relied upon by the appropriate authority in support of its view that the police officer’s performance constitutes gross incompetence.

7.13 The notice does not have to give the names of the panel members at this stage as these may not be known at the time of issue. However, as soon as reasonably practicable after the panel has been appointed by the appropriate

authority, it should notify the police officer of the members' names. (For details of panel membership and procedures, see paragraphs 7.16 – 7.23).

7.14 The purpose of the meeting is for the panel to hear the evidence of the gross incompetence and to give the police officer and his or her representative the opportunity to make representations on the matter.

7.15 The appropriate authority will explain that the police officer is required to attend the third stage meeting and that the possible outcomes of the stage three meeting are:

- redeployment to alternative duties;
- the issue of a final written improvement notice;
- reduction in rank (with immediate effect);
- dismissal (with immediate effect) or.
- the issue of a written improvement notice (if the panel considers that there has been unsatisfactory performance and not gross incompetence)

Panel membership and procedure

7.16 The panel will comprise a panel chair and two other members and be appointed by the appropriate authority of the force in which the police officer is a police officer. At least one of the three panel members must be a police officer and one should be an HR professional. Membership will be as follows:

1st panel member (chair): Senior police officer;[5] or
Senior HR professional (see paragraph 7.18).

2nd panel member: Police officer of at least the rank of superintendent; or
HR professional who in the opinion of the appropriate authority is at least equivalent to that rank.

3rd panel member: Police officer of at least the rank of superintendent; or
police staff member who in the opinion of the appropriate authority is at least equivalent to that rank.

7.17. None of the panel members should be junior in rank to the police officer concerned i.e. they must be of at least the same rank or equivalent (in the opinion of the appropriate authority).

7.18 For the purposes of chairing a third stage meeting, the Police (Performance) Regulations 2008 define a "senior HR professional" as:

[5] "senior police officer" means a police police officer holding a rank above that of chief superintendent.

"…a human resources professional who, in the opinion of the appropriate authority, has sufficient seniority, skills and experience to be a panel chair".

In this context 'sufficient seniority' should be interpreted to mean that the panel chair is senior in rank (or, in the opinion of the appropriate authority, is senior in rank) to the police officer concerned.

7.19 The appropriate authority may appoint police officers or police staff managers from another police force to be members of a panel.

7.20 No panel member should be an interested party e.g. someone who is related to the police officer or has had prior involvement in the case

7.21 As soon as the appropriate authority has appointed a third stage panel, it should arrange for copies of all relevant documentation to be sent to those members. In particular, any document:

- that was available to the line manager in relation to any first stage meeting;
- which was available to the second line manager in relation to any second stage meeting;
- which was prepared or submitted in advance of those meetings;
- which was prepared or submitted following those meetings i.e. improvement notices, action plans and meeting notes;
- relating to any appeal.

7.22 As soon as the appropriate authority has appointed a third stage panel, it must send the police officer written confirmation of the names of panel members.

Objection to panel members

7.23 The police officer has the right to object to any panel members appointed by the appropriate authority and any such objection must be made in writing to the appropriate authority no later than 3 working days after receipt of the notification of the names of the panel members. The police officer must include the ground of his or her objection to a panel member (s) in that submission.

7.24 The appropriate authority must inform the police officer in writing whether it upholds or rejects an objection to a panel member.

7.25 If the appropriate authority upholds the objection, a new panel member will be appointed as a replacement. As soon as practicable after any such appointment, the police officer will be informed in writing of the name of the new panel member.

7.26 The police officer may object to the newly appointed panel member in the same way as that described in paragraph 7.23 whereupon the appropriate authority must follow the procedure described above.

Special constables and third stage meetings

7.27 In cases where the police officer is a special constable, as indicated above, the force will appoint a member of the special constabulary to attend the meeting to advise the panel. This is for the purpose of fairness so that any significant differences between the role of a regular and special police constable and which may have a bearing on the police officer's performance or attendance can be taken into account.

7.28 The special constable advising the panel must have sufficient seniority and experience of the special constabulary to be able to advise the panel. The special constable advising the panel can be an police officer serving in a different force.

7.29 The special constable advisor will not form part of the panel and will not have a role in determining whether or not the police officer's performance or attendance is unsatisfactory.

7.30 In arranging a third stage meeting involving special constables, due consideration should be given to the fact that special constables are unpaid volunteers and may therefore have full time employment or other personal commitments.

Meeting dates and timeframes

7.31 Subject to paragraph 7.32, any third stage meeting should take place no later than 30 working days after the date that the notification described in paragraphs 7.2 to 7.4 has been sent to the police officer. Within that timeframe, wherever possible, the meeting date and time should be agreed between the panel chair and the police officer. However, where agreement cannot be reached the panel chair may specify a time and date without agreement. If the police officer or his or her police friend is not available at the date or time specified by the panel chair, the police officer may propose an alternative time. Provided that the alternative time is reasonable and falls within a period of 5 working days beginning with the first working day after that proposed by the panel chair, the meeting must be postponed to that time.

7.32 If the panel chair considers it to be in the interests of fairness to do so, he or she may extend the 30 working day period within which the meeting should take place and the reasons for any such extension must be notified in writing to both the appropriate authority and the police officer.

7.33 As soon as a date for the meeting is fixed, the panel chair should send to the police officer a notice in writing of the date, time and place of the third stage meeting.

Procedure on receipt of notice of third stage meeting

7.34 Within 14 working days of the date on which a notice (as set out in paragraphs 7.2. and 7.11) has been sent to the police officer (unless this period is extended by the panel chair for exceptional circumstances), the police officer must provide to the appropriate authority:

(a) a written notice of whether or not he or she accepts that his or her performance or attendance has been unsatisfactory or that he or she has been grossly incompetent, as the case may be;

(b) where he or she accepts that his or her performance or attendance has been unsatisfactory or that he or she has been grossly incompetent, any written submission he or she wishes to make in mitigation;

(c) where the police officer does not accept that his or her performance or attendance has been unsatisfactory or that he or she has been grossly incompetent or where he or she disputes part of the matters referred to in the notice that he or she has received, he or she shall provide (within 14 working days) the appropriate authority with a written notice of:

- the matters he or she disputes and his or her account of the relevant events; and
- any arguments on points of law he or she wishes to be considered by the panel.

7.35 The police officer shall provide the appropriate authority and the panel with a copy of any document he or she intends to rely on at the third stage meeting.

Witnesses and evidence

7.36 The police officer may propose witnesses to attend the third stage meeting in support of his or her case. The details of the witnesses that he or she proposes should attend must be submitted to and agreed with the senior manager. Where agreement cannot be reached, the police officer may submit to the appropriate authority his or her list of proposed witnesses (including their addresses) for consideration by the panel chair.

7.37 Where agreement has not been reached as above, the appropriate authority may also propose a list of witnesses.

7.38 As soon as reasonably practicable after any list of witnesses has been agreed or, in the case where no agreement could be reached, compiled by the police officer or the appropriate authority, the appropriate authority must send the list(s) to the panel chair. The panel chair will consider the list of proposed witnesses and will determine which, if any, witnesses should attend the third stage meeting.

7.39 The panel chair can determine that persons not named in the list should attend as witnesses.

7.40 No witnesses will give evidence at a third stage meeting unless the panel chair reasonably believes that it is necessary for the witness to do so, in which case he or she will:

a. in the case of a police officer, cause him or her to be ordered to attend the third stage meeting;
b. in the case of a member of staff, cause him or her to be given notice that his or her attendance at the third stage meeting is required; or
c. in the case of a member of the public, cause him or her to be given notice that his or her attendance at the third stage meeting is necessary.

Such notices will include the date, time and place of the meeting.

7.41 Where a witness attends to give evidence then any questions to that witness must be made through the panel chair. This does not prevent the panel chair allowing questions to be asked directly if he or she feels that this is appropriate.

7.42 The documents or other material to be relied upon at the meeting are required to be submitted in advance. Any document or other material that was not submitted in advance of the meeting may be considered at the meeting at the discretion of the panel chair. The purpose of allowing this discretion is to ensure fairness to all parties. However, the presumption should be that such documents or other material will not be permitted unless it can be shown that they were not previously available to be submitted in advance or that they relate to mitigation following a finding of unsatisfactory performance or attendance that was contested by the police officer. Where such a document or other material is permitted to be considered, a short adjournment may be necessary to enable those present to read or consider the document or other material and consider its implications. The length of the adjournment will depend upon the case. A longer adjournment may be necessary if the material in question is complex.

At the third stage meeting

7.43 At the third stage meeting the panel chair will conduct the meeting in accordance with the principles of natural justice and fairness and will:

a. explain to the police officer the reasons why he or she has been required to attend a third stage meeting;
b. provide the police officer with the opportunity to make representations in response;

c. where the case is one of gross incompetence and the police officer has opted for legal representation, provide the police officer's legal representative with the opportunity to make representations;
d. unless the police officer is entitled to be and has chosen to be legally represented, provide the police officer's police friend (if he or she has one) with an opportunity to make representations (see Role of Police Friend);
e. listen to what the police officer (and/or his or her police friend) has to say and ask questions as appropriate

7.44 Having considered any representations by either the police officer and/ or his or her police friend or (where applicable) the police officer's legal representative, the panel will come to a finding as to whether or not the performance or attendance of the police officer has been unsatisfactory or whether or not his or her behaviour constitutes gross incompetence, as the case may be.

7.45 If there is a difference of view between the three panel members, the finding or decision will be based on a simple majority vote, but it will not be indicated whether it was taken unanimously or by a majority.

7.46 The panel must prepare (or cause to be prepared) their decision in writing which shall also state the finding. Where the panel have found that the police officer's performance or attendance has been unsatisfactory or that he or she has been grossly incompetent, the decision must also state their reasons and any outcome which they order.

7.47 As soon as reasonably practicable after the conclusion of the meeting, the panel chair shall send a copy of the decision to the police officer and the line manager. However, the police officer must be given written notice of the finding of the panel within 3 working days of the conclusion of the meeting.

7.48The copy of the decision sent to the police officer must also be accompanied by a notice informing him or her of his or her right to appeal to a police appeals tribunal (under regulation 38 of the Police (Performance) Regulations 2008).

Records

7.49 A verbatim record of the meeting should be taken. The police officer must, on request, be supplied with a copy of the record.

Postponement and adjournment of a third stage meeting

7.50 If the panel chair considers it necessary or expedient, he or she may direct that the third stage meeting should take place at a different time to that originally notified to the police officer.

7.51 The panel chair's alternative time may fall after the period of 30 working days specified in paragraph 7.31.

7.52 In the event that the panel chair postpones a third stage meeting he or she should notify the following relevant parties in writing of his or her reasons and the revised time and place for the meeting:

- the police officer;
- other panel members; and
- the appropriate authority.

7.53 If the police officer informs the panel chair in advance that he or she is unable to attend the third stage meeting on grounds which the panel chair considers reasonable, the panel chair may allow the police officer to participate in the meeting by video link or other means.

7.54 In cases where the police officer is absent (for example through illness or injury) a short delay may be reasonable to allow him or her to attend. If this is not possible or any delay is considered not appropriate in the circumstances then the person(s) conducting the meeting/hearing may allow the police officer to participate by telephone or video link. In these circumstances a police friend will always be permitted to attend the meeting/hearing to represent the police officer in the normal way (and, in the case of a gross incompetence meeting, the police officer's legal representative where appointed).

7.55 Where the police officer informs the panel chair that he or she will be unable to attend the third stage meeting, or in the absence of such notification does not attend the meeting, and the panel chair is satisfied that a good reason for such non-attendance is given by (or on behalf of) the police officer, he or she may postpone, or as the case may be, adjourn the meeting in the absence of the police officer.

7.56 The police officer's presence, in person or otherwise, is not necessary for the third stage meeting proceedings to be valid. Where a meeting is postponed or adjourned because of absence, the panel chair may nonetheless decide to hold the meeting or resume the meeting, as the case may be.

Assessment of final and extended-final improvement notices issued at the third stage

7.57 Where the police officer has been issued with a final improvement notice or, in exceptional cases, the panel has extended a final improvement notice period, it is expected that the police officer's performance or attendance will be actively monitored by the line manager throughout the specified period of the final/ extended final improvement notice. The line manager should discuss with the police officer any concerns that the line manager has during this period as regards his or her performance or attendance and offer advice and guidance where appropriate.

7.58 As soon as the specified period of the final/ extended-final improvement notice comes to an end, the panel will assess the performance or attendance of

the police officer during that period. The panel chair must then inform the police officer in writing of the panel's conclusion following assessment i.e. whether there has been sufficient improvement in his or her performance or attendance during the specified period.

7.59 If, at the end of the validity period of the final/ extended-final improvement notice, the panel considers that sufficient improvement to the police officer's performance or attendance has not been made or maintained during this period, the panel chair will similarly inform the police officer of the panel's assessment.

7.60 Any notification to the police officer that, in the opinion of the panel, there has been insufficient improvement in his or her performance or attendance must also include notification that he or she is required to attend a further third stage meeting.

7.61 As with the initiation of stages one and two for unsatisfactory performance or attendance, a further third stage meeting must relate to matters similar to or connected with the unsatisfactory performance or attendance or gross incompetence referred to in the final improvement notice extended or issued by the panel.

7.62 The panel should (where possible) be composed of the same persons who conducted the previous third stage meeting. However, there may be cases where re-constitution of the panel is either inappropriate or not possible. For example, original panel members may be on a career break or have left the force. In such circumstances the appropriate authority may substitute members as it sees fit subject to the requirements in the regulations described in paragraph 7.16. As soon as practicable after the appointment of any new panel member (s), the police officer should be notified in writing of the changes in panel membership. The police officer will have the opportunity to object to any new panel member (s) subject to the restrictions set out in paragraphs 7.23 – 7.26.

7.63 A police officer may only be given an extension to a final improvement notice on one occasion. Therefore where the police officer is required to attend a reconvened third stage meeting and the panel find that the police officer's performance or attendance continues to be unsatisfactory, the only outcomes available to the panel are:

- Re-deployment;
- Reduction in rank (only in performance cases)[6]; or
- Dismissal (with notice).

Assessment of improvement notices issued at the third stage

7.64 In cases where an police officer was issued with an improvement notice (as opposed to a final improvement notice) for unsatisfactory performance at a gross incompetence third stage meeting, that written improvement notice will be equivalent to a written improvement notice issued at a first stage meeting. In that

[6] A reduction in rank may also involve re-deployment to alternative duties.

case the procedure for assessing the performance of the police officer will be the same as that following the first stage. See paragraphs 5.19 to 5.25.

Third stage appeals

7.65 A police officer has a right of appeal against the finding of the third stage meeting or the outcome imposed, or both the finding and the outcome. The appeal will be made to the Police Appeals Tribunal.

7.66 However, any finding and outcome of the third stage meeting will continue to apply up to the date that the appeal is determined. For example, where an improvement notice was issued, the police officer must follow the terms of the improvement notice and any accompanying action plan pending the determination of the appeal.

8. Other Matters

Management action and medical and attendance issues

8.1 Where absence is due to genuine cases of illness, either self certified or medically certified, the issue is one of capability and thus falls under the UPPs rather than the procedures relating to misconduct. In such cases management may need to take a sympathetic and considerate approach, particularly if the absence is disability related and where reasonable adjustments in the workplace also need to be made which might enable the police officer to return to work.

8.2 On the basis of the occupational health advice, management should consider whether alternative work is available. If there is some doubt about the nature of the police officer's illness or injury, the police officer will be informed that he or she will be examined by a force medical adviser (FMA). If the police officer refuses, he or she will be told in writing that a decision on whether he or she is subject to UPPs will be taken on the basis of the information available. The above will be applied in accordance with forces' own managing attendance procedures.

8.3 In accordance with local force attendance management procedures, the line manager and the police officer should keep in regular contact. If management wish to contact the police officer's doctor, normal force arrangements will be followed.

8.4 The police officer should be made aware at the start of the UPPs that if he or she remains unwell and if necessary adjustments cannot be made dismissal from the force is a possible outcome at stage three.

8.5 For further guidance on sickness and absence matters, see separate guidance on attendance management (Chapter 4).

Attendance at each stage of the procedures and ill-health

8.6 Attendance at any stage meeting is not subject to the same considerations as reporting for duty and the provisions of Regulation 33 (sick leave) of the Police Regulations 2003 do not apply. An illness or disability may render an police officer unfit for duty without affecting his or her ability to attend a meeting. However, if the police officer is incapacitated, the meeting may be deferred until he or she is sufficiently improved to attend.

8.7 A meeting will not be deferred indefinitely because the police officer is unable to attend, although every effort should be made to make it possible for the police officer to attend if he or she wishes to be present. For example:

- the acute phase of a serious physical illness is usually fairly short-lived, and the meeting may be deferred until the police officer is well enough to attend;
- if the police officer suffers from a physical injury – a broken leg - for instance, it may be possible to hold the meeting at a location convenient to him or her.

8.8 Where such circumstances apply at a stage three meeting, the force may wish to consider the use of video, telephone or other conferencing technology.

8.9 Where, despite such efforts having been made and/or the meeting having been deferred, the police officer either persists in failing to attend the meeting or maintains his or her inability to attend, the person conducting the meeting will need to decide whether to continue to defer the meeting or whether to proceed with it, if necessary in the absence of the police officer. The person conducting the meeting must judge the most appropriate course of action. Nothing in this paragraph should be taken to suggest that, where an police officer's medical condition is found to be such that he or she would normally be retired on medical grounds the UPPs should prevent or delay retirement.

Medical retirement under police pension legislation

8.10 The Police Pensions Regulations 1987 in relation to the Police Pension Scheme and the Police Pensions Regulations 2006 in relation to the New Police Pension Scheme provide that where a police authority is considering whether an police officer is permanently disabled it shall refer the issue to the selected medical practitioner (SMP) for a decision.

8.11 Some cases of unsatisfactory attendance may raise the need to consider whether the police officer is permanently disabled within the meaning of the Police Pension Regulations 1987 or 2006. In such cases, this guidance should be read in conjunction with the PNB Joint Guidance on Improving the Management of Ill-Health.

8.12 Where an police officer is referred to the SMP for consideration of permanent disablement under the Police Pensions Regulations, no action shall be commenced or continued under the Police (Performance) Regulations 2008 with regard to the unsatisfactory attendance of an police officer until the issue of

permanent disablement has been considered and the report of the SMP has been received by the Police Authority.

8.13 Where an police officer appeals to a Medical Appeal Board against a decision of the SMP that he or she is not permanently disabled or to a Crown Court against a decision of the Police Authority not to refer the permanent disablement questions to an SMP, no action shall be commenced or continued under the Police (Performance) Regulations 2008 with regard to the unsatisfactory attendance of the police officer until the appeal has been resolved.

8.14 Action can, however, be taken under the UPPs where a case has been referred or is the subject of appeal if the unsatisfactory attendance is unrelated to the condition forming the basis of the referral or appeal. However, forces must be confident that there is no connection as a decision to proceed in such circumstances may be challenged in the courts or tribunals. If the appropriate manager is unsure whether any condition forming the basis of a referral to the SMP or an appeal to either a Medical Appeal Board or Crown Court is related to the unsatisfactory attendance of an police officer, then advice should be sought from the HR professional acting on behalf of the Police Authority before any decision is taken to commence or continue the UPPs. Medical advice from the force medical advisor (FMA) may also be necessary.

For further guidance on medical retirement procedures, see:

http://www.ome.uk.com/downloads/0319%20Ill%20Health%20Retirementfinal.doc

http://www.lge.gov.uk/lge/aio/53547

http://police.homeoffice.gov.uk/human-resources/police-pensions/IHR/

Retirement under A19 of the Police Pensions Regulations 1987 and Regulation 20 of the Police Pensions Regulations 2006 and the 30+ Scheme

8.15 A19 of the Police Pensions Regulations 1987 provides for the compulsory retirement of police officers who have built up 30 years of pensionable service (and are entitled to an immediate full pension) where the police officer is not fully effective *and* his or her retention would not be in the general interests of the wider force efficiency. Similarly, regulation 20 of the Police Pensions Regulations 2006 provides for the compulsory retirement of those police officers who are members of the new 2006 Police Pension Scheme, and can be retired immediately with a full pension, on the same grounds.

8.16 These regulations should not to be used to remove a police officer in situations of unsatisfactory performance or attendance where there is no issue of wider force efficiency. The UPPs should be used in such cases.

8.17 UPPs can also be used where police officers have resumed service under the 30+ Scheme and where a termination of office under A19 or regulation 20 is not appropriate (as above).

8.18 For detailed guidance on the Police Pension Regulations and 30+ Scheme, see:

http://www.npia.police.uk/en/8395.htm

http://police.homeoffice.gov.uk/human-resources/police-pensions/

Special Priority Payments and Competency Related Threshold Payments

8.18 A finding or admission of unsatisfactory performance or attendance or gross incompetence at a UPP meeting will not automatically result in the removal of an police officer's competency related threshold payment or special priority payment. However, where an police officer has received an improvement notice or final improvement notice, this may trigger a review of the appropriateness of that police officer continuing to receive such payments. Any such review should take into account the qualifying criteria for payments under these schemes.

The use of records under UPPs

8.19 Records of any part of the UPPs should not be taken into account after an improvement notice has ceased to be valid. Equally, where a police officer appeals and that appeal is successful, the record of that procedure should not be taken into consideration in any future proceedings or for any other purpose.

GUIDANCE ON ATTENDANCE MANAGEMENT

INTRODUCTION

1. The police service is committed to promoting a good attendance culture and a supportive working environment within police forces. This guidance on attendance management is issued by the Home Office with the full support of the Police Advisory Board for England and Wales.

2. The purpose of this guidance is to highlight the key principles that should guide police forces in developing good attendance management policies and practices.

3. While the guidance is not statutory, it is relevant to the application of the Police (Performance) Regulations 2008. There is a clear expectation that forces will have in place an attendance policy that meets the standards set out in this guidance. Failure to have or to follow such a policy could be taken into account when decisions are being made, or appeals decided under the Unsatisfactory Performance Procedures (UPPs).

4. This guidance has been developed in conjunction with the police staff associations.

5. The Police (Performance) Regulations 2008 define unsatisfactory attendance as 'the inability or failure of a police officer to perform the duties of the role or rank he [she] is currently undertaking to a satisfactory standard or level'. In this context, this would be due to absence during agreed hours of duty.

6. In the case of lateness, there will be a need to establish the reasons for the behaviour. Consideration should be given to whether the matter is properly dealt with under the attendance management policy or as an issue of personal misconduct.

SCOPE

7. This guidance covers an attendance management policy as it relates to police officers, including Special Constables. Arrangements are underway to develop a parallel document in relation to police staff. However, while acknowledging the differing employment status of officers and staff, the principles of effective attendance management set out here are generally applicable to both officers and staff, and forces may chose to develop a single policy to cover both officers and staff.

KEY PRINCIPLES

- All forces should have a clear policy on attendance management that is well-publicised and accessible to all.

- There should be ownership of the policy at the Chief Officer level.

- The policy should be developed in consultation with staff associations, force medical advisors, occupational health practitioners and health and safety advisors.

- To maximise the likelihood of success, forces must adopt a positive, supportive and transparent approach to attendance management that does not unlawfully discriminate. Policies should be reviewed at stipulated regular intervals, the review to include an equality impact assessment.

- Forces must place appropriate emphasis on the prevention of accidents and factors that cause or contribute to ill-health and take all reasonably practicable steps to safeguard the health, safety and welfare of all their officers.

- All officers have a duty to have due regard to health, safety and welfare and to co-operate with their force arrangements in order to safeguard themselves and others[1].

- There must be clear and effective communication in relation to attendance management, both generally and in individual cases.

- Any decision to use the Unsatisfactory Performance Procedures (UPPs) to deal with poor attendance should be taken only after all supportive approaches have been offered in line with force policy.

- Where the UPPs are invoked, the primary aim is to improve attendance. Where attendance does not improve to acceptable levels or where there is no realistic prospect of return to work in a reasonable timeframe, such action may result in the termination of service.

POLICY

[1] **'General duties of employees at work**
It shall be the duty of every employee while at work-
(a) to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work; and
(b) as regards any duty or requirement imposed on his employer or any other person by or under any of the relevant statutory provisions, to co-operate with him so far as is necessary to enable that duty or requirement to be performed or complied with.'

Health and Safety at Work Act 1974 (as amended by the Police (Health and Safety) Act 1997), Section 7

8. Each Force must ensure it has in place formal policies and procedures setting out its approach to the management of attendance. These should be endorsed by Chief Officers. The policy should have clear aims and objectives. It is essential that these are communicated to all managers, officers and their representatives and steps taken to ensure that they are familiar with, and fully understand their responsibilities. Officers should have ready access to the policy and procedures.

9. The Chief Officer should appoint a named individual at a senior level who takes the lead on attendance issues.

10. Staff associations have a key role in the development and review of attendance management policies and procedures.

11. The policy should set out clearly the Force's expectations in respect of attendance management. Effective policies have the following features:

- The policy and procedures should be monitored for effectiveness, and include a stated process and period for review. Publication of regular management reports on attendance management may assist in keeping attendance management in focus.

- The policy demonstrates senior management's commitment to care for officer health, safety and welfare and to comply with all relevant legislation, using all available data to promote improvement and learning.

- Support for officers to improve their attendance and assist those who are on sick leave to return to work.

- Clarity on how information will be captured and recorded, locally and on a force wide basis; this should include the stated recording method. Given many Forces now operate a variety of shift patterns, the recording of absence in hours, as directed by the current Home Office Guidance on Statutory Performance Indicators[2], is critical in order that accurate comparisons can be made between Forces.

- Whole organisation ownership, demonstrating effective communication and consultation process with the workforce

- Transparent and non discriminatory application at all levels in the organisation and for all officers, whilst taking individual circumstances and requirements into account.

[2] http://police.homeoffice.gov.uk/news-and-publications/publication/performance-and-measurement/SPI_Technical_Guidelines_204.pdf?version=1

12. There will be clarity regarding roles and responsibilities of individual officers, line managers, human resource managers, occupational health practitioners, health and safety advisors and force medical advisors.

13. Forces must clearly set out the relationship of the attendance management policy with other Force policies which may have a link to health-related issues. These could include substance misuse; health promotion; Risk Assessment Based Medical Examination (RABME)[3]; Fairness at Work; dispute resolution; disability; maternity; and workplace stress policies and policies on work-life balance.

THE PROCEDURE

14. The procedure describes how the objectives of the policy will be achieved in practice, by setting the framework for management action to maintain and where appropriate, to improve attendance levels.

15. An attendance management procedure should seek to ensure the following outcomes:

- The promotion of a healthy and safe working environment
- Consistent and transparent application to all officers, regardless of grade or rank, taking into account individual circumstances and requirements.
- Levels of sickness absence are accurately recorded in line with Home Office guidance on a regular basis, with regular monitoring reports to be used locally and nationally.
- Communication by forces to all officers on the organisation's objectives around attendance management.
- Managers at all levels are fully aware of their responsibilities
- Defined levels of occupational health and other welfare support to be provided.

An effective procedure should contain the following features:

- Clear processes for reporting periods of sickness absence, and reasons for absence, both at the start of the period of sickness and at defined periods thereafter.
- Clear process for either self-certification or the provision of medical certificate(s)

[3] http://www.npia.police.uk/en/9170.htm

- Clear process for how lateness should be dealt with
- Clear processes for reporting and recording injuries incurred on duty
- Clear process for maintaining contact during periods of absence.
- Clear process for conducting return to work interviews and the development of rehabilitation and/or action plans to improve attendance
- Guidance on records to be kept regarding interviews and rehabilitation and/or action plans
- Guidance on the use of recuperative or restricted duties to encourage early and safe structured return to work
- Guidance on the recording of absence and action to be taken under special circumstances, eg where absence is maternity or disability related[4]. Where absence is disability related separate records should be kept.
- Whether, and if so, how, sickness absence will be a factor used in selection for training opportunities/postings/promotion. Where sickness absence is a factor, forces should ensure that this is compliant with other relevant force policies on issues such as disability and equality.

MANAGING PROCESSES

16. Forces should take a proactive and supportive approach to managing absence, identifying and tackling any barriers to good attendance.

Short term absence

17. Every instance of sickness absence should be considered in line with force procedures. Managers should seek to ascertain any underlying causes of absence, and take appropriate action to prevent absence from escalating further. Using every instance of sickness absence as an opportunity to review the health of the officer concerned is important and such review may prevent the sickness becoming more prolonged. Each review will also be an opportunity to consider whether there are any patterns of absence that give rise to any concern.

Long-term absence

[4] http://police.homeoffice.gov.uk/news-and-publications/publication/human-resources/disability-in-the-police-service/?view=Standard&pubID=479855

18. Long term absence is defined as absence lasting 28 calendar days or more. Once an individual is absent from work for around 28 calendar days, regardless of their medical condition, their return to work can become more problematic, and there is a distancing from the workplace and work colleagues. It is of the utmost importance that clear arrangements are in place to maintain contact from an early stage in any absence.

Maintaining Contact

19. It is important that there are clear, locally published arrangements in place to maintain contact with officers who are absent for extended periods. Such arrangements should set out the purpose for the contact. This is likely to include ensuring medical certificates are regularly supplied and access to internal services such as counselling and rehabilitation are offered.

20. Line managers should maintain or facilitate regular contact with all officers absent on locally defined periods of sickness or long term absence throughout the period of absence and maintain a contact log.

21. Any arrangements should specify the nominated person who is responsible for ensuring contact is maintained.

22. Depending on the reason for absence and whether the officer is at home or in hospital, sensitivity will be required in ensuring that the appropriate level of contact is maintained. Phone calls, letters or regular Force newsletters could all be used. A balance needs to be struck between too much or too little contact as too much could be regarded as intrusive and bordering on harassment, whereas too little could be interpreted as not caring.

23. In rare cases it may be appropriate to have a person who is not in the officer's line management chain as the point of contact. For example, this could arise where the reported cause of the absence is due to management issues. Any Force procedure should ensure there is guidance on this point. Local arrangements should however make clear that the officer has a responsibility to provide the necessary medical certification and information on progress. The officer should also facilitate contact and co-operate with the advice and services provided by occupational health.

Facilitating Return to Work

24. Effective and sensitive management can be effective in facilitating the earliest possible safe return to work, especially in cases of extended sickness absence. Management, in consultation with occupational health, should make the officer's medical practitioners aware that the return to work can be phased, either by reducing hours at the start of the return or adjusting some of the tasks of the role to ensure no undue risk is placed on the officer concerned. Managers should ensure an appropriate 'risk assessment' is undertaken in such cases. Managers can be active in their support and encouragement for an early, safe return to work.

25. It is very likely that in these cases occupational health would have been involved at an earlier stage and their advice to managers is important. There may be some locally funded spend-to-save schemes which could facilitate private health care if undue NHS waiting times are being encountered. The role of occupational health in supporting the management of sickness absence is specifically reflected in the Strategy for a Healthy Police Service[5].

26. The offer of a discussion with the officer and his or her representative may assist in the return to work. Police officers are key in understanding their condition and how their role may be temporarily adjusted to facilitate a return to work.

Payment during sickness absence

27. It will be important at the appropriate time to inform the officer of the effect of Regulation 28 of the Police Regulations 2003 and its implications for sick pay. This will be particularly important when the officer concerned is approaching the time when his or her pay may be reduced or removed, to ensure there is clarity regarding this point and where appropriate, application for discretion to extend the period for which a specific rate of pay is payable is made in good time[6].

Return to work interviews.

28. Return to work interviews, conducted effectively, play a fundamental role in ensuring attendance is carefully and fairly managed. Such interviews should be conducted following a return to work after every period of unscheduled absence, even if the absence has been very short.[7]

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[5] http://www.acpo.police.uk/asp/policies/Data/strategy_for_a_healthy_police_service_website.doc
[6] PNB Circular 2005/1 at http://www.ome.uk.com/downloads/Circulars_2005.doc

29. Return to work interviews should apply to all officers regardless of rank, and should be viewed by both the officer and the manager as positive. However there should be reference to the officer's overall sickness record, where this is appropriate, so there can be an open discussion regarding any patterns of absence or other issues affecting his or her ability to attend regularly, or a need for further intervention or support.

30. The return to work interview should:

- Ensure that all documentation (such as medical certificates or self-certification) has been completed.
- Discuss the reasons for absence in a non-confrontational way and whether the officer is able to undertake the full range of duties applicable to his or her role or develop a plan for recuperative duties. Where there is any doubt, the matter should be referred to occupational health for advice.
- Consider whether, if appropriate, an adjustment could be made to an officer's working environment to enable him or her to return to work.
- Provide the opportunity for the officer to indicate any areas of concern that may have contributed to his or her period of absence.
- Where appropriate, update the officer on any matters of significance that have occurred in his or her period of absence; this should cover both his or her own work, and that of the team.
- Be conducted sensitively and in a manner that enables any particular circumstances to be dealt with.

31. Records of return to work interviews must be securely stored in line with general policies on officer data and in accordance with the Data Protection Act 1998.

32. A return to work interview may raise the question as to whether the principles governing the treatment of disabled officers may need to be considered. Detailed guidance on managing disability can be obtained from the Home Office publication Disability in the Police Service[8]

Disability

33. The decision as to whether or not an officer is disabled under the Disability Discrimination Act 1995 (as amended) (DDA) is ultimately a matter for an Employment Tribunal to decide. However, whether an officer definitely falls within the scope of the DDA should not be the

[8] www.police.homeoffice.gov.uk/news-and-publications/publication/human-resources/disability-in-the-police-service /

overriding principle in the process of deciding whether to make reasonable adjustments. If a Force considers that an officer may be covered by the DDA, then it is good practice to treat him or her as such.

Recuperative duties

34. A phased return to work using recuperative duty arrangements can aid an early return to work. Recuperative duties should be used when there is the expectation that an officer will return to full duties upon his or her recovery. They are appropriate as a time-limited measure based on individual circumstances to enable officers to re-integrate into the workforce following a period of sick leave or injury. Any change to tasks should be temporary and a measured increase to return to normal hours and tasks should be actively managed and achieved in the shortest possible time.

Restricted duties

35. Where the condition is likely to be permanent, a return to work on the basis of restricted duties should be considered. Restricted duties are used in order to retain the skills and expertise of police officers and prevent unnecessary and costly early retirement. Police officers who are performing restricted duties are working full hours, as the restriction is predominantly based upon the type of work an officer can perform rather than the hours worked. This work should utilise their police skills and experience.

Ill-health retirement

36. There will be occasions where the medical condition causing the absence will be very serious and potentially with a permanent effect. In such cases the issues of whether the officer is 'permanently disabled' within the definition used in ill-health retirement guidance, will need to be considered[9].

Unsatisfactory Performance Procedures

37. Where supportive approaches have failed to improve attendance to acceptable levels, and ill-health retirement is inappropriate, it may be necessary to use the Unsatisfactory Performance Procedures (see Chapter 3).

ALLOCATING RESPONSIBILITIES

38. Chief Officers have responsibilities under the Health and Safety at Work etc Act 1974[10] and related legislation to protect officers whilst at

[9] http://police.homeoffice.gov.uk/human-resources/police-pensions/2006-pension/ill-health-benefits/
[10] as amended by the Police (Health and Safety) Act 1997

work. If they are vulnerable to risk particularly if they have an illness, injury or disability, Then human resources, health and safety practitioners and occupational health and welfare are the competent advisors.

39. It is the role of HR professionals to support sickness absence policies by providing advice and guidance to the line managers responsible for implementing the policies. This will include the provision of advice which takes into account the requirements of the Disability Discrimination Act 1995 (as amended) and HSE's Stress Management Guidance[11].

40. Occupational health practitioners should play a major role in evaluating reasons for absence, conducting health assessments, advising HR professionals and line managers in planning returns to work, and promoting good health.

41. All managers have a significant role to play by demonstrating their commitment to managing absence and making it a service priority.

42. The development of good practice in managing attendance is encouraged. The NPIA will be developing a database of good practice, which will be made available to forces.

43. The Strategy for a Healthy Police Service details the specific responsibilities of the various parties who contribute to a healthier police service.

Role of Occupational Health

44. Occupational health has a role both in giving advice to managers to assist in taking managerial decisions and in supporting officers who seek their advice and assistance. Forces and Police Authorities should ensure that sufficient resources are available to provide a defined level of occupational health service.

45. Occupational health is responsible for providing advice on clinical issues affecting officers in the workplace, where this may be affecting performance or attendance. Where the force is required to conduct a risk assessment, officers can be required to co-operate with occupational health and/or health and safety advisors as part of the risk assessment process.

46. The Force should clearly define for all officers, the role and range of services they can expect from the occupational health service. It is vital that officers have confidence in the service and that managers are clear regarding the professional confidentiality requirements of occupational health practitioners.

[11] http://www.hse.gov.uk/stress/standards/standards.htm

47. Advice given to managers should be in a form which enables the manager to make a decision regarding the officer. Managers are responsible for making decisions regarding the officer informed by professional advice, including that provided by occupational health. A manager who has concerns about an officer's health and the effect it may have on his or her ability to attend regularly and perform his or her normal tasks, may refer the officer to occupational health.

48. A manager should set out clearly the questions he or she wants occupational health to advise on, and should provide occupational health with information about the role the officer performs to enable the advice to be relevant. The following issues are examples of medical advice that may be requested. In addition managers should state the reasons for referrals and any management issues:

- Is the officer fully fit for work in the particular role or are they subject to temporary or permanent limitations?
- Are there any adjustments required and, if so, what is the nature of any adjustments that can be recommended to enable the officer to carry out his or her role?
- Are there any issues affecting the workplace that are impacting on the officer's performance?
- Is the condition one which could recur, and which may in the future affect effective attendance and performance?
- How does the medical condition directly affect the role undertaken, i.e. what parts of the role can be undertaken and which cannot?
- Does the impairment affect day-to-day activity?
- Could the officer return to work on recuperative duties as a step to returning to full duties and if so what functional activities could be performed?
- Is the condition such that a return on a restricted duty basis is an option and if so what functional activities are capable of being performed regularly?
- Is there any equipment that could assist in a safe return to work?
- Is time needed to undertake treatment/rehabilitation?
- Does the officer's condition fall within the scope of the DDA?
- How long is the condition likely to last before a return to full duties?

- Advice as to whether the condition is likely to require consideration of 'permanent disability' as defined in pension arrangements. If so, procedures covering pensions should be followed[12].

49. Information given to managers by occupational health will not give the medical diagnosis as this is protected by medical confidentiality, but the impact of the condition on the officer's performance, capability and attendance will be identified, together with relevant timescales.

Health and Safety

50. The legal responsibility for assurance of proactive preventative measures rests with the Chief Officer and the Police Authority. As part of the requirement to provide a safe and healthy environment for all officers, each Force will have to assess how it will meet those responsibilities. This should include an assessment of a range of proactive preventative measures to reduce the incidence of both physical and psychological ill-health where work may be a factor, for example, access to private health care may be an option available where NHS waiting lists are lengthy.

51. Such measures should be designed to support and promote an environment where safe systems of work are a natural feature. The introduction of a Risk Assessed Based Medical Examination (RABME) process may provide a useful structured approach, identifying posts where there may be higher risks to physical or psychological wellbeing, together with appropriate measures to reduce or mitigate such risks. Analysis of the major causes of absence should guide the delivery of service provision.

TRAINING AND COMMUNICATION

52. All managers who are required to participate in any aspect of attendance management must have clarity about their responsibilities and have confidence in handling attendance management issues. In addition to providing ready access to the policies and procedures, attention should be given to ensuring there is competence in the necessary skills required to conduct all aspects of the process, for example conducting a return to work interview in a non-confrontational way and formulating risk assessment and rehabilitation plans.

53. All new officers should receive information regarding their individual responsibilities in the attendance management process as part of their induction.

54. The organisation should provide accessible regular updates when changes are introduced, and provide opportunity for clarification, while

[12] http://www.knowledgenetwork.gov.uk/HO/circular.nsf/79755433dd36a66980256d4f004d1514/27e87af1b5edbb3880256cfa003fd9d3?OpenDocument

officers should take responsibility for familiarising themselves with information provided.

55. There should be appropriate training and available information in place to ensure that:

- All parties are familiar with and understand the force's attendance management policy and procedure, and where it can be located.
- All managers and officers understand the arrangements, including timescales for reporting sickness absence
- All managers and officers understand their responsibilities in relation to achieving and maintaining good attendance

MONITORING INDIVIDUAL PROGRESS

56. It is the responsibility of all managers, using the Force's attendance management arrangements and taking advice as necessary, to monitor their officers' attendance records.

57. Monitoring and recording absence accurately is essential if absence is to be managed effectively and fairly. Managers should keep a record of every absence of each officer reporting to them. Accurate records are the only way to identify when and where problems are occurring; they also provide a historical record for determining patterns of absence for individual officers and departments.

58. It is the responsibility of all officers to ensure that, in the case of sickness absence they comply with the reporting requirements of the attendance management procedures.

59. Nominated staff should be responsible for recording data at the start and end of periods of absence, in addition to the reasons for absence.

60. Managers should also keep written records of any action (or non action) taken in relation to their officers.

Reviews

61. Every instance of sickness absence is an opportunity for managers to take a proactive approach to examining the causes of absence and provide appropriate support.

62. Forces may also set locally defined and published review points, to assist managers in identifying patterns of absence and taking appropriate action.

63. Reviews are intended to act as a gateway to further management support or action, to ensure that officers are accessing all the

necessary support to improve their attendance. This could include referral to occupational health, consideration of flexible working arrangements, and/or the involvement of a more senior manager.

64. Such reviews can provide a framework for consistent application of management intervention, but there is a need to ensure that these are not used rigidly without taking into account individual circumstances. Line managers should have the confidence and training to use their discretion in applying the policy[13]. While review points may be of assistance in identifying patterns or unusually high levels of absence, managers should not wait until a review point is reached before any action is taken. Similarly, based on their knowledge of a case, managers may choose not to take action, even where a review point has been reached.

65. The use of reviews should be non-discriminatory, regularly assessed, and subject to a full equality impact assessment.

AUDIT AND REVIEW

66. To be sure that an attendance management procedure is effective in achieving its stated objectives, there is a need to ensure that there is a robust and accurate information collection process, which provides realistic and simple information to enable managers to manage attendance in a timely and fair manner.

67. Monitoring information should be used as a positive tool to identify areas of concern and offer the opportunity for targeted improvement action where necessary. Monitoring information should form a regular input to Chief Officer Review meetings and should also be scrutinised by the appropriate consultative committee. Care should always be taken to ensure that information that is made generally available does not identify individual officers and where significant factors are identified, review whether there are underlying issues that should be addressed.

68. Forces should introduce a structured monitoring regime to:

- Measure the overall performance of the Force in terms of absolute levels of sickness absence for all groups of officers. This can identify trends and indicate whether in overall terms the attendance management policy/procedures are effective in reducing absence and maintaining levels of attendance.

- Identify whether the Force is performing against national set targets and whether there is an improvement against the Force's previous levels.

[13] http://www.hse.gov.uk/research/rrhtm/rr582.htm

- Identify areas of low levels of absence which may indicate areas of good practice which could be shared.

- Identify areas where there is a high level of absence, which may indicate inadequate management attention to the active management of absence, or roles which may be particularly hazardous.

- Identify where the Force appears to have predominantly short or long term absences and whether there are patterns of absence.

- Measure the levels of sickness absence of different groups (e.g. gender, ethnicity, age, full or part time) in order to identify whether the Force's procedure impact disproportionately on any group. The information should be factored into regular equality impact assessments of the policy.

- Allow managers to see how their section is performing alongside other available workforce information.

69. The Home Office has developed a standard method of recording sickness absence, including definitions and criteria. This requires absence to be recorded in hours. These should always be used as it is necessary to supply the Home Office, quarterly, with information so it can prepare service wide monitoring information. Police Authorities will also find the information useful when considering Force performance. Consideration should be given to benchmarking with other forces to assess relative performance. Forces may also find it helpful to consider the cost to the organisation of sickness absence.

70. In the collection of all data, Forces must comply with their statutory requirements under the Data Protection Act 1998

ANNEX A

FAST TRACK PROCEDURES (SPECIAL CASES)

Introduction

1. The following paragraphs provide guidance on the operation of the fast track misconduct procedures, referred to as "special cases" in the Conduct Regulations. Part 5 of the Conduct Regulations sets out the procedures for dealing with special cases.

2. The special case procedures can only be used if the appropriate authority certifies the case as a special case, having determined that the 'special conditions' are satisfied or if the IPCC has given a direction under paragraph 20H(7) of Schedule 3 to the Police Reform Act 2002.

The 'special conditions' are that –

(a) there is sufficient without further evidence, in the form of written statements or other documents, to establish on the balance of probabilities that the conduct of the police officer concerned constitutes gross misconduct; and

(b) it is in the public interest for the police officer concerned to cease to be a police officer without delay.

These procedures are therefore designed to deal with cases where the evidence is incontrovertible in the form of statements, documents or other material and is therefore sufficient without further evidence to prove gross misconduct and it is in the public interest, if the case is found or admitted for the police officer to cease to be a member of the police service forthwith.

3. Even where the criteria for special cases are met there may be circumstances where it would not be appropriate to certify the case as a special case, for instance, where to do so might prematurely alert others (police officers or non-police officers) who are, or may be, the subject of an investigation.

4. In the case of non senior officers the case will be heard by the police officer's Chief Constable (Assistant Commissioner in the Metropolitan Police) or in cases where the Chief Constable is an interested party or is unavailable, another Chief Constable or an Assistant Commissioner. In the case of a senior officer, the case will be heard by a panel as set out in Regulations 48 and 49 of the Conduct Regulations. The police officer will have a right of appeal under regulation 58 of the Conduct Regulations to a Police Appeals Tribunal against the finding of gross misconduct and the disciplinary action imposed.

Complaint cases

5. Where a matter that meets the criteria for using the special case procedures has arisen from a complaint by a member of the public, the complainant or interested person will have the right to attend the special case hearing as an observer.

6. Where a complainant or interested person is to attend a special case hearing he or she will be entitled to be accompanied by one other person and if the complainant or interested person has a special need, by one further person to accommodate that need.

7. A complainant or interested person and any person accompanying the complainant or interested person will be permitted to remain in the hearing up to and including any finding by the person (or persons in the case of a senior officer) conducting the hearing. The complainant or interested person and any person accompanying the complainant or interested person will not be permitted to remain in the hearing whilst character references or mitigation are being given or the decision of the person conducting the hearing (or persons in the case of a senior officer) as to the outcome. However, the appropriate authority will have a duty to inform the complainant or interested person of the outcome of the hearing whether the complainant or interested person attends or not.

Evidence

8. There will be no oral witness testimony at the special case hearing other than from the police officer concerned. There will be copies of the notice given to the police officer, the notice the police officer has supplied in response, a copy of the investigator's report or such parts of that report as relate to the police officer concerned, statements made by the police officer during the investigation, and in a case where the police officer concerned denies the allegation against him or her, copies of all statements and documents that in the opinion of the appropriate authority should be considered at the meeting.

Special case process

Procedure for consideration in advance of the meeting

9. Where the appropriate authority determines that the special conditions (see paragraph 2 above) are satisfied, unless it considers that the circumstances are such to make it inappropriate to do so, he, she or it shall certify the case as a special case and refer it to a special case hearing. The decision as to whether a case is suitable for using the fast track procedure should be authorised by a senior officer (the police authority in the case of a senior officer). The senior officer (the police authority in the case of a senior officer) will authorise the decision whether the case should be dealt with as a special case by determining whether he, she or it believes the special

conditions are satisfied in that case having regard to the available evidence and any other relevant information.

10. If the senior officer authorising the decision (or the police authority in the case of a senior officer) decides that the special case procedures will not be used then he, she or it will refer it back to the investigator if the investigation is not complete or to the appropriate authority to proceed under the standard procedures.

11. If the senior officer (or police authority in the case of a senior officer) decides that the special case procedures should be used then he, she or it will sign a "Special Case Certificate" and will provide to the police officer concerned notice giving particulars of the conduct that is alleged to constitute gross misconduct and copies of: -

- the Special Case Certificate
- any statement the police officer may have made to the investigator during the course of the investigation
- Subject to the harm test, :-
    - the investigator's report(if any) or such parts of that report as relate to the police officer concerned, together with any documents attached to that report; and
    - any relevant statement or documents gathered during the course of the investigation

The police officer concerned will also be told the date of the hearing and of his or her right to legal representation and to advice from a 'police friend'.

12. The date of the meeting will be not less than 10 working days and not more than 15 working days from the date the "Special Case Certificate" and other documents are provided to the police officer concerned.

13. Within 7 working days of the date on which the written notice and documents are supplied to the police officer concerned, the police officer shall provide a written notice to the appropriate authority of –

- whether or not he or she accepts that his or her conduct constituted gross misconduct
- where he or she accepts that the conduct constituted gross misconduct, any submission he or she wishes to make in mitigation
- where he or she does not accept that the conduct constituted gross misconduct
  (a) the allegations he or she disputes and his or her version of the relevant events; and
  (b) any arguments on points of law he or she wishes to be considered by the person or persons conducting the meeting.

At the same time the police officer shall provide the person conducting or chairing (in the case of a senior officer) the hearing with copies of any documents he or she intends to rely on at the hearing (see regulation 46).

14. The Chief Constable or Assistant Commissioner (in the MPS) or Commissioner (in the case of the City of London Police) (or the chair of the hearing in the case of a senior officer) should be provided with the papers at least 3 working days prior to the hearing.

Outcome of special case hearing

15. Where the person(s) conducting the special case hearing find that the conduct of the police officer concerned constituted gross misconduct, then he, she or they shall impose disciplinary action, which may be: -

a) Dismissal without notice.

b) A final written warning (unless a final written warning has been imposed on the police officer concerned within the previous 18 months).

c) an extension of a final written warning.

Where the police officer concerned has received a final written warning within the 18 months prior to the assessment of the conduct then in exceptional circumstances only, the final written warning may be extended by a further 18 months. An extension of a final written warning can occur on one occasion only.

16. Where the person(s) conducting the hearing determines that the conduct does not amount to gross misconduct, then he, she or they may dismiss the case.

17. Alternatively, he, she or they may return the case to the appropriate authority to deal with under the standard procedures. This may be because the person(s) conducting the hearing consider that the conduct is misconduct rather than gross misconduct.

18.There is power under regulation 43 for the appropriate authority to remit the case to be dealt with under the standard procedures at any time. This might be because he, she or it considers that a particular witness whose evidence is crucial to the case and is disputed must be called to give oral testimony.

19.Where the police officer admits the allegation or the person(s) conducting the hearing find it proved on the balance of probabilities, then the person(s) conducting the hearing –

a) shall have regard to the record of police service of the police officer concerned as shown on his or her personal record;

b) may consider such documentary evidence as would, in his, her or their opinion, assist him, her or them in determining the question; and

c) shall give the police officer concerned, and his or her police friend or solicitor or counsel, an opportunity to make oral or written representations.

20.The police officer concerned shall be informed of the finding and any disciplinary action imposed or a decision to dismiss the case or revert it back to be dealt with under the standard procedures as soon as practicable and in any event shall be provided with written notice of these matters and a summary of the reasons within 5 working days of the conclusion of the hearing.

Absence of police officer concerned at the hearing

21. The hearing may proceed in the absence of the police officer concerned, but the person(s) conducting the hearing should ensure that the police officer concerned has been informed of his or her right to be legally represented at the hearing or to be represented by a police friend where the police officer chooses not to be legally represented.

ANNEX B

Misconduct Meetings/Hearings

Senior Police Officers

1. This section sets out the persons who will hear a misconduct case involving a senior police officer that has been referred to either a misconduct meeting or misconduct hearing.

Misconduct Meeting/Hearings – Chief Constables etc.

2. Where a case is referred to a misconduct meeting and the police officer concerned is—

(a) a chief constable; or

(b) in the case of the Metropolitan Police Force—

(i) the commissioner;

(ii) the deputy commissioner; or

(iii) an assistant commissioner; or

(c) in the case of the City of London police force, the commissioner,

the misconduct proceedings shall be conducted by the following panel of persons appointed by the appropriate authority: -

i) the chair of the police authority for the police force concerned, or another member of that police authority nominated by the chair, who shall be the chair; and

ii) HMCIC or an inspector of constabulary nominated by HMCIC.

3. For a misconduct hearing, those persons are—

(a) a senior counsel selected from a list of candidates nominated by the Lord Chancellor , who shall be the chair;

(b) the chair of the police authority for the police force concerned or another member of that police authority nominated by that chair;

(c) HMCIC or an inspector of constabulary nominated by HMCIC;

(d) a person selected from a list of candidates maintained by a police authority.

Misconduct Meeting/Hearings – Other senior officers.

4. Where the case is referred to a misconduct meeting and the police officer concerned is a senior officer other than one mentioned above, those proceedings shall be conducted by the following panel of persons appointed by the appropriate authority: -

(i) where the police officer concerned is a member of the Metropolitan Police Force, an assistant commissioner or a senior officer of at least one rank above that of the police officer concerned, nominated by an assistant commissioner, who shall be the chair;

(ii) in any other case, the chief officer of the force concerned or a senior officer of at least one rank above that of the police officer concerned, nominated by the chief officer, who shall be the chair; and

(iii) the chair of the police authority for the force concerned or another member of that police authority nominated by the chair.

5. For misconduct hearings, those persons are—

(a) HMCIC or an inspector of constabulary nominated by HMCIC, who shall be the chair;

(b) the chief officer of the force concerned or a senior officer of at least one rank above that of the police officer concerned, nominated by the chief officer;

(c) the chair of the police authority for the force concerned or another member of that police authority nominated by that chair;

(d) a person selected from a list of candidates maintained by a police authority.

6. The senior officer concerned should be informed of the names of the persons appointed to conduct the misconduct meeting/hearing together with the name of any person appointed to advise such persons at the meeting/hearing as soon as reasonably practicable after they have been appointed.

7. The senior officer may object to any person hearing or advising at a misconduct meeting or hearing. In doing so the senior officer concerned will need to set out clear and reasonable objections as to why a particular person(s) should not conduct or advise at the meeting.

8. If the senior officer concerned submits a compelling reason why such a person should not be involved in the meeting/hearing then, in the interests of fairness, a replacement should be found. The senior officer will be informed who the replacement is and will have the right to object to such person if he or she submits compelling reasons why the replacement should not be involved in the meeting/hearing.

ANNEX C

APPEALS TO POLICE APPEALS TRIBUNAL

POLICE APPEALS TRIBUNAL RULES 2008

1. Introduction

1.1 This guidance relates to appeals made to a Police Appeals Tribunal for matters that have been dealt with under the Police (Conduct) Regulations 2008 and the Police (Performance) Regulations 2008.

1.2 Appeals made to a Police Appeals Tribunal that were dealt with under the Police (Conduct) Regulations 2004 or the Police (Efficiency) Regulations 1999 will be dealt with under the Police Appeals Tribunal Rules 1999.

1.3 For the purposes of this guidance the following terms will be used: -

- 'Appellant' – The police officer who has submitted an appeal.
- 'Respondent' – In the case of an appeal brought by a police officer up to and including the rank of chief superintendent, the respondent will be the chief officer of that force. For senior officers the respondent is the police authority for that force.
- 'Working Day' – means any day other than a Saturday or Sunday or a day which is a bank holiday or a public holiday in England and Wales

2. Scope

2.1 A police officer has a right of appeal to a Police Appeals Tribunal against any disciplinary finding and/or disciplinary outcome imposed at a misconduct hearing or special case hearing held under the Police (Conduct) Regulations 2008. Senior police officers, in addition, have the right to appeal to a Police Appeals Tribunal against any disciplinary finding and/or outcome imposed at a misconduct meeting. A police officer may not appeal to a tribunal against a finding of misconduct or gross misconduct where that finding was made following acceptance by the officer that his or her conduct amounted to misconduct or gross misconduct (as the case may be).

2.2 A police officer of a rank up to and including chief superintendent has a right of appeal to a Police Appeals Tribunal against the finding and/or the following outcomes imposed following a third stage meeting under the Police (Performance) Regulations 2008: -

i) Dismissal; or

ii) Reduction in rank

2.3 In addition to the outcomes at (i) and (ii), if the case has been dealt with at a stage three meeting, without having progressed through stages 1 and 2, the police officer may appeal against the following outcomes: -

(a) redeployment to alternative duties

(b) the issue of a final written improvement notice

(c) the issue of a written improvement notice

2.4 A police officer may not appeal against a finding of unsatisfactory performance or attendance, or gross incompetence at a third stage performance meeting where that finding was made following acceptance by the officer that his or her performance or attendance has been unsatisfactory or that he or she has been grossly incompetent (as the case may be).

3. Composition and timing of Police Appeals Tribunals

3.1 The Tribunal appointed by the police authority will consist of; -

a) a legally qualified chair drawn from a list maintained by the Home Office;

b) a member of the police authority nominated by the authority;

c) a serving senior officer (ACPO rank); and

d) a retired officer of appropriate rank, also drawn from a list supplied by the Home Office.

3.2 The composition of a Police Appeals Tribunal for senior officers is set out in the Police Act 1996.

3.3 It is expected that a tribunal will take place as soon as reasonably practicable and in any case no later than 3 months of the determination by a tribunal chair that a hearing should be held.

3.4 It will be the responsibility of the police authority to satisfy itself that the members who are to sit on a Police Appeals Tribunal are sufficiently independent of the matter so as not to give rise to any suggestion of bias or the appearance of bias. [You may wish to seek Noel' s view on this. Generally it is important to avoid both actual bias and the appearance of bias but he may think 'unfairness' is adequate in this context]

4. Grounds of appeal

4.1 A Police Appeals Tribunal is not a re hearing of the original matter; rather it is an appeal based on specific grounds.

4.2 In the case of matters dealt with under the Police (Conduct) Regulations 2008 the grounds for appeal are: -

a) That the finding or disciplinary action imposed was unreasonable; or

b) that there is evidence that could not reasonably have been considered at the misconduct meeting (in the case of senior police officers), the misconduct hearing or special case hearing (as the case may be); or

c) that there was a breach of the procedures set out in the Police (Conduct) Regulations 2008 or other unfairness which could have materially affected the finding or decision on disciplinary action.

4.3 In the case of matters dealt with under the Police (Performance) Regulations 2008 the grounds for appeal are: -

a) That the finding of unsatisfactory performance or attendance or gross incompetence, or the outcome imposed, was unreasonable; or

b) that there is evidence that could not reasonably have been considered at the third stage meeting which could have materially affected the finding or decision on the outcome; or

c) that there was a breach of the procedures set out in the Police (Performance) Regulations 2008 or other unfairness which could have materially affected the finding or decision on the outcome; or

d) that the police officer concerned should not have been required to attend a third stage meeting as his or her unsatisfactory performance or attendance was not similar to or connected with the unsatisfactory performance or attendance referred to in his or her final written improvement notice.

4.4 In order for the grounds of 'unreasonableness' to be met the appellant must show that the original panel/person misdirected itself in law, or misunderstood the law/procedures, or misapplied the law/procedures; or that there was no evidence to support a particular conclusion or finding of fact; or that the decision was perverse in that it was one which no reasonable panel/person, directing itself properly on the law and/or procedures, could have reached.

5. Notice of appeal

5.1 Where a police officer wishes to appeal then he or she will need to give notice of his or her appeal in writing to the police authority. The notice of appeal must be given within 10 working days, beginning with the day after the police officer is supplied with a written copy of the decision that he or she is appealing against.

5.2 In cases where the police officer fails to submit his or her notice of appeal within the 10 working days period, he or she may, as soon as possible after the end of that period, submit a notice of appeal which shall be accompanied by the reasons why it was not submitted within that period.

5.3 The police authority will appoint a Police Appeals Tribunal chair to deal with the notice of appeal and any applications for extensions to the time limits. (See paragraphs 6 to 8 XXXXXX below). The same chair may, but need not, chair the tribunal that deals with the substantive appeal, if the matter proceeds to that stage.

5.4 Upon receipt of an appeal that has been submitted outside the 10 working day time limit, the police authority shall send a copy of the notice and the reasons to a tribunal chair, who shall determine: -

a) whether or not it was reasonably practicable for the notice to be given within the time limit, and

b) whether the notice was submitted as soon as possible after the end of the 10 day period for submitting a notice of appeal.

5.5 Where the tribunal chair determines that it was reasonably practicable to have submitted the notice of appeal within the time limit or the chair determines that the notice was not submitted as soon as possible after the end of the 10 day time limit, the appeal shall be dismissed. Where the tribunal chair determines that it was not reasonably practicable to have submitted the notice, the appeal shall be allowed to proceed.

5.6 In his or her notice of appeal, the appellant may request a copy of all or part of the transcript of the original hearing. A police officer should only need to request a copy of part or all of a transcript where it is necessary and relevant having regard to the nature and scope of the appeal. Where, for example, the police officer is appealing only on the grounds of the outcome imposed, then it will often not be necessary for a transcript to be requested.

5.7 The police authority, upon receipt of a notice of appeal, shall, as soon as reasonably practicable, send a copy of the notice to the respondent and (where the appeal is a specified appeal[1]) to the Independent Police Complaints Commission (IPCC).

6. Procedure on notice of appeal

6.1 As soon as practicable after receipt of a copy of the notice of appeal and in any case within 15 working days (beginning with the day following the day of such receipt) the respondent shall provide to the police authority: -

[1] A specified appeal is one where the decision appealed against arose from a complaint or conduct matter to which paragraph 17, 18 or 19 of Schedule 3 to the Police Reform Act 2002 (investigations) applied.

a) a copy of the decision appealed against (namely the written judgement of the original panel/person);

b) any documents that were available to the panel/person conducting the original hearing; and

c) the transcript or part of the transcript of the proceedings at the original hearing requested by the appellant (see 4.5 above)

6.2 A copy of the transcript (if applicable) shall also at the same time be sent to the appellant.

6.3 The appellant, within 20 working days beginning with the day following the day on which he or she is supplied with a copy of the transcript or, where no transcript is requested, within 35 working days (beginning with the day following the day on which the appellant gave notice of his or her appeal), shall provide to the police authority: -

a) a notice setting out the finding, disciplinary action or outcome appealed against and of his or her grounds for the appeal;

b) any supporting documents

c) where the appellant is allowed to call witnesses (for appeals made only on the ground of there being evidence that could not reasonably have been considered at the original hearing and which could have materially affected the finding or outcome): -

i) a list of any proposed witnesses;

ii) a witness statement from each of the proposed witness

iii) a statement setting out why each proposed witness could not have given evidence at the original hearing; and

d) If he or she consents to the appeal being determined without a hearing (that is, on the basis of the papers alone), notice in writing that he or she so consents.
.

6.4 Not later than 20 working days, beginning with the day following the day on which the respondent is supplied with the documents from the police authority, the respondent shall send to the police authority: -

a) a statement setting out the respondent's response to the appeal;

b) any supporting documents;

c) where the respondent is permitted to adduce witness evidence: -

i) a list of any proposed witnesses;

ii) a witness statement from each of the proposed witnesses; and

d) If he or she consents to the appeal being determined without a hearing (that is, on the basis of the papers alone), notice in writing that he or she so consents

6.5 The respondent should also send to the appellant, at the same time, a copy of the documents in (a),(c) and (d) above, together with a list of any documents submitted under (b).

6.6 The police authority will send a copy of the papers submitted by the respondent and appellant to the tribunal chair appointed to deal with the notice of appeal as soon as practicable following receipt.

6.7 The respondent should only propose a witness to attend where the ground for appeal by the appellant is that there is evidence that could not reasonably have been considered at the original hearing which could have materially affected the finding or decision on disciplinary action or the outcome. In such cases the respondent may propose a witness who may give evidence to deal with the issue raised by the appellant. An example may be where the appellant submits new medical evidence that was not available to the original hearing and the respondent wishes to propose its own witness to give evidence on this issue.

6.8 The respondent may request a hearing notwithstanding that the appellant is content for the hearing to be dealt with on the papers. In such cases the respondent shall provide its reasons for the request to the police authority which shall, as soon as practicable, forward them to the tribunal chair.

6.9 In the event that the chair decides that there should be a hearing, the appellant is under no obligation to attend but is entitled to reconsider his or her position in the light of the respondent's request for a hearing and to attend or be represented at the hearing. The appellant may also reconsider his or her consent to the determination of the appeal on the basis of the papers prior to a determination on this issue by the chair. The appellant's withdrawal of consent should be notified to the police authority in writing and if this occurs, a hearing must be held..

6.10 Where the appellant, having seen the documents sent in by the respondent, changes his or her mind and requests a hearing, a hearing must be held.

7. Extension of time limits

7.1 The appellant or the respondent can apply to the police authority for an extension to the time limits stated above for providing documents (except the time for giving notice of appeal: see paragraph 4.2) setting out its reasons for the application and the additional time period it is seeking.

7.2 The police authority will copy any application by the respondent or the appellant to the other party as soon as practicable after receipt and ask whether it consents to the application.

7.3 Where the other party consents to the application for more time then the police authority shall extend the time to the agreed time limit. Where the other party does not consent then the police authority will refer the matter to the tribunal chair who shall determine whether the relevant time period should be extended and if so for how long.

7.4 There is an expectation that the time limits will ordinarily be complied with and only in exceptional circumstances, for example due to the complexity of the case, will a time limit be extended. The tribunal chair may extend the time limits but should do so only if good and sufficient reasons can be shown as to why the time limits cannot be complied with.

8. Review of notice of appeal

8.1 Upon receipt of the documents submitted to him or her by the police authority, the chair appointed to consider the notice of appeal shall determine whether the appeal should be dismissed at this stage. It is expected that the chair will normally make his or her preliminary determination within 10 working days of receiving the documents (see also paragraph 8.4).

8.2 The tribunal chair will dismiss the appeal at this stage if he or she considers that: -

a) the appeal has no real prospect of success; and

b) there is no other compelling reason why the appeal should proceed.

8.3 Where the tribunal chair is minded to dismiss the appeal at this stage, he or she will notify the appellant and the respondent in writing of his or her view together with his or her reasons before making his or her final determination.

8.4 The appellant and the respondent may within 10 working days, beginning with the day after the day of being notified of the chair's preliminary view, make written representations to the chair and the chair will consider such representations before coming to his or her final decision.

8.5 The tribunal chair shall inform the appellant, respondent and police authority of his or her final decision. It is expected that the tribunal chair's decision will be made and communicated within 10 working days of receipt of the last of the representations. Where the tribunal chair dismisses the appeal then the notification will include his or her reasons for doing do.

Determination of an appeal

Should this section be 9? All other paras following a bold heading have a new section number

8.6 Where the tribunal chair allows the appeal to go forward to a tribunal hearing then the police authority will be responsible for making the administrative arrangements prior to and at the tribunal and for ensuring that the members of the tribunal appointed to deal with the appeal are sent the papers together with a schedule of the documents that each of the members should have.

8.7 The tribunal chair who made the determination as to whether to allow the notice of appeal to proceed to a tribunal need not necessarily be the same tribunal chair who hears the subsequent appeal, although there is no bar on such a person doing so. However, the chair who makes the decision as to whether the appeal should be dealt with at a hearing or on the papers should be the chair appointed to hear the appeal itself.

8.8 Where an appeal has not been dismissed at the review stage, the tribunal chair shall determine whether the appeal should be dealt with at a hearing. It is expected that this decision will be made by the tribunal chair within 10 [for consistency: figure used elsewhere] working days of receiving the papers. If the appellant has not consented to an appeal being dealt with on the papers then a hearing shall be held. If the appellant has consented, the tribunal chair may determine that the appeal shall be dealt with without a hearing. If the appeal is to be dealt with at a hearing, the chair shall give the appellant and the respondent his or her name and contact address.

9. Power to request disclosure of documents

9.1 At any time after the appellant and respondent have submitted their respective documents, the appellant or respondent may apply to the tribunal chair for disclosure of any document by the other party which is relevant to the appeal.

9.2 The tribunal chair may request the disclosure of any such document and where it is disclosed, a copy shall be given to the tribunal chair and (where appointed) the other tribunal members and the other party.

9.3 Where the appellant or respondent does not comply with a request to disclose any document, then the appellant or respondent (as appropriate) shall give the tribunal chair and the other party their reasons for non-disclosure in writing.

9.4 The tribunal in making its determination of the appeal may take into account any non-disclosure of documents where the tribunal decides that the requested documents may have been relevant to the determination of the appeal.

10. Legal and other representation

10.1 The appellant can be represented at a hearing by a relevant lawyer or a police friend. Where the appellant is represented by a lawyer then the

appellant's police friend may also attend. (See the section on 'Police friends' in the introduction to the Guidance).

10.2 The respondent may be represented at the hearing by a relevant lawyer, a police officer or police staff member of that force, the chief executive or other officer or employee of the relevant police authority.

11. Procedure at hearing

11.1 Where the case is to be heard at a tribunal hearing, the chair of the tribunal shall cause the appellant and the respondent to be given written notice of the time, date and place of the hearing, at least 20 working days or such shorter period as may with the agreement of both parties be determined, before the hearing begins.

11.2 Subject to the rules set out in the Police Appeals Tribunal Rules 2008, the procedure at the tribunal shall be determined by the tribunal.

11.3 The tribunal chair will determine in advance of the tribunal whether to allow any witness that the appellant or respondent proposes to call to give evidence at the tribunal.

11.4 Witnesses will only be permitted where the ground for appeal is that there is evidence that could not reasonably have been considered at the original hearing which could have materially affected the finding or decision on outcome.

11.5 Witnesses should be kept to a minimum and only be permitted to attend where the tribunal considers that their presence is necessary to assist it in determining the appeal.

11.6 Any witness that does attend the tribunal may be subject to questioning and cross questioning.

11.7 It is for the Tribunal to decide on the admissibility of any evidence, or to determine whether or not any question should or should not be put to a witness.

11.8 The police authority shall arrange for a verbatim record of evidence given at the tribunal to be taken and kept by the authority for at least 2 years.

11.9 The Tribunal have discretion to proceed with the hearing in the absence of either party, whether represented or not, if it appears to be just and proper to do so. Where it is decided to proceed in the absence of either party the Tribunal will record its reasons for doing so. The Tribunal may adjourn the appeal as necessary.

11.10 On the application of the appellant or the respondent or otherwise, the tribunal chair may require any observer to withdraw from all or any part of the hearing.

12. Attendance of other persons

12.1 Where the matter to be dealt with at the appeal is related directly to a complaint made against the appellant or a conduct matter involving an interested party, then the chair of the tribunal shall cause the complainant or interested party to be given notice of the time, date and place of the tribunal.

12.2 The complainant or interested party may attend the tribunal as an observer. The complainant or interested party may be accompanied by one other person and in addition, if the complainant or interested party has a special need, by one further person to accommodate that need.

12.3 Where the complainant or interested party is to give evidence at the tribunal, then he or she or any person accompanying him or her may not attend the hearing before that evidence is given.

12.4 Where the appeal is a 'specified appeal' (see footnote 1), then the tribunal chair shall cause the IPCC to be notified of the time, date and location of the tribunal. In such cases the IPCC may attend as an observer.

13. Determination and Outcome of Appeal

13.1 A tribunal need not be unanimous in its determination of the appeal or of any other decision before it and may reach a decision based on a majority. Where a tribunal finds itself divided equally, the tribunal chair will have the casting vote. The tribunal shall not indicate whether any determination was taken unanimously or by a majority.

13.2 A tribunal, when determining any disciplinary or unsatisfactory performance outcome imposed, may impose any outcome that the original panel/person could have imposed. The tribunal has the power to increase as well as reduce the outcome imposed by the original panel/person.

13.3 The decision of the tribunal will normally be made on the day of the tribunal hearing. Where this is not practicable then the decision will be made as soon as possible.

13.4 The tribunal chair shall, within 3 working days of the tribunal determining the appeal, give written notice to the appellant, respondent and the police authority of the tribunal's decision.

13.5 As soon as reasonably practicable after the determination of the appeal the tribunal chair shall cause to be sent to the appellant, respondent and police authority a written statement of its reasons for its determination of the appeal. It is expected that this will normally be sent within 20 working days of the determination of the appeal.

13.6 Where this is not possible, the tribunal chair will notify the appellant, respondent and police authority concerned setting out the reasons for delay and an indication of when the statement will be sent.

13.7 A police officer ordered to be reinstated in his or her former force or rank will be deemed to have served in his or her force and/or rank continuously from the date of the original decision to the date of reinstatement. Reinstatement means that the officer is put back in the position that he or she would have been in if not dismissed or reduced in rank. However any pay for the period in question will not include any payment for overtime that could have been incurred had the officer concerned still been serving with the force.

14. Costs

14.1 The fees and expenses of the tribunal members will be borne by the police authority.

14.2 The reasonable expenses of any witness called by the appellant or the respondent will be borne by the party calling that witness.

14.3 The appellant and respondent will normally pay their own costs. The exception to this general principle will be where the tribunal considers in the light of a successful appeal by the appellant that the circumstances of the particular case warrant reasonable costs being awarded against the police authority. The amount of costs awarded should be expressed as a specific percentage of the costs incurred by the appellant. In such cases the tribunal chair will set out the reasons for doing so to the police authority concerned and identify any lessons to be learned for the force concerned as a result of that case.

ANNEX D

SECONDED POLICE OFFICERS

UNDER SECTION 97 OF THE POLICE ACT 1996

1. This guidance sets out the procedures for dealing with matters of unsatisfactory performance or attendance and misconduct allegations in respect of police officers who are seconded under the provisions of Section 97 of the Police Act 1996.

2. The procedures set out in the Police (Conduct) Regulations 2008 and Police (Performance) Regulations 2008 cannot be applied by the organisation to which the police officer is seconded under Section 97 of the Police Act 1996. However such officers remain subject to the Standards of Professional Behaviour expected of all police officers and the procedures set out in the Regulations can be applied by the parent force in respect of conduct, performance or attendance whilst on secondment.

3. Those responsible for managing police officers on secondment are expected to uphold the principles contained within this guidance, namely to manage any issue of unsatisfactory performance or attendance or minor misconduct in a proportionate, fair and timely manner without returning an officer to his or her parent force. Only if it is necessary to institute the formal procedures should an officer be returned to force, in accordance with the principles and procedures expressed below. [These additions are not strictly necessary but may help in emphasising the general message]

4. It is important that police officers on secondment are clear about who has line management responsibility for them. The line managers for such police officers must ensure that the police officer continues to have a PDR and is made aware of these arrangements for dealing with issues of misconduct or unsatisfactory performance or attendance.

Unsatisfactory performance procedures

5. It is recognised that the public is entitled to expect the highest standards of performance of police duties from all seconded police officers. Similarly, police managers need a management system which both supports police officers performing their tasks and reinforces the aims of the service.

6. Unlike the broad policing functions performed by police forces throughout England and Wales, the nature and range of the tasks carried out by police officers who are seconded from their forces are specific and, by their nature, narrow. It follows that the need to deal fairly with such police officers whose performance is giving rise to concern requires particular attention.

7. Where a pattern of performance by a seconded police officer is giving rise to concern, the line manager should raise his or her concerns with the

police officer concerned and seek to identify any underlying causes of the unsatisfactory performance or attendance. The line manager should seek to improve the police officer's performance or attendance to an acceptable standard without the need to use the Unsatisfactory Performance Procedures (UPPs).

8. Where there is no or insufficient improvement in the performance or attendance of the police officer, the seconded police officer's line manager should prepare a written report which details the nature of the unsatisfactory performance or attendance together with the remedial and other measures taken, and send this report to the head of the organisation to which the police officer is seconded (or his or her nominated representative). The head of the organisation (or nominated representative), in conjunction with the appropriate authority for the police officer concerned, will decide whether it is appropriate that the police officer concerned should be returned to his or her parent force or whether the unsatisfactory performance or attendance can be addressed with the police officer remaining on secondment.

9. Where a police officer who has been returned to his or her parent force under this procedure continues to demonstrate the same pattern of unsatisfactory performance or attendance then the details of the unsatisfactory performance or attendance whilst on secondment may be used to inform the decision whether it is appropriate to use the UPPs.

Misconduct procedures

10. The public and colleagues with whom police officers work are entitled to expect the highest level of personal and professional standards of police officers. Those serving on secondment are expected to act in accordance with the Standards of Professional Behaviour (see Section 1).

11. Section 2 of this guidance sets out the principles for dealing with allegations of misconduct. This allows for less serious matters to be dealt with in a proportionate and timely manner by means of management action and this principle will apply to police officers who are seconded to other organisations with line managers having the responsibility for dealing with these issues.

12. The organisation to which the police officer has been seconded will need to make an initial assessment of the allegation of misconduct. If that assessment determines that the matter can be dealt with by management action then the police officer's manager is expected to deal with the matter in this way.

13. However, where the line manager considers that an alleged breach of the Standards of Professional Behaviour is more serious and indicates that the police officer concerned may have committed a criminal offence, or behaved in a manner that would justify the bringing of disciplinary proceedings, then the head of the organisation to which the police officer is seconded (or his or her nominated representative) will liaise with the police

force from which the police officer concerned is seconded to assess whether the officer should be returned to the force while a preliminary investigation into the matter is conducted by the parent force. If, as a result of that preliminary investigation, the parent force considers it appropriate to issue a Regulation 15 notice in relation to the matter then the officer must be returned to force

14. Where it is determined by the police officer's parent force and the organisation to which he or she is seconded, that the conduct, if proved or admitted, would not justify the bringing of disciplinary proceedings then management action may still be taken where appropriate.

15. At the conclusion of any disciplinary proceedings, where the police officer has been returned to the parent force, then the parent force together with the organisation to which the police officer concerned was seconded, will decide if it is appropriate for the police officer to be able to resume his or her secondment.

Notice of alleged breach of the Standards of Professional Behaviour Regulation 15 Police (Conduct) Regulations 2008 / Regulation 14A Police (Complaints and Misconduct) Amendment Regulations 2008

Name: _____ Warrant number: _____ Rank: _____

Name of complainant (If appropriate):

Case reference number:

This is to notify you that an allegation has been made that your individual conduct may have breached the Standards of Professional Behaviour and that there will be an investigation into the circumstances.

Whilst you do not have to say anything it may harm your case if you do not mention when interviewed, or when providing any information (under regulations 16(1) or 22(2) or (3) of the Police (Conduct) Regulations 2008 or Regulation 14C Police (Complaints and Misconduct) Amendment Regulations 2008), something which you later rely on in any misconduct proceedings or special case hearings or any appeals proceedings.

The details of your conduct that it is alleged may have breached the Standards of Professional Behaviour can be found below. (See notes overleaf).

Based on the information available at this time the conduct described above, if proven or admitted, has been assessed as amounting to:

Misconduct ☐ **Gross Misconduct** ☐

This may result in your attendance at a:

Misconduct Meeting ☐ **Misconduct Hearing** ☐

(continue on separate sheet as necessary)

Name of person investigating _____

Contact Details (Address / Tel / E-mail) _____

Signature of person investigating _____ Date:

I acknowledge that I have received a copy of this document and my attention has been drawn to the accompanying notes.

Signature of Officer concerned. _____ Date:

Print Name _____

I authorise a copy of this notice to be forwarded to my Staff Association. Yes ☐ No ☐

Signature of Officer concerned. _____

If the notice is not given to the officer by the person investigating please append the name and signature of the person giving the notice below: -

Name: Signature: Date:

EXPLANATORY NOTES

1. This notice has been issued to inform you at the earliest possible stage that an allegation has been made that you may have breached the Standards of Professional Behaviour and that there is to be an investigation into your individual conduct in accordance with the Police (Conduct) Regulations 2008 or the Police (Complaints and Misconduct) Amendment Regulations 2008.

2. The fact that you have been given this notice does not necessarily imply that misconduct proceedings will be taken against you but is given to safeguard your interests. It is given in order that you have the opportunity to secure any documentation or other material or make any notes that may assist you in responding to the allegation(s).

3. You have the right to seek advice from your staff association and be advised, represented and accompanied at any interview, meeting or hearing by a 'police friend' who must be a member of the police service or a nominee of your staff association and not otherwise involved in the matter (in accordance with regulation 6 of the Police (Conduct) Regulations 2008). A special constable may be represented by a police officer or police staff member.

4. Within 10 working days of being served with this notice (starting with the day after this notice is given, unless this period is extended by the investigator) you may provide a written or oral statement relating to any matter under investigation and you or your police friend may provide any relevant documents to the investigator. Failure to provide a response to this notice may lead to an adverse inference being drawn in any subsequent misconduct proceedings.

5. If, following service of this notice, the assessment of conduct or the determination of the likely form of any misconduct proceedings to be taken is revised then as soon as practicable you will be given a further written notice together with reasons for that change.

6. Prior to being interviewed you will be provided with sufficient information and time to prepare for the interview. The information provided should always include full details of the allegations made against you, including the relevant date(s) and place(s) of the alleged misconduct. You should normally be provided with all relevant evidence obtained, subject to the harm test (in accordance with the regulations)

7. You are reminded that failure to provide an account or response to any questions at this stage of the investigation may lead to an adverse inference being drawn at a later stage.

8. At the conclusion of the investigation, if direction is given to withdraw the case then upon request you shall, subject to the harm test, be provided with a copy of the investigator's report or such parts of that report as relate to you.

9. Where the case is referred to misconduct proceedings you shall be given written notice of the referral, a copy of any statement made by you to the investigator, a copy, subject to the harm test, of the investigator's report or such parts of that report as relate to you and any other relevant document gathered in the course of the investigation.

10. You should understand that any decision as to whether there is a case to answer that you may have breached the Standards of Professional Behaviour and whether the matter should be referred to misconduct proceedings will be based on an objective assessment of all the evidence provided during the course of the investigation. If the case is referred to misconduct proceedings, the decision at the meeting or hearing will be determined on the standard of proof required in civil cases, which is the balance of probabilities.

11. If the case is referred to a misconduct hearing or special case hearing you have the right to be legally represented by counsel or solicitor. If you elect not to be so represented you may be represented by a police friend, however if you elect not to be legally represented you may still be dismissed or receive any other disciplinary outcome without being so represented.

12. Outcomes available in misconduct proceedings:

Misconduct Meeting

- Misconduct not found
- No further action
- Management advice
- Written warning (12 months)
- Final written warning (18 months)

Misconduct Hearing

- Misconduct not found
- No further action
- Management advice
- Written warning (12 months)
- Final written warning (18 months)
- Extension of final written warning (exceptional circumstances only)
- Dismissal with notice (minimum 28 days)
- Dismissal without notice (Gross misconduct)

ipcc
independent
police complaints
commission

Making the new police complaints system work better

Statutory Guidance

Some cover photographs courtesy of Karen Bristoll, West Midlands Police.

Contents

Foreword by the Minister for Policing, Security and Community Safety.

Maintaining confidence in the accountability and integrity of the police is vital not only to successful policing but also to increasing public confidence in our police service. Part of that challenge is ensuring that the public are able to raise legitimate concerns with their police service and have a clear understanding of how they will be pursued.

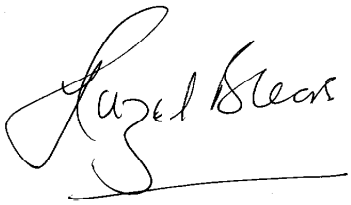
The Police Reform Act 2002 provided a statutory framework for both a new police complaints system and the Independent Police Complaints Commission (IPCC).

The IPCC has responsibility under that legislation to ensure suitable arrangements are in place for dealing with complaints or allegations of misconduct against any person serving with the police in England or Wales. The police service can demonstrate through those arrangements the independence, accountability and integrity of the system and so increase public confidence not only in the police complaints system but also in the police service as a whole. This Statutory Guidance will be a valuable tool to support the police service in achieving this.

This Guidance sets out the principles and standards for dealing with complaints or allegations of misconduct, including those on timeliness and proportionality. It is important that good customer service is at the heart of resolving complaints and the police service should learn from the feedback it receives to make citizen-focused policing a reality.

Whilst this Guidance is for those who have a responsibility for attending to complaints it is also made available to the public to inform how the complaints system will work and what standards they can expect to receive.

This Guidance will help to achieve a consistent service to the public and the police service and I am optimistic that working together we will be successful.



Rt. Hon. Hazel Blears, MP
Minister for Policing, Security and
Community Safety.

Foreword by the Chair

The Independent Police Complaints Commission (IPCC) wants to see good customer service right at the heart of the police complaints system and confident handling of complaints by police at local level where we can make a real difference to community confidence.

Public expectations of the police service are increasing and sometimes service falls short of those expectations. When that happens, people expect to have their concerns addressed appropriately and promptly and the IPCC is the independent body which ensures that people's complaints against the police are handled properly.

The IPCC has a legal duty to oversee the whole of the complaints system and to make change happen - its guardianship role. Created by the Police Reform Act 2002, the IPCC aim is to improve responsiveness to complainants and so transform the way the police handle complaints from the public.

This Statutory Guidance for police forces about the complaints system, developed in partnership with police organisations as well as voluntary and community organisations, sets out the framework for that guardianship role - greater access to the complaints system; improved confidence of police officers, police staff and the public in the complaints system; proportionate and timely complaint investigations; evidence of lessons learned being fed back into operational policing.

We're grateful for the dedicated and hard work of colleagues from police organisations and community groups in the development of this Guidance and to all those who responded to our public consultation on this. This is just the start - and the IPCC looks forward to the continued cooperation of all concerned to bring about further improvements to the police complaints system.

Nick Hardwick
Chair, IPCC.

1. The Independent Police Complaints Commission and the new complaints system

1.1 Introduction to the IPCC

The IPCC began work on 1 April 2004 with a wide range of new, stronger powers to radically change the way complaints against the police are handled in England and Wales.

The IPCC's core beliefs inform all of the IPCC's work to improve the complaints system;

- ***Justice and respect for human rights***
- ***Independence***
- ***Valuing diversity***
- ***Integrity***
- ***Openness***

The purpose of the IPCC is to ensure suitable arrangements are in place for dealing with complaints or allegations of misconduct against any person serving with the police in England and Wales. And in doing so to increase public confidence by demonstrating the independence, accountability and integrity of the complaints system and so contribute to the effectiveness of the police service as a whole.

The statutory powers and responsibilities of the IPCC, Chief Police Officers, police authorities and Her Majesty's Inspectorate of Constabulary (HMIC) for the new complaints system are set out in the Police Reform Act 2002 and in regulations made under it. The new system covers all police officers and special constables, police staff and designated contracted escort and detention officers.

The IPCC may choose to independently investigate the most serious incidents, manage a police investigation, or supervise a police investigation.

Currently, the Commission consists of a Chair, a Deputy Chair and 15 Commissioners, each responsible for specific police forces, for guardianship work and for individual cases.

Four Commissioners share responsibility for the Metropolitan Police Service.

The IPCC is regionally represented in England and Wales through four regional offices covering London and South East England, Wales and South West England, Central and Eastern England, and Northern England. The national office is in central London.

1.2 Safeguarding the police complaints system – the IPCC's guardianship function

The IPCC's general duty under the Police Reform Act 2002 to increase confidence in the police complaints system in England and Wales and in so doing, to contribute to increasing confidence in policing as a whole, is the basis of the IPCC's ***guardianship function***.

All the IPCC's activities including referrals, involvement in investigations, appeals and casework contribute to guardianship. One of the main differences between the previous police complaints system and this one is the independence and impartiality that the IPCC can bring to these activities.

The four elements of guardianship

1. Setting, monitoring, inspecting and reviewing standards for the operation of the police complaints system
2. Promoting confidence in the complaints system as a whole, among the public and the police
3. Ensuring the accessibility of the complaints system
4. Promoting policing excellence by drawing out and feeding back learning

1.3 The legislative framework of guardianship

1.3.1 Setting, monitoring, inspecting and reviewing standards for the operation of the police complaints system

- Power to issue statutory guidance[1]
- Inspection powers[2]
- The annual report and any specific reports[3] requested by the Secretary of State
- Monitoring the system by calling for information from police authorities and forces[4]
- To keep the complaints system under review[5]

1.3.2 Promoting confidence in the complaints system, among the public and the police

- To secure public confidence in the complaints system[6]
- To ensure that arrangements are efficient and effective and demonstrate an appropriate degree of independence[7]
- The IPCC's power to call in for consideration complaints or allegations of misconduct[8]

1.3.3 Ensuring the accessibility of the complaints system

- Designate gateways into the police complaints system[9]
- Promote third party reporting of complaints[10]

1.3.4 Promoting policing excellence by drawing out and feeding back learning

- The ability to make recommendations and give advice on police complaints arrangements and also on other matters of police practice that appear from the IPCC's work, to be necessary or desirable[11]
- Reporting to the Secretary of State on matters which should be drawn to his or her attention; including reasons of gravity or exceptional circumstances[12]
- Within its legal powers the IPCC can do anything that helps facilitate its functions[13]

1.4 Developing guardianship

The IPCC will work in partnership with the police service and with community and voluntary sector groups to contribute to improvements in policing through:

- ***Promoting learning from IPCC and police investigations***
- ***Implementing this Guidance***
- ***Developing a police complaints good practice system***
- ***Developing the IPCC's monitoring and oversight function so the IPCC adds value to policing***

1.5 Promoting easier access to the police complaints system

The IPCC has a duty under the Police Reform Act to increase access to the complaints system and expects the police service also to develop a range of ways for people to access the complaints system, which address the specific needs of complainants.

Initially, the IPCC began working with five national organisations: Citizens Advice Bureaux (CAB), Youth Justice Board (YJB), National Probation Service (NPS), Neighbourhood Renewal Unit (NRU) and Commission for Racial Equality (CRE) to explore ways in which they could act as signposting points for the new system. Since then the IPCC has focussed on using its regional offices to create links with local communities and volutary organisations which can signpost people to the new complaints system.

Organisations keen to provide a signposting service to the police complaints system can contact the IPCC through the website at www.ipcc.gov.uk

In developing this guidance, the IPCC has worked with a range of statutory, voluntary and community sector organisations and with the police service to identify possible gaps in communication about the complaints system and the need for practical support to make the system accessible to all. Needs may include:

- where English is not the first language
- where effective communication is the spoken not the written word
- where sign language is the effective means of communication
- support for people with learning difficulties
- support for those who may be – or are perceived to be – mentally ill
- whether a young person under 16 who wishes to make a complaint independently fully understands the system – and the duty of care that the IPCC and the police service have in these cases to safeguard the rights of the young person.

These are examples, not an exhaustive list. The IPCC will continue to work with these organisations to develop practical tools – such as sources of advice or advocacy – which may be useful to complainants or the police.

The IPCC makes leaflets about the complaints system available in a variety of languages and formats, including Braille, large print and audio. The IPCC can translate/put into alternative formats correspondence or information during the handling of a complaint (e.g. letters into audio format).

Third party reporting

Under the Police Reform Act 2002, anyone can make a complaint on behalf of someone else (a family member, friend, support organisation) provided that the complainant gives written permission for the other person to act on their behalf. The written permission does not have to be in English. This is a feature of the new system.

1 Section 22, Police Reform Act 2002
2 Section 18, Police Reform Act 2002
3 Section 11, Police Reform Act 2002
4 Section 17, Police Reform Act 2002
5 Section 10(1)(b), Police Reform Act 2002
6 Section 10(1)(d), Police Reform Act 2002
7 Section 10(1)(c), Police Reform Act 2002
8 Schedule 3, Paragraph 4(1)(c) and Schedule 3, Paragraph 13(1)(c), Police Reform Act 2002
9 Section 12(6), Police Reform Act 2002
10 Section 12(6)(b), Police Reform Act
11 Section 10(1)(e), Police Reform Act 2002
12 Section 11(3) and (4), Police Reform Act 2002
13 Section 10(6), Police Reform Act 2002

2. The ethos of the new police complaints system

2.1 *Increasing public confidence*

The IPCC has a legal duty to help increase public confidence in policing through an improved system of resolving complaints about the police. The IPCC wants the system to be more timely with a proportionate response to complaints and provide action that is demonstrably fair for complainants and for police officers and police staff involved.

Police complaints are one indicator of the level of public satisfaction with policing. Complaints may increase for a number of reasons including where a police force has promoted access to the complaints system and demonstrated that it acts effectively in response to complaints. Identifying trends in complaints, understanding them and acting where necessary is crucial to public confidence.

2.2 *Confidence of police officers and police staff in handling complaints*

The IPCC wants to see individual officers, supervisors and members of police staff become more confident in dealing with complaints. The new system presents an opportunity for this – by being fair and more open and by focusing on learning from complaints. The IPCC will help in practical ways, working with Chief Police Officers, police authorities, HMIC, police staff associations and trade unions by providing information and contributing to the development of training so that the police service is confident in applying this guidance.

2.3 *Learning from complaints*

The new system is about reform of how the police handle complaints. It is also a pathway to improvement and excellence in policing. It presents a positive opportunity for forces to open up the complaints system; to listen to and learn from complaints.

To make this happen there needs to be a good process for learning in the force, strong links between the work of the Professional Standards Department and territorial and specialised policing, and strong links too with police training. The IPCC will expect to see evidence of those links and of organisational learning from complaints in guardianship and in future inspections.

2.4 *An open and accessible complaints system*

Knowing how to complain and what will happen about a complaint are essential to public confidence. The police need to promote access to the complaints system which in turn may make communities feel confident about engaging with police forces.

The complaints system needs to work for everyone and needs to deliver results for complainants where things have gone wrong. Meeting this need may mean the police using diverse ways of communicating, or working through existing local partnerships to promote awareness and understanding.

2.5 *Equality and human rights*

One of the drivers of the reform of the police complaints system was the Stephen Lawrence Inquiry. It is essential that justice and respect for human rights are at the heart of the complaints system. The complexity of policing a modern and diverse society means always having to balance the rights of individuals and the public interest in law and order. The IPCC wants to see fair and equal treatment of all complainants, police officers and staff. Promoting race equality is a legal duty of the IPCC and the police service, under the Race

Relations (Amendment) Act 2000. The police service is responsible for building confidence in dealing with discrimination effectively. The IPCC will pay particular attention in guardianship to responses to complainants who believe they have been discriminated against because of race, faith, gender, sexual orientation, disability or age.

3. Setting and monitoring standards

3.1 Setting standards

The IPCC guidance for the police service sets out minimum standards expected of forces in handling complaints, but without being so prescriptive as to stifle innovation. It also sets out practical ways in which the police can make the system work better and learn from complaints.

The IPCC and the police service share the objective of handling complaints in a more timely fashion and with proportionate effort. Improved communication with complainants is a requirement of the new system.

In setting standards in this guidance, the IPCC aims to lead by example on timeliness. The timescales for handling complaints are set out in the table below: some are required by law. Generally, prompt action will depend on the right information being available.

IPCC		***POLICE***
IPCC will forward a complaint received from a member of the public to the relevant police force within two working days of receiving the necessary consent from the complainant.	***Initial handling of complaint***	The police will decide whether a complaint should be recorded under the Police Reform Act 2002 within 10 working days from receipt of the complaint.
The IPCC provides a 24 hour on-call service for serious incidents and: • will acknowledge a referral by the end of the next working day, and • will decide the form of investigation within two working days of receiving the referral	***Mandatory referrals to the IPCC***	The police must refer specific categories of case(s) by the end of the working day following the day on which it came to attention.[15]
The IPCC must keep the complainant informed every 28 days if no specific arrangement has been made[16]. The IPCC will ensure officers/staff are kept informed at appropriate points in the investigation. The IPCC will update the force on the progress of the investigation every 28 days, or make liaison arrangements.	***Communication by IPCC in independent or managed investigations*** • ***With the complainant or interested parties*** • ***With the police officer(s)/staff member(s) involved*** • ***With the force***	
	Communication by the police in a supervised or local investigation • ***With the complainant or interested parties*** • ***With the police officer(s)/staff member(s) involved***	The police must keep the complainant informed every 28 days if no specific arrangement has been made[17]. The police will keep officers/staff informed at appropriate points in the investigation.
The IPCC will acknowledge receipt of the appeal and notify the force by the end of the next working day after receipt. The IPCC will make a substantive decision and notify the complainant and the force within 28 days.	***Communication about appeals*** The complainant has 28 days to appeal against: • Non-recording of a complaint[18] • Local Resolution process[19] • Outcome of a local or supervised investigation[20]	
The IPCC will acknowledge the request within two working days and aim to give force a decision within 21 days of receipt.	***Communication between IPCC and the police about requests to dispense with a complaint or discontinue an investigation.***	

3.2 Monitoring progress

The IPCC will work in partnership with the police service on implementing this Guidance and thereafter a picture of progress on improvement will emerge from:

- IPCC performance data published, in the annual report
- IPCC work with individual forces, which will be a two-way flow of information and learning
- Experience of complainants in the appeals that are made to the IPCC
- The views of stakeholders on progress
- Analysis of the national data on police complaints for which the IPCC has overall responsibility
- Research done by the IPCC and other organisations
- HMIC inspections
- IPCC oversight
- Police authority oversight

3.3 Future review

The Guidance will be reviewed in 2007-08. If amendment becomes necessary in the interim because of, for example, changes in the law, it will be made in consultation with the police service and stakeholders.

16 Regulation 11(2), The Police (Complaints and Misconduct) Regulations 2004
17 Regulation 11(3), The Police (Complaints and Misconduct) Regulations 2004
18 Regulation 8(1), The Police (Complaints and Misconduct) Regulations 2004
19 Regulation 9(1), The Police (Complaints and Misconduct) Regulations 2004
20 Regulation 10(1), The Police (Complaints and Misconduct) Regulations 2004

4. Application of the guidance

4.1 Introduction

The IPCC is part of the police complaints system and therefore the principles set out in this guidance apply to the IPCC as well as the police service.

This Guidance applies fully to all the 43 local police forces (Home Office forces) in England and Wales. All police officers, police staff and special constables working for these forces are covered by the Guidance, as are those contracted staff who have been designated under the Act as custody or escort officers.

This Guidance also applies to those specialist and small police forces outside the 43 force structure which have entered into an agreement with the IPCC under section 26 of the Police Reform Act. However, the IPCC will allow for a degree of flexibility to take account of the particular roles of these forces and the distinct circumstances under which they operate. These forces may also ask for specific exemptions in the application of the Guidance to be set out in their formal agreements with the IPCC.

The National Criminal Intelligence Service and National Crime Squad for England and Wales will also be subject to this Guidance until these organisations are merged into the Serious Organised Crime Agency in April 2006. Under the Serious Organised Crime and Police Act 2005 the IPCC and SOCA must enter into an agreement to bring the new agency under the police complaints system[21]. The extent to which this Guidance will apply to SOCA will be set out in this agreement.

This Guidance is primarily addressed to a police service audience, particularly Chief Police Officers and Professional Standards Departments. However, under the Police Reform Act, police authorities must investigate complaints against officers of ACPO rank and discharge specific statutory functions. Where the Guidance is not explicitly addressed to a police authority, the IPCC expects all authorities to adopt the principles set out within it.

4.2 What the guidance does not cover

- Matters being dealt with under the Police Act 1996
- Disciplinary proceedings: separate guidance is issued by the Home Office[23]

4.3 Roles and responsibilities and the 'appropriate authority'

For ease of reference, the terms 'police service' or 'police force' are used in this Guidance except where it is necessary to distinguish different responsibilities.

The 'appropriate authority' for police officers up to Chief Superintendent is the Chief Police Officer; for ACPO ranks, the 'appropriate authority' is the police authority.

When a member of the police service is serving with another force or organisation, responsibility for dealing with a complaint rests with their home force.

4.4 Responsibilities of police authorities

The role of police authorities in complaints forms part of their core duties around promoting the efficiency and effectiveness of policing locally. Section 15 of the Police Reform Act 2002 sets out the responsibilities of police authorities to:

- Keep themselves informed about complaint and discipline matters within their force
- Provide the IPCC with the information and

documentation to carry out its functions (including inspection)
- Ensure that the IPCC or person nominated by the IPCC has access to any police premises and material/documentation within those premises during the course of an investigation[24]
- Ensure that the IO carrying out the investigation is given all the assistance that they may reasonably require
- Refer complaints or misconduct matters to the IPCC, where the Chief Police Officer has decided not to
- Act as the 'appropriate authority' in the recording and investigation of complaints and conduct matters against officers of ACPO rank. This includes a statutory requirement to obtain and preserve evidence in such cases.

4.5 Complaints about ACPO officers

Police authorities should ensure that they have procedures in place for:

- Recording complaints or conduct matters about ACPO ranks
- Distinguishing complaints that are solely about direction and control and dealing with them appropriately including:
  - Identifying complaints about ACPO ranks that are suitable for Local Resolution
  - Identifying when a complaint or misconduct matter should be referred to the IPCC

In deciding whether to refer a matter to the IPCC, the authority needs to consider both the mandatory referral grounds and public confidence issues that may be engaged when a potentially serious allegation is made against an ACPO rank officer. The issue should be referred to the IPCC for independent accountability.

The IPCC will advise on policy matters on referrals but not on a specific case – it must be referred for decision where there is uncertainty.

4.6 Arrangements for police staff

The appropriate authority for police staff is the Chief Police Officer. The contractual terms for police staff vary from force to force .

The IPCC recognises that the disciplinary processes for police officers and staff are different. The IPCC expects a fair and efficient process, where both officers and staff are involved and an aspiration towards parity of outcomes.

Police authorities should consider the following issues and ensure that any action required to address them is taken in conjunction with support associations and the recognised trade unions active in their force:

- Are the procedures consistent with the ACAS code?
- Do the procedures comply with the latest employment legislation?
- Are police staff fully aware of the standards of behaviour expected of them on duty and of what off-duty conduct may lead to disciplinary action?
- Are contracts clear on discipline issues?
- Have staff with supervisory, management or human resources responsibilities received adequate training on the new system and their own force's policies and procedures?
- Do they understand the position in respect of Local Resolution – i.e. that admissions relating to the subject matter of the complaint being resolved cannot be used in criminal, civil or disciplinary proceedings?[26]
- Is the staff standard of conduct, in whatever format it is set out locally, clear to all police staff so they know what is expected of them?
- Have robust arrangements been made to ensure that complaints and allegations are reported to the Chief Police Officer?

The IPCC expects the Chief Police Officer to have an overview of complaints and misconduct in the force. It is important that Chief Police Officers ensure that investigations personnel have a suitable knowledge of the employment law requirements of the discipline process for staff in the force.

4.7 Arrangements for contracted staff

Staff provided by contractors are subject to these procedures if they are either escort or custody officers and have been designated as such by a Chief Police Officer. This depends on the contractual relationship between the force and the contractor. Forces should check the contracts of escort and custody staff and where

they are not designated by the Chief Police Officer, ensure that contra ctors have appropriate arrangements to handle complaints.

The criminal law applies to contractors' escort and custody staff whether or not they have been designated.

4.8 Responsibilities of Chief Police Officers

Chief Police Officers have overall responsibility for the conduct of the force, including complaints and decisions on suspension of police officers, or disciplinary proceedings in relation to police officers. Section 15 of the Police Reform Act 2002 sets out the general responsibilities of the Chief Police Officers. The responsibilities are:

- Keep themselves informed about complaint and discipline matters within their force
- Ensure there is a timely response to complaints
- Ensure that complaints and conduct matters are properly handled and recorded
- Ensure evidence is properly obtained and preserved[28]
- Act as the 'appropriate authority' in the recording and investigation of complaints against officers of rank up to Chief Superintendent, of police staff, and of designated contractors' staff
- Ensure complaints and conduct matters are properly referred to the IPCC in accordance with mandatory referral criteria or voluntarily referred where a serious issue engages public confidence issues in the police
- Provide the IPCC with the information and documentation to carry out its functions[29]
- Provide assistance and co-operation to any person appointed to investigate a complaint[30]
- Ensure that the IPCC or person nominated by the IPCC has access to any police premises and material/documentation within those premises during the course of an investigation[31]
- Ensure that complainants are kept regularly informed[32]
- Ensure officers and staff are kept regularly informed
- Ensure that, when necessary, complaints are properly dispensed with
- Ensure that suitable complaints are properly locally resolved
- Ensure that conduct matters arising from civil claims, or other proceedings, are identified and recorded[33]
- Where a Chief Police Officer is required by another force, or a police authority, to provide assistance with an investigation it is the duty of the Chief Police Officer to whom the requirement is addressed to comply with it.[34]

4.9 Responsibilities of Her Majesty's Inspectorate of Constabulary

HMIC has a duty under Section 54 of the Police Act 1996 to promote the efficiency and effectiveness of the police service, including police complaints and discipline, through inspection and their other functions.

Section 15 of the Police Reform Act 2002 sets out the responsibility of HMIC to keep itself informed about the handling of complaints.

HMIC also has a role in advising individual police authorities in relation to complaints made against Chief Police Officers.

The IPCC has a duty under Section 10 of the Police Reform Act 2002 to establish arrangements with HMIC about carrying out their respective duties and to provide HMIC with any assistance and co-operation required in conducting inspections. A protocol is in operation.

24 Section 17, Police Reform Act 2002
25 Schedule 3, Paragraph 4(3), Police Reform Act 2002
26 Schedule 3, Paragraph 8(3), Police Reform Act 2002
27 Section 39(2), Police Reform Act 2002 and Regulation 28, Police (Complaints and Misconduct) Regulations 2004, No. 643.
28 Schedule 3, Paragraph 1(2), Police Reform Act 200229
Section 17, Police Reform Act 2002
30 Section 15, Police Reform Act 2002
31 Section 18, Police Reform Act 2002
32 Section 21, Police Reform Act 2002
33 Schedule 3, Paragraph 10, Police Reform Act 2002
34 Section 15(3), Police Reform Act 2002

5. How the police can make the complaints system work better

5.1 *Telling people about the new complaints system and how to use it*

5.1.1 *Public information*

The public need information about the new system, about who can make a complaint; how they go about it, and what complaints come within the scope of the system covered by this guidance.

The IPCC expects the police to get this information to the communities they serve in a positive way, telling people about their right to complain and being open to questions about the system.

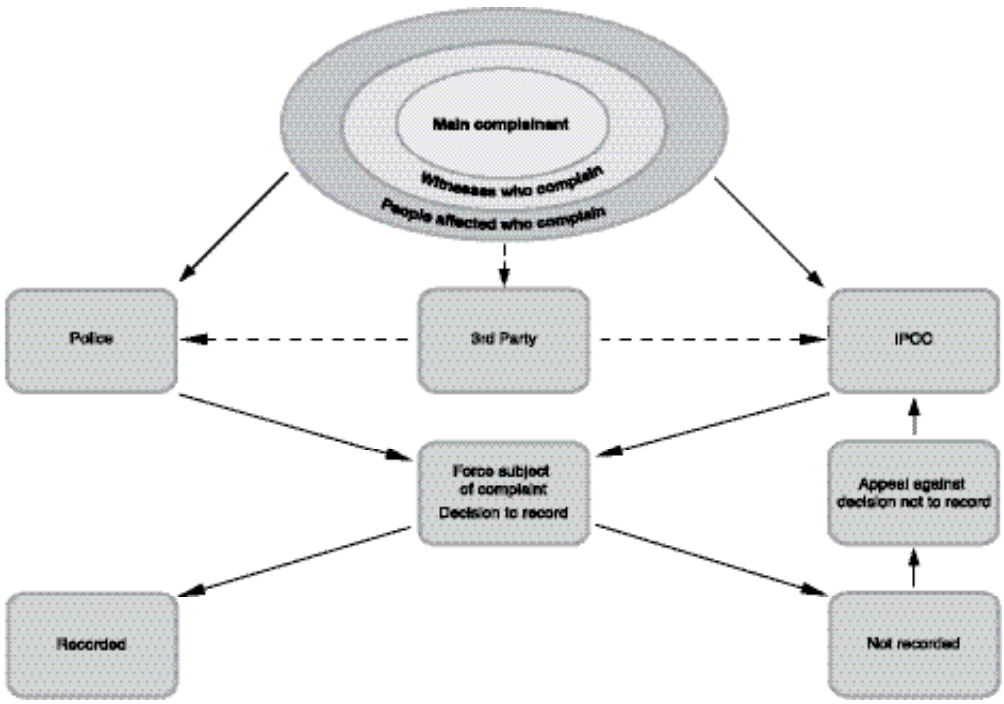
5.1.2 *How complaints can be made*

It is essential that the police let people know how to make a complaint:

- In person at any police station or by phone or in writing, email or fax
- By phoning, emailing, writing or faxing to the IPCC, who will pass it on, with the complainant's consent, to the relevant force for action. The force which is subject to the complaint is responsible for recording the complaint.
- By a third party, provided the complainant gives written permission for the third party to make the complaint on their behalf[35]

5.1.3 *What is a complaint under the Police Reform Act?*[36]

It is any complaint about the "conduct" of a person serving with the police. It may be about, for example, behaviour, inappropriate language, actions or omissions. In some cases, it may be about an allegation of criminal behaviour.



For further information about referrals to the IPCC and recording categories see paragraph 5.6.1 and Appendix A: *Referral of complaints and conduct matters to the IPCC*; Appendix B: *Checklist for referrals by the police to the IPCC* and Appendix D: *Police complaints data standards* - which sets out the way in which complaints are categorised for recording purposes.

Sometimes it is not clear at the outset whether the complaint is about individual behaviour, or about an officer or member of staff acting in accordance with agreed force or local policy, or really a request for an explanation or information about a particular incident or the delivery of a policing service. The way the complaints system works should be explained. Information such as the IPCC leaflet '*How to make a complaint against the police'* leaflet should be provided.

Two types of complaint fall outside the Police Reform Act, as long as no conduct question arises;

(1) A "direction and control" complaint is about the standard of general policing, for example, or an operational policy or operational management decision (see 5.2.6 below). The police service will have a procedure for dealing with these complaints.

(2) A complaint about a management or organisational support function: e.g. personnel, finance, or procurement is also not covered by the Police Reform Act and it is for the Chief Police Officer to decide how these are to be dealt with by the force.

5.1.4 *Off-duty conduct of police officers and police staff*

The police should ensure that complaints made about off-duty conduct are in the public interest and do not arise, for example, from a personal dispute.

There are restrictions on officers' private lives but this should be balanced against police officers' right to a private life. Off-duty conduct must be judged against a high test of whether the conduct was likely to or did bring the police service into disrepute.[37]

For example if a police officer has a dispute with a neighbour about parking or noise, it should not automatically trigger an investigation under off-duty conduct, simply because the neighbour knows the person is a police officer. It is a different issue if the officer decides to go 'on duty' in circumstances such as these by declaring authority by showing a warrant card.

The '*Police Code of Conduct'* sets very high standards to follow at all times.

For police staff, a general standard of behaviour applies that they must not bring the force into disrepute by any of their actions.

5.1.5 *Recordable conduct*[38]

A recordable conduct matter is not a complaint but where it appears that a member of the police service has committed a criminal offence or behaved in a manner that justifies the bringing of disciplinary proceedings it should be recorded. Most conduct matters will come to attention through internal force channels or from legal proceedings. Sometimes a member of the public may witness misconduct and not wish to make a complaint but be willing to provide evidence to the force as a witness.

5.1.6 *Who can make a complaint?*

It is important to be clear who can make a complaint under the Police Reform Act 2002[39].

- Any member of the public who alleges that police misconduct was directed at them
- Any member of the public who alleges that they have been adversely affected by police misconduct, even if it was not directed at them
- Any member of the public who claims that they witnessed misconduct by the police
- A person acting on behalf of someone who falls within any of the three categories above, for example, a member of an organisation who has been given written permission.

Being 'adversely affected' is broadly interpreted in the legislation and includes distress, inconvenience, loss or damage, or being put in danger or at risk.[40] This might apply, for example, to other people present at the incident or to the parent of a child or young person or a friend of the person directly affected. It does not include someone

distressed by watching an incident on television.

'Witness' has a narrow interpretation. A witness is defined in the Police Reform Act 2002 as someone who "acquired his knowledge of that conduct in a manner which would make him a competent witness capable of giving admissible evidence of that conduct in criminal proceedings".[41] This includes for example someone in control of CCTV cameras or in possession of material evidence.

5.1.7 Complaints by police

Police officers and staff members cannot make a complaint against a member of their own force or another force (arising from their own operational duty). They should raise concerns through management channels and have a general responsibility to do so. Managers should then consider whether to record their concerns as a conduct matter. If the officer or staff member was off-duty at the time they can make a complaint against a member of another police force. A former police officer or police staff member (who has retired, resigned or been dismissed from a police force) cannot make a complaint about someone in relation to an incident that happened during the time they worked in that force.[42]

5.1.8 Reporting of concerns by the police

The IPCC has been designated as a prescribed person for the purposes of public interest disclosure in relation to the conduct of a person serving with the police, or of any other person in relation to whose conduct the IPCC exercises a function under any legislation.[43] This means that someone serving with the police can report concerns about the conduct of other persons serving with the police in a protected disclosure to the IPCC. Information may be provided to the IPCC by a person serving with the police without suffering any employment law consequences.[44]

The IPCC may forward the information to the force where it can be recorded if the conduct falls within the legislation.

5.1.9 Complaints from young people

Where a young person under the age of 16 wishes to make a complaint, the IPCC encourages the police to have regard to the principle in the Gillick Competency Guidelines[45] that children under the age of 16 years are able, under Common Law, to give valid consent provided they have sufficient understanding and intelligence to enable them to understand fully what is involved. Applying this to the complaints system means that as long as the child under 16 understands fully what is involved in making a complaint they should be able to do so. However the police service, and the IPCC, have a responsibility to ensure a young person making a complaint does understand the process and potential outcomes and where necessary is provided with appropriate support in making the complaint.

The IPCC will work with the police and with young people's organisations on this issue.

Specific safeguards already operate when a young person age 17 or under is involved in the criminal justice system.

A complaint can be made on behalf of a child or young person by a parent or guardian or a third party.

5.2 Recording complaints as part of customer service

5.2.1 General principles

The IPCC encourages the police service as a whole to follow the good practice, evident in some areas, of shifting to a complainant-centred approach, and using complaints as an opportunity to identify learning and to improve service. At the outset complaints should be taken at face value and at the point when the complaint is made, the complainant should be given the name of a contact person or other information which will allow them to check on how their complaint is progressing.

The public expects the police complaints system to be easy to use. The police should not put practical obstacles in the way, for example by requiring a complainant to attend a police station in person or having to wait for an officer of a specific rank to take a complaint. The police should be willing to go to the complainant – where practical – or talk to the complainant over the telephone.

5.2.2 Recording a complaint without delay

The police have a duty under the Police Reform Act 2002 to record complaints about the conduct of a person serving with the police which fall within the Act.[46]

The public should get similar standards from the police wherever they live. It needs to be clear who is responsible for deciding to record a complaint. The recording of the complaint gives a member of the public rights under the Police Reform Act 2002. Recording practice is a measure of a force's willingness to deal with people who want to complain, not just a means of collecting statistical data on dissatisfaction.

Complaints are recorded when entered on the police complaints data system. Usually the Professional Standards Department (PSD) will make this decision but practice also needs to allow for complaints to be resolved quickly by local managers.

The IPCC expects the police to record a complaint within 10 working days. A recorded complaint is also easier for the force to track and respond to follow up enquiries from a complainant about progress.

If the force needs more information, efforts still should be made to record within 10 working days.

5.2.3 Recommended recording practice

- Start with the presumption that where a member of the public expresses dissatisfaction which, on the face of it, is a complaint about conduct, it is valid under the Police Reform Act 2002 and should be recorded
- Where the wishes of the member of the public are unclear, explain the information in, or provide a copy of the IPCC leaflet '*How to make a complaint against the police*', or invite further information. Do not discourage from making a complaint.
- If it is unclear whether a complaint is about conduct or direction and control of the force, record and proceed with a complaint about conduct until it does become clear. This is in accordance with the Home Office guidance on direction and control complaints.[47]
- Local procedures for direction and control complaints should have checks to ensure that a wrongly categorised complaint can be picked up and pursued under the conduct system
- Where there are concerns about the capacity of the person who is making the complaint either provide support, if practical, or record the complaint and then consider need for support in follow up action
- Where a decision is taken not to record a complaint about conduct the reason should be explained to the complainant who should be advised of the right of appeal to the IPCC. Good practice is to provide the IPCC leaflet '*Appealing against the non-recording of a complaint*'.

5.2.4 Encouraging consistent recording practice

The IPCC and the police service want to encourage consistent recording practice through the application of this guidance, which includes new police complaints data standards set out in Appendix D. The accurate and consistent recording of complaints has a part to play in ensuring public confidence in the complaints system. It also contributes to a sound evidence base to inform development of future policy and practice at local level and nationally.

The IPCC will work with the police service on consistent approaches and in the analysis and presentation of the national data picture.

5.2.5 Exceptions to the duty to record

A complaint against the police does not have to be recorded under the Police Reform Act where it:

- Has been made by a person serving with the police (unless the complainant was off duty at the time of the incident and the person being complained about is from a different force)
- Is already the subject of a complaint being dealt with by criminal or misconduct proceedings
- Has been made under the Police Act 1996
- Is solely about direction and control
- Has been withdrawn
- Does not fall within the provisions of the Act

5.2.6 Direction and control

Guidance has been issued by the Home Office

to Chief Police Officers and police authorities about the handling of direction and control complaints.[48]

This suggests that a direction and control complaint is one that relates to:

- Operational policing policies (where there is no issue of conduct)
- Organisational decisions
- General policing standards in the force
- Operational management decisions (where there is no issue of conduct)

For more information about how to deal with a direction and control complaint refer to the Home Office guidance.

5.2.7 *The complainant's right of appeal to the IPCC about a decision not to record a complaint*

When the force decides not to record a complaint under the Police Reform Act 2002, the force must explain to the complainant their right to appeal to the IPCC. Good practice is to give the complainant a copy of the IPCC leaflet '*Appealing against the non-recording of a complaint*'. The complainant has 28 days to make an appeal.[49]

5.2.8 *Identifying and recording conduct matters from civil claims*[50]

The IPCC focus is on ensuring robust links between civil claims and the complaints system and encouraging a timely response to members of the public involved. The police have a duty to identify and record any conduct matters raised in civil proceedings. The force should make an initial assessment and consider what action would be appropriate, including whether the matter should be referred to the IPCC. This duty arises when a police force becomes aware that civil proceedings are likely to be brought, and continues to the conclusion of any proceedings. The IPCC expects Chief Police Officers and police authorities to be able to demonstrate that conduct matters can be readily identified, recorded and considered.

In some forces complaints/conduct matters and civil claims are handled in the same department. Where different departments are involved good communication is key: this needs to cover risk and insurance managers too.

The IPCC encourages Chief Police Officers and police authorities to ensure there is local guidance on who is responsible for identifying and recording conduct matters to ensure these matters are progressed in a timely manner. Information regarding any conduct matter should then be readily available for civil claims and this should reduce the work involved.

Information about local arrangements should also be readily available to lawyers who act on behalf of claimants to raise awareness and improve communication.

Action in respect of a complaint or conduct matter should not have a detrimental effect on the progress of a civil claim. Matters that are not dealt with in an efficient manner can have an adverse impact on the ability of the civil courts to adjudicate on civil claims. In principle the complaints process and the civil claim may run concurrently. A civil claim will be progressed in accordance with Civil Procedure Rules and at the discretion of the court. Where criminal proceedings are part of the picture, generally those proceedings are concluded first under current arrangements.

The IPCC recognises that there can be practical difficulties dealing with some conduct matters and civil proceedings at the same time. Reasons need to be explained clearly to the complainant, who should be given the opportunity to respond. Similarly a member of the service involved in the case should also be informed of the position.

There is no 'cut-off' for recording a conduct matter arising from a civil claim i.e. where the events took place some years ago. However, police forces can consider whether there are grounds to apply to the IPCC to discontinue an investigation into a conduct matter and the IPCC apply the criteria set out later in this Guidance.

5.2.9 *Identifying recordable conduct matters at an employment tribunal*[51]

Where an allegation comes to attention in the process ahead of a possible employment tribunal, or emerges at the hearing and it has not already been investigated and it appears to the police force that it involves a conduct matter relating to a serving officer or staff

member, it should be recorded whether or not the individuals are identified.

5.2.10 Initial assessment of recorded complaints

An initial assessment of the complaint needs to be made by the relevant person, in line with local practice, to decide the appropriate response. This should take account of:

- The nature of the complaint
- The information in the statement of complaint – which could be a complaint form or a letter
- The expectations of the complainant. It is important to find out from the complainant what they want. Some complaints contain an allegation of serious criminal behaviour. The majority do not and the complainant may be looking for an explanation, an apology, action to be taken to prevent the same thing happening to someone else or action to address the behaviour of an individual. The complainant should have the opportunity to explain their thoughts and feelings about the incident, in addition to the facts, similar to a 'victim impact' statement.

Police officer(s) or member(s) of staff should be notified of the complaint.

Then in the light of the available information, consider whether:

- The complaint appears suitable for Local Resolution; or
- Proportionate investigation is necessary; or
- The complaint involves serious allegations that come within the criteria for referral to the IPCC; or
- No further action should be taken other than a request to dispense with the complaint may be made to the IPCC

Forces should ensure that whatever route a complaint takes, the officer or staff member complained about is not involved in handling the complaint.

5.3 Resolving more complaints locally

5.3.1 The importance of Local Resolution

During the course of a year, around 44 per cent of the population has contact with police, and communities make judgements about the policing they receive based on this local contact. Most people who make complaints about the police have them resolved locally by the force, for example by the station inspector or police staff manager or at Basic Command Unit (BCU) level.

The IPCC believes that even more complaints can be dealt with at this level – Local Resolution is usually the most appropriate and proportionate response. The IPCC will support the police in raising awareness and increasing understanding of Local Resolution. If handled confidently and professionally, this approach will have a positive impact on the views of people about policing in their area. This, in turn, will lead to increased public confidence and better community engagement and co-operation.

Where a pattern of behaviour is identified in an officer or staff member, the appropriate person who is making the initial assessment of the complaint should consider carefully whether Local Resolution is appropriate. Local Resolution would be the proportionate response for example, to a complaint of incivility but if there have been similar or previous complaints which have also been locally resolved the IPCC encourages the force to consider whether there are underlying reasons for the pattern of behaviour. This may be about supervision as well as the individual's behaviour and learning from the complaint could be used to improve performance and reduce risk of recurrence.

Resolution means solving, explaining, clearing up or settling the matter with the complainant. While achieving complainant satisfaction may be too high an expectation in some cases, the complainant's acceptance of the outcome has to be the objective. Therefore the complainant's consent to Local Resolution – which is required under the Police Reform Act 2002[52] – needs to be based on sound information and a clear understanding of what will and will not happen before consent is given. A complainant should not feel under pressure to agree.

Local Resolution should be relatively quick and straightforward and this should be part of the explanation of what is going to happen about the complaint.

5.3.2 *Making Local Resolution work better*

If Local Resolution is to work better in police stations and BCUs, the police service needs to:

- Build complainants' confidence in the process
- Build particular communities' confidence in the process
- Build police confidence in the process
- Consider training needs
- Use imaginative and innovative ways of settling complaints

5.3.3 *Building complainants' confidence*

Successful use of Local Resolution depends on voluntary participation by the complainant which will rest on arriving at a shared understanding between the complainant and the police officer or staff manager dealing with the complaint of:

- The complainant's expectations
- What action by the force would be proportionate in response to the complaint
- What practical action can and cannot be taken about an individual's behaviour or broader force practice
- What process will be followed and by whom in resolving the complaint

The method of communicating this explanation should take account of any particular needs of the complainant.

An important aspect of the complainant making an informed decision to participate is about understanding what outcome is not possible from Local Resolution - that it is not a route to disciplinary proceedings against an officer or staff member.

Wherever possible the force should outline for the complainant what practical action or force learning may come out of the complaint.

5.3.4 *Building particular communities' confidence*

All communities need to have confidence that Local Resolution is an effective way of responding to a complaint. Where people have experienced or have a shared perception – whether well-founded or not – that the police are unfair, such as black and minority ethnic communities, gay and lesbian communities and people with disabilities, greater effort may be required. For example, there is a particular need to increase the confidence of black and minority ethnic communities in Local Resolution and the complaints system as a whole, given the particular sensitivities around race and policing.

It is especially important where a complaint of discriminatory behaviour has been made, or may be involved, that the complainant does not feel under pressure to agree to Local Resolution. This will only add to their perception of injustice. Complaints of discriminatory behaviour meet the threshold for mandatory referral to the IPCC where, for example, a relatively minor criminal offence such as common assault is alleged accompanied by discriminatory behaviour or where there has been abuse of authority.

This underlines the importance that the IPCC attaches to tackling discriminatory behaviour in the police service. Commissioners will take a close interest in how forces are responding to complaints of discrimination.

Referral to the IPCC does not preclude the possibility of Local Resolution. In considering how to respond to these complaints, the IPCC will have regard to the views of the force and the complainant, and the criteria for initiating an investigation and the performance of the force in handling discrimination.

5.3.5 *Building police confidence*

It is important to build confidence among officers and staff members in the Local Resolution process – which is a new way of resolving complaints in this system and is designed to provide an opportunity to respond quickly to complaints at local level. Local Resolution can provide an opportunity for an officer or staff member to explain why they took particular action. It can encourage change and improvement both for individuals who accept that they could have dealt with an incident differently and want to acknowledge that, and for the force in enabling officers or staff to develop their capability through training or other means, and in being more open about the whole process.

The IPCC and the police service need to build officers' and staff's confidence in the complaints system, to ensure it is fair, voluntary and worthwhile.

To that end, forces should send clear messages to

officers and staff that Local Resolution is about:

- Management action to improve services the public expect
- Being willing to acknowledge when something could have been done differently or handled better
- Listening to officers' concerns
- Accepting a legitimate complaint as a risk of a high visibility, high response public service
- Following up public concerns
- Talking to communities at BCU level about what forces have learned from complaints
- Individual learning and development

It is not about:

- Members of the public making unchallenged, personal attacks on individual officers
- 'Substantiated' or 'unsubstantiated' complaints
- Blame or discipline

A statement made by any person in Local Resolution is not admissible in any subsequent criminal, civil or disciplinary proceedings (except where it is an admission to a matter that was not part of the Local Resolution).[53] Therefore a Regulation 9[54] notice to an officer or the corresponding letter, to a member of staff is not issued.

The IPCC would like to see a performance management approach to Local Resolution that tackles capability issues and focuses on lessons for improved policing.

5.3.6 *Looking at training needs*

The skills needed for dealing with complaints through Local Resolution are different to those required for criminal investigations and include problem-solving and customer service. The IPCC encourages forces to consider training for first and second line managers in Local Resolution.

Confidence in Local Resolution is undermined by the policy in some forces of withdrawing payments from an officer who has three or more complaints in a year – whether a complaint is investigated or locally resolved. This amounts to a bigger penalty than the loss of pay which might be determined under disciplinary proceedings and is unfair to officers.

5.3.7 *Using imaginative and innovative ways of settling complaints*

Local Resolution is an umbrella process that may work in different ways. The important point is that a complainant is clear how it will work for them. Local Resolution may include:

- immediate resolution over the counter or by telephone
- providing information
- an apology on behalf of the force
- concluding the matter through correspondence explaining the circumstances of a case and action taken
- individual communication between the complainant and the person complained about via the manager who is handling the complaint
- an apology made by the manager or the PSD on behalf of an individual (who has to agree)
- a face-to-face meeting between the complainant and the person complained about, mediated by the manager handling the complaint or by another person agreed by all parties.

Some forces have developed imaginative and innovative methods of responding to complaints including arranging visits for complainants to see the police in action, or sending a bouquet of flowers with an apology. The IPCC encourages forces to work with local branches of the staff associations and trade unions in developing innovative ways of settling complaints. As long as such approaches cannot be misconstrued as avoiding the issue or failing to take appropriate action, and providing they are used to develop and improve relationships with complainants and/or communities, the IPCC supports them.

The key point is that forces can demonstrate to complainants and to communities that Local Resolution feeds back into improved police practice. In particular they need to reassure the public that any patterns of poor behaviour that may emerge over a series of locally resolved complaints can be tackled effectively.

5.3.8 *Timescale for Local Resolution*

The IPCC and the police service want timely and proportionate responses to complaints. In

a survey before the IPCC went live, the average time for completing an informal resolution under the old system was around 40 days. The IPCC would like to see the average come down to 28 days. Local Resolution is a proportionate response and it is important to move it along. The IPCC encourages forces to work towards an average of 28 days but sees outcome as more important than timescale and recognises some cases may take longer to resolve.

To ensure a consistent approach to recording time taken in individual cases, forces should follow the police complaints data standards at Appendix D.

5.3.9 *Appeals to the IPCC on Local Resolution process*[55]

A complainant has the right to appeal to the IPCC against the Local Resolution process within 28 days of the occurrence of what they have alleged has gone wrong.[56] The force is given the opportunity to respond to the appeal. In considering whether the force handled Local Resolution properly, the IPCC will look at:

- The type and level of information and explanation the police gave the complainant
- And, in that light, whether the complainant's consent was informed
- What other options were realistically available
- Whether the process explained before consent was given was in fact followed

A complainant cannot appeal the outcome of Local Resolution.

5.4 *Carrying out effective investigations*

5.4.1 *Effective investigations*

Carrying out effective investigations that are also proportionate and timely is part of the minimum standards expected of the police. It is crucial to improving public confidence and the confidence of police officers and police staff in a fair complaints system. The IPCC and the police service are giving this a high priority; arrangements for IPCC investigations are explained in section 5.6, '*Using the IPCC as a touchstone of public interest*'.

The minimum requirements for an investigation are the appointment of a single person serving with the police (Investigating Officer)[57] to investigate the complaint or conduct matter who must submit a report to the *appropriate authority*[58]. Some investigations can be very quick and straightforward and can be concluded with a short factual report which could be sent to the complainant with information about any action that may be taken.

Where it becomes clear that an allegation or concern involving the conduct of an identifiable officer is going to be included in the investigation for possible disciplinary purposes a Regulation 9 notice should generally be served as soon as practicable. Similarly, an appropriate letter should be sent to a member of police staff.

Police officers and staff being investigated for the same incident should get the same information and fair treatment. The decision whether or not to suspend an officer or a staff member rests with the Chief Police Officer or as set out in local procedures for police staff.

5.4.2 *Adopting a proportionate approach to local investigations*

The IPCC expects Investigating Officers (IOs) to adopt a proportionate approach to local investigations. The level of an investigation should be proportionate both to the seriousness of the allegation or incident being investigated and to the likelihood of a criminal or disciplinary outcome.

Throughout the investigation the IO should consider whether the force can learn and identify emerging lessons.

The IO will usually start by looking at a statement of complaint, a recorded conduct matter, or when investigating a fatality the circumstances of the death. These should make clear what specific allegations are to be investigated. It may not always be necessary to take a statement of complaint if adequate

information has already been provided, for example if the complaint is capable of independent verification. Where a statement is taken, it should allow a complainant to express thoughts and feelings as well as facts. A statement must be taken from the complainant if it is to be used as evidence in criminal or disciplinary proceedings.

Terms of Reference for the investigation should include the allegation contained in the statement of complaint, recorded conduct matter or the circumstances of the incident. Good practice is to ensure a complainant understands the allegations that are being investigated to avoid the risk of new issues being introduced much later.

5.4.3 *Keeping the complainant and officers or staff informed*

The IO should aim to give the complainant an estimate of how long the investigation is likely to take and that timescale should be reviewed as the investigation progresses. This information should be given to officers or staff under investigation.

The police have a duty to keep the complainant informed of the progress of the investigation every 28 days, if no other arrangement has been made.[59] The IO should agree with the complainant how they wish to be kept informed of the progress of the investigation. The officer(s) or staff member(s) involved should be updated at appropriate points in the investigation.

5.4.4 *Key factors in proportionality*

IOs will use their professional judgement in determining the level of an investigation; the IPCC expects them to take the following issues into account:

- If a complaint was suitable for Local Resolution but the complainant did not consent
- The seriousness of the allegation being made
- Whether the facts are in dispute
- The availability of corroborative documentation or other evidence
- The availability of independent evidence for example, independent witnesses, CCTV, medical or forensic evidence
- How old the incident is and whether evidence is still likely to be available; has evidence already been seized
- The prospects of gaining evidence for criminal prosecution or disciplinary proceedings
- Whether it is necessary to interview officers/staff or whether sufficient evidence is available
- Whether all officers/staff apparently involved need to be interviewed when a clear picture emerges at an early stage
- Public interest in the case

The IPCC expects that policy decisions in relation to an investigation will be recorded. The format will vary according to the nature and the scale of investigation.

5.4.5 *Risk assessment*

This is crucial whatever the nature of the allegation. Sometimes cases go wrong because risks were not identified and managed at the outset. Risk assessment has to be a dynamic process as the case progresses and depending upon the level of complexity of the case, for example, the number of officers/staff involved, the number of witnesses, the identity, or potential vulnerability of the complainant.

5.4.6 *Investigating allegations of racially discriminatory behaviour*

The IPCC has endorsed the Police Complaints Authority Guidelines, published in July 2003, on investigating allegations of racially discriminatory behaviour.[60] The guidelines will be updated and the IPCC will consider the feasibility of extending the guidelines to other forms of discrimination.

5.4.7 *Details of previous convictions on PNC*

Forces need to be aware that it is the view of the Information Commissioner that routine enquiry of the Police National Computer (PNC) for any previous convictions of a complainant is a breach of the data protection principle that information should be used only for the purpose for which it is collected. Information on PNC is held for the purpose of prevention and detection of crime.

5.4.8 *Investigations reviews*

The IPCC encourages regular reviews to ensure that IOs are on top of individual investigations, that caseloads are manageable and that individual investigations are timely and proportionate. Where an investigation is no longer proportionate to the likely outcome (e.g. because no further evidence is likely to emerge or there are practical problems such as lack of co-operation) it should be concluded. The complainant will have the opportunity to appeal the outcome of the investigation to the IPCC.

5.4.9 *The Investigation Report*

- Should explain what the complaint is about
- Include the terms of reference for the investigation
- Give a clear account of the investigation and the evidence received
- Show that the investigation has met the terms of reference
- Set out clear reasoning, drawing out conclusions from the evidence
- Make clear whether each aspect of the complaint is upheld or not
- Where the complaint is upheld any action recommended in the case should be based on the conclusions
- Set out any learning for the force, or the police service, or possibly other public services, where appropriate
- Where a complaint is not upheld, learning should still be considered
- Should be written in plain language free of technical jargon

The IO in writing the report should have regard to the different standards of proof in civil and criminal proceedings.

5.4.10 *Action on the report*[61]

The IO provides the report to the force in a local investigation. In a supervised or managed investigation the report is provided to the IPCC and copied to the force.

Consideration of the action to be taken following a local or supervised investigation lies with the force. The police (or the IPCC in a managed or independent investigation) have a responsibility under the legislation to consider whether the report indicates that a criminal offence may have been committed by a person whose conduct was under investigation. If the force decides that the report does suggest this threshold has been reached, the file should be referred to the CPS to consider. It should not be referred automatically to the CPS for them to reach a view.

5.4.11 *Explaining action to the complainant*

Whether or not a complaint is upheld, the police should consider whether any action should be taken, either in relation to force practice or in management discussion with the police officer(s) or staff member(s) concerned. The police should also write to the complainant, explaining the action to be taken. In particular, in cases where a complainant's expectations cannot be met, it may be helpful for the IO to meet the complainant face-to-face to explain the outcome.

5.4.12 *Involving the Crown Prosecution Service at an early stage*

Early involvement of the Crown Prosecution Service (CPS) in serious cases should be automatic through a case conference involving other agencies as appropriate. This can help to clarify avenues of investigation where a criminal offence may be involved; identify the kind of evidence to be obtained; minimise the risk of evidence being ruled inadmissible by not being obtained properly; identify human rights issues, and advise on the nature of the charge.

At the end of an investigation, CPS involvement will also help to decide whether the evidence in the IO's report is likely to meet the standard of proof for a criminal conviction of beyond reasonable doubt. Where the CPS is engaged at an early stage it nevertheless remains the responsibility of the appropriate authority (or the IPCC in an independent or managed investigation) to formally refer the matter to the CPS at the conclusion of the investigation if it is concluded that a criminal offence may have been committed.

5.4.13 *Sub judice and suspended investigations*

The start of an investigation may be postponed because the matter is considered to be sub judice, which means 'before the court'. Sub judice has two main purposes; to

avoid prejudice for the complainant/ defendant and an overarching public interest to ensure proceedings are free from prejudice. A complainant may, with legal advice, provide a statement for the complaint investigation. However, even if a complainant wishes to continue with the complaint, the police, in consultation with the CPS may decide to suspend the complaint investigation if they believe it would prejudice the criminal proceedings. They should explain the reasons to the complainant.

Even where the sub judice rule applies there may be opportunity to do part of the investigation, such as taking witness statements by those not involved in the criminal trial. The police also have a duty to ensure evidence is preserved throughout the sub judice period.

An example of where the sub judice rule ***would not*** apply: a person is arrested for theft and complains about the treatment received in the custody suite. The complaint will not impinge on the theft trial and sub judice does not apply.

An example of where the public interest ***might require*** the application of sub judice: a person is arrested for assaulting a police officer. The person complains about being assaulted by the officer at the time of their arrest. The same issues are at the centre of the case which goes to criminal prosecution of the alleged offence and the investigation of the complaint, *namely was there an assault, who assaulted whom and did the complainant act unlawfully*. As these are inseparable it is in the public interest to apply sub judice.

The IPCC expects forces to document why an investigation is being held sub judice. After the conclusion of criminal proceedings, the force should contact the complainant about starting or restarting the investigation. If there is no response, then the force should write to the complainant giving 21 days for reply. The IPCC expects the force to have checked whether the complainant is in prison and communication is slow or should be conducted through a solicitor. If the complainant does not reply then the force should take a view on whether it is in the public interest to pursue the investigation of alleged misconduct anyway. If not, the force can close the case and should notify the complainant to that effect.[62]

5.4.14 Measuring timescale for complaints which are investigated

The IPCC and the police service want the time scale for investigations to reduce significantly over time. Taking a proportionate approach is key. The IPCC encourages police forces to adopt consistent practice in measuring the timescale for complaints which are investigated, and to do that from the complainant's perspective. This means the time taken starts on the day on which the complaint is received by the force, and finishes when either the IO's report/letter goes to the complainant or the case is referred out of the force to the CPS or IPCC. (See Appendix D: *Police Complaints Data Standards*) The clock stops for sub judice.

The IPCC will work with the police in developing performance measures that take account of the different levels of complexity in investigations.

5.4.15 Appeals to the IPCC about the outcome of a local or supervised investigation

A complainant who is dissatisfied with the outcome of the local or supervised investigation may appeal to the IPCC within 28 days of notification of the outcome of the investigation.[63] See Section 5.7: '*Appeals to the IPCC*'.

5.5 Recognising the right to information[64]

5.5.1 Communication

The IPCC believes that making the police complaints system as open and transparent as possible should help to increase public confidence that complaints are handled fairly.

The IPCC encourages forces to agree with the complainant at the outset on the method of communication, taking account of any particular needs. If telephone calls, or face-to-face meetings, are the agreed method of communication, the police should make a note of the conversations or whether a third party was needed to assist.

Before an investigation starts the police (or the IPCC in an independent or managed

investigation) should provide the complainant with good information and a clear explanation about what will happen, what they can expect and when they are likely to know the outcome. A family whose relative has died following contact with the police will have different needs from a person who complains about the incivility of a police officer. However, sharing the main points of the investigation plan with the complainant or interested person will often meet their need to know how the investigation will be undertaken and the likely timescale and complexity.

Once an investigation is underway, the police or the IPCC have a duty to keep the complainant or interested person informed of its progress. How frequently a complainant is given an update may vary according to the nature of the case and the needs of the person, and so may the method. In the absence of an agreement with the complainant, the IO must write every 28 days with an update.

Throughout the investigation the police should review regularly whether further information can be given to the complainant, subject to assessing the risk of any prejudice to the investigation.

Forces (or the IPCC in an independent or managed investigation) should also keep the police officer(s) or staff member(s) who are the subject of the complaint informed too at appropriate points in the investigation. They will have the same feelings of uncertainty and frustration at any delay as the complainant or interested person.

5.5.2 *Making the Investigation Report available to the complainant*

The IPCC believes making the IO's report available to the complainant is the most transparent way to show what the investigation has found. The practical needs of the complainant, such as language or other support, should be taken into account when communicating the findings of the investigation in the best way for the complainant. If the findings are set out in a letter the complainant should be given the opportunity to request a copy of the report.

Being open with police officers or police staff about the investigation by giving them the report too will demonstrate that the system is fair and evidence-based. There is no reason of principle for treating the complainant or the person being investigated differently on this issue.

The IPCC recommends that IOs should make a working presumption that the reports they write may be disclosed to the complainant or to the relevant police officer or staff member at some stage. IOs should carry out risk assessments as they are compiling evidence as to whether information should go in the main body of the report, which will be disclosed or in an annex of material that may not be disclosed because of the risk of harm.

Reports should continue to be robust and evidence-based. They should not be written to avoid challenge from individuals or to try to anticipate other developments in the law such as the Freedom of Information Act. New legislation or court decisions may have an impact on this in due course; practice and this Guidance may need to be adjusted.

5.5.3 *Content and timing of disclosure and the 'harm test'*

Responsibility for decisions about disclosure rests with the police in local or supervised investigations, and with the IPCC in respect of managed and independent investigations. It is important that a complainant or other interested person, such as the family in the case of a death in custody, understands that disclosure of the investigation report is subject to a 'harm test'.

This is a judgement about whether releasing the information in the report may cause more harm than good and so disclosure must be restricted. The decision will be about both the substance of the information and the point at which it may be released.

5.5.4 *Damaging disclosures*

The Police Reform Act 2002 sets out a number of specific circumstances where disclosure may need to be restricted because it is not in the public interest.[66] These are:

- To prevent the premature or inappropriate disclosure of information relevant to criminal proceedings
- To prevent the disclosure of information

- In the interests of national security
- For the purposes of the prevention or detection of crime, or the apprehension or prosecution of offenders
- Where required on proportionality grounds
- Where otherwise necessary in the public interest

It is for the police (or the IPCC) to decide in each case whether any restriction to disclosure is necessary because there is a real risk of a significant adverse effect.[67]

5.5.5 *Prosecution decisions and criminal trials*

Generally an investigation report will not be disclosed in advance of a decision to prosecute. If there is a decision to prosecute, the report should not be given to witnesses.

Disclosure of the report in advance of a trial of a police officer who is the subject of a complaint may prejudice the trial. The officer may argue that those who are giving evidence against him or her may have altered it as a result of seeing what others have said. This problem will be particularly acute when the complainant is to be a witness at the trial.

5.5.6 *Exceptional circumstances*

There may be exceptional circumstances where disclosure in advance of a criminal trial can go ahead because there is no real prospect of these difficulties arising. Considerations include:

- The complainant – or family/friends in a death following police contact case – will not be witnesses of fact
- The extent of disclosure in an individual case depends on a risk assessment by the IO of whether information is likely to be passed on by the complainant or family/friends to witnesses or the media
- The CPS has been consulted in the making of that risk assessment
- The complainant/family understand the possibility of prejudicing the trial if information is revealed

It is important to make clear to the complainant/family that disclosure is on a confidential basis and to ensure that the risks and consequences of prejudicing any criminal trial are explained before disclosure occurs.

The complainant/family will understand the need to prevent the possibility of prejudicing proceedings and, where this is likely, may be willing to forego disclosure. The complainant/family need to be confident that any concerns that they have raised with the police during the investigation or with the Crown Prosecution Service in a meeting to discuss the criminal proceedings have been answered.

5.5.7 *Witness statements*

The IPCC recommends that in all cases where complainants or those associated with them are witnesses, their statements should be agreed and signed by them prior to disclosure. This should help to avoid problems including accusations that statements have been altered later.

Third parties should be informed before they make a statement that any information they provide may be used in criminal or disciplinary proceedings and that it may be shared with the complainant/family, subject to the harm test. Personal information should not be disclosed unless it is material to the case.

5.5.8 *Disciplinary hearings*

Forces will also have to consider whether disclosure could prejudice any subsequent disciplinary decisions.

The IPCC's view is that the balance between the public interest in disclosure and the nature and possibility of prejudice is different once criminal prosecution issues are out of the way, for a number of reasons.

First, the professional decision-making bodies involved in disciplinary proceedings are less likely to be influenced by disclosure. Second, disciplinary proceedings that do not involve complainants as witnesses giving evidence are less likely to be tainted by disclosure: the risk of contamination is the key issue to be assessed at this point by the IO.

Third, the public interest in disclosure needs to be weighed against the public interest in ensuring a disciplinary hearing is properly and fairly concluded. A decision on disclosure will depend on risk assessment in individual cases and should take account of whether the people who are to receive the information have already signed witness statements, making disclosure less problematic.

The majority of investigations do not lead to recommendations for disciplinary action against officers and once that decision has been made by the force in local and supervised investigations there can be no argument against disclosure except where another harm test applies (such as a witness may be assaulted).

Decisions about disclosure in disciplinary cases where police officers and police staff are involved will need to take account of the processes and timing required by employment law and contracts of police staff. These vary according to local agreements and are different to the regulated system for police officers.

5.5.9 Inquests and disclosure

Decisions about disclosure in advance of inquests should take into account the views of the coroner who should be consulted in advance, although the final decision is a matter for the IPCC in managed and independent investigations and for the police in local and supervised investigations. The coroner has no power to prohibit or order disclosure of any particular document. Home Office guidance[68] to the police on pre-inquest disclosure to the relatives of those who have died in police custody gives guidance on the disclosure of statements and other evidence and this is the minimum which relatives should expect. It may be that disclosure can be made more quickly than set out in that circular and if so that should happen. In addition, the IO's report should be disclosed to the relatives, subject to any other issues of harm as set out above. Disclosure of the IO's report to officers and staff who might be subject to disciplinary proceedings will need to be postponed until after those proceedings, if any, have been concluded. This may mean disclosure will have to await the outcome of the inquest.

5.5.10 Recording and justification of decisions not to disclose information

A decision by the police, or the IPCC, not to disclose some part or all of an investigation report to a complainant should be properly recorded along with the reasons for the decision which should be given to the complainant, unless this information itself may lead to harm. The record should set out the factual basis for the decision rather than merely repeating the provisions of the law. If nondisclosure is challenged by a complainant as part of an appeal to the IPCC, the IPCC will consider the justification given and may require the police to disclose the information (see section 5.7, *'Appeals to the IPCC'*).[69] There is no appeal in an IPCC independent or managed investigation: a decision of the IPCC, like any public body, is open to challenge by application for judicial review.

5.6 Using the IPCC as a touchstone of public interest

5.6.1 Referrals to the IPCC

Increasing public confidence in the independence, accountability and integrity of the police complaints system will depend on the public seeing an effective response to the most serious incidents. The police must refer to the IPCC specific complaints or incidents that could damage public confidence in policing. Mandatory referrals, along with other cases that the police may decide to refer to the IPCC, help the police to demonstrate openness. These arrangements ensure that the IPCC can oversee these investigations with the appropriate level of external supervision.

5.6.2 Incidents of death or serious injury[70]

There is a statutory duty to refer to the IPCC incidents where persons have died or been seriously injured following some form of direct or indirect contact with the police and there is reason to believe that the contact may have caused or contributed to the death or serious injury. They will be cases that do not involve a complaint or conduct matter when first identified and categorised.

5.6.3 Categories of mandatory referrals[71]

The police must refer complaints and conduct matters that include the following allegations:

- Serious assault by a member of the police service
- Serious sexual assault by a member of the police service
- Serious corruption
- Criminal offence or behaviour aggravated by discriminatory behaviour
- Serious arrestable offences

An explanation of these categories is given at: Appendix A: *Referral of complaints and conduct matters to the IPCC: definitions.*

Where there is doubt about whether a complaint or incident falls within the mandatory criteria, the IPCC encourages the force to refer. The police can seek IPCC advice about general policy on referrals but not in relation to a particular case. It must be referred for decision. The general test is whether the failure of the IPCC to intervene will undermine public confidence in the police.

5.6.4 Voluntary referrals to the IPCC

The IPCC encourages forces to refer complaints or incidents that do not come under the automatic referral categories but where there are serious concerns or exceptional circumstances that may have a significant impact on public confidence.

Where evidence comes to light that suggests there are types of complaint or incident that are causing particular public concern or are proving difficult for forces to investigate locally the IPCC will advise forces and encourage voluntary referral.

The IPCC encourages police authorities to refer a complaint or conduct matter if there are particular concerns about its seriousness or exceptional circumstances.[72] Exceptional circumstances might include the failure of the force to refer the matter. This responsibility is to be distinguished from the police authority's duty to refer to the IPCC a complaint or serious allegation about an ACPO rank officer.

5.6.5 Call-in by the IPCC[73]

The IPCC has the power to call in particular cases of concern or sensitivity which might not otherwise be referred to the IPCC.

5.6.6 Timescale for referral to the IPCC[74]

Forces should refer complaints or incidents as soon as practicable and no later than the end of the working day following the day when it becomes clear to the force that it should be referred. The IPCC provides a 24-hour on-call facility to the police service.

Referrals to the IPCC will not delay any initial action by the police in terms of incident scene management, or securing or preserving evidence.

5.6.7 Timescale for decision on form of investigation

The IPCC aims to decide the form of investigation within two working days. If the force is able to provide the full information at the time of referral it will help towards a quick decision, see Appendix B: *Checklist for referrals by the police to the IPCC.* Sometimes the decision will take longer because of particular factors in a case.

5.6.8 IPCC advice to interested persons about the rights to appeal

Serious incidents are referred automatically to the IPCC by the police and usually there is no complaint. Where it is decided that there will be a supervised or local investigation the right of appeal only applies to someone who has made a complaint. In these cases the IPCC will ensure that interested persons are advised of their right to make a complaint so they have the right of appeal. No inference should be drawn in these circumstances about the IPCC's view of the incident.

5.6.9 Mode of investigation

The IPCC assesses the seriousness of the case and the public interest and determines the form of investigation in this way.[75]

An independent investigation is conducted by IPCC staff into incidents that cause the greatest level of public concern, have the greatest potential to impact on communities or have serious implications for the reputation of the police service. In independent investigations, IPCC investigators have the powers of a police constable. There is no right of appeal in an independent investigation.

A managed investigation is conducted by the police under the direction and control of the IPCC, when an incident, or a complaint or allegation of misconduct, is of such significance and probable public concern that the investigation of it needs to be under the direction and control of the IPCC but does not need an independent investigation. The IPCC is responsible for setting the Terms of Reference for the investigation in consultation with the force. An IPCC Commissioner agrees the Terms of Reference and approves the choice of IO who is nominated by the force. The IPCC Regional Director or Investigator manages the investigation and receives regular progress reports. Responsibility for maintaining the record of decisions and for conducting a timely

investigation rests with the IPCC. There is no right of appeal in a managed investigation.[77]

A supervised investigation is conducted by the police when the IPCC decides that an incident or a complaint or allegation of misconduct is of less significance and probable public concern than for an independent or managed investigation but oversight by the Commission is appropriate. An IPCC Commissioner approves the choice of IO, and agrees the Terms of Reference and investigation plan; both are drafted by the force. An IPCC process for regular review including risk assessment, may be agreed at the outset depending on the nature and scale of the investigation and included in the Terms of Reference. In these cases any changes should be recorded. Responsibility for maintaining the record of decisions and for conducting a timely investigation rests with the force. The complainant also has the right of appeal to the IPCC at the end of the investigation.[78]

A local investigation is appropriate where the IPCC concludes that none of the factors identified in terms of the seriousness of the case or public interest exist and that the police have the necessary resources and experience to carry out an investigation without external assistance. The complainant has the right of appeal to the IPCC at the end of the investigation.[79]

The IPCC adopts a flexible approach to allow the mode of investigation to change as appropriate[80] and can discontinue an investigation, subject to limitations.[81]

5.6.10 Principles of investigation of serious incidents

There are certain principles that underpin investigations into serious incidents, which are often initiated where there is no public complaint or recorded conduct matter.

- Investigations should be a search for the truth
- The starting point is to investigate the incident, not the assumption that a person is to blame. It may be that as the investigation progresses, it needs to focus on the performance or conduct of individuals and they should be held to account
- The investigation process must be independent, competent, proportionate and timely
- Police officers and police staff are entitled to a consistent investigation process wherever they work
- The investigation process must be more open and must improve communication with those who have complained and members of the police service
- Where possible, the focus should be on learning lessons not apportioning blame.

5.6.11 Terms of Reference and investigation plans

Terms of Reference should be clear, unambiguous and tightly drawn to provide focus and direction with no open ended phrases. In any IPCC investigation the possibility of lessons to be learned should be included.

The Investigating Officer should consider including:

- The incident out of which the complaint, the allegation of misconduct or the referral has arisen
- Any specific concerns expressed by the complainant or family/friends which the Commissioner agrees should be included
- The focus of the investigation
- Any questions about compliance with local or national policies

Explicit investigation planning is important in ensuring a proportionate and timely investigation. The plan should address the action required to meet the Terms of Reference and include risk assessment, indicative timescales, resources required and the scope of the evidence to be identified and recovered including any specific forensic examination. Sharing the main points of the investigation plan with the complainant, or relative or interested person, will often meet their need to know how the investigation will be undertaken and the likely timescale and complexity.

The plan should set out the actions required to meet the Terms of Reference. It should also include where appropriate, arrangements for keeping the family informed or for engaging with local community organisations to address concerns and help maintain confidence in the investigation and may also include arrangements for handling the media.

5.6.12 Resources in IPCC investigations

The IPCC meets all the costs of its investigation staff in an independent investigation.

Assistance may be required in an investigation – whether independent, managed or supervised. The Chief Police Officer of the force under investigation should always be consulted about resource needs, which should be reviewed regularly. This will ensure that local resources are released as soon as practical. Similarly any assistance from another force in an investigation should be agreed between the Chief Officers and regularly reviewed. A protocol between the IPCC, APA and ACPO covers these arrangements.

5.6.13 National data on police complaints

The IPCC is now responsible for the collection and presentation of national statistics for complaints and discipline in England and Wales. It will publish annual statistics on complaints. The first publication will cover the year April 2004 to March 2005. The IPCC is receiving data from forces in an electronic and un-aggregated form to reduce administrative burdens on the police. The IPCC will work with forces to ensure compliance with the Police Reform Act 2002 and to encourage consistent recording practice across police forces in England and Wales. Police complaints data standards for forces are set out in Appendix D.

Section 95 of the Criminal Justice Act 1991 requires the collection and publication of ethnic monitoring information in relation to police complaints. In order to get a full picture forces should record the ethnicity of the police officer or staff member who is the subject of a complaint, as well as the ethnicity of the complainant. The importance of self-defined ethnicity monitoring led to the 2001 national census introducing a wider range of ethnic codes than used before – the "16+1 codes". It is the intention of the Home Office that all criminal justice agencies in England and Wales should collect information on self-classified ethnicity using these codes. The IPCC encourages Chief Police Officers to ensure that all appropriate members of the service are aware of the importance of collecting this information. For further information see ACPO's Guide to Self-Defined Ethnicity and Descriptive Monitoring.

5.7 Appeals to the IPCC[82]

5.7.1 Grounds of appeal to the IPCC

A complainant who is dissatisfied with the outcome of a local or supervised investigation may appeal to the IPCC within 28 days of notification of the outcome of the investigation. The complainant should be aware from the police that notification is coming as part of the duty to keep the complainant informed so that, for example, if the complainant is going to be away, a representative can be nominated to receive information.

The IPCC may exercise discretion about accepting appeals later in exceptional circumstances, for example if the complainant was ill and unable to respond. This applies to all complaints investigated by the police themselves or supervised by the IPCC. There is no avenue of appeal from independent or managed investigations.

A complainant may appeal on grounds that they:
- Have not been kept adequately informed of findings or the proposed action
- Disagree with the findings of the investigation
- Disagree with the action – or no action – that the police propose to take.

5.7.2 How the IPCC will consider the appeal

The law requires the IPCC to look at all three aspects (listed above). The IPCC will take a proportionate approach to focus on the main ground(s) set out by the complainant and then consider other aspects.

In considering the appeal, the IPCC may look at:
- Whether this guidance has been followed
- What arrangements were agreed with the complainant about being updated on progress or where there was no agreement, what practice was followed
- What information was given to the complainant as the investigation progressed
- Whether the complainant has been given the full report by the IO or what has been withheld and on what grounds
- In relation to the investigation, whether it was carried out in a proportionate way
- Whether any proposed action by the force in disciplinary proceedings is based on a sound assessment of the evidence

The IPCC would expect this information and responsibility for relevant decisions to be recorded and readily available, for example in the investigation log.

In deciding an appeal the IPCC might direct the police to release information; or to reinvestigate the complaint, subject to the nature of the original complaint, the evidence available and how the investigation has been handled or recommend the force to take disciplinary or other action.

Where an appeal is upheld it does not automatically follow that disciplinary measures will be applied. Reasons might include: systemic failure in how the police carried out the investigation or that the misconduct of the officer(s) does not merit disciplinary action. An investigation into the appropriate use of handcuffs causing minor injury establishes the local force hand cuffing policy is not clear enough to prevent their use on this occasion. The IPCC upholds the complaint since it judges the use of handcuffs to be unnecessary and inappropriate. Nevertheless, it is satisfied that a change in policy and force-wide practice is the only suitable and necessary response.

5.8 Applications from police forces for dispensing with complaints or discontinuing investigations

The IPCC will acknowledge forces' requests to dispense and discontinue with complaints, within two working days. The IPCC may in some cases send a letter to the complainant requesting their views within seven days. The IPCC will then consider the matter and aim to give the force a decision within 21 days from the receipt of request. This may depend on sufficient information being provided.

5.8.1 Sub judice[83]

Where the subject of a complaint was sub judice the force does not need the consent of the IPCC to dispense with the complaint following the conclusion of criminal proceedings, providing reasonable efforts have been made to pursue the complaint. Once the criminal proceedings have concluded the force is required to contact the complainant about restarting or starting to deal with the complaint. If there is no response the force is required to write to the complainant giving 21 days for reply.

The IPCC expect the force to check whether the complainant is in prison and communication is slow or should be conducted through a solicitor. If the complainant does not reply then the force should take a view on whether it is in the public interest to pursue the alleged misconduct anyway. If not, the case can be closed and the force should notify the complainant to that effect.

Where the mode of investigation has been agreed before sub judice, and the IPCC is supervising the case, the Investigating Officer should write to the supervising Commissioner setting out the action taken to contact the complainant before deciding to close the case and so enabling the Commissioner to make a reasonable requirement, before the complaint is closed.

Recordable conduct matters cannot be considered for dispensation.

5.8.2 Dispensations[84]

When a force or a police authority considers that no action should be taken about a complaint (this is before a Local Resolution or an investigation has started), they must get IPCC agreement for a dispensation.

Grounds for dispensation[85]

Where more than 12 months have elapsed between the incident, or the latest incident, giving rise to the complaint and the making of the complaint; and either that no good reason for the delay has been shown or that injustice would be likely to be caused by the delay.

In such cases the presumption will be made that it is not fair for those complained against if a complaint is made more than 12 months after an incident. Each case will however be considered on its merits and the IPCC will take into account the reasons given for the delay and the public interest in the case.

The matter is already the subject of a complaint.

A repetitious complain is one which:
- Is substantially the same as a previous complaint, or conduct matter
- Contains no new allegations which significantly affect the case
- Contains no new evidence to support the complaint

Forces will be required to provide evidence to the IPCC of the previous complaint(s) and how the current one is repetitious.

The complaint discloses neither the name and address of the complainant nor that of any other interested person and it is not reasonably practicable to ascertain such a name or address.

The complaint is vexatious, oppressive or otherwise an abuse of the procedures for dealing with complaints.

It is important to note that it is the complaint itself which must be judged vexatious, oppressive or an abuse, not the complainant. Accordingly, reference to previous complaints history and the fact, perhaps, that the complainant is a serial complainer, may or may not be wholly irrelevant to the dispensation application in question.

Some assessment of the complaint may be required if the IPCC is to be satisfied that the complaint does indeed lack any foundation or amounts to an abuse, and information from the force should be provided to support the application.

'Vexatious' and 'oppressive' should be given their usual dictionary meaning. So, a vexatious complaint will be a complaint without foundation which is intended, or tends, to vex, worry, annoy or embarrass. ***It should be noted, however, that, for a complaint to be vexatious, it does not have to be repetitious***.

An oppressive complaint is without foundation and intended, or likely, to result in burdensome, harsh or wrongful treatment of the person complained of.

An abuse of the complaints system will occur where there has been manipulation or misuse in order to initiate or progress a complaint which, in all the circumstances of the particular case, should not have been made or should not be allowed to continue.

The IPCC recognises that there will be instances where the complaints system is abused, and that such complaints can occupy a disproportionate amount of resources. In these circumstances the IPCC encourages a proportionate response from the force.

It is not practicable to communicate with the complainant or person acting on their behalf in order to proceed with the complaint.

It is not practicable to proceed with the complaint because of a refusal or failure, by the complainant, to co-operate.

In considering applications for dispensations the IPCC will consider whether:

- Reasonable efforts were made to contact the complainant (i.e. more than one attempt) and to gain their co-operation using a range of appropriate methods
- Efforts were made to work through the complainant's representative
- Efforts were made to contact the complainant – in prison, for example – because the case has been sub judice
- Practical help in supporting a complainant with specific needs was made available
- The impact of the refusal or failure to co-operate affected the viability of investigating.

5.8.3 Discontinuance

Forces undertaking investigations where there is sufficient evidence on which to make a judgement despite all anticipated action not being complete, should conclude the matter and notify the complainant of the circumstances and the right of appeal. The force should not apply for discontinuance.[86]

Grounds for discontinuance[87]

When a force considers it is no longer practical to continue with an investigation and is unable to conclude the investigation they can apply to the IPCC for discontinuance on the following grounds:

Non co-operation by the complainant
This is where the investigation cannot continue without the co-operation of the complainant. Before seeking a discontinuance the IO must consider whether it would be in the public interest or/and whether there is enough evidence to continue and conclude an investigation into misconduct irrespective of the lack of co-operation of the complainant.

The complaint/conduct matter turns out to be

vexatious, oppressive or an abuse of procedure (see dispensations above)

The complaint/conduct matter turns out to be repetitious (see dispensations above)

The complainant agrees to Local Resolution.

The force will be expected to provide information to the IPCC that the complainant has given informed consent to the complaint being locally resolved, and understands that the evidence in the case cannot be used in any future disciplinary proceedings about an officer/staff member.

A checklist of information required by the IPCC from forces in applications for dispensation and discontinuance is in Appendix C.

35 Section 12(6), Police Reform Act 2002
36 Section 12(1), Police Reform Act 2002
37 Schedule 1, Paragraph 12, The Police (Conduct) Regulations 2004
38 Section 12(2), Police Reform Act 2002
39 Section 12(1-6), Police Reform Act 2002
40 Section 29(5), Police Reform Act 2002
41 Section 12(5), Police Reform Act 2002
42 Section 29(4), Police Reform Act 2002
43 Section 37, Police Reform Act 2002
44 See Public Interest Disclosure Act 1998
45 Gillick v West Norfolk & Wisbech HA [1986] AC 112
46 Schedule 3, Paragraph 2, Police Reform Act 2002
47 Home Office Circular 19/2005
48 Home Office Circular 19/2005
49 Regulation 8, The Police (Complaints and Misconduct) Regulations 2004
50 Schedule 3, Paragraph 10, Police Reform Act 2002
51 Schedule 3, Paragraph 11, Police Reform Act 2002
52 Schedule 3, Paragraph 6(2),(6),(7), Police Reform Act 2002
53 Schedule 3, Paragraph 8(3), Police Reform Act 2002
54 Regulation 9, Police (Conduct) Regulations 2004, (see Glossary)
55 Schedule 3, Paragraph 9, Police Reform Act 2002
56 Regulation 9, The Police (Complaints and Misconduct) Regulations 2004
57 Schedule 3, Paragraph 16(3), Police Reform Act 2002
58 Schedule 3, Paragraph 22(1), Police Reform Act 2002
59 Regulation 11, The Police (Complaints and Misconduct) Regulations 2004
60 PCA guidelines, Investigating allegations of racially discriminatory behaviour, July 2003
61 Schedule 3, Paragraph 23 or Paragraph 24, Police Reform Act 2002
62 Regulation 17, The Police (Complaints and Misconduct) Regulations 2004
63 Regulation 10, The Police (Complaints and Misconduct) Regulations 2004
64 Section 20, Police Reform Act 2002
65 Regulation 11(2) or (3), The Police (Complaints and Misconduct) Regulations 2004
66 Section 20(6), Police Reform Act 2002
67 Regulation 12, The Police (Complaints and Misconduct) Regulations 2004
68 Home Office Circular 31/2002, Deaths in Police Custody: Guidance to the Police on Pre Inquest Disclosure
69 Schedule 3, Paragraph 25(6), Police Reform Act 2002
70 Paragraph 4(1)(a) and 13(1)(a), Schedule 3, Part 1, Police Reform Act 2002. As amended by the SOCA and Police Act 2005 Schedule 12
71 Regulation 2(2) and Regulation 5(1), The Police (Complaints and Misconduct) Regulations 2004
72 Schedule 3, Paragraph 4(3), Police Reform Act 2002
73 Schedule 3, Paragraph 4(1)(c), Police Reform Act 2002
74 Regulation 2(3) and (4), The Police (Complaints and Misconduct) Regulations 2004
75 Schedule 3, Paragraph 15, Police Reform Act 2002
76 Schedule 3, Paragraph 19, Police Reform Act 2002
77 Schedule 3, Paragraph 18, Police Reform Act 2002
78 Schedule 3, Paragraph 17, Police Reform Act 2002
79 Schedule 3, Paragraph 16, Police Reform Act 2002
80 Schedule 3, Paragraph 15(5), Police Reform Act 2002
81 Schedule 3, Paragraph 21, Police Reform Act 2002
82 Paragraph 25, Schedule 3, Part 3, Police Reform Act 2002 & Regulation 10, The Police (Complaints and Misconduct) Regulations 2004
83 Regulation 17, The Police (Complaints and Misconduct) Regulations 2004
84 Schedule 3, Paragraph 7, Police Reform Act 2002
85 Regulation 3(2), The Police (Complaints and Misconduct) Regulations 2004
86 Schedule 3, Paragraph 21, Police Reform Act 2002
87 Regulation 7, The Police (Complaints and Misconduct) Regulations 2004

Appendix A

Referral of complaints and conduct matters to the IPCC: definitions

1. *Serious injury*

Serious injury means a fracture, a deep cut, a deep laceration or an injury causing damage to an internal organ or the impairment of any bodily function.

2. *Serious assault*

For the purposes of paragraphs 4(1)(b) and 13(1)(b) of Schedule 3 to the 2002 Act and regulations 2(2)(a)(i) and 5(1)(a) of the Regulations, the term 'serious assault' shall be construed in accordance with the charging guidelines agreed between the Crown Prosecution Service and the Association of Chief Police Officers in relation to assault occasioning actual bodily harm contrary to section 47 of the Offences Against the Person Act 1861, the terms of which are set out below.

Any harm or injury caused to a person in relation to which a complaint alleging conduct resulting in serious injury or any conduct resulting in serious injury which is more serious than assault occasioning actual bodily harm contrary to section 47 of the Offences Against the Person Act 1861 should be referred to the IPCC in accordance with paragraphs 4(1)(a) and 13(1)(a) of Schedule 3 to the 2002 Act.

Assault occasioning actual bodily harm, contrary to section 47 of the Offences Against the Person Act 1861

Charging guidelines

1. The offence is committed when a person assaults another, thereby causing actual bodily harm to that other person.
2. It is an either way offence, which carries a maximum penalty on indictment of five years' imprisonment and/or an unlimited fine. Summarily, the maximum penalty is six months' imprisonment and/or a fine not exceeding the statutory maximum.
3 The only factor in law that distinguishes a charge under section 39 of the Criminal Justice Act 1988 from a charge under section 47 is the degree of injury. By way of example, the following injuries should normally be prosecuted under section 47:

- Loss or breaking of a tooth or teeth
- Temporary loss of sensory functions (which may include loss of consciousness)
- Extensive or multiple bruising
- Displaced broken nose
- Minor fractures
- Minor, but not merely superficial, cuts of a sort probably requiring medical attention (e.g. stitches)
- Psychiatric injury that is more than fear, distress or panic. (Such injury will be proved by appropriate expert advice.)

3. *Assault which, as a general rule, need not be referred to the IPCC*

Although any injury can be classified as actual bodily harm, the appropriate charge will be contrary to section 39 of the Criminal Justice Act 1988 where injuries amount to no more than the following:

- Grazes
- Scratches
- Abrasions
- Minor bruising
- Swellings
- Reddening of the skin
- Superficial cuts
- A 'black eye'

4. *Serious sexual offences*

For the purposes of paragraphs 4(1)(b) and 13(1)(b) of Schedule 3 to the 2002 Act and regulations 2(2)(a)(ii) and 5(1)(b) of the

Regulations, the term 'serious sexual offences' shall be construed as including all offences under the Sexual Offences Act 1956 to 2003 that are triable only on indictment and such other offences under the said Acts of 1956 to 2003 appearing to an appropriate authority to be an offence where a Magistrates' Court would be like to decline jurisdiction.

Any attempt, incitement or conspiracy to commit any offence referred to above shall be referred to the IPCC.

5. *Serious corruption*

For the purposes of paragraphs 4(1)(b) and 13(1)(b) of Schedule 3 to the 2002 Act and regulations 2(2)(a)(iii) and 5(1)(c) of the Regulations, the term 'serious corruption' shall refer to conduct that includes:

- Any attempt to pervert the course of justice or other conduct likely to seriously harm the administration of justice, in particular the criminal justice system
- Payments or other benefits or favours received in the connection with the performance of duties where a Magistrates' Court would be likely to decline jurisdiction
- Corrupt controller/handler/informer relationships
- Provision of confidential information in return for payment or other benefits or favours where the conduct goes beyond a possible prosecution for an offence under section 55 of the Data Protection Act 1998
- Extraction and supply of seized controlled drugs, firearms or other material
- Attempts or conspiracies to do any of the above.

6. *Criminal offences and behaviour aggravated by discriminatory behaviour*

For the purposes of paragraphs 4(1)(b) and 13(1)(b) of Schedule 3 to the 2002 Act and regulations 2(2)(a)(iv) and 5(1)(d) of the Regulations, any criminal offence or other behaviour which is liable to lead to a disciplinary sanction that is aggravated by discrimination caused by the actual or perceived sexual orientation of the person subject to the conduct, or disability discrimination, whether physical or mental, or age discrimination shall be referred to the IPCC in addition to any criminal offence or behaviour aggravated by discrimination on the grounds of a person's race, sex or religion that is required to be referred to the IPCC by the said regulations 2(2)(a)(iv) and 5(1)(d).

Serious arrestable offences

Section 116 of the Police & Criminal Evidence Act 1984 determines whether an offence is a serious arrestable offence. The following offences are always serious:

- An offence, whether at common law or under statute specified in Part I of Schedule 5
- An offence in statute specified in Part II

Appendix B

Checklist for referrals by the police to the IPCC

Where notified by telephone or in person to the IPCC, the referral should be confirmed by e-mail, fax or letter within 24 hours of the oral referral.

Wherever possible, the information to be provided at the time of the first referral shall include:

- The name of the referring authority
- The nature of the complaint or conduct being referred
- The location of the incident that is subject to the referral
- The date and time of the incident
- The name of the complainant or victim
- The date of birth of the complainant or victim
- The address of the complainant or victim
- Where there is a complaint, the number of complaints
- Where there is a complaint or conduct matter, the nature and number of allegations
- The number of police witnesses
- The number of independent witnesses
- Ethnicity of the complainant.
- Risk assessment

Additional information may be required at a later date.

Appendix C
Dispensations and discontinuances checklist of information

The information required from forces by the IPCC for dispensations includes (as appropriate):

- A copy of the complaint form showing when and how the complaint was made
- Evidence of correspondence from the force to the complainant which draws the complainant's attention to the fact that the force intends to apply to the IPCC for a dispensation
- Evidence in the form of a note of a telephone call to the complainant as a follow up to the letter
- Evidence that the complainant has been told about the application for dispensation within five days of making it
- Custody log/record
- Evidence that reasonable efforts have already been made to contact a complainant and look into the complaint
- Evidence of responding to any special needs a complainant might have – for example around language, disability, age, illness – to enable an investigation to go ahead. Was an attempt made to engage an appropriate adult, for example?
- Evidence of attempts to meet any reasonable conditions set by a complainant for co-operation with an investigation

An application for discontinuance of an investigation must be in writing and needs to include:

- A copy of the complaint form
- A report of the investigation undertaken so far explaining the reasons for the application to discontinue the investigation with key supporting documents

The force must send the complainant a copy of the application for the discontinuance on the same day that the application is sent to the IPCC.

Appendix D
Police complaints data standards

Introduction

Earlier parts of this guidance have addressed the duty to record a complaint under the Police Reform Act 2002. This appendix focuses on how information about complaints should be recorded. In providing guidance this appendix has two objectives. Firstly, to promote consistency in recording across forces as this supports fair comparison. Secondly, to promote the principle that recording and associated measures should reflect the complainant's perspective. The new definitions, measures of timeliness and guidance on counting complaints included here come into force on 1 April 2006.

Definitions

Allegation: an allegation concerns the conduct of a person serving with the police. It is made by someone defined as a complainant under the Police Reform Act, 2002. An allegation may be made by one or more complainants about the conduct of one or more persons serving with the police. An allegation will be recorded against an 'allegation category' (see table below), for example 'serious non-sexual assault', 'incivility' or 'corrupt practice'.

Complaint Case: each complaint case represents a single investigation or a Local Resolution process. It may contain one or more allegations, brought by one or more complainants, against one or more persons serving with the police. A complaint case starts on the day that the first allegation is recorded.

Complainant: a complainant under the Police Reform Act, 2002 is anyone who:

a) is directly affected by the conduct of a person serving with the police
b) claims to be adversely affected by the conduct
c) who claims to have witnessed the conduct
d) who represents any of the above.

A complainant may make one or more allegations against one or more persons serving with the police. An allegation may be made by one or more complainants.

Date Received: this is the date when a complainant first contacts a police force to make an allegation. Contact may involve a telephone call, email, fax, or letter which may be received at a police station, communications centre or by a Professional Standards Department. Where a force has needed time to decide that something is an allegation or concerns the conduct of a person serving with the police, Date Received should still be the date when the complainant first contacted the police force about the matter.

Date Recorded: is the date when an allegation is recorded on a Professional Standards Departmental database.

Date Local Resolution Completed: is the date when the complainant is told that all action is completed with regard to the Local Resolution. It does not include any period of time after this point when a complainant may make an appeal. Nor does it include any time needed to undertake actions that may arise from a Local Resolution. For example, an officer may undertake training as a result of a local Resolution. Undertaking this training or waiting to undertake it should not be counted.

Date Investigation Completed: is when

(a)the complainant is notified of the findings and any action being taken by the force

or

(b) when the case file goes to the CPS or IPCC and the complainant is notified.

It does not cover further stages such as prosecution, or any appeal that may be made by the complainant. If an investigation has no complainant then Date Investigation Closed

should be the officer or staff member subject to the investigation are informed of the outcome and whether any action is being taken.

Date Complaint Case Closed: is the point at which all stages relating to a complaint case have been concluded. Examples of Date Complaint Case Closed:

- when a Local Resolution has been completed and the time during which an appeal could be made has passed by or any resulting appeal has been dealt with.
- when an investigation has been completed, but does not lead to criminal or misconduct proceedings, and a resulting appeal by the complainant has been finalised.
- when an investigation is completed and criminal and/or misconduct proceedings are finalised, any sanctions are implemented and any appeals are concluded.

Incident: an event or series of clearly connected events relating to the conduct of a person(s) serving with the police. For example: events during a night in custody for one complainant. An incident may give rise to one or more allegations.

Incident Date: is the date the incident or alleged behaviour occurred.

Investigation Outcomes: are unsubstantiated, substantiated, withdrawn or discontinued. Substantiated allegations may lead to one or more responses e.g. proceedings, a written warning, and no action.

Person Serving with the Police: Under the Police Reform Act, 2002 a person is serving with the police if they are:

a) a police officer
b) a member of police staff
c) or a special constable.

The legislation also covers contracted employees that a chief officer has designated as either:

a) a detention officer, or
b) an escort officer.

Measuring timeliness of complaint activity

The following measures are an initial step in building a picture of police activity and performance in response to complaint cases concerning police conduct.

Time taken to record an allegation: is the number of working days from Date Received to Date Recorded.

Length of time to locally resolve an allegation: is the number of working days from Date Received to Date Local Resolution Completed.

Length of time to deal with an allegation which is investigated: is the number of working days from Date Received to Date Investigation Completed. The "clock" stops *only* for sub judice. The clock should stop on the date that an allegation is declared sub judice. It should start again when sub judice no longer applies and the allegation is capable of investigation.

Length of an investigation: is the number of working days from the date an investigating officer is appointed to Date Investigation Completed. The "clock" stops *only* for sub judice. The clock should stop on the date that an allegation is declared sub judice. It should start again when sub judice no longer applies and the complaint case is capable of investigation.

Defining complainants and allegations for recording purposes

Recording of the same allegation made by different people

Where several people make the same allegation relating to the same incident these should be recorded as counted as one allegation. For example: if an officer is alleged to have assaulted a person, and the person directly affected and a witness both raise their concerns about this conduct, this will be recorded as one allegation, involving two complainants and one person serving with the police.

Accurate recording of different types of allegation

Where a complainant alleges, on one occasion or in one letter, several different matters (for example, that an officer assaulted the complainant and stole some money) these should be recorded as separate allegations. The main object of distinguishing and separately recording different actions in this way is to enable the figures for substantiated and unsubstantiated allegations to be given properly. If it is established that a police officer assaulted, but did not steal from a complainant, this would make one substantiated and one unsubstantiated allegation.

Multiple allegations of the same type resulting from the same incident

If a person alleges a series of *like* actions, whether or not involving more than one officer, and these form one *continuous incident*, this should be recorded as a single allegation. This allegation would be recorded as substantiated if an investigation established that any one of the alleged actions took place.

Example one: a detainee alleges that while being booking into custody s/he was refused access to legal advice, not allowed a telephone call and refused a copy of the PACE codes of practice. The booking-in procedure would be seen as one continuous incident, the matters raised by the complaint all relate to breaches of PACE Code C and therefore be recorded as one allegation.

However, if the matters occurred at different times, then these would not form one *continuous incident* and should be recorded as different allegations. Example two: a detainee alleges that while in custody s/he was refused legal advice when booked-in, and two hours later was refused medical attention, and two hours after that was refused food. These are three separate incidents and therefore should be recorded as three separate allegations concerning breaches of PACE Code C.

Codes	***Category***	***Definitions***
A	Serious Non-sexual assault	Section 18 or 20 assaults and up to and including homicide.
B	Sexual assault	Including female or male rape, attempted rape and paedophilia (including sexual assaults on children).
C	Other assault	A person serving with the police must never knowingly use more force than is reasonable, nor should they abuse their authority. This category includes any unjustified use of force or personal violence (but not technical assaults arising from unlawful arrest) and any incident involving police dogs or police horses where the incident is attributable to the conduct of the member in control, unless the severity of injury puts them into category 'A' above.
D	Oppressive conduct or harassment	Unjustified interference, questioning or surveillance.
E	Unlawful/unnecessary arrest or detention	Where a person serving with the police makes any unlawful or unnecessary arrest or detains any person unnecessarily.
F	Discriminatory behaviour	Acts toward an individual that a person serving with the police may have come into contact with whilst on or off duty, which amount to an abuse of authority or maltreatment. Includes acts committed on grounds of another person's nationality or ethnicity; sexual orientation; disability, age or religion.

Codes	*Category*	*Definitions*
G	Irregularity in relation to evidence/perjury	It is of paramount importance that the public has faith in the honesty and integrity of all those serving with the police. All such persons should therefore be open and truthful in their dealings; avoid being improperly beholden to any person or institution; and discharge their duties with integrity. A breach of this category includes perjury or other allegations of falsehood, including an allegation that evidence was obtained by irregularity or under duress.
H	Corrupt practice	It is of paramount importance that the public has faith in the honesty and integrity of all persons serving with the police and that they avoid being improperly beholden to any person or institution; and discharge their duties with integrity. A breach of this category includes any criminal allegation of corruption or any other form of corrupt practice.
J	Mishandling of property	A person serving with the police must exercise reasonable care to prevent loss or damage to property (excluding their own personal property but including police property). A breach of this category includes the theft or loss of property (including money); unreasonable retention of property; damage to property in police custody; failure to account for money or property; improper disposal of property. In all cases save complaints of theft, these matters should be included under S (Failures in duty) if the complaint is specifically one of negligence, with no implication of dishonesty.
K	Breach of Code A PACE on stop and search	Unjustified use of the relevant power, particularly where reasonable suspicion cannot be supported; failure to act appropriately before or during a search or to make the necessary record where practicable.
L	Breach of Code B PACE on searching of premises and seizure of property	Unauthorised entry on search; failure to provide information to occupier; improper or excessive search; failure to record searches properly; not securing premises where necessary; breach of rules on seizure or retention.
M	Breach of Code C PACE on detention, treatment questioning	Failure to inform detained persons of their rights and entitlements; unjustified obstruction of access to legal advice; holding persons incommunicado; not providing necessary support/advice to young/vulnerable detained persons; failure to maintain proper custody/property records; not providing mandatory physical conditions whenever practicable; not carrying out searches on detained persons in accordance with the Code; conducting review of detention improperly or at inappropriate intervals. Failure to caution or charge when required; interviewing oppressively or in inappropriate circumstances; not making proper records of interviews and allowing them to be checked by suspects where practicable; not providing interpreters where necessary.

Codes	*Category*	*Definitions*
N	Breach of Code D PACE on identification procedures	Failure to provide suspects with information about identification procedures or to offer them a choice between procedures where appropriate; not conducting or recording identification procedures properly; not obtaining necessary consents to the taking of fingerprints, photographs or body samples; not providing suspects with opportunity to witness destruction of fingerprints or photographs where appropriate.
P	Breach of Code E PACE on tape recording	Failure to tape record (without good reason); failure to handle tapes openly and in front of the suspect or to maintain adequate tape security; not making a proper record of objections, complaints, breaks etc.
Q	Lack of fairness and impartiality	A person serving with the police has a particular responsibility to act with fairness and impartiality in all their dealings with the public and colleagues.
R	Multiple or unspecified breaches of PACE which cannot be allocated to a specific code	
S	Other neglect or failure in duty	A person serving with the police should be conscientious and diligent in the performance of their duties. They should attend work promptly when rostered or informed of their duties. If absent through sickness or injury, they should avoid activities likely to retard their return to duty.
T	Other irregularity in procedure	Other procedural irregularities not caused by neglect except breaches in the Codes of Practice.
U	Incivility, impoliteness and intolerance	A person serving with the police should treat members of the public and colleagues with courtesy and respect, avoiding abusive or deriding attitudes or behaviour. In particular they must avoid: favouritism of an individual or group; all forms of victimisation or unreasonable discrimination.
V	Traffic irregularity	Complaints about the driving or use of vehicles on police business (but not about police conduct in dealing with civilian traffic).
W	Other	E.g. criminal damage (except in connection with searches of property).
X	Improper disclosure of information	From police, national or other records, whether by paper, electronic means, or any other means.
Y	Other sexual conduct	Indecent assaults; sexual harassment; soliciting of prostitutes; incidents relating to the collection or use of child pornography, either in or out of the workplace.

Glossary of terms

ACAS	The Advisory Conciliation and Arbitration Service A non-departmental public body responsible for improving employee relations and human resource management.
Access	Way of, or opportunity for, making a complaint.
ACPO ranks	The most senior officers in police forces. For most forces that includes the Assistant Chief Constable and above; for the Metropolitan Police Service and City of London Police it includes Commander and above.
Allegation	A claim or assertion that someone has done something wrong or illegal.
Appeal	Application by complainant for IPCC to review police decision.
Appropriate Authority	In relation to any complaint, matter or investigation relating to the conduct of a person, it is the police authority if the officer is of ACPO rank and for all others it is the Chief Police Officer who is responsible for them.
BCU	Basic Command Unit Local geographic areas by which police are organised for carrying out operational functions.
Civil claim	Any course of legal action, that is not covered by criminal proceedings, where the civil court resolves the dispute between the parties.
Complaint (about the police)	Complaint about the individual conduct of a person serving with the police (who comes under the Police Reform Act 2002).
3rd party complaint	Made by an individual or organisation acting on behalf of the complainant, with the complainant's written consent.
Complainant	Person who makes the complaint.
Conduct	Individual behaviour or way of acting at work; may include lack of action.
Contracted staff	Employees of company under contract to police service providing custody and escort services who have been designated as such by a Chief Police Officer.
Direction and Control Complaint	Police force organisational issues not within provisions of Police Reform Act 2002 e.g. budgeting; resources; deployment of officers.
Discipline proceedings	The process of determining whether allegations of misconduct of a police officer or staff member have been substantiated; and deciding any appropriate sanction.
Disclosure	Revealing information in accordance with the Police Reform Act 2002.
Discontinuance	Stopping an investigation that has already started.

Dispensation	Exemption, granted by the IPCC to a force, from the need to take further action or no action at all about a complaint.
ECHR	European Convention on Human Rights. Treaty of Council of Europe given effect by the Human Rights Act 1998.
Her Majesty's Inspectorate of Constabulary (HMIC)	HMIC inspect and report to the Secretary of State on the efficiency and effectiveness of police forces in England and Wales.
Investigate	A formal process for examining a complaint or conduct matter begins with the appointment of an Investigating Officer.
Investigating Officer's Report	The report of the investigator at the end of an investigation into a complaint or allegation.
Investigating Officer	Usually a police officer, directed by a PSD to investigate a complaint or allegation and subject to the approval of the IPCC in a specified or managed investigation.
Independent Investigation	Carried out by IPCC staff.
Managed Investigation	Carried out by the police under the direction and control of the IPCC.
Supervised Investigation	Carried out by the police and supervised by an IPCC Commissioner.
Local Investigation	Carried out by the force.
Local Resolution	Complaint is resolved at local level such as police station or BCU.
Mandatory Referrals	Serious incidents or complaints, or allegations that could damage public confidence in policing which must be submitted to the IPCC for a decision on how the matter should be investigated.
Police officer	Holder of the office of constable up to and including a Chief Police Officer.
Police Staff Member	Any employee of the police authority under the direction and control of Chief Police Officer.
Police force	In an area, a body entrusted by government with maintaining law and order, preventing and detecting crime, under the direction and control of a Chief Police Officer. There are 43 forces in England and Wales.
Police service	General term for service throughout England and Wales.
PSD	Professional Standards Department Department in a police force responsible for standards of conduct and the investigation of complaints and allegations.
Record (a complaint)	The police force decides a complaint falls under PRA and it is entered on the complaints data system.
Regulation 9 notice	Formal notification to a police officer that an allegation about that officer is to be included in an investigation.
Sub judice	Where an investigation into a complaint is postponed because the matter it is "before the court". The sub judice rule limits comment and disclosure so as not to prejudice the defendant/complainant and/or the proceedings.
Terms of reference	A list of agreed, specific, issues to be covered by an investigation.
Withdraw	The complainant or person acting on their behalf retracts the complaint.

The IPCC welcomes any comments and suggestions about this guidance.

These should be sent to:

The Independent Police Complaints Commission
90 High Holborn
London
WC1V 6BH

Email: enquiries@ipcc.gsi.gov.uk
Tel: 0845 3002 002

Independent Police Complaints Commission
90 High Holborn
London
WC1V 6BH

Tel: 08453 002 002
Email: enquiries@ ipcc. gsi. gov. uk
www. ipcc. gov. uk

August 2005
Reference: POL/06

POLICE FEDERATION MISCONDUCT TRAINING 2008

MODULE 1 – Investigation Stage (Part 1)

1. PRIVILEGE and CONFIDENTIALITY

1.1. Lawyers have Legal Professional Privilege (LPP) – any conversation between lawyer and client *for the purposes of obtaining legal advice* or *relating to litigation* is privileged and cannot be disclosed by lawyer (nor anyone else present) without consent of client.

1.2. Friends – no decided case on this but a written Legal Advice has been obtained from senior Counsel experienced in police misconduct matters. This Advice has been in existence since 1987 and has never been challenged by Professional Standards Depts.

1.2.1. The advice says:- *The effect of the Regulations and Guidance is to put the friend in the same position as the legal representative: it would be outlandish if, the accused having opted for the former rather than the latter, his position is materially prejudiced in that his confidential disclosures to the friend will/may be open to compulsory disclosure to others, whereas there are (practically) no circumstances in which the lawyer could make disclosure save with the client's express prior permission.*

1.2.2. It also says:- *It is not an exaggeration to suggest that, unless the friend can receive information and advise in confidence, the current procedures for discipline and hybrid investigations would be fundamentally undermined… The friend often plays a vital role: he advises the suspected officer initially, often where a lawyer is not available: he liaises with the investigating officer; he may be able to achieve some compromise or other satisfactory early resolution of the problem. In order to do so effectively, he must have the co-operation of the suspected officer, who will hinder rather than assist his cause if he is other than candid with the friend. Candour is unlikely to be forthcoming if the suspect is aware that anything incriminating said by him to*

the friend will – or even may be – transmitted by the friend to the investigators.

1.3. Communications between a Friend and an accused officer relating to an investigation or misconduct proceedings will be protected from disclosure by PII (public interest immunity). The Friend cannot disclose any information from such communications without the consent of the accused officer. Whilst in theory a tribunal or court could, having conducted a "balancing exercise" between the interests of the accused officer and those of the public, order disclosure in practice this is highly unlikely to happen.

1.4. The advice has stood the test of time.

2. RIGHT TO ADVICE/REPRESENTATION

2.1. Federation Friend:-

2.1.1. Reg 15(1)(f) - officer served with a notice informing him he is under investigation must be informed he …*has the right to seek **advice** from his staff association or any other body.*

2.1.2. Reg 6(2)(d) – right to …*accompany the officer concerned to any interview, meeting or hearing.*

2.1.3. Reg 6(2)(b) Officer facing hearing may be represented by Friend (and at meeting if officer chooses not to be legally represented). At a meeting or hearing Friend may *put the officer concerned's case; sum up that case; respond on the officer concerned's behalf to any view expressed at the meeting; make representations; ask questions of any witness* Reg 34(5).

2.1.4. HOG Introduction page 9 headed *Police Friend – Police officers have the right to consult with, and be accompanied by, a police friend at any misconduct investigatory interview and at all stages of the misconduct or performance proceedings.*

2.1.5. At the investigation stage Friend can …*advise the officer concerned **throughout** the proceedings under these Regs –*

Reg 6(2)(a); and *make representations to the appropriate authority concerning* ***any aspect*** *of the proceedings…*Reg 6(2)(c).

2.1.6. HOG page 9 - *…at any stage of a case, up to and including a misconduct meeting or hearing or an unsatisfactory performance meeting…the friend may submit that there are insufficient grounds upon which to base the case and/or the correct procedures have not been followed….*

2.2. Lawyer:-

2.2.1. Reg 7(1) – if officer is to face hearing where ultimate outcome of dismissal may be imposed he has a right to be legally represented at that hearing.

2.2.2. Can be solicitor or counsel.

2.2.3. In addition to consulting a friend, officer may feel that he or she should seek legal advice, either generally or in respect of, for example, some aspect of an interview during any informal enquires or formal investigation.

2.3. Thus if criminal investigation officer has right to seek advice from lawyer and friend. In interview, for criminal investigation, officer has a right under PACE 1984 to have lawyer present – see Codes of Practice Code C para 3.21 (but no legal right to have friend present – see HOG page 10). In misconduct investigation officer has right to have friend present (but no legal right to have lawyer present – only right to seek advice from lawyer). Up to lawyer/friend to negotiate with investigation officer to enable both to be present.

3. RIGHT TO BE INFORMED

3.1. Officer has the right to be given notice in writing that he or she is under investigation - Reg 15. Notice must inform officer of his right to seek advice from a friend and that he is not obliged to say anything (caution will be dealt with in Module 2).

3.2. Notice must give information …*describing the conduct…and how that conduct is alleged to have fall below the Standards of*

Professional Behaviour… (as set out in HOG Ch 1) and confirm assessment as to whether, if proved, it amounts to misconduct or gross misconduct.

3.3. How detailed should the information in the notice be? HOG para 2.104 says *The notice should clearly describe in **unambiguous language** the particulars of the conduct that it as alleged fell below the standards expected….* Friend should be prepared to argue that there must be sufficient information given so that he understands the nature of the allegation and the strength of the evidence so as to be able to properly advise the officer as to whether he should put his side of the story or exercise his right of silence. In practice it often comes down to the issue of the "adverse inference" caution and whether on the basis of the information provided it would reasonable for the officer to put his side of the story. (The adverse inference issue and the effect of inadequate disclosure is dealt with below at section 5).

3.4. *As soon as practicable* means days not weeks –

R v CC Merseyside ex parte Calveley 1986 1QB 424 and **R v CC Merseyside ex parte Merrill 1989 1 WLR 1077**;
…I regard the Regulation as an essential protection for Police Officers facing disciplinary charges. It follows from this that prima facia an officer is prejudiced by any breach and the greater the breach, it if takes the form of delay in giving notice, the greater the prejudice…If the…notice is not given "as soon as practicable" the investigating officer must be prepared to justify the delay.

4. NEGOTIATING WITH THE APROPRIATE AUTHORITY

4.1. Friend should be prepared to negotiate with line manager and/or DPS to seek to influence decision whether to deal with matter locally or whether formal investigation required, and during or after formal investigation, whether matter merits misconduct proceedings.

4.2. Proportionality – One of the 13 recommendations of the TAYLOR review on Police discipline and the stated objectives of the new **conduct** procedures is *…investigations and hearings to be less formal and managed and **proportionate** to the context*

and nature of the issue at stake… HOG 1.8 says …*Where these standards of behaviour are being applied in any decision or misconduct meeting/hearing, they shall be applied in a* ***reasonable, transparent, objective and proportionate*** *manner…*

4.3. New **performance** procedures [see HOG Ch 3 para 1.3] say …*the underlying principle…is to provide a fair, open and proportionate method of dealing with performance and attendance issues and to encourage a* ***culture of learning and development*** *for individuals and the organisation.*

4.4. Friend must be prepared to argue as to how these stated objectives can best be achieved at every stage of the process. e.g. HOG 2.114 …*a frequent criticism of previous misconduct investigations was that they were lengthy, disproportionate and not always focused on the relevant issues. It is therefore crucial that any investigation is kept proportionate to ensure that an overly lengthy investigation does not lead to grounds for* ***challenge****…*

4.5. Friend has opportunity to get involved and guide or suggest proportionate way of dealing with matter at ASSESSMENT stage.
Initial Assessment – is this a "conduct" matter requiring investigation or can it be dealt with by "management action" - Reg 12(1) & 12(2) and HOG 2.70 and 2.73
Severity Assessment – is this misconduct or gross misconduct - HOG 2.51 and 2.82.

4.6. Management Action in conduct proceedings may be way of heading off potential misconduct proceedings – HOG 2.91 to 2.96. NB that management action *…does not have to be revealed to the CPS….*

4.7. Reg 19(5) and HOG 2.144 – even where DPS has decided that there is a case to answer on misconduct, there is a discretion not to refer the matter to a meeting, but to deal with the matter by way of *…immediate management action…*e.g. where member has accepted conduct fell below the standards expected and has demonstrated a commitment to improve.

5. DISCLOSURE PRE-INTERVIEW

5.1. Reg 17(6) – *The investigator shall, **in advance** of the interview, provide the officer concerned with **such information as the investigator considers appropriate** in the circumstances of the case to enable the officer concerned to prepare for the interview.*

5.2. HOG para 2.128 – *…sufficient information and **time to prepare**…The information should **always** include **full details** of the allegations made…including the relevant dates and places of the alleged misconduct. The investigator should consider whether there are good reasons for withholding certain evidence obtained…and if there are no such reasons then the police officer should **normally be provided with all the relevant evidence obtained**…Examples of when there may be good reasons to withhold information include on the grounds of national security or to protect sources of information such as witnesses or informants…*

5.3. Seek disclosure of the …***terms of reference***…for the investigation – HOG 2.105. May tell you more than Reg 15 Notice. Particularly helpful on large-scale investigations where IPCC may have set terms of reference. See IPCC Statutory Guidance para 5.6.11 for what should be included in Terms of Reference: - *Terms of Reference should be clear, unambiguous and tightly drawn to provide focus and direction with no open ended phrases…The Investigating Officer should consider including:*

- *the incident out of which the complaint, the allegation of misconduct or the referral has arisen;*
- *any specific concerns expressed by the complainant of family/friends which the Commission agrees should be included;*
- *the focus of the investigation;*
- *any question about compliance with local or national policies.*

5.4. **R v Roble [1997] Crim LR 449** – insufficient disclosure making it impossible for advisor to properly advise suspect on whether or not he should respond to questioning is likely to result in judge (or tribunal) declining to allow adverse inferences to be drawn.

5.5. The Centrex Practice Advice on Core Investigative Doctrine para 6.11.11 says:- *An investigator must develop a clear strategy for*

pre-interview briefing. This should strike a balance between providing sufficient information to enable the legal representative to properly advise their client, and giving too much information that produces an adverse impact on the subsequent interview. The investigator is under no obligation to disclose anything at this point. It may however be beneficial to make a limited disclosure or to adopt a staged disclosure strategy.

5.6. Protocol issued by Lord Chief Justice of England & Wales 22 March 2005 entitled Control and Management of Heavy Fraud and Other Complex Criminal Cases - *suspect must be **given sufficient information before or at the interview to enable them to meet the questions** - asking detailed questions about events a considerable period in the past without reference to the documents is often not very helpful*

5.7. It is a fact that the more disclosure that is given and the better the understanding of the evidence on the part of the lawyer/friend the more likely it is that the lawyer/friend will advise the officer to put their side of the story. Friend should negotiate with investigating officer to obtain as much information (through sight of statements or verbal disclosure) as possible before making decision as to how to advise client. (Advice that can/should be given is dealt with in Module 2).

POLICE FEDERATION MISCONDUCT TRAINING 2008

MODULE 2 – Investigation Stage (Part 2)

1. RIGHT OF SILENCE

1.1. Officer facing a misconduct allegation has a right to exercise a right of silence. This is very similar, although not identical, to the right of silence in criminal proceedings. The right is tempered by the possibility that if it is exercised an adverse inference may be drawn in any subsequent misconduct proceedings.

1.2. The right is set out in Reg 15 Police (Conduct) Regs 2008 – officer concerned to be served with written notice…*informing him that whilst he* ***does not have to say anything*** *it* ***may harm his case*** *if he does not mention when interviewed or when providing any information under regulations 16(1) or 22(2) or (3) something which he later relies on in any…proceedings.*

1.3. Effect is given to caution through Reg 34(10) and (11) and HOG para 2.190 …*where evidence is given at the misconduct proceedings that the officer concerned, at any time after he was given written notice under reg 15(1), on being questioned by an investigator or in submitting any information under reg 16(1), 22(2) or (3)…failed to mention* ***any fact relied on in his case*** *at the misconduct proceedings, being a fact which in the circumstances existing at the time the officer concerned could* ***reasonably have been expected to mention****…the person conducting the proceedings may draw such inferences from the failure as appear proper*.

1.4. Do not succumb to suggestion by investigating officer that if client says nothing there will be no option other than to 'put him before a meeting or hearing'. The evidence available will need to be sufficient in its own right before a decision is taken to hold a formal meeting/hearing. Exercising a right of silence is not of itself evidence.

1.5. There are potentially two adverse inferences.

The first is a **general inference of guil**t i.e why would an innocent person not want to answer an allegation.

The second is '**recent fabrication**' i.e. waiting until you have got all the evidence immediately prior to a hearing and then creating

a defence to meet that evidence. Recent fabrication is highly unlikely to arise in a case where the officer has made an IRB or notebook entry about the matter at the time and prior to service of a Reg 15, provided defence put forward at meeting/hearing is consistent with notes made.

2. INTERVIEW STRATEGY

2.1. The effect of the adverse inference caution and when it should or should not be taken into account has been the subject of numerous cases in the criminal courts. These criminal case precedents are likely to be directly applicable to misconduct proceedings, and Friends should therefore be familiar with the key cases.

2.2. **R v Howell [2003]Crim LR 405** – court said that avoidance of inference requires *soundly based objective reasons* and gave examples eg: suspect's condition especially mental disability; inability to genuinely recollect events without reference to docs which are not to hand or communication with persons who may assist in recollection.

2.3. BUT, important to remember that **primary** objective of decision whether or not to respond to questions in interview is to minimise risk of being charged – the impact at trial/hearing is secondary unless obvious that member is going to be charged.

2.4. Friend should approach decision on how best to advise officer in 3 stages.

2.5. **1st stage** is what is best way to minimise risk of being charged – putting forward client's version of events or exercising right of silence? The way to assess this is firstly, to examine carefully the Reg 15 and any pre-interview disclosure to assess the strength of the case against the officer; secondly ask your client to give you their side of the story and assess whether this is a good answer to the allegation made.

2.6. if because of available evidence it is likely that client will be charged, **2nd stage** is to assess what the likely impact will be on the evidence available at the hearing if your client put's forward his version of events at the interview stage as opposed to making no comment.

2.7. some basic rules

2.8. self defence – alibi – almost always better to put facts forward at earliest opportunity.

2.9. sexual allegations – danger of inadvertent corroboration.

2.10. identification in issue – **Beckles v UK [2002] Crim LR 917** is authority for proposition that if there is no identification of your client as the person subject of the allegation it is perfectly proper advice not to answer questions if to do so would provide the missing evidence of identity. But be careful.

2.11. balance effect of adverse inference against possibility of client doing an awful interview. Consider advantages of client being consistent with what they may have said in IRB or other notes or statement against disadvantages of inconsistency.

2.12. if having assessed the evidence and your client's version of the events you decide it is better for client to give his side of story, then **3rd stage** is to assess whether it is best to do so by answering questions in interview or by submitting written statement under caution – authority for written statement in **R v Knight [2003] Crim LR 799.**

2.13. pros and cons of verbal/written response options. Better to answer questions if client can do so well, but worst option is for client to answer questions badly. Written response is middle ground. Not as good as answering questions well but better than answering questions badly.

3. DUTY STATEMENTS

3.1. An officer cannot lawfully be required to provide a duty statement if they are or may be investigated for criminal or misconduct matters.

3.2. If an officer is asked to provide a first account or a duty statement and there is doubt as to whether the officer's conduct is under investigation, it should be made clear to the investigating officer that the officer concerned is entitled to seek advice and that the officer will reserve his/her position until they have had the benefit of independent advice from a friend or lawyer.

4. COMMUNICATION WITH APPROPRIATE AUTHORITY

4.1. Ensure DPS complies with obligation under Reg 15(4) and HOG 2.116 to update member every four weeks of the…*progress of the investigation…*

4.2. Ensure DPS makes decision as to whether there is a case to answer and what action to take no more than 15 days after receipt of investigators report , or provides *…reasons…*for any delay – Reg 19(7).

4.3. Ensure DPS notifies the member in writing of decision to take no action, take management action or refer matter to be dealt with under the Performance Regs – Reg 12(6). A complainant has a right of appeal to IPCC and if decision is later reversed and member then faces misconduct proceedings, the written notification may give platform to argue "abuse of process" or unfairness, or at very least to put forward strong mitigation.

5. TAKING YOUR CLIENT'S INSTRUCTIONS

5.1. An important part of preparation for interview, and an essential part to help you decide how to advise your client is taking your client's instructions.

5.2. Professionally, you are bound by the instructions you receive. You cannot "suggest" a possible defence to your client. You can and should explain your understanding of the allegation your client faces (based upon such disclosure as you have). You can "interpret" your client's instructions. You can advise on the best way for your client to express what you understand to be his/her instructions. There is a fine line between this and suggesting a defence (a line you must not cross).

5.3. For the above reasons it is often sensible not to ask your client to give you a detailed story until you have received as much disclosure as you are going to get and have passed this on to your client. You obviously need to have a basic story early on but this should suffice until after disclosure when, once your client (and you) are as fully aware as you are likely to be, you can ask for a more detailed account.

5.4. Should your client change his/her story in a material and unexplainable way you may have to withdraw from representing them. For example, if your client has given a version of events, and then in interview gives a completely different version, you may be professionally embarrassed. Remember that you

cannot breach your client's right of confidentiality, so you cannot storm out of the interview, nor tell your client in the presence of the investigating officers that you can no longer act for him. At the first reasonable opportunity (that will usually be at the end of the interview, but depending on the circumstances may be at any break in the interview) you should speak to your client in private and invite an explanation for the difference between what he/she has said in interview to the instructions given to you earlier. If a reasonable explanation is given you may be able to continue to represent them. If no reasonable explanation is given then you should inform them that you are no longer able to represent them.

5.5. It is good practice to warn your client of this professional obligation at the outset of your relationship.

6. STANDARD OF PROOF

6.1. A knowledge and understanding of the appropriate standard of proof in misconduct investigations and the way that it will be applied at a hearing is essential to enable the friend to advise the client as to what they should do in interview.

6.2. Reg 34(14) - the person conducting the proceedings …*shall not find that the conduct of the officer concerned amounts to misconduct or gross misconduct unless –*

(a) he is or they are satisfied on the balance of probabilities…; or

(b) the officer concerned admits it is the case.

6.3. HOG para 2.197 *…the misconduct meeting/hearing must apply the standard of proof required in civil cases, that is the balance of probabilities. Conduct will be proved on the balance of probabilities if the person(s) conducting the meeting/hearing is/are satisfied by the evidence that it is more likely than not that*

6.4. *the conduct occurred. The more serious the allegation of misconduct that is made or the more serious the consequences for the individual which flow from a finding against him or her,* ***the more persuasive (cogent) the evidence will need to be*** *in order to meet that standard.*

6.5. Friend should assess the "*cogency*" or strength of the evidence disclosed in deciding how to advise the officer. Be aware of the current state of the law on this as cited in **R v Mental Health Tribunal [2005] EWCA Civ 1605** : -

Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved…Thus the flexibility lies not in any adjustments to the degree of probability required for an allegation to be proved…but in the strength or quality of the evidence that will in practice be required for an allegation to be proved…

6.6. HOG para 2.198 – *Misconduct meetings/hearings should bear in mind the fact that police officers may be required to deal with some people who may have a particular motive for making false or misleading allegations against the police officer.*

7. FUNDING

7.1. Interview on suspicion of having committed a criminal offence. If client is being interviewed at a police station either under arrest or as a volunteer then the costs of providing legal advice whilst at the police station can funded by legal aid under Legal Services Commission (LSC) police station scheme. The lawyer must hold an LSC contract to be able to provide LSC funded police station advice.

7.2. Provided the matter is duty related the Federation will fund Legal advice (i.e. advice given outside the police station) in relation to both criminal and misconduct matters. This provides the opportunity for the officer and the friend to meet the lawyer and to go through the details and to reach the important decision as to whether or not to answer questions (orally or in writing) in a less pressurised environment than whilst at the police station immediately prior to the interview.

7.3. If the officer is charged with a criminal offence then the costs of representing the officer in both the Magistrates Court and Crown court can be covered by a legal aid LSC certificate [Representation Order]. The officer will have to complete a very detailed means form (giving details of his/her and partner's income and outgoings). Recent changes in the financial eligibility limits has resulted in virtually all police officers being ineligible. This has resulted in the Federation agreeing to fund the costs of representation in the Magistrates Court provided the matter is duty related. Crown Court means testing is imminent but not yet in force.

7.4. Be aware that if legal aid is granted, at the conclusion of the case if the officer is convicted or in very limited circumstances even if acquitted (if for example the judge believes that the officer brought the proceedings on himself through his own actions) the court can investigate the officers means and order that he/she pays towards the costs of his representation up to the full amount of the lawyer's bill to the LSC. This is a Recovery of Defence Costs Order [RDCO].

7.5. If charged with misconduct, the Federation will not generally pay for legal representation if the officer is to plead guilty. The friend can obtain legal advice to assist him/her in preparation of the case for hearing. Bear in mind that under Reg 7(4)(b) the case against an officer at a hearing may be presented by a lawyer whether or not the officer concerned chooses to be legally represented.

7.6. Misconduct appeals. The Federation will fund where it has funded the first instance hearing. However, the Federation may ask the lawyer's to provide advice on the merits and if the advice is that there are none then funding may be withdrawn.

7.7. Judicial Review. If there is a serious departure from the Regulations and or Guidance such that it may be possible to apply to the Administrative Court the Federation will fund advice in the first instance, and if there is merit in the application, fund the actual judicial review proceedings. e.g. the Calveley and Merrill cases.

POLICE FEDERATION MISCONDUCT TRAINING 2008

MODULE 3 – Preparation for and Attendance at Meetings/Hearings.

1. OVERVIEW

1.1. Most effective advocacy is done prior to arriving at the meeting/hearing. There is no substitute for detailed preparation, and ensuring that you have covered all eventualities.

1.2. Demonstrating to your client, the person conducting the meeting/hearing, and the opposition that you are totally familiar with the Regs and Guidance, and the evidence and documents in the case, is half the battle.

1.3. New procedures are an attempt to make process more like an employer/employee scenario, with person conducting the meeting acting more in an inquisitorial manner than the parties conducting an adversarial contest. One of the 13 recommendations of the TAYLOR review on Police discipline was that *the style of hearings should be less adversarial.* But whilst this may be appropriate for non-complaints matters e.g. efficiency etc, it is not appropriate in complaints cases where a person arrested by a police officer may have grounds or motive to make a false allegation. In such cases the friend must strive to persuade DPS and person conducting the meeting that the evidence must be tested in order to ensure fairness to the accused officer.

2. ROLE of FRIEND at MEETINGS/HEARINGS

2.1. Role at meetings/hearings – Reg 34(5) –

- put the officers case;
- sum up that case;
- respond on officer's behalf to any view expressed at the proceedings;
- make representations concerning any aspect of the proceedings;
- ask questions of any witnesses.

2.2. Role where member 'convicted' or admitted failure to meet standard and appropriate disciplinary action is being considered

– Reg 35(10)(c) – make oral or written representations in mitigation and as to appropriate action or outcome.

3. RESPONSE to NOTICE of REFERRAL to MISCONDUCT PROCEEDINGS

3.1. Has officer received copies of all material he/she is entitled to under Reg 21:-

- written notice of conduct and how that conduct is alleged to amount to misconduct/gross misconduct - see also HOG 2.148 (*clearly setting out the particulars of the behaviour*) & 2.149 (*describe the actual behaviour*);
- name of person appointed to conduct proceedings and names of other panel members;
- right to legal representation if gross misconduct;
- copy of any **statement made by the officer** concerned to the investigator during the course of the investigation;
- the **investigator's report** or relevant parts thereof together with any documents attached to or referred to (subject to the "harm test"[see Reg 4]);
- any other relevant document gathered during the investigation [see 21(1)(c)].
    - NB1 - definition of "relevant document" in 21(10) …*a document which in the opinion of the appropriate authority is relevant to the case the officer concerned has to answer*...;
    - HOG 2.146 states test to be applied is same as under Criminal Procedure and Investigations Act 1996 – **undermines pros case** or **assists defence case**;
    - NB2 - there is no longer a requirement in the 2008 Regs or HOG (comparable with HOG 3.52 of the 2004 HOG) that the accused officer to be supplied with a schedule detailing other witnesses interviewed and categories of other material with sufficient precision to enable the accused to assess the relevance. Notwithstanding this, friend should argue that in order to comply with above, such a **schedule** must be provided or accused officer/friend should be allowed to examine everything to enable him to assess the relevance.

3.2. What to include in Response under Reg 22:-

- confirm ACCEPTS or DOES NOT ACCEPT allegation;
- if ACCEPT – any written submission in mitigation;
- if DOES NOT ACCEPT – written notice of *the allegation he disputes* and ***his account of the relevant events***;
- any arguments on points of law;
- a copy of any documents he intends to rely on;
- seek to agree a list of witnesses.

3.3. Time limit is 14 days. This is very tight and save in very straightforward cases the amount of detail required in response will almost certainly require friend to seek an extension to this very unrealistic time frame. Whilst there is a facility to seek an extension, Reg 22(1) says this is only where *exceptional circumstances* [not defined] arise, and application is to the *person conducting or chairing the proceedings.* So this will have to be done in writing and within the 14 day time period. Rep will need to set out reasons e.g. length of time/size of investigation; volume of papers served.

3.4. Effect of non compliance – see para 8 below.

4. WITNESSES

4.1. Reg 23 (3) says:- *No witnesses shall give evidence at misconduct proceedings unless the person conducting or chairing those proceedings* ***reasonably believes*** *that it is necessary for the witness to do so.*

4.2. Decision maker has obligation to consider the list [if agreed between DPS and friend/officer concerned – Reg 22(4)] or lists [if not agreed – Reg 22(5)] of proposed witnesses and determine which if any witnesses should attend the proceedings.

4.3. Friend will need to prepare list of witnesses required (both from investigating officer's bundle and defence witnesses) and seek to agree this with appropriate authority – Reg 22(4). HOG 2.161 sets out the process for seeking to agree which witnesses are required to attend. If Friend is unable to agree list (i.e. I/O or appropriate authority does not accept Friend's request), then Friend can prepare (non-agreed) list and appropriate authority must forward this to person conducting proceedings [Reg 23(1)(b)].

4.4. Friend will need to set out in written response sufficient information to satisfy the *…reasonable belief that it is necessary…*test under Reg 23(3) …and …***to resolve disputed issues*** *in the case* HOG 2.160.

4.5. Strategic decision as to whether to provide FULL details of members case, or LIMITED information but sufficient to secure the attendance of witnesses.

4.6. Where witness does attend to give evidence then, Friend has a **right to ask questions** [see Reg 34(5)(a)(v)] although the chair has final say as to whether a question should or should not be put [see Reg 34(8)]. Be aware of HOG para 2.151*…any questions to that witness should be made through the person conducting the meeting/hearing*, but HOG 2.194 says chair can allow questions to be asked directly if the chair …*feels it appropriate...* Friend should be prepared to argue that only fair way to conduct hearing is to allow Friend to ask the questions.

4.7. If chair rejects the request for a particular witness to attend then reasons for the refusal must be given – HOG 2.163. This will be 1st ground of appeal or potential judicial review point.

4.8. Friend can invite chair to hear character evidence from witnesses even though not dealt with in 'agreed list' pre-meeting/hearing procedure provided chair persuaded that hearing from that witness will …*assist him in determining the question…* as to what the appropriate disciplinary action or outcome should be– Reg 35(10)(b).

5. TIME FRAME

5.1. Gross Misconduct "hearing" not later than 30 working days after service of documents under Reg 21 - see Reg 24(1);

5.2. Misconduct "meeting" not later than 20 working days after service of documents under Reg 21;

5.3. Chair can extend time limit where he considers that it would be *in the interests of justice* to do so - Reg 24(2);

5.4. Chair must give **written reasons** for any extension and (more importantly) where he decides not do to so - see Reg 24(3). If application refused Friend should consider written reasons

carefully (as any grounds of appeal or Judicial Review are likely to arise there from).

6. PRELIMINARY ISSUES

6.1. Way the procedures have been applied. e.g. Friend should keep record of anything said at INITIAL assessment stage and SEVERITY assessment stage. Reg 12(6) requires the appropriate authority to …*notify the officer concerned in writing…* whatever the decision is. There is a right of appeal by a complainant against such a determination and a power to conduct a…*fresh assessment…if the initial assessment has been made incorrectly or if new evidence emerges.* If matter does end up with a misconduct meeting/hearing, the earlier decision and reason for it may be relevant at meeting.
Note HOG para 2.55 and recognition of potential unfairness to officer concerned in any "upgrading" of seriousness after initial assessment.
Note also HOG para 2.75 and 2.76 re need to ensure officer concerned has protection afforded by Reg 15.

6.2. Deploy difficulties arising from overlap of criminal and misconduct proceedings.

- has the…*appropriate authority…consider[ed] whether disciplinary proceedings* [or "fast track" proceedings] ***would prejudice*** *the criminal proceedings…* Reg 9(3)*;*
- HOG 2.30 says test is …***a real risk of prejudice***…;
- has the …*appropriate authority…consult[ed]…the relevant prosecutor…and inform[ed] him of the names and addresses…of witnesses*…who MAY be a witness in the criminal proceedings and who may be…*asked to attend a misconduct meeting* - Reg 9(4); If CPS are consulted history suggests they are likely to be "risk averse";
- can the appropriate authority or the chair of meeting be sure there is no risk of prejudice?

6.3. Legal arguments;

6.4. "Unfairness" – delay, breach of Reg 15, prejudice;

6.5. Misconduct following criminal proceedings. See HOG para 2.35 to 2.40. The …***in substance the same***… test still applies (dealt with a section 12 below).

7. PROCEDURE at MEETING/HEARING

7.1. Standard of Proof – Reg 34(14) and draft HOG para 2.197 - the person conducting the meeting …*shall not find that the conduct of the officer concerned constituted misconduct or gross misconduct unless…he is satisfied on the balance of probabilities.* Be aware of ongoing debate in Home Office between IPCC (strict 51% rule) and Federation and be prepared to make representations to the meeting on the…*cogency*…or strength of the evidence required. Be prepared to cite **R v Mental Health Tribunal [2005] EWCA Civ 1605** on the correct approach to balance of probabilities:

> *Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved…Thus the flexibility lies not in any adjustments to the degree of probability required for an allegation to be proved…but in the strength or quality of the evidence that will in practice be required for an allegation to be proved…*

This is particularly important in a complaints case where it is the complainant's word against the officer's, and where the officers reputation or livelihood is in jeopardy.

7.2. Documents Supplied to Person conducting the Meeting/Hearing (see Reg 28):-

- copy of Notice to officer under Reg 21;
- investigator's report (or relevant parts) and documents referred to therein;
- copy of any response from officer under Reg 22;
- but note Reg 34(9) power to admit any documents not served under Reg 21 or 22 – watch for DPS seeking to introduce material at meeting/hearing not previously disclosed – Rep should use HOG para 2.191 and presumption in favour of non-admission.

7.3. Purpose of a formal misconduct meeting/hearing is to (see HOG para 2.171):-

- *…Give the police officer a fair opportunity to make his or her case having considered the investigation report including supporting documents…*;
- *decide if the conduct…fell below the standards…having regard to all of the evidence…*;
- consider the appropriate outcome.

7.4. Up to Rep to persuade DPS in advance, and Chair in advance and/or on the day, that cannot fairly deal with contested case without hearing from witnesses.

8. EFFECT of ADVERSE INFERENCE

8.1. Reg 34 (10) and (11) – effect of failure to respond :-

- To service of Reg 15 Notice and interview; or
- failure to provide written or oral statement under Reg 16 (response to Reg 15); or
- failure to provide written notice under Reg 22 (response to service of allegation and papers in support);

Person conducing the hearing/meeting may *…draw such inferences from the failure as appear proper…*

8.2. Two inferences may arise, and Rep must be in a position to address both of them:

Firstly – a general inference of guilt
Secondly – an inference of recent fabrication.

The wording of Reg 34(10) makes it clear that there are a number of pre-conditions required before an adverse inference can be drawn:-

- failure to mention any fact **relied on in his case** at the misconduct meeting/hearing;
- a fact which in the circumstances existing at the time the officer could **reasonably have been expected to mention when questioned** (or when providing a written response).

8.3. Criminal case precedents re *adverse inference* will need to be cited by Reps e.g. **R v Howell [2003]Crim LR 405** – (court said that avoidance of inference requires *soundly based objective reasons* and gave examples eg: suspect's condition especially

mental disability; inability to genuinely recollect events without reference to docs which are not to hand or communication with persons who may assist in recollection).

8.4. Issues as to the adequacy of disclosure under Reg 17(6) and HOG para 2.128 [read] *…should normally be provided* ***with all the relevant evidence*** *obtained…*will need to be utilised by Friend to seek to prevent adverse inference being drawn. Friend will need to keep careful note of all communications between DPS and officer on issue.

8.5. Strategic decision as to whether it is better to give officer's version of events in detail early on in the process or whether better to give limited information – what is the lesser of 2 evils – adverse inference or a very poor (inconsistent and ambiguous) early version of events?

9. PLEA IN MITIGATION

9.1. If officer ADMITS conduct failed to meet the appropriate standard then friend will need to prepare plea in mitigation.

9.2. Friend *SHALL* respond to written notification of meeting and service of papers by confirming acceptance of misconduct or gross misconduct and providing *…any submissions he wishes to make in mitigation* – see Reg 22(2)(b).

9.3. If Friend wants to call witnesses to give character evidence does consideration have to be given to providing notice under Reg 22(4) at very early stage. Very unlikely that you will know within 14 days of receipt of notice and papers which character witnesses you will want to call, so will need to put in a "holding" response, and then provide written notice as soon as practicable prior to the meeting. Reg 35(10)(b) suggests chair may *…receive evidence from any witness whose evidence would…assist them in determining the question*. Highly unlikely meeting would refuse permission to call a character witness, and if so, would give a good ground of appeal.

9.4. Remember "Newton hearings" - **R v Newton (1983) 77 Cr App R 13** (No.16 in DLO precedent file). Where there is a dispute on the facts on a guilty plea, the chair of meeting should sentence on the basis of the accused officer's plea, or resolve the dispute by requiring evidence to be called. If chair/panel is not prepared to impose *…disciplinary action…*on basis of member's plea,

then Friend may have to argue that meeting/hearing must call evidence to resolve dispute on facts relevant to culpability and therefore appropriate disciplinary action.

9.5. **Credit** for early admission – HOG 2.202. The earlier in the investigation or proceedings the member admits their shortcomings the more credit should be given at a meeting/hearing. Friend has to balance professional duty to advise member whether evidence is sufficient to prove case against benefit of early admission.

9.6. Outcomes at misconduct hearing – Reg 35(2)(b) - Nothing between dismissal and final written warning.

9.7. Friend is required to submit points in mitigation in writing before the meeting/hearing [Reg 22 (2)(b)], but still has the right to address the meeting/hearing – Reg 34(5) and 35 (10)(c)(ii)*…friend* (or legal rep as appropriate)*…may make oral or written representations…* on behalf of officer concerned.

9.8. Friend should address meeting first on the conduct of the officer – i.e. confirm on what basis officer is admitting his conduct fell below required standard, and put it in context. Consider what may be seen by meeting as mitigating and what aggravating factors. Be aware as to whether your own force has issued "sentencing guidelines" to those who will conduct meetings and be familiar with them.

9.9. Friend should then address meeting on character evidence. Reg 35(10)(a) requires the person conducting the misconduct meeting to:-

> *…have regard to the record of police service of the officer concerned as shown on his* ***personal record****…*
>
> *AND may receive evidence from any witness whose evidence would, in their opinion, assist them in determining the question* [of sanction].

9.10. As now, Friend can exert pressure on other side to ensure only material that can properly be included in an officer's personal record should appear in any statement re character. Reg 15(3) Police Regs 2003 defines what can properly be included in a personal record – e.g. *…a record of his service…including commendations, rewards, punishments other than cautions…*

9.11. Ensure punishments of a fine or reprimand have been expunged after 3 years free from punishment, and any other punishment after 5 years.

10. ADVOCACY GENERALLY

10.1. At all times retain credibility. If you lose credibility it is highly unlikely meeting is going to believe what you say even when you make your best points. That means not taking every conceivable point, but focusing on the points you have to take (to put your client's case across) and the ones you are most likely to win.

10.2. Identify your objectives at outset. On guilty plea it will be to retain officer's job. On not guilty meeting it will be to persuade meeting that on true application of standard of proof the meeting cannot be satisfied that the conduct is proved.

10.3. You need to be able to make points in your closing address that follow on from issues raised during course of meeting. Hopefully you will have been able to put questions to witnesses or at least persuade the person conducting the meeting to put the questions. Preparation of your closing speech will help you identify in advance the issues you need to deal with during the meeting.

10.4. In cases where issue is word of complainant against word of officer, cite para 2.198 HOG, the warning that police officers have to deal with people that have a motive for making false allegations against police, and seek to persuade meeting/hearing that where it is one persons word against the other a proper application of the balance of probabilities still requires the benefit of any doubt to be given to the officer concerned.

11. RIGHT OF APPEAL AND TIME LIMITS

11.1. Be aware of different source for information on appeals from level 1 **meetings** and level 2 **hearings**. Former is dealt with in Regs 38 to 40 and HOG 2.230 to 2.244. The latter is dealt with entirely separately in the Police Appeals Tribunals Rules 2008 (PATR) and HOG Annex C.

11.2. Officer to be informed orally at conclusion of meeting/hearing of the finding and sanction, but then he is entitled to be provided with…*a written notice… and summary of the reasons within 5 days*…Reg 36(1).

11.3. Meeting - Officer has right of appeal to a…*member of a police force at least one rank higher…than person who conducted misconduct meeting*…OR… *a police staff member more senior… than the person who conducted the misconduct meeting… unless the case substantially involves operational policing matters* - Reg 38(4);
Hearing - to a Police Appeals Tribunal – Rule 4 PATR. PAT made up of 4 people – HOG Annex C para 10:

- legally qualified chair;
- member of police authority from list supplied by Home Office;
- a serving senior officer (ACPO rank);
- retired officer of appropriate rank drawn from list supplied by Home Office.

11.4. Meeting - Officer must give notice and…*the grounds of appeal (with details)…* within 7 working days of receipt of notification of the outcome of the misconduct meeting - Reg 38(3)(a) - and must state whether a meeting is required.
Hearing – within 10 working days – PATR 7.

11.5. What is time frame?
Meetings - Reg 39(2) says if appellant requests a meeting (oral hearing?) the person determining the appeal …*shall determine whether the notice of appeal sets out arguable grounds of appeal…and if he determines that it does he shall hold an appeal meeting…within 5 working days of that determination…*
There is no time limit for the actual determination of whether there are arguable grounds, the 5 day time limit only kicks in once that determination has been made.
Hearings: –

- 10 days to lodge notice
- 15 days for Police Authority to respond by providing to the Chief Officer and the appellant…*a copy of the decision…and documents made available to the hearing…a copy of the transcript if requested* PATR9.
- 20 days for grounds after provided with copy of transcript (or if no transcript requested 35 days from notice of appeal PATR9(6)
- 20 days for response PATR9(8)

- if PAT decides no …*real prospects of success no compelling reason why appeal should proceed* PATR11(2) then must give appellant 10 days to submit written representations;
- if PAT decides there are prospects of success then 20 days notice of hearing PATR14.

11.6. If person determining decides that the notice and grounds do not set out *arguable grounds* then he/she can dismiss appeal without a meeting – Meeting Reg 39(2)(b); Hearing PATR11 but note different test …*no real prospect of success*….

11.7. Grounds;-
Meetings - Reg 38(2) and HOG para 2.233 says an appeal may ONLY be on grounds that:-
- *the finding or disciplinary action was unreasonable;*
- *there is critical new evidence that could not reasonably have been considered at the meeting;*
- *there was a serious breach of the procedures or other unfairness which could have materially affected the finding or outcome*.

Hearings – PATR4(4) – same save for omission of the words …*critical*… and …*serious*…

11.8. Be aware that for first time Appeal can result in outcome/sanction being increased.
Meetings - – see Reg 40(4)(b) and HOG para 2.240:- person determining the appeal can …*deal with the officer concerned in any manner in which the person conducting the misconduct meeting could have dealt with him under regulation 35*…
Heartings – Annex C para 13.2.

11.9. Advocates responsibility to be aware of these tight time limits, to ensure officer is advised of them, and that deadlines are diarised so as not to be overlooked.

12. "Double Jeopardy"

12.1. Strictly speaking there is no such thing in misconduct proceedings.

12.2. HOG para 2.35 to 2.40 states that where criminal proceedings have been taken against officer and he has been acquitted …*consideration will then need to be given as to whether*

instigating misconduct proceedings or a special case hearing is a reasonable exercise of discretion in light of the acquittal…Relevant factors in deciding whether to proceed with disciplinary proceedings include the following non-exhaustive list:-
*(a) whether the allegation is in **substance the same** as that which was determined during criminal proceedings*
*(b) whether the acquittal was the result of a **substantive decision**…*
(c) whether significant further evidence is available…

12.3. Be aware of decision of in **The Queen (Redgrave) v Commissioner of Police of the Metropolis[2003] EWCA Civ 04**. Case confirmed that whilst double jeopardy does not apply in police misconduct proceedings, the court specifically recognised the then version of the HOG and commended the "…in substance the same…" restriction on bringing misconduct proceedings after an acquittal in the criminal courts.

POLICE FEDERATION MISCONDUCT TRAINING 2008

MODULE 4 – Unsatisfactory Performance & Attendance Procedures ("UPPs")

1. INTRODUCTION

The legal framework

1.1. The legal basis of the Unsatisfactory Performance and Attendance Procedures is found in the Police (Performance) Regulations 2008 ("the Regulations").

1.1.1. The Regulations apply to both performance and attendance. The procedure is substantially the same in relation to both, although very different practical issues can arise.

1.1.2. Detailed guidance on the Regulations has been issued by the Home Office. This guidance ("the Guidance") appears at Chapter 3 of the Home Office Guidance on Police Officer Misconduct.

The key principle

1.2. The aim of the procedures is not to punish but to improve performance and attendance, and to encourage a culture of learning and development. [See Guidance paras 1.3;1.5 & 1.11] **You should keep this principle in mind at all stages.**

The standard of proof

1.3. The nature of the issues is such that the standard of proof is probably less likely to be an issue than in conduct cases. Where however it is relevant it is the civil standard of the balance of probabilities. [Regulation 7(7) and Guidance 1.16]

Key documents

1.4. While these will vary from case to case:

1.4.1. it is likely that PDRs will be relevant in all performance cases and in many attendance cases;

1.4.2. it is likely that the member's attendance record will be relevant in any attendance case; and

1.4.3. you should ask for records of any discussions to date of the alleged poor performance or attendance

What is the matter?

1.5. Your starting point in all cases should be to make sure that you and the member are clear what the reason for concern is. While the position should generally be clear in attendance cases, performance cases may be more difficult. You should insist that any discussion relates to specific incidents or omissions that have occurred. [Guidance 1.29(b)]

2. INFORMAL ACTION

2.1. Particularly given the importance of the key principle (see 1.2), in all but wholly exceptional circumstances, informal "management action" should have been properly tried before any formal action under the UPPs is considered.

2.2. Management action is likely to include:

2.2.1. discussion of any concerns or shortcomings (which should be properly recorded)

2.2.2. an exploration of any underlying reasons for the allegedly unsatisfactory performance or attendance, such as training or health or welfare issues

2.2.3. advice and guidance and any other support

2.2.4. an opportunity to improve, which is implicit in paragraphs 1.29(g) and 1.33 of the Guidance.

3. PERFORMANCE

What performance is expected?

3.1. Members should know what performance is expected and be given support to achieve such performance. [Guidance 2.1]

3.2. In any performance case you should consider whether these two elements were present. If they were not, then this will be a central part of the response.

Unsatisfactory performance

3.3. This is defined in Regulation 4(2) as:

"an inability or failure of a police officer to perform the duties of the role or rank he is currently undertaking to a satisfactory standard or level."

When can formal action be taken in relation to performance?

3.4. There is no formula. In considering whether formal action can be justified you should consider the following points which are emphasised in the Guidance:

3.4.1. the key principle (see 1.2 above) that the intention is to improve performance not to punish;

3.4.2. that occasional lapses below acceptable standards should not trigger action, the UPPs are designed to deal with "repeated failures to meet such standards or more serious case of unsatisfactory performance." [Guidance 2.4]

4. ATTENDANCE

Introduction

4.1. It is our experience that the UPP are more likely to be invoked in relation to attendance than performance.

4.2. Attendance cases may overlap with areas outside the Conduct and UPP field, and may require consideration of issues such as:

4.2.1. the Disability Discrimination Act ("DDA") (see 10. 1-10.10 below)

4.2.2. medical retirement (see 10.11 – 10.13 below)

4.2.3. the right to be paid during sick leave

4.2.4. health and safety

You should be ready to seek further advice should the need arise. In the first instance you should liaise with your JBB Secretary.

Supportive action

4.3. As ever, keep the key principle (see 1.2 above) in mind.

4.4. In all cases, the starting point is supportive action. The Force should take all reasonable steps to support the member. There is no definition of supportive action. You should consider what is appropriate on the facts of the particular case. Factors that may be relevant include:

4.4.1. the member's sick record. Is the current absence a blip?

4.4.2. the reason for the absence. e.g. Is it the result of an injury on duty? Is it due to an accident or illness that by its nature means that there will unavoidably be absence for a certain period, but then a good prospect of return?

4.4.3. what is the position regarding treatment?

4.4.4. could the Force do anything to assist a return to work even for limited hours or on restricted duties?

4.4.5. is working from a different location or home, even on different work, possible?

4.4.6. can the Occupational Health Unit help?

4.4.7. can the Force contribute to the cost of treatment?

4.4.8. would assistance with a journey to or from work help or a variation of working hours to avoid rush hours?

4.5. While some of these steps may fall to be considered as potentially reasonable adjustments under the DDA (which is dealt with in more detail at 10.1 – 10.10 below), it is important not to be distracted by legal concepts. What matters most is to consider with the member what might assist and to put this to the Force.

4.6. You should keep a record of all discussions, both with the member and with the Force.

Unsatisfactory attendance

4.7. Although the concept is arguably different, the definition of unsatisfactory attendance is the same as that for unsatisfactory performance. It is defined in Regulation 4(2) as:

"an inability or failure of a police officer to perform the duties of the role or rank he is currently undertaking to a satisfactory standard or level."

When can formal action be taken in relation to attendance?

4.8. There is no formula but the Guidance states that formal action should not be taken unless:

4.8.1. supportive action was declined or the member did not co-operate and there has therefore been no improvement in attendance;
4.8.2. the member is on long term sick leave and despite supportive action, there is no realistic prospect of return within a reasonable time frame. [Guidance para 3.22]

4.9. In considering whether formal action can be justified you should also consider the following points:

4.9.1. the key principle that the intention is to improve attendance not to punish (1.2 above). Can you argue that in the circumstances formal action will not have the desired end?
4.9.2. the Guidance emphasises the need for managers to have acted reasonably and to treat members who are injured or ill fairly and compassionately [para 3.11]
4.9.3. is there an argument that taking action would breach the DDA? [See Guidance 3.18 and 10.1 – 10.10 below]
4.9.4. is there an argument that the member may be permanently disabled within the meaning of the Pensions Regulations and that medical retirement ought to be considered? [see Guidance 3.21 (vii) and 10.11 – 10.13 below]; and
4.9.5. the other matters listed at 3.21 of the Guidance.

5. OVERVIEW OF THE UPP PROCESS

The three stages

5.1. There are three stages in the UPP process:

5.1.1. the first stage, which is conducted by the line manager and which may result in an improvement notice;

5.1.2. the second stage, which is conducted by the second line manager and may result in a further improvement notice;
5.1.3. the third stage, which is a hearing before a panel, and which can result in sanctions.

5.2. In very limited circumstances, of grossly unsatisfactory performance only (not attendance) referred to in the Regulations as "gross incompetence", the process can be commenced at stage 3.

5.3. The core structure of each stage is similar. In short:

5.3.1. there is a meeting or hearing;
5.3.2. which may result in an improvement notice (or, at the third stage a sanction);
5.3.3. an improvement notice will have both a period for improvement ("the specified period") and a period during which it remains effective ("the validity period");
5.3.4. there is an appeal right at each stage

Improvement notice

5.4. An improvement notice (described as " a written improvement notice" in the Regulations) must:

5.4.1. record in what respect performance or attendance is considered unsatisfactory;
5.4.2. record the improvement that is required in performance or attendance;
5.4.3. warn the member that if sufficient improvement is not made within "the specified period" that s/he may be required to attend the next stage meeting (or in the case of a final improvement notice, a further third stage meeting); and
5.4.4. warn the member that if sufficient improvement is not maintained within "the validity period" that s/he may be required to attend the next stage meeting (or in the case of a final improvement notice, a further third stage meeting).

5.5. An improvement notice must:

5.5.1. be accompanied by a written record of the relevant meeting;
5.5.2. be accompanied by an indication of the member's right of appeal;
5.5.3. be signed and dated by the person issuing the notice

5.6. The Guidance states at paragraph 4.9 that an improvement notice "would normally be followed by an action plan" which should:

5.6.1. help the member achieve and maintain the required improvement
5.6.2. be agreed by the member and line manager
5.6.3. identify the relevant weaknesses
5.6.4. describe the steps the member must take
5.6.5. specify a follow up date and a staged review date or dates (NB these dates should be during the validity period, the intention is that these are monitoring stages to assist in reaching the necessary improvement).

Although the Guidance states that an improvement notice will normally be followed by an action plan, you should press for such a plan in all cases and keep a record confirming that you have done so.

The specified period

5.7. Each improvement notice must set out a reasonable period during which the member is to make sufficient improvement, which is known as the "specified period".

5.8. The Regulations provide that the specified period is not to exceed 12 months (Regulation 13(6)(c),Regulation 20(6)(c) Regulation 37(6)(c)). The Guidance provides that the specified period "would not normally exceed 3 months" but acknowledges that a longer (or shorter) period may be appropriate.

5.9. It is not anticipated that a shorter period than 3 months will be appropriate in many, if any, cases. You should however be ready to argue for a longer period than 3 months and to refer to the 12 months provision in the Regulations. The appropriate length will depend on the circumstances, but clearly it is likely that the longer the period, the better for the member.

5.10. In an attendance case, you should pay careful attention to the specified period. For example, if it is clear that the member's medical condition is such that a return to duty, even with adjustments, will not be possible for a particular length of time, then you should press for the specified period to be longer.

5.11. The specified period can be extended by "the appropriate authority". The Chief Constable is the appropriate authority but

s/he may delegate any functions to a police officer of the rank of chief inspector or above or a staff member of similar seniority.

5.12. An extension to the specified period may not take it beyond 12 months unless there are exceptional circumstances. The Guidance suggests at paragraph 4.10 that this provision is to deal with unforeseen circumstances, such as an emergency deployment preventing sufficient time to improve (although Regulation 9 does not contain this limitation).

5.13. Time spent on a career break does not count towards the specified period.

The validity period

5.14. Each improvement notice lasts for a period, during which sufficient improvement must be maintained. If the improvement is not maintained then the member may be required to attend the next stage meeting (or in the case of a final improvement notice, a further third stage meeting).

5.15. The validity period runs for 12 months from the date of the improvement notice.

5.16. For example, on 1 March 2009 a member is given an improvement notice with a specified period of 3 months:

5.16.1. the specified period will end on 31 May 2009
5.16.2. the validity period will end on 1 March 2010

if the member improves during the specified period but does not maintain the improvement until 1 March 2010, action under the UPP can recommence.

5.17. Time spent on a career break does not count towards the validity period.

Line manager etc

5.18. The first stage is driven by the line manager who is the police officer or police staff member who has immediate supervisory responsibility for the member concerned.

5.19. The second stage is driven by the second line manager who is a police officer or police staff member having supervisory responsibility for the line manager. If both the line manager and

second line managers are police officers, the second line manager must be senior in rank to the line manager.

5.20. Regulation 8 allows a senior officer to appoint a nominated person to carry out the functions of a line manager or second line manager. A nominated person must be of equivalent rank or seniority to the person whose role s/he carries out and the same person cannot be nominated to carry out the functions of line manager and second line manager.

6. THE ROLE OF THE FRIEND

What the Regulations say

6.1. Regulation 5(2) provides that a Friend may:

6.1.1. advise the member throughout the UPP process

6.1.2. accompany and represent the member at a meeting

6.1.3. make representations to the appropriate authority (see 5.11 above) about any aspect of the UPP

6.2. Regulation 5(3) provides that the chief officer must allow you a reasonable amount of duty time to advise, accompany and represent the member.

6.3. Regulation 6(3) provides that at any meeting a Friend may:

6.3.1. put and sum up the member's case

6.3.2. respond on the member's behalf to any view expressed at the meeting but the Friend cannot answer any question asked of the member

6.3.3. make representations about any aspect of the UPP

6.3.4. confer with the member

The main elements of the role in relation to the UPP

6.4. Your role is:

6.4.1. to support the member

6.4.2. to guide him or her through the process

6.4.3. to ensure that the process is properly and fairly applied

6.4.4. to help the member present their best case

6.4.5. to seek further advice if necessary, from the JBB Secretary in the first instance.

Checklist

6.5. Whatever stage the member is at in the UPP, you should:

6.5.1. make sure everyone (you, the member, management) are clear whether the formal process has started and if it has, where the member is in the process;

6.5.2. check the member's rights under the Regulations and Guidance at the relevant stage;

6.5.3. make sure that the member has been given all information and documentation s/he is entitled to. In particular:

6.5.3.1. that the nature of the unsatisfactory performance or attendance is clearly understood
6.5.3.2. that it is supported by evidence
6.5.3.3. that the Force has supplied all the documents upon which it relies
6.5.3.4. that where there is an improvement notice it is followed by an action plan
6.5.3.5. that an improvement notice contains all relevant information and is accompanied with the written record (see paragraphs 5.4 and 5.5 above)

6.5.4. make sure that in any case in which an improvement notice is given, the member has an action plan and that this is reviewed regularly during the specified period. Do not just leave matters until the end of the specified period as it may be too late to improve at that stage

6.5.5. make sure that you and the member are aware of time limits. In particular:

6.5.5.1. try to agree a date and time for formal meetings
6.5.5.2. ensure that any document relied upon is produced in advance of a formal meeting
6.5.5.3. remember the time limit for an appeal

6.5.6. make sure you keep an appropriate record of your input

6.6. At the second and third stages, make sure that the case against the member is for unsatisfactory performance or attendance that is similar or connected to that dealt with in the improvement notice (see paragraphs 8.2 and 9.8 below).

Helping the member present their best case

6.7. You must first make sure you understand the case against the member.

6.8. Once you do, while the detail will differ greatly from case to case, the main issues will usually be as follows:

6.8.1. is there any dispute about the facts?
6.8.2. is there any argument that the performance or attendance is not unsatisfactory?
6.8.3. can you argue that formal action is premature?
6.8.4. is the procedure being properly followed?
6.8.5. if performance or attendance is unsatisfactory, what are the reasons for this?
6.8.6. what steps (and in particular assistance from the Force) would help the member's performance or attendance improve? (In an attendance case this is likely to involve consideration of reasonable adjustments. The member has a right to reasonable adjustments if covered by the DDA, but you should press for reasonable adjustments in all cases.)
6.8.7. how long does the member need to improve?

6.9. You need to consider these issues with the member as soon as possible after a meeting has been notified and agree what case is going to be put.

6.10. You then need to consider what if any evidence you need to assist the member put their case. It is difficult to be prescriptive about the kind of evidence that may be needed. In some cases, particularly if there is no dispute that performance has been unsatisfactory, there may be no evidence and the focus will be on the steps needed to secure improvement.

6.11. In an attendance case, it may be appropriate to obtain medical evidence.

6.12. Where it is believed that legal advice ought to be sought, due to discrimination or a breach of process, consult your JBB Secretary.

7. THE FIRST STAGE

When a first stage meeting can be required

7.1. The line manager can require the member to attend a first stage meeting if s/he considers the performance or attendance of the member to be unsatisfactory.

7.2. You should be satisfied at this point that management action has been properly tried (see section 2 and, as appropriate, 3 or 4 above). If you are not, you should consider making representations that invoking the UPP is premature.

Written notice

7.3. If the line manager does require a first stage meeting, s/he must send a written notice to the member. This notice must:

7.3.1. require the member to attend a meeting with the line manager;
7.3.2. indicate how the time and date of the meeting will be fixed;
7.3.3. summarise the reasons that performance or attendance is considered unsatisfactory and be accompanied by any documents relied upon;
7.3.4. set out the possible outcomes of the meeting (and of second and third stage meetings);
7.3.5. indicate that an HR professional or police officer may attend to advise the line manager;
7.3.6. seek the member's consent if the line manager wants anyone else to attend. (In such a case, the member need not consent. Whether it is appropriate to agree or not will depend on who it is and why their presence is requested.);
7.3.7. inform the member of their right to seek advice and to be accompanied by a Friend; and
7.3.8. inform the member that s/he must provide any documents s/he wishes to rely upon in advance of the meeting.

Time and date of the meeting

7.4. Regulation 12(3) requires the line manager to agree a time and date if reasonably practicable. You should make every effort to agree an appropriate time, as the default position is a time being imposed. While the member can propose an alternative time regulation 12(6) requires this to be within five working days of the imposed time.

Preparing for the first stage meeting

7.5. See section 6 above.

7.6. It is important that you make every effort to ensure that any documents you are relying on are provided in advance of the meeting. The Guidance provides at paragraph 5.4 that a document can be admitted at the discretion of the line manager, but that there is a presumption that this will not be allowed unless it can be shown that the documents were not previously available.

The first stage meeting

7.7. This is dealt with at paragraphs 5.9 -5.13 of the Guidance and in Regulation 13.

7.8. The line manager will explain the reasons that performance or attendance are regarded as unsatisfactory and give the member and Friend the opportunity to respond.

7.9. The meeting can be postponed or adjourned if the line manager considers it appropriate, including for the line manager to make a decision.

7.10. If performance or attendance is regarded as satisfactory no further action will be taken. Otherwise the member will be informed:

7.10.1. in what respect it is considered unsatisfactory
7.10.2. what improvement is required
7.10.3. that if sufficient improvement is not made and maintained a second stage meeting may follow
7.10.4. that s/he will receive a written improvement notice

Immediately after the first stage meeting

7.11. As soon as reasonably practicable the line manager must send a written record of the meeting, and, if performance or

attendance was found to be unsatisfactory, an improvement notice to the member.

7.12. The member can submit written comments on the written record but not if s/he appeals. Any comments must be within 7 working days (unless the line manager allows a longer period).

7.13. In all cases where there is an improvement notice you should ensure that there is an action plan (see 5.6 above).

Appeal against first stage meeting

7.14. The member can appeal against:

7.14.1. the finding of unsatisfactory performance or attendance;
7.14.2. the respect in which it was considered unsatisfactory;
7.14.3. the improvement required; or
7.14.4. the length of the specified period.

7.15. The grounds of appeal are:

7.15.1. that the finding was unreasonable
7.15.2. that the terms of the improvement notice are unreasonable
7.15.3. that there is critical new evidence that could not reasonably have been considered at the meeting
7.15.4. that there was serious breach of procedure or unfairness that could have materially affected the outcome

7.16. Written notice of appeal must be given to the second line manager no later than 7 working days after receiving the improvement notice. It must:

7.16.1. set out the grounds of appeal; and
7.16.2. be accompanied by any evidence the member relies upon

7.17. The second line manager can extend the 7 day time limit.

7.18. The appeal meeting is to be heard no later than 7 working days after the notification, unless the second line manager considers it necessary or expedient for it to be later.

7.19. At the appeal meeting the second line manager will hear representations and may:

7.19.1. confirm or reverse the finding; and/or

7.19.2. endorse or vary the terms of the improvement notice

7.20. Notifying an appeal does not stay the finding and outcome of the first stage meeting.

Action during the specified period

7.21. It is essential that you press for an action plan and that the member's performance and attendance is monitored in accordance with that during the specified period (see 5.6 above).

7.22. You should try to ensure that any support or assistance that the Force has promised is delivered. If it is not, then it may be appropriate to seek an extension to the specified period and/or to raise this at any further stage meeting.

7.23. If the member's performance does improve during the specified period, similar considerations may continue to apply during the validity period to ensure that the improvement is maintained.

Assessment at the end of the specified period

7.24. As soon as reasonably practicable, the line manager is required to assess the member's performance or attendance during the period with the second line manager or an HR professional, or both. This is to decide whether there has been sufficient improvement.

7.25. If there has been sufficient improvement the member should be informed in writing and reminded of the validity period.

7.26. If there has been insufficient improvement (or the improvement is not maintained during the validity period) then the member will be required to attend a second stage meeting.

8. THE SECOND STAGE

Overview

8.1. The structure of the second stage is parallel to the first stage, but for ease of reference, the detail is repeated with the necessary changes.

Similar unsatisfactory performance or attendance

8.2. It is important to note that Regulation 18(7) provides that a second stage meeting must concern unsatisfactory performance or attendance "which is similar or connected with" the unsatisfactory performance or attendance referred to in the improvement notice. It may be possible to argue that continued poor attendance for a different medical reason is neither similar nor connected to that referred to in the improvement notice, but this will depend on the facts of the case.

Written notice

8.3. If the line manager does require a second stage meeting, the second line manager must send a written notice to the member. This notice must:

8.3.1. require the member to attend a meeting with the second line manager;
8.3.2. indicate how the time and date of the meeting will be fixed;
8.3.3. summarise the reasons that performance or attendance is considered unsatisfactory and be accompanied by any documents relied upon;
8.3.4. set out the possible outcomes of the meeting (and of a third stage meeting);
8.3.5. indicate that an HR professional or police officer may attend to advise the second line manager and that the line manager may attend;
8.3.6. seek the member's consent if the second line manager wants anyone else to attend. (In such a case, the member need not consent. Whether it is appropriate to agree or not will depend on who it is and why their presence is requested.);
8.3.7. inform the member of their right to seek advice and to be accompanied by a Friend; and
8.3.8. inform the member that s/he must provide any documents s/he wishes to rely upon in advance of the meeting.

Time and date of the meeting

8.4. Regulation 19(3) requires the second line manager to agree a time and date if reasonably practicable. You should make every effort to agree an appropriate time, as the default position is a time being imposed. While the member can propose an alternative time regulation 19(6) requires this to be within five working days of the imposed time.

Preparing for the second stage meeting

8.5. See section 6 above.

8.6. It is important that you make every effort to ensure that any documents you are relying on are provided in advance of the meeting. The Guidance provides at paragraph 6.5 that a document can be admitted at the discretion of the second line manager, but that there is a presumption that this will not be allowed unless it can be shown that the documents were not previously available.

The second stage meeting

8.7. This is dealt with at paragraphs 6.10 – 6.14 of the Guidance and in Regulation 20.

8.8. The second line manager will explain the reasons that performance or attendance are regarded as unsatisfactory and give the member and Friend the opportunity to respond.

8.9. The meeting can be postponed or adjourned if the second line manager considers it appropriate, including for the second line manager to make a decision.

8.10. If performance or attendance is regarded as satisfactory no further action will be taken. Otherwise the member will be informed:

8.10.1. in what respect it is considered unsatisfactory
8.10.2. what improvement is required
8.10.3. that if sufficient improvement is not made and maintained a third stage meeting may follow
8.10.4. that s/he will receive a final written improvement notice

Immediately after the second stage meeting

8.11. As soon as reasonably practicable the second line manager must send a written record of the meeting, and, if performance or attendance was found to be unsatisfactory, a final improvement notice to the member.

8.12. The member can submit written comments on the written record <u>but not if s/he appeals</u>. Any comments must be within 7 working days (unless the second line manager allows a longer period).

8.13. In all cases where there is a final improvement notice you should ensure that there is an action plan (see 5.6 above).

Appeal against second stage meeting

8.14. The member can appeal against:

8.14.1. the decision of the line manager to require the member to attend the second stage meeting. (NB this is a ground not available at the first stage. It is only available where it is argued that the second stage meeting did not concern "similar or connected" unsatisfactory performance or attendance – see 8.15.1 below);
8.14.2. the finding of unsatisfactory performance or attendance;
8.14.3. the respect in which it was considered unsatisfactory;
8.14.4. the improvement required; or
8.14.5. the length of the specified period.

8.15. The grounds of appeal are:

8.15.1. that the member should not have been required to attend the second stage meeting as the meeting did not concern unsatisfactory performance or attendance similar to or connected with the earlier unsatisfactory attendance or performance
8.15.2. that the finding was unreasonable
8.15.3. that the terms of the improvement notice are unreasonable
8.15.4. that there is critical new evidence that could not reasonably have been considered at the meeting
8.15.5. that there was serious breach of procedure or unfairness that could have materially affected the outcome

8.16. Written notice of appeal must be given to the senior manager no later than 7 working days after receiving the improvement notice. It must:

8.16.1. set out the grounds of appeal; and
8.16.2. be accompanied by any evidence the member relies upon

8.17. The senior manager can extend the 7 day time limit.

8.18. The appeal meeting is to be heard no later than 7 working days after the notification, unless the senior manager considers it necessary or expedient for it to be later.

8.19. At the appeal meeting the senior manager will hear representations and may:

8.19.1. confirm or reverse the finding; and/or
8.19.2. endorse or vary the terms of the improvement notice and/or
8.19.3. if the appeal is that the member should not have been required to attend the second stage meeting, make that finding.

8.20. Notifying an appeal does not stay the finding and outcome of the second stage meeting.

Action during the specified period

8.21. It is essential that you press for an action plan and that the member's performance and attendance is monitored in accordance with that during the specified period (see 5.6 above).

8.22. You should try to ensure that any support or assistance that the Force has promised is delivered. If it is not, then it may be appropriate to seek an extension to the specified period and/or to raise this at any third stage meeting.

8.23. If the member's performance does improve during the specified period, similar considerations may continue to apply during the validity period to ensure that the improvement is maintained.

Assessment at the end of the specified period

8.24. As soon as reasonably practicable, the line manager is required to assess the member's performance or attendance during the period with the second line manager or an HR professional, or both. This is to decide whether there has been sufficient improvement.

8.25. If there has been sufficient improvement the member should be informed in writing and reminded of the validity period.

8.26. If there has been insufficient improvement (or the improvement is not maintained during the validity period) then the member will be required to attend a third stage meeting.

9. THE THIRD STAGE

Gross incompetence

9.1. Regulation 27 provides that where the appropriate authority considers that a member's performance amounts to gross incompetence the member can be required to attend a third stage meeting, despite not having had a first or second stage meeting.

9.2. Such cases are likely to be very rare.

9.3. This power does not extend to attendance cases.

9.4. It is only in gross incompetence cases that the member has the right to be legally represented.

9.5. The Guidance deals with these cases at paragraph 7.8 – 7.15.

9.6. It will almost certainly be appropriate to seek legal advice in any case in which gross incompetence is alleged.

Overview of "standard" cases

9.7. Unlike the first and second stages, the third stage is before a panel. It is more of a hearing and sanctions can be imposed.

Similar unsatisfactory performance or attendance

9.8. It is important to note that Regulation 25(7) provides that a third stage meeting must concern unsatisfactory performance or attendance "which is similar or connected with" the unsatisfactory performance or attendance referred to in the improvement notice. It may be possible to argue that continued poor attendance for a different medical reason is neither similar nor connected to that referred to in the improvement notice, but this will depend on the facts of the case.

Written notice

9.9. If the line manager does require a third stage meeting, the senior manager must send a written notice to the member. This notice must:

9.9.1. require the member to attend a third stage meeting with a panel;
9.9.2. indicate how the time and date of the meeting will be fixed;

9.9.3. summarise the reasons that performance or attendance is considered unsatisfactory and be accompanied by any documents relied upon;
9.9.4. set out the possible outcomes of the meeting;
9.9.5. indicate that an HR professional or police officer may attend to advise the panel on the proceedings;
9.9.6. indicate that a lawyer may attend to advise the panel on the proceedings and on any question of law that may arise;
9.9.7. seek the member's consent if the senior manager wants anyone else to attend. (In such a case, the member need not consent. Whether it is appropriate to agree or not will depend on who it is and why their presence is requested.); and
9.9.8. inform the member of their right to seek advice and to be accompanied by a Friend.

Procedure after notice of third stage hearing

9.10. Within 14 working days of the date on which the notice is sent to the member, s/he must:
9.10.1. indicate in writing whether s/he accepts that performance or attendance has been unsatisfactory (or in a gross incompetence case, grossly incompetent)
9.10.2. where this is accepted, provide any submission in mitigation;
9.10.3. where it is not accepted, indicate in writing the matters disputed, his/her account of the relevant events and any arguments on points of law
9.10.4. provide a copy of any document s/he intends to rely on;
9.10.5. where s/he proposes to call witnesses, if possible agree a list of these with the senior manager. If agreement is not possible the names and addresses of the proposed witnesses must be provided.

9.11. The panel chair can extend the 14 day period if there are exceptional circumstances.

Witnesses

9.12. The list of witnesses, whether agreed or not, is sent to the panel chair by the appropriate authority.

9.13. The panel chair will decide which witnesses, if any, should attend (and can also determine that witnesses who are not named should attend).

9.14. The panel chair will allow witnesses only if s/he reasonably believes it is necessary for the witness to give evidence.

9.15. The Guidance deals with witnesses at paragraphs 7.36 – 7.42.

Time and date of the meeting

9.16. Regulation 31(1) requires the third stage meeting to take place no later than 30 working days after the notice that a third stage meeting is required (see 9.9 above), unless the panel chair extends this period in the interests of fairness.

9.17. Regulation 31(4) requires the panel chair to agree a time and date if reasonably practicable. You should make every effort to agree an appropriate time, as the default position is a time being imposed. While the member can propose an alternative time regulation 31(7) requires this to be within five working days of the imposed time.

9.18. Regulation 34 allows the postponement or adjournment of the meeting if the panel chair considers it necessary or expedient.

Appointment of panel members

9.19. Regulation 32 sets out the detail about the composition of the panel and the arrangement for appointing them.

9.20. Regulation 33 sets out the right of the member to object to panel member.

9.21. The Guidance deals with these issues at paragraphs 7.16 – 7.26.

Preparing for the third stage meeting

9.22. See section 6 above.

9.23. It is important that you make every effort to ensure that any documents you are relying on are provided in advance of the meeting. The Guidance provides at paragraph 7.42 that a document can be admitted at the discretion of the panel chair, but that there is a presumption that this will not be allowed unless it can be shown that the documents were not previously available.

9.24. It may be appropriate to take legal advice if there has been a clear breach of process, victimisation or discrimination.

The third stage meeting

9.25. This is dealt with at paragraphs 7.43 – 7.48 of the Guidance and in Regulation 35.

9.26. The panel chair will explain the reasons that performance or attendance are regarded as unsatisfactory and give the member and Friend (or in a gross incompetence case, where the member is legally represented, the lawyer) the opportunity to respond.

9.27. The meeting can be postponed or adjourned if the panel chair considers it appropriate to do so.

9.28. The panel will make a finding, by majority if necessary. Where they find against the member they must give reasons in writing for their decision. The decision, but not necessarily the reasons, must be given within 3 working days of the end of the meeting.

Outcomes

9.29. If performance or attendance is regarded as satisfactory no further action will be taken.

9.30. If performance or attendance is regarded as having been unsatisfactory then (in a case that does not involve a finding of gross incompetence) the panel may order:

9.30.1. dismissal with a minimum of 28 days' notice;
9.30.2. reduction in rank (but NB this cannot be ordered in an attendance case);
9.30.3. an extension of the final improvement notice, though this is only where the panel are satisfied that there are exceptional circumstances justifying it; or
9.30.4. redeployment to alternative duties (this can also involve a reduction in rank)

9.31. In a case where gross incompetence is found the panel may order:

9.31.1. dismissal with immediate effect (NB there is no scope for dismissal with notice);
9.31.2. reduction in rank;

9.31.3. the issue of a final improvement notice; or
9.31.4. redeployment to alternative duties (this can also involve a reduction in rank)

9.32. In a case where gross incompetence is alleged but only unsatisfactory performance found, the panel will issue an improvement notice which is treated as if it was a notice issued after a first stage meeting.

Improvement notice at the third stage meeting

9.33. if an improvement notice is issued or extended at a third stage meeting, the position is similar to that where an improvement notice is issued at the second stage meeting except that it is the panel that assesses whether there has been sufficient improvement in the member's performance or attendance.

9.34. If a further third stage meeting is required, it should if possible be before the same panel.

9.35. The panel cannot at this further meeting order a further extension of the improvement notice.

Appeal against third stage meeting

9.36. Any appeal against the decision at a third stage meeting is to a Police Appeals Tribunal. The legal basis of such appeals is the Police Appeals Tribunals Rules 2008.

9.37. The member can appeal against:

9.37.1. the finding of unsatisfactory performance or attendance or gross incompetence;
9.37.2. in an ordinary case (where all three stages have been followed):
9.37.2.1. dismissal with notice
9.37.2.2. reduction in rank

NB there is no right of appeal against redeployment or extension of the final improvement notice; and

9.37.3. in a gross incompetence case, all outcomes (including a written improvement notice).

9.38. The grounds of appeal are:

9.38.1. that that the finding or outcome imposed was unreasonable;

9.38.2. that there is evidence that could not reasonably have been considered at the original hearing which could have materially affected the finding or decision on the outcome;

9.38.3. that there was a breach of the procedures set out in the Performance Regulations or other unfairness which could have materially affected the finding or decision on the outcome; or

9.38.4. that in a case not involving an allegation of gross incompetence the member should not have been required to attend that meeting as it did not concern unsatisfactory performance or attendance similar to or connected with the unsatisfactory performance or attendance referred to in the final written improvement notice..

9.39. Written notice of appeal must be given to the police authority no later than 10 working days after receiving a written copy of the relevant decision. It must:

9.39.1. set out the grounds of appeal; and
9.39.2. be accompanied by any evidence the member relies upon

9.40. If an appeal is not notified within the 10 day time limit the tribunal chair will decide whether it was reasonably practicable for it to have been notified in time. If s/he determines it was reasonably practicable for it to have been notified in time, the appeal will be dismissed.

9.41. The subsequent procedure is set out in the PAT Rules and Guidance.

9.42. Notifying an appeal does <u>not</u> stay the finding and outcome of the third stage meeting.

10. MISCELLANEOUS

Disability Discrimination Act ("the DDA")

10.1. The DDA provides various rights to workers in an employment context, and applies to police officers who are deemed to be employed by the chief officer.

10.2. The DDA can give rise to complicated and technical issues, but the main elements in relation to the UPP are relatively straightforward.

10.3. The DDA applies where a worker falls within the definition of a disabled person. A person will be a disabled person under the DDA if:

10.3.1. s/he has a physical or mental impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities;
10.3.2. s/he has had a qualifying disability in the past, provided that the past disability meets certain conditions as regards its long-term effects;
10.3.3. s/he has been diagnosed with cancer, HIV or multiple sclerosis.

10.4. In relation to the UPP, the main rights under the DDA are likely to be:

10.4.1. the right to have reasonable adjustments made to reduce or eliminate any disadvantage caused by the disability; and
10.4.2. the right not to be treated less favourably for a reason connected with the disability unless such treatment can be justified. Treatment is only justified if it is both material to the circumstances of the particular case and substantial.

10.5. Claims for discrimination under the DDA are brought in the Employment Tribunal and should be commenced within three months of the act about which complaint is made.

10.6. If it is appropriate to consider a claim, in the first instance you should contact the JBB Secretary. Your main focus should however not be on claims under the DDA, so much as using the concept of “reasonable adjustment”.

10.7. It is not possible to give an exhaustive list of potentially reasonable adjustments but the following are examples:

10.7.1. allocating some duties to another person
10.7.2. altering hours of working or training
10.7.3. assigning to a different place of work
10.7.4. allowing absence during working hours for rehabilitation, assessment or treatment
10.7.5. giving training or mentoring
10.7.6. acquiring or modifying equipment

10.7.7. providing supervision or other support
10.7.8. modifying a procedure. In some cases it may be possible to argue that suspending or ceasing the UPP is in itself a reasonable adjustment.

The question to consider is what could the Force do to improve attendance or performance?

10.8. While the DDA only imposes obligations in relation to members who fall within the definition of disabled person, best practice suggests that forces should adopt a similar approach to all officers. You should press for this and avoid adopting and oppose the Force adopting a legalistic approach to whether the member is technically a disabled person.

10.9. While the DDA is most obviously relevant in attendance cases, it may also be relevant in performance cases if there is any connection between performance and the member's medical condition.

10.10. Further guidance is available using the link to the Home Office Guidance on the DDA via the link at 3.18 of the Guidance.

Medical retirement

10.11. If, particularly in an attendance case, there is a realistic possibility that the member may be permanently disabled within the meaning of the Police Pensions Regulations, then this will affect the position.

10.12. In such a case there should be a reference of the relevant medical questions to a Selected Medical Practitioner ("SMP") and no action should be commenced or continued under the UPP until the issue (and any appeal) is resolved. [Guidance 8.10 – 8.14].

10.13. If you need further advice on such matters in the first instance you should speak to your JBB Secretary.

This section contains a small number of relevant stated cases.

Federation Representatives may find these sample cases more relevant than others.

F

[COURT OF APPEAL]

*REGINA v. CHIEF CONSTABLE OF THE MERSEYSIDE POLICE, *Ex parte* MERRILL

G 1989 May 9; 17 — Lord Donaldson of Lymington M.R., Woolf L.J. and Sir Denys Buckley

Police—Disciplinary procedure—Delay—Complaint against police officer—Complainant charged with criminal offence—Police officer not served with notice of complaint until after complainant's trial—Whether notice of complaint served "as soon as . . . practicable"—Police (Discipline) Regulations 1985 (S.I. 1985 No. 518), reg. 7

H

On 28 August 1984 after a car chase, the applicant and two other police officers arrested E. and two other young men on suspicion of stealing a car. On 31 August solicitors acting for one of the men wrote to the Chief Constable giving details of a complaint against the police. An officer was appointed to investigate the complaint. In June 1985 E. appeared before the

Crown Court on a charge of reckless driving, but the jury failed to agree and a retrial was ordered. The retrial took place at the end of October 1985, and E. was acquitted. The applicant was interviewed on 10 January 1986 and served with a notice of the complaint against him under regulation 7 of the Police (Discipline) Regulations 1985. In January 1987 the Police Complaints Authority agreed to the preferment of disciplinary proceedings against the applicant. On 26 June there was a preliminary hearing before the Chief Constable on the question whether there had been a breach of regulation 7. The Chief Constable determined that the regulation 7 notice had been served as soon as reasonably possible after the conclusion of the criminal proceedings against E., and that the applicant's case had not been prejudiced and that there had therefore been no abuse of process. The applicant sought judicial review of the Chief Constable's decision. The Divisional Court dismissed the application.

On appeal by the applicant:—

Held, allowing the appeal, that in deciding whether to allow the disciplinary proceedings to continue the Chief Constable did not have to consider whether there had been a breach of regulation 7 which amounted to an abuse of process; but that he had a discretion to dismiss the charge without hearing the full evidence if he was satisfied that it would be unfair to proceed further; that unfairness as a general concept not only comprehended prejudice to the accused officer, but might also extend to a significant departure from the prescribed framework of disciplinary proceedings; that, prima facie, any breach of regulation 7 caused prejudice and, where delay in giving notice constituted the breach, the greater the delay the greater the prejudice; that time for giving notice under the regulation normally ran from the appointment of an investigating officer, and had to be given as soon as reasonably possible in all the circumstances, subject only to postponement for as long as might be necessary to avoid actual, or at least likely, prejudice to a parallel or overlapping investigation into the subject matter of the complaint; that in ruling that the regulation 7 notice had been given as soon as reasonably practicable after the conclusion of the criminal proceedings against the complainant and that the applicant had not been prejudiced the Chief Constable had misdirected himself; and that, accordingly, in the circumstances, the disciplinary proceedings should be quashed (post, pp. 1085F–H, 1086A–G, 1087H—1088A, D–G).

Reg. v. Chief Constable of the Merseyside Police, Ex parte Calveley [1986] Q.B. 424 considered.

Per curiam. (i) *Calveley's* case did *not* decide that a regulation 7 notice was to be served as soon as reasonably possible after the conclusion of any criminal proceedings (post, p. 1087E).

(ii) Cases in which the evidence is so substantial that it is sensible to give separate consideration to a preliminary objection based on regulation 7 must be very rare. It must be even rarer to have a situation in which judicial review should be considered before the chief constable has reached a final decision on the complaint. Normally, the time for judicial review would not arise, if at all, before the appeal tribunal had given its decision (post, p. 1088C–D).

Decision of the Divisional Court of the Queen's Bench Division reversed.

The following cases are referred to in the judgment of Lord Donaldson of Lymington M.R.:

Reg. v. Chief Constable of the Merseyside Police, Ex parte Calveley [1986] Q.B. 424; [1986] 2 W.L.R. 144; [1986] 1 All E.R. 257, C.A.

Reg. v. Inland Revenue Commissioners, Ex parte Preston [1985] A.C. 835; [1985] 2 W.L.R. 836; [1985] 2 All E.R. 327, H.L.(E.)

No additional cases were cited in argument.

APPEAL from the Divisional Court of the Queen's Bench Division.

The applicant, Michael Philip Merrill, sought judicial review of a decision of the Chief Constable of the Merseyside Police, Kenneth Gordon Oxford, given on 26 June 1987 whereby he had ruled that disciplinary proceedings against the applicant arising out of an incident which had taken place on 28 August 1984 should continue, that notice of the complaint against the applicant, given on 10 January 1986, had been given under regulation 7 of the Police (Discipline) Regulations 1985 as soon as reasonably possible after the conclusion of criminal proceedings against the complainant and that the applicant had suffered no prejudice. On 17 February 1988 the Divisional Court of the Queen's Bench Division dismissed the application.

The applicant appealed by notice of appeal dated 15 March 1988 on the grounds that (1) the Divisional Court, having correctly concluded that a regulation 7 notice ought to have been given to the applicant as soon as practicable, and in particular prior to the conclusion of the criminal proceedings being pursued against the complainant ought to have held the decision of the Chief Constable was flawed by self-misdirection; (2) it was common ground before the Chief Constable that his correct approach to the preliminary issue should be to respond to the questions as formulated by counsel. Since the answer given by the Chief Constable to the first question was wrong in point of law, the decision of the Chief Constable in relation to the preliminary issue could only satisfactorily be upheld if the Divisional Court were satisfied that it was one which a Chief Constable, properly directing himself in law, could reasonably have reached; (3) the next question for determination by the Chief Constable was whether the delay in the service of the regulation 7 notice had caused the applicant *any* prejudice. The Chief Constable purported to answer that question by stating that the applicant's case was *not* prejudiced; but that answer was governed by his preliminary conclusion that the regulation 7 notice was served "as soon as reasonably possible after the conclusion of the criminal proceedings." To the extent that the Divisional Court concluded that the answer of the Chief Constable was reasonably susceptible of any alternative explanation the Divisional Court was in error; (4) the Divisional Court, having correctly identified an error of law in the reasoning of the Chief Constable which governed his determination of the preliminary issue ought to have concluded that the supervisory jurisdiction of the High Court could only satisfactorily be applied by setting aside the determination of the Chief Constable. Whether such an order ought properly to have resulted in an order of mandamus requiring the Chief Constable to re-hear the preliminary issue in the light of the judgment of the court or for an order of certiorari quashing the determination of the Chief Constable was a matter which the Divisional Court ought to have raised with counsel once satisfied that the construction of regulation 7 applied by the Chief Constable and, contended for by leading counsel instructed on his behalf, was erroneous in point of law; (5) to the extent that the Divisional Court based their decision on the factors that (i) when the Chief Constable said that the applicant's case was not "prejudiced" he

meant that the applicant had sustained no "real" or substantial prejudice; and/or (ii) the matters which "first and foremost" the Chief Constable had taken into account were not "irrelevant" considerations, albeit not relevant factors to be taken into account; and/or (iii) it was inconceivable that the applicant did not in fact know that a complaint had been received against him which was liable to be investigated in consequence of his cross-examination at the complainant's trial; and/or (iv) the allegation that the applicant among others had consumed alcohol was not raised in the initial complaint, the Divisional Court were in error.

By a respondent's notice dated 14 April 1988 the Chief Constable sought to contend that his decision should be affirmed on the following additional grounds, namely, that there was not a breach of regulation 7 of the Police (Discipline) Regulations 1977 in that the regulation 7 notice was served upon the applicant as soon as was practicable bearing in mind the words in parenthesis of regulation 7 "without prejudicing his or any other investigation of the matter" and that, in deciding that there was a breach of regulation 7, the Divisional Court was wrong on the grounds, inter alia, that (1) the Divisional Court was wrong to conclude that regulation 7 required service of a notice prior to any investigation into criminal offences on the part of the police officer, the subject matter of the complaint; (2) the Divisional Court failed to have regard to the relevant guidelines issued by the Home Office; (3) the Divisional Court was wrong to interpret "the matter" as limited to disciplinary offences; (4) the Divisional Court was wrong to interpret "any other investigation" as not potentially including the criminal investigation of the complaint by the police officer the subject matter of the complaint or by other police officers on the one hand and the criminal investigation of the police officer the subject matter of the complaint by the investigating officer; (5) the Divisional Court failed to have regard to the prejudice which was likely to arise in the service of a regulation 7 notice prior to investigation of the complaint when the subject matter of the complaint was likely to involve facts arising out of which criminal proceedings or disciplinary proceedings could be brought against the police officer the subject matter of the complaint or criminal proceedings could be brought against the complainant; and (6) the Divisional Court, whilst recognising the difficulties inherent in serving a notice on an officer telling him that a complaint has been made about his conduct at a time when the investigation of criminal offences by those making the complaint was just starting and the trial of them relating to those offences was pending, erred in finding that such difficulties did not of themselves amount to prejudice in that the service of a regulation 7 notice in such circumstances put a police officer at an advantage in a criminal investigation over and above that which an ordinary member of the public would enjoy.

The facts are stated in the judgment of Lord Donaldson M.R.

John Samuels Q.C. and *Charles Pugh* for the applicant.
Brian Leveson Q.C. and *John Pugh* for the Chief Constable.

Cur. adv. vult.

17 May. The following judgments were handed down.

LORD DONALDSON OF LYMINGTON M.R. The applicant, a detective constable in the Merseyside force, sought judicial review of the refusal

A by his Chief Constable to discontinue an inquiry into a disciplinary offence alleged to have been committed by him. As in the leading case of *Reg. v. Chief Constable of the Merseyside Police, Ex parte Calveley* [1986] Q.B. 424, the issue turned upon an alleged failure to serve a formal notice of the complaint within the time contemplated by regulation 7 of the Police (Discipline) Regulations 1977 (S.I. 1977 No. 580) and 1985 (S.I. 1985 No. 518), which are in identical terms. B However, unlike the position in *Calveley's* case, it was thought by all concerned to be appropriate to deal with this aspect by preliminary decision and to adjourn further hearing of the complaint in order to enable Detective Constable Merrill to apply for judicial review.

Leave to apply was granted, but upon the conclusion of the substantive hearing a Divisional Court (Glidewell L.J. and French J.) C dismissed the application. Detective Constable Merrill has appealed to this court. That appeal has two aspects. The first affects Detective Constable Merrill alone—is he entitled to relief? The second is of more general importance—is this an appropriate procedure for rectifying alleged errors of this nature occurring in the course of police disciplinary proceedings?

Regulation 7 is in the following terms:

D

> "The investigating officer shall, as soon as is practicable (without prejudicing his or any other investigation of the matter), in writing inform the member subject to investigation of the report, allegation of complaint and give him a written notice—(*a*) informing him that he is not obliged to say anything concerning the matter, but that he may, if he so desires, make a written or oral statement concerning E the matter to the investigating officer or to the chief officer concerned, and (*b*) warning him that if he makes such a statement it may be used in any subsequent disciplinary proceedings."

The meaning of the words "the matter" in the Regulations was the subject of some argument and, as an aid to construction, we were referred to regulation 6 which uses the same words. In the 1977 F Regulations, regulation 6(1) provided that:

> "Where a report, allegation or complaint is received from which it appears that an offence may have been committed by a member of a police force (hereinafter referred to as 'the member subject to investigation'), the matter shall be referred to an investigating officer who shall cause it to be investigated"

G unless, in certain specified circumstances, the chief officer concerned decides that disciplinary proceedings need not be taken. The format of regulation 6 in the 1985 Regulations is slightly different, but in so far as regard can be had to it as an aid to construction, its effect is the same.

I refer to both sets of Regulations because the 1985 Regulations took effect in replacement of the 1977 Regulations after the complaint was H made and before the regulation 7 notice was given, but nothing turns upon which Regulations fall to be applied at any particular time.

The factual background and chronology, which in the main I take from the judgment of Glidewell L.J., was as follows.

28 August 1984

Shortly before midnight Detective Constable Merrill with two other police officers, Mutch and Johnston, all of them in plain clothes, were in

an unmarked police car in Parliament Street, Liverpool. They saw another car containing three young men, Evans, who was driving, Fell and Burnham, which drew along the unmarked police car at traffic lights.

Merrill's evidence was that, as he was getting out of the car to speak to the three young men, they drove off and a chase ensued. Merrill alleged that Evans drove at an excessive speed and recklessly, apparently racing two other cars. Finally, the car that Evans was driving was stopped. Merrill told all three that he was arresting them on suspicion of stealing the car they were in. There was then a violent struggle, at the end of which the three young men were arrested by the three officers and, with the assistance of others, taken to Admiral Street Police Station, where they arrived at about 12.20 a.m.

Evans said, correctly as it turned out, that the car was owned by his sister who allowed him to drive it, and accordingly no charges relating to the theft of the car were preferred. However, Detective Constable Merrill also alleged that Evans had been driving recklessly and warned him that he might be prosecuted for this offence.

29 August 1984

(a) The three arrested youths were examined by a police surgeon in the early hours of the morning. (b) Evans' father, a retired police constable of the Merseyside Force, went to the Admiral Street Police Station and was seen by Detective Constables Merrill, Johnston and Mutch whilst his son was still there. (c) Detective Constable Merrill made a witness statement.

31 August 1984

Solicitors acting for Evans wrote to the Chief Constable giving details of their client's complaints. Suffice it to say that they alleged the use of wholly excessive force, including kicking Evans in the face and tearing his clothing, and the use of bad language. They gave notice that Evans would be claiming compensation for wrongful arrest, imprisonment, assault and distress. In another letter written on the same day on behalf of another of the arrested youths, the same solicitors alleged that the officers had been drinking on duty.

6 September 1984

Superintendent Larsen was appointed to investigate the complaint.

7 September 1984

The solicitors wrote requiring the police not to attempt to contact either the complainants or their families.

19 September 1984

Detective Constable Merrill made a second witness statement.

30 November 1984

Evans was committed to the Crown Court on a charge of reckless driving.

12 December 1984

A civil action was begun against the Chief Constable on behalf of the complainants Fell and Burnham.

2 January 1985

Detective Constable Merrill attended police headquarters at Canning Place to be interviewed about the civil action being brought by the complainants Fell and Burnham.

17 January 1985

Superintendent Corrin was appointed to investigate the complaint in place of Superintendent Larsen.

18 to 21 June 1985

Evans appeared before the Crown Court on a charge of reckless driving. The jury were unable to agree upon a verdict and a re-trial was ordered. Evidence for the defence was given by Evans' father and by the police surgeon.

September 1985

The civil action by Fell and Burnham was settled out of court.

21 to 24 October 1985

Evans was re-tried and acquitted. Again, the evidence for the defence was given by Evans' father and by the police surgeon.

21 November 1985

A civil action was begun against the Chief Constable on behalf of Evans.

10 January 1986

The investigating officer interviewed Detective Constable Merrill and served a regulation 7 notice.

January to August 1986

The investigation of the complaints against Detective Constable Merrill continued.

April 1986

Evans' civil action was settled out of court.

6 August 1986

A report was submitted to the Director of Public Prosecutions who on 22 September 1986 recommended that no criminal proceedings be brought against Merrill or the other police officers involved.

23 October 1986

The investigating officer's report was submitted to the Police Complaints Authority together with a recommendation from the Assistant

Chief Constable that disciplinary proceedings be brought against Detective Constable Merrill.

22 January 1987

The Police Complaints Authority agreed to the preferment of disciplinary proceedings against Detective Constable Merrill.

26 June 1987

A preliminary hearing took place before the Chief Constable limited to the preliminary point of whether there had been a breach of regulation 7 and, if so, whether the proceedings should be dismissed at that stage.

The hearing

The Chief Constable did not lack legal assistance. Both the presenting officer, who is in effect the "prosecutor," and Detective Constable Merrill were represented by counsel. In addition, the Chief Constable was advised by Mr. Hedley of counsel, who fulfilled the role of the Judge-Advocate at a court-martial. With a view to assisting the Chief Constable in the approach which he should adopt, Mr. Hedley produced a document containing four questions in flow form as follows:

> "*Proposed approach*
> "(1) Was the regulation 7 notice served as soon as was practicable? (a) if yes, the officer's submission fails; (b) if no, then (2) has any prejudice been sustained by the officer as a result of the breach of regulation 7? (a) if no, then there is no abuse of process; (b) if yes, then (3) What prejudice has in fact been sustained in this case? e.g. (a) opportunity to trace and interview witnesses; (b) approaching witnesses for the first time many months after the incident; (c) dimming of recollections with the passage of time; (d) the availability of contemporaneous documents; (e) any other matter. (4) (a) In the context of your duty to act fairly in all the circumstances and bearing in mind the burden and onus of proof, is the prejudice which you find to exist here such as effectively to prevent a hearing being conduct which is both fair and seen to be fair? (b) And, if so, ought you therefore in your discretion to rule that this hearing should proceed no further."

Much of the argument at the hearing was directed to a minute study of the judgments of this court in *Reg. v. Chief Constable of the Merseyside Police, Ex parte Calveley* [1986] Q.B. 424 and it was accepted by all concerned that this suggested approach was soundly based upon that decision. This attitude was maintained both in the Divisional Court and in this court.

In the light of the respect, or even reverence, shown to a decision in which I gave the leading judgment, it may seem churlish to express misgivings, but I feel that I must do so. The reasons for judicial decisions are intended to explain the decision and, in so far as the reasoning involves the formulation of principles, those principles fall to be applied in other cases in which the facts or issues render such application appropriate. But a judgment is neither intended to be, nor is, a statute and should not be so regarded. Statutes are of general application and are drafted with that object in view. Judgments apply

A specifically to the facts of the case under consideration and only incidentally may have more general application.

Calveley was a case in which the court was being invited to depart from the general, and very salutary, rule that the judicial review process should not be allowed to supplant the normal statutory appeal procedure: *Reg. v. Inland Revenue Commissioners, Ex parte Preston* [1985] A.C. 835. Such a procedure exists under the police disciplinary scheme, there B being a right of appeal to an appeal tribunal in accordance with the Police (Appeals) Rules 1977 (S.I. 1977 No. 759) and 1985 (S.I. 1985 No. 576). This court held that such a departure could only be justified if the court was satisfied that the decision under review was not only incorrect, but constituted an abuse of the process. The process, involving as it does an appeal procedure, makes provision for errors of fact or law and for C differing views on the exercise of discretion. The mere fact that a court considers a first instance decision was wrong forms no basis for finding that there has been an abuse of the process.

It follows from this that the introduction of the concept of "abuse of process" as being the test which the Chief Constable had to apply in deciding whether or not to allow the proceedings to continue could result in creating a greater hurdle for Detective Constable Merrill to D surmount than was justified. A study of the transcript shows that the phrase was the subject of considerable argument. Thus Mr. Pugh, appearing for Detective Constable Merrill, seems to have submitted that the Chief Constable should first consider whether there had been a breach of regulation 7 and, if so, "has that given rise or is it attended also by abuse of process. And if you are against me on that, then the E third question is has there been prejudice." On the other hand, Mr. Hedley advised the Chief Constable that

> "abuse and prejudice are in fact entwined in the sense that the only basis on which you might want to find that there had been an abuse of processs was that you had found that there had been both a breach of regulation 7 and you had answered question 4(a) in the affirmative." F

The Chief Constable had no need to concern himself with "abuse of process." As a judicial tribunal, he had a discretionary power to dismiss the charge without hearing the full evidence if he was satisfied that, whatever the evidence might reveal, it would be unfair to proceed further. "Unfairness" in this context is a general concept which comprehends prejudice to the accused, but can also extend to a G significant departure from the intended and prescribed framework of disciplinary proceedings or a combination of both.

Regulation 7

This court held in *Calveley's* case [1986] Q.B. 424 that the regulation is directory and not mandatory. It follows that breach of the regulation H does not of itself vitiate the disciplinary proceedings. On the other hand, as I said in that case, at p. 432, I regard the regulation as an essential protection for police officers facing disciplinary charges. It follows from this that prima facie an officer is prejudiced by any breach and the greater the breach, if it takes the form of delay in giving the notice, the greater the prejudice. I say "prima facie" because one can construct a scenario in which there would be very little prejudice, e.g. the complaint was very simply stated and the investigating officer formally read it out

to the police officer concerned and cautioned him in accordance with the regulation but failed to give him *written* notice.

I now turn to the meaning of the regulation itself. Leaving aside the parenthesis, the investigating officer's duty is to give the member subject to investigation written information of the report, allegation or complaint and the written cautionary notice "as soon as is practicable." Since the investigating officer will normally be given details of the report, allegation or complaint at the time of his appointment, this appointment will normally be the moment from which time begins to run. "Practicable" is a common English word whose nearest synonym is probably "feasible" and the word is so defined in the *Shorter Oxford Dictionary*.

An alternative definition might be "reasonably possible in all the circumstances." The full phrase might thus be written "as soon as is reasonably possible in all the circumstances" with, as I said in *Calveley's* case, all the emphasis on the word "soon."

What of the parenthesis? the fact that the giving of the notice would prejudice "his or any other investigation of the matter" is one of such circumstances and with regard to that circumstance the regulation resolves all doubts as to whether it would then be reasonable to give the notice by providing that it would not. Reference to regulation 6 shows clearly that "the matter" means the subject matter of the "report, allegation or complaint" and the reference to "any other investigation" contemplates a parallel or overlapping investigation (to the extent of the overlap) by someone else for a different purpose, e.g., a coroner's inquest into a death caused by a police officer which was also being investigated for police disciplinary purposes.

If the regulation 7 notice was not obviously given "as soon as is practicable" the investigating officer must be prepared to justify the delay. A short delay may be easily explained by reference to practicability—the officer may have been working round the clock on some other urgent and important investigation or he may have been going on leave on the day of his appointment. However, he will no doubt bear in mind that someone else of suitable seniority could perform his duty on his instructions and on his behalf. If it is longer, the burden will be heavy. If he is relying on the parenthesis, he must be prepared to explain precisely whose investigation would have been prejudiced if the notice had been given earlier and how it would have been prejudiced. It would be misleading to seek to define situations in which this could occur, but an obvious example is provided by a complaint of a systematic taking of bribes when the investigating officer might reasonably wish to set a trap as part of the investigation which would be prejudiced by the giving of the notice. However, it should be emphasised that the parenthesis is directed at actual or at least likely prejudice, not to the bare possibility of prejudice. Furthermore, the giving of the notice can only be postponed for so long as is necessary to avoid such prejudice.

The Chief Constable's decision

The Chief Constable ruled as follows:

> "Well gentlemen, I am reminded quite properly that in the context of my duty in this case, in all the circumstances and bearing in mind the burden and onus of proof. First and foremost in this context, I have a duty to the accused officer now and to the future; I have also a duty to the complainant. And equally when considering the

A seriousness of the allegation, I have a duty to protect the reputation of the Merseyside Police in particular, and the police service generally; and in this context then I have a duty to consider the public interest, particularly in relation to serious allegations of complaint against the police. Taking all this into account, then, it is my duty as I see it, to try and maintain a fundamental balance. I, more than most you will agree, am aware of the *Calveley* judgment B which has been constantly referred to here today, and I am in no doubt I must adhere to that judgment without comment, but with one exception. I quote May L.J.; he said 'Unnecessary delay in legal and analogous proceedings, such as the disciplinary ones in this instant case is of course to be deplored, but it does occur.' In general I have little known control over the delay factor relative to C legal proceedings, which is a constant inhibition when pursuing my disciplinary responsibilities. In consequence then, I am satisfied that in this present case, the regulation 7 notice was served as soon as reasonably possible after the conclusion of the criminal proceedings, and in addressing myself to prejudices let me make it quite clear, I have had the question of prejudices very much in the foremost of my mind in this case, particularly after hearing all the submissions. D And I have come to the view that the officer's case is not prejudiced and in consequence there has been no abuse of process. My decision is that this discipline inquiry shall pursue to its natural conclusion, which I am satisfied will be seen to be fair, because I hope that I have made it abundantly clear where my responsibilities lie."

E In giving this ruling the Chief Constable loyally sought to follow the decision of this court in *Calveley's* case, but misunderstood that decision and thus misdirected himself. *Calveley's* case did *not* decide that a regulation 7 notice was to be served as soon as reasonably possible after the conclusion of any criminal proceedings. Indeed, even if it had, in the absence of very special circumstances, a delay of some eleven weeks thereafter would have been far removed from "as soon as reasonably F practicable." The regulation obviously contemplates a period counted in single figures of days rather than double figures of weeks.

The Divisional Court so held, but it also considered the detailed allegations of prejudice put forward on behalf of Detective Constable Merrill and concluded that there was material from which the Chief Constable could properly conclude that there was no substantial or real G prejudice to him resulting from the late service of the regulation 7 notice. Accordingly, relief by way of judicial review was refused.

For Detective Constable Merrill it was submitted in this court that this consideration of specific allegations of prejudice meant that the Divisional Court was substituting its own judgment for that of the Chief Constable. This submission is untenable in the light of the court's conclusion which was not that Detective Constable Merrill was not H prejudiced, but that there was material which could justify the Chief Constable's decision.

Nevertheless, I do not think that the Chief Constable's decision can stand. On his behalf attempts were made to persuade us that he was considering prejudice stemming from the whole period of delay and not merely from the delay following the conclusion of the criminal proceedings. This may well be correct, but in my judgment his evaluation of the prejudice as non-existent or minimal cannot have been wholly

uninfluenced by his earlier decision that there had been no delay. Furthermore, neither he, nor for that matter the Divisional Court, appear to have given any weight or indeed consideration to the prejudice inherent in depriving a police officer for 15 months of the information to which he was entitled under regulation, namely notice that his conduct was formally under investigation.

The question which then arises is whether we should remit the matter to the Chief Constable to reconsider his decision in the light of our judgments or whether we should simply quash the whole proceedings. At this point we can no longer ignore the fact that what is under investigation is a short but violent incident which occurred as long ago as August 1984. That situation has arisen not through any fault of Detective Constable Merrill but because it was decided to treat the issue relating to the regulation 7 notice as a preliminary point and to adjourn to enable an application to be made for leave to apply for judicial review and because leave was granted. Each of these decisions was I think mistaken. There can be cases in which the evidence is so substantial that it is sensible to give separate consideration to a preliminary objection based upon regulation 7, but these must be very rare and I do not think that this was such a case. It must be even rarer to have a situation in which judicial review should even be considered before a Chief Constable has reached a final decision on the complaint, if indeed one can be imagined. Normally, the time for judicial review would not arise, if at all, before the appeal tribunal had given its decision.

The public interest in complaints against police officers being fully investigated and adjudicated is undoubted, but it must be done speedily. I express no view upon whether Detective Constable Merrill was guilty of the offence charged, but if he was the course of these proceedings has been such that it will have provided neither him nor any other police officer with any encouragement so to attend. If he was not, he has already suffered an injustice which should not be increased. If the Chief Constable was called upon to reconsider his decision today, the additional factor of the time which has elapsed would inevitably lead him to discontinue the inquiry.

I would therefore quash the disciplinary proceedings against Detective Constable Merrill.

WOOLF L.J. I agree.

SIR DENYS BUCKLEY. I also agree.

Application granted with costs in Court of Appeal and below.

Solicitors: Russell Jones & Walker; Solicitor, Merseyside Police Authority, Liverpool.

R. C. W.

[COURT OF APPEAL]

REGINA v. CHIEF CONSTABLE OF THE MERSEYSIDE POLICEEx parte CALVELEY AND OTHERS

1985 Nov. 11, 12;27	Sir John Donaldson M.R.,May and Glidewell L.JJ.

police - Disciplinary procedure - Delay - Two-year delay in informing police officers of complaints - Chief Constable proceeding with disciplinary hearing - Officers intending to appeal against finding of guilt - Whether notice of complaint served "as soon as is practicable" - Whether judicial review to be granted where alternative remedy available - Police (Discipline) Regulations 1977 (S.I. 1977 No. 580), reg. 7

On 21 June 1981 complaints were made against five police officers of the Merseyside Police. An investigating officer was appointed on 30 June, but the officers were given no formal notice of the complaints under regulation 7 of the Police (Discipline) Regulations 1977[1] until November or December 1983. At a disciplinary hearing in September 1984 the Chief Constable rejected a submission on behalf of the officers that the delay had been such that the officers had been irremediably prejudiced in that records and logs relating to the period when the incident giving rise to the complaint had occurred had been routinely destroyed. He proceeded to conduct the hearing. The officers were found guilty and dismissed the force or required to retire. The officers had a right of appeal against the Chief Constable's decision under section 37 of the Police Act 1964 which they proceeded to exercise by giving notice in accordance with the Police (Appeals) Rules 1977. Before the appeal was heard they also applied for judicial review of the Chief Constable's decision. The Divisional Court refused the application on the ground that the application was premature in view of the alternative appeal procedure.

On the officers' appeal:-

Held, allowing the appeal, that the judicial review jurisdiction would not normally be exercised where there was an alternative remedy by way of appeal, save in exceptional circumstances; that the speed of the alternative procedure, whether it was as convenient and whether the matter depended on some particular or technical knowledge available to the appellate body were all factors to be taken into account in considering whether the circumstances were exceptional; that (*per* May L.J.) where the basis of the application was delay in taking the necessary proceedings judicial review should only be granted where the delay amounted to an abuse of process, and that in the circumstances, despite the expertise of the appeal tribunal, the delay of over two years before the service of the regulation 7 notices was a serious departure from the disciplinary procedure (*per* May L.J. amounting to an abuse of process) which had prejudiced the officers and which justified the grant of judicial review (post, pp. 432G - 433A, C-G, 434F - 435B, 439F - 440D).

Reg. v. Epping and Harlow General Commissioners, Ex parte Goldstraw [1983] 3 All E.R. 257, C.A.; *Reg. v. Inland Revenue Commissioners, Ex parte Preston*

1 Police (Discipline) Regulations 1977, reg. 7: see post, p. 430A-B.

Reg. v. Inland Revenue Commissioners, Ex parte Preston [1985] A.C. 835, H.L.(E.) and *Ex parte Waldron* [1985] 3 W.L.R. 1090, C.A. applied.

Reg. v. Hillingdon London Borough Council, Ex parte Royco Homes Ltd. [1974] Q.B. 720, D.C. considered.

Per Sir John Donaldson M.R. Save in the rare case where an investigation of a complaint or a related investigation would be prejudiced by the giving of the notice or where the nature of the complaint is unclear or it is clearly frivolous, it will be difficult to justify any appreciable delay in giving the officer concerned notice of the complaints. "As soon as practicable" should be read with all the emphasis on the word "soon." It is not necessary to collect and consider all the evidence before the regulation 7 notice is given (post, p. 432D-E).

Per May L.J. One must guard against granting judicial review in cases where there is an alternative appeal route merely because it may be more effective and convenient to do so (post, p. 437C-D).

Decision of the Divisional Court of the Queen's Bench Division reversed.

The following cases are referred to in the judgments:

Chief Constable of the North Wales Police v. Evans [1982] 1 W.L.R. 1155; [1982] 3 All E.R. 141, H.L.(E.)

Kilduff v. Wilson [1939] 1 All E.R. 429, C.A.

Reg. v. Brentford Justices, Ex parte Wong [1981] Q.B. 445; [1981] 2 W.L.R. 203; [1981] 1 All E.R. 884, D.C.

Reg. v. Epping and Harlow General Commissioners, Ex parte Goldstraw [1983] 3 All E.R. 257, C.A.

Reg. v. Grays Justices, Ex parte Graham [1982] Q.B. 1239; [1982] 3 W.L.R. 596; [1982] 3 All E.R. 653, D.C.

Reg. v. Hillingdon London Borough Council, Ex parte Royco Homes Ltd. [1974] Q.B. 720; [1974] 2 W.L.R. 805; [1974] 2 All E.R. 643, D.C.

Reg. v. Inland Revenue Commissioners, Ex parte Preston [1985] A.C. 835; [1985] 2 W.L.R. 836; [1985] 2 All E.R. 327, H.L.(E.)

Reg. v. Oxford City Justices, Ex parte Smith [1982] R.T.R. 201, D.C.

Reg. v. Paddington Valuation Officer, Ex parte Peachey Property Corporation Ltd. [1966] 1 Q.B. 380; [1965] 3 W.L.R. 426; [1965] 2 All E.R. 836, C.A.

Reg. v. Secretary of State for the Home Department, Ex parte Miller (unreported), 4 May 1983, D.C.

Ridge v. Baldwin [1964] A.C. 40; [1963] 2 W.L.R. 935; [1963] 2 All E.R. 66, H.L.(E.)

Waldron, Ex parte [1985] 3 W.L.R. 1090; [1985] 3 All E.R. 775, C.A.

The following additional cases were cited in argument:

Calvin v. Carr [1980] A.C. 574; [1979] 2 W.L.R. 755; [1979] 2 All E.R. 440, P.C.

Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374; [1984] 3 W.L.R. 1174; [1984] 3 All E.R. 935, H.L.(E.)

O'Reilly v. Mackman [1983] 2 A.C. 237; [1982] 3 W.L.R. 1096; [1982] 3 All E.R. 1124, H.L.(E.)

Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd. [1982] A.C. 617; [1981] 2 W.L.R. 722; [1981] 2 All E.R. 93, H.L.(E.)

Rex v. Wandsworth Justices, Ex parte Read [1942] 1 K.B. 281; [1942] 1 All E.R. 56, D.C.

APPEAL from the Divisional Court of the Queen's Bench Division.

Pursuant to leave granted by Forbes J. on 11 January 1985 the applicants, William Kenneth Calveley, Michael Blundell, Stanley Gordon Griffiths, Anthony Spencer and Rory James Anderson, sought judicial review by way of certiorari to quash the decision of the Chief Constable of the Merseyside Police, Kenneth Gordon Oxford, following a disciplinary

hearing on 25 and 26 September 1984, that the applicants were guilty of disciplinary offences. On 26 June 1985 the Divisional Court (Lloyd L.J. and MacPherson J.) refused the relief sought.

The applicants appealed on the grounds that (1) the Divisional Court misdirected themselves in concluding that an applicant for judicial review should normally first exhaust his rights by way of appeal, and ought to have concluded that the function of the court on an application for judicial review was to correct such error as might have occurred in the decision-making process of a body, tribunal or inferior court amenable to the supervisory. jurisdiction of the High Court; and (2) the Divisional Court were in error in holding that the application for judicial review was premature, in that they assumed that a hearing before the appeal tribunal on the merits would inevitably proceed, and had the Divisional Court been prepared to reach a conclusion on the arguments advanced on behalf of the applicants, they would have concluded that, by reason of the prejudicial delay which had occurred before the applicants knew that their conduct was under investigation, no charges based on that alleged conduct could be tried without breaching the principles of natural justice, and thus that the applicants were entitled to the orders of certiorari and mandamus which they sought.

The facts are stated in the judgment of Sir John Donaldson M.R.

John Samuels Q.C. and *Robert Percival* for the applicants. The first issue is prematurity. If the Divisional Court was wrong on that then it is necessary to go into the merits.

Two questions arise. Ought a person aggrieved by the decision of a court or tribunal who has a statutory right of appeal by way of rehearing on the merits to exhaust those rights of appeal before applying for judicial review even where his complaint is that the exercise of jurisdiction by the decision-making body amounted to an abuse of power? Should the Divisional Court decline to adjudicate on a complaint on the ground that it is premature when the substance of the complaint is that by initiating or continuing the decision-making process against a background of prejudicial delay, the decision-making body misdirected itself in law or abused its powers? The point arose only late in the argument below and was not relied on by the Chief Constable.

The manner in which the Chief Constable dealt with the case was wrong from the start: see *Chief Constable of the North Wales Police v. Evans* [1982] 1 W.L.R. 1155, 1173D, 1174F. There was self-misdirection so that the complaint is not merely that his decision was wrong, but that it was made in the wrong way. If the delay between the complaint and

the notification to the applicants had been 10 years instead of two, a fair hearing would clearly be impossible. The statutory appeal is inappropriate in the circumstances, although notice of appeal was given in order to preserve the applicants' rights. The appeal procedure would take over a year from now. It is available for the rehearing of any case on the merits. The proceedings before the Chief Constable were not properly constituted. It is the manner of making the decision that is complained of. The proceedings before the Chief Constable were not properly constituted.

Although in *Reg. v. Epping and Harlow General Commissioners, Ex parte Goldstraw* [1983] 3 All E.R. 257, 262 Sir John Donaldson M.R. said that judicial review is not available where there is a remedy by way of appeal save in exceptional circumstances, that is not to be taken as a principle of law. See also *Reg. v. Inland Revenue Commissioners, Ex parte Preston* [1985] A.C. 835. Unfairness or delay in instituting proceedings is one of the exceptions to the normal rule.

What is complained of here may be categorised as either "procedural impropriety" or "illegality". It is a breach of the duty to act fairly: see *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, *per* Lord Diplock, at p. 411, *per* Lord Scarman, at p. 407E, and *per* Lord Roskill, at p. 415C and *Reg. v. Inland Revenue*

Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd. [1982] A.C. 617, where Lord Scarman deals with the duty to act fairly at p. 652. For the duty to act fairly see also*per* Lord Hailsham of St. Marylebone L.C. in *Chief Constable of the North Wales Police v. Evans* [1982] 1 W.L.R. 1155, 1161B, and *per* Lord Brightman at p. 1172B, and *O'Reilly v. Mackman* [1983] 2 A.C. 237, 275E. There is a legitimate expectation that the disciplinary regulations will be complied with. The approach of the House of Lords in the cases cited enables a clear attack to be made on the thinking of the Divisional Court in its conclusion that this application was premature.

On the question of delay, see *Reg. v. Brentford Justices, Ex parte Wong* [1981] Q.B. 445, where the statutory time limits had been complied with, but the court dealt with the totality of the delay. See also *Reg. v. Oxford City Justices, Ex parte Smith* [1982] R.T.R. 201. Regulation 7 of the Police (Discipline) Regulations 1977 is directory, not mandatory: see *Reg. v. Secretary of State for the Home Department, Ex parte Miller* (unreported), 4 May 1983. We adopt the ratio of that case. There are only two qualifications on the duty to inform an officer of a complaint, namely practicability and investigations in train. Neither of those applies here.

The Divisional Court's observations on the appropriate remedy are too wide. If a justices' clerk retired with them and influenced their decision on a matter of fact, it would be no answer to an application for judicial review to say that there was the opportunity to appeal to the Crown Court: see *Rex v. Wandsworth Justices, Ex parte Read* [1942] 1 K.B. 281. The exercise of a right of appeal from a domestic tribunal does not normally oust the jurisdiction of the courts to cure a breach of natural justice by the tribunal of first instance: see *Calvin v. Carr* [1980] A.C. 574.

We also rely on *Ex parte Waldron* [1985] 3 W.L.R. 1090, where *Reg. v. Hillingdon London Borough Council, Ex parte Royco Homes Ltd.* [1974] Q.B. 720 was approved by the Court of Appeal. Judicial review is a more effective and convenient remedy in terms of speed, efficiency and cost than the appeal procedure, which could take as long as a year to complete. There would now be considerable prejudice to a disciplinary hearing. Records, such as duty rosters, have been lost, and relevant evidence is no longer available. It is not necessary to be an inspector of constabulary to appreciate that. There is no need for a specialist appeal tribunal. The matter can be dealt with on the documents available to this court.

Compare the dismissal of actions for want of prosecution. The prejudice to the court in doing justice should also be taken into account. It is now conceded that the requirement to notify the applicants as soon as possible was not complied with. Will that be repeated if there is an appeal to the Home Office? If so, will the Chief Constable resist the appeal, and on what grounds? The answers to these questions are relevant to the question whether judicial review is appropriate. If a police constable resigned before a disciplinary hearing but the Chief Constable insisted on continuing with the hearing and announced his decision to dismiss the constable in a blaze of publicity, it would be wholly inappropriate to consider the jurisdiction to continue the hearing on an appeal. The abuse of power in continuing with the hearing in the present case is just as glaring as the lack of jurisdiction in the example.

In *O'Reilly v. Mackman* [1983] 2 A.C. 237 the House of Lords affirmed that judicial review is the only way to challenge public law decisions.

The Chief Constable abused his powers in the sense meant by Lord Scarman and Lord Templeman in *Reg. v. Inland Revenue Commissioners, Ex parte Preston* [1985] A.C. 835, 839 and 852.

R. J. D. Livesey Q.C. and *J. F. Appleton* for the Chief Constable. If there is another avenue of appeal open judicial review is simply not available. Sir John Donaldson M.R. was entirely correct in his observations in *Reg. v. Epping and Harlow General Commissioners, Ex parte*

Goldstraw [1983] 3 All E.R. 257. Nothing in *Preston's* case [1985] A.C. 835 is contrary to that proposition. This is not an exceptional case. It is similar to the *Miller* case, 4 May 1983. There the delay was shorter, but there were no criminal proceedings pending against the complainant, and there had been no threat of civil proceedings by the respondents against the complainant.

In this case proceedings could have been served earlier on the applicants, but it is not conceded that it should have been done at the beginning. It was not necessary to do so before the termination of the magistrates' court proceedings against the applicants in December 1981.

An appeal hearing would be a hearing de novo. It would be open to the applicants to call witnesses not present at the original hearing and to take points not taken before the Chief Constable.

On the issue of speed, this matter could have been dealt with by now if the applicants had not sought judicial review. We do not accept that it

would take a year to hear this appeal. It could be heard within five to six months.

As to efficiency, an appeal is a full hearing de novo.

On the issue of expertise, an inspector of constabulary is clearly more suitable for dealing with this type of case than the courts.

[SIR JOHN DONALDSON M.R. Would you seek to uphold the Divisional Court in so far as by saying "premature" it meant that the right moment to apply for judicial review is after the Secretary of State's decision on an appeal?]

We would not.

Samuels Q. C. in reply.

Cur. adv. vult.

27 November. The following judgments were handed down.

SIR JOHN DONALDSON M.R. The applicants are five police officers. They have been found guilty of disciplinary offences by the Chief Constable of Merseyside and dismissed the force or required to retire. They are entitled to appeal, and are appealing, to the Secretary of State. However, they submit that an alternative, and more appropriate, remedy is open to them, namely judicial review of the decision by the Chief Constable to hear and adjudicate upon the charges.

The Divisional Court (Lloyd L.J. and MacPherson J.) held that although judicial review might be the appropriate remedy after the appeal had been heard and determined by the Secretary of State, the applicants were premature in their application. In reaching this conclusion, the court, as it was entitled to do, was proceeding of its own motion in the sense that this was not a contention advanced on behalf of either party.

The essential basis of the application can be briefly stated. The incident which gave rise to the disciplinary charges occurred in the early hours of 21 June 1981. There was a disturbance in the street and two of the five applicants were involved. They called for assistance by radio and were reinforced by the three other applicants. The five police officers then arrested five men and took them to the police station. Later in the day three of the prisoners made formal complaints concerning the conduct of the police officers concerned, alleging that there had been a largely unprovoked attack by the officers.

On 30 June 1981 an investigating officer was appointed, but it was not until some two and a half years later, at the end of November and the beginning of December 1983, that the

applicants were officially informed of the fact that complaints had been made or that they were being investigated. The basis of the applicants' claim for relief by way of judicial review is that this failure to inform them constituted a breach of regulation 7 of the Police (Discipline) Regulations 1977 and so seriously prejudiced their ability to defend themselves against the disciplinary charges as to amount to a denial of natural justice.
Regulation 7 provides:

> "The investigating officer shall, as soon as is practicable (without prejudicing his or any other investigation of the matter), in writing inform the member subject to investigation of the report, allegation or complaint and give him a written notice - (*a*) informing him that he is not obliged to say anything concerning the matter, but that he may, if he so desires, make a written or oral statement concerning the matter to the investigating officer or to the chief officer concerned, and (*b*) warning him that if he makes such a statement it may be used in any subsequent disciplinary proceedings."

Having adverted to the essence of the problem, it is convenient to set out the full chronology of events.

21 June 1981
(i) At about 1.40 a.m. five men were arrested by the applicants and later charged with being drunk and disorderly.
(ii) Later during the day three of these men formally complained of the conduct of the arresting officers. All alleged that they were assaulted in the van whilst being taken to the police station and one alleged that he was also the subject of an unprovoked assault before being arrested. The girlfriend of one of the men also complained, but almost immediately withdrew the complaint.
30 June 1981
The Deputy Chief Constable appointed a Detective Superintendent as investigating officer. However, the investigation was suspended pending the completion of the criminal proceedings against the arrested men.
20 July 1981
Two of the applicants prepared and signed witness statements against the five men.
30 September 1981
The remaining three applicants did likewise.
22 to 23 December 1981
The five arrested men were tried and acquitted by justices.
24 February 1982
The Deputy Chief Constable instructed the investigating officer to continue to defer his investigation, pending clarification of the complainants' declared intention to pursue a civil claim against the police rather than to use the statutory complaints procedure.
June 1982
Routine destruction of divisional incident reports, including radio messages and logs relating to 21 June 1981.
April/May 1983
In response to inquiries, the police were told that the solicitors acting for the complainants in the civil proceedings had no instructions and would not object to their clients being interviewed.
June 1983
Routine destruction of parade states showing what other officers were on duty on 21 June 1981.

August/November 1983

The investigating officer interviewed the complainants and other witnesses.

28 November to 12 December 1983

The applicants were interviewed by investigating officer and served with regulation 7 notices.

6 January 1984

The investigating officer reported to the Deputy Chief Constable.

9 January to 3 April 1984

Consultations with the Director of Public Prosecutions and the Police Complaints Board.

26 April 1984

Disciplinary forms specifying the charges were served on the applicants.

25 to 26 September 1984

Disciplinary hearing before the Chief Constable.

Under the relevant regulations, a police officer facing disciplinary charges may conduct his case at the hearing either in person or by a police officer selected by him. All the applicants elected to be represented by a Sergeant Ashton. He took a preliminary objection to the hearing of the charges, submitting that compliance with regulation 7 was mandatory. This submission is not, I think, well founded. The issue of whether it was mandatory or directory was considered fully in *Reg. v. Secretary of State for the Home Department, Ex parte Miller* (unreported), 4 May 1983, and a divisional court consisting of Robert Goff L.J. and Glidewell J. held that it was directory, basing their decision, inter alia, on a decision of this court: *Kilduff v. Wilson* [1939] 1 All E.R. 429. Suffice it to say that the submission was expressly disavowed by Mr. John Samuels, appearing on behalf of the applicants. In fairness to Sergeant Ashton, I should make it clear that he is not to be, and has never been, criticised for making the submission.

However, Sergeant Ashton also, in effect, submitted that, even assuming that the regulation was directory, the delay in these cases had been so considerable that the applicants had been irremediably prejudiced. In particular he took the following points. (1) The interval between the receipt of the complaints and the moment when the applicants were informed of their nature and given an opportunity of making a statement was of the order of two years and five months. (2) The passage of time would have dulled their recollection of the events in question and would have made it difficult or impossible to trace witnesses. (3) The divisional incident reports, radio logs and parade states had been destroyed meanwhile and a sight of these might have assisted the applicants by refreshing their memories, corroborating their evidence or putting them on to the track of potential witnesses. (4) Since the incident, changes had occurred in the street lighting and hedges at the scene.

In reply it was submitted that the regulation 7 notices had been given "as soon as is practicable." The basis of this submission was that the notices could not be served before all the evidence had been acquired

and considered by the investigating officer. The delay in reaching this point was unavoidable in the light of the criminal proceedings against the complainants and the anticipated civil actions by them which prevented the investigation proceeding meanwhile.

The Chief Constable ruled on this submission, saying:

"… I don't think that anything should be frustrated by documentary delay, which was certainly out of the hands of the investigating authority in any event, because of the vagaries of both civil and criminal justice systems. So on that alone, with all good honesty of purpose, I think that this discipline hearing must pursue."

Evidence concerning the charges was then given by various witnesses including the applicants and the charges were found proved.

Although the Chief Constable's ruling is not over-elaborate, I think that he must be taken to have been saying that the notices were indeed served as soon as was practicable. Certainly this is what was maintained before the Divisional Court, where it met with some scepticism. The contention was rightly abandoned before us, it being accepted that the notices could have been given soon after the conclusion of the criminal proceedings or about 18 months before they were in fact given.

For my part I regard regulation 7 as providing an essential protection for police officers facing disciplinary charges and think that, save in the rare case where an investigation of the complaint or a related investigation would be prejudiced by the giving of the notice or where the nature of the complaint is unclear or it is clearly frivolous, it will be difficult to justify any appreciable delay in giving the officer concerned notice of the complaints. "As soon as is practicable" should be read with all the emphasis on the word "soon." In particular I do not accept the view, which appears at one time to have been taken by the police, that all the evidence must be collected and considered before the regulation 7 notice is given. The procedure does not require that the officer under investigation be given only one opportunity of making a statement and it would often be both fair and sensible that he should be re-interviewed at the conclusion of the investigation or, indeed, at intervals during it. The primary purpose of the regulation is to put the officer on notice that a complaint has been made and to give him a very early opportunity to put forward a denial, which in some cases might even take the form of an alibi, or an explanation and to collect evidence in support of that denial or explanation.

On the facts of this case, I can see no obvious justification for failing to give regulation 7 notices in or about July 1981 and I regard it as self-evident that the applicants have been prejudiced by the delay. What is more difficult is to assess the degree of prejudice. At the time of the disciplinary hearing, they still had access to their notebooks, but the entries were not in sufficient detail to be of much assistance in refreshing their memories in the context of the charges. In addition, their own witness statements prepared for the criminal proceedings were still available. Finally, the alleged factual basis of the complaints was no doubt put to them at the hearing in the magistrates' court within six

months of the incident, albeit nearly two years before they were told of the fact that the complaint was being investigated.

Mr. Ronald Livesey, for the Chief Constable, submits that the application for judicial review was rightly dismissed, not upon the ground that it was premature, but because judicial review is not an available remedy when another avenue of appeal is open. In this context he referred to *Reg. v. Epping and Harlow General Commissioners, Ex parte Goldstraw* [1983] 3 All E.R. 257 where, with the agreement of Purchas L.J., I said, at p. 262:

"it is a cardinal principle that, save in the most exceptional circumstances, [the judicial review] jurisdiction will not be exercised where other remedies were available and have not been used."

This, like other judicial pronouncement on the inter-relationship between remedies by way of judicial review on the one hand and appeal procedures on the other, is not to be regarded or construed as a statute. It does not support the proposition that judicial review is not available where there is an alternative remedy by way of appeal. It asserts simply that the court, in the exercise of its discretion, will very rarely make this remedy available in these circumstances.

In other cases courts have asserted the existence of this discretion, albeit with varying emphasis on the reluctance to grant judicial review. Thus in *Reg. v. Paddington Valuation Officer, Ex parte Peachey Property Corporation Ltd.* [1966] 1 Q.B. 380, 400, Lord Denning M.R., with the agreement of Danckwerts and Salmon L.JJ., held that certiorari and mandamus were available where the alternative statutory remedy was "nowhere near so convenient, beneficial and effectual." In *Reg. v. Hillingdon London Borough Council, Ex parte Royco Homes Ltd.* [1974] Q.B. 720, 728, Lord Widgery C.J. said: "it has always been a principle that certiorari will go only where there is no other equally effective and convenient remedy." In *Ex parte Waldron* [1985] 3 W.L.R. 1090, 1108, Glidewell L.J., after referring to this passage, said:

> "Whether the alternative statutory remedy will resolve the question at issue fully and directly; whether the statutory procedure would be quicker, or slower, than procedure by way of judicial review; whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate body; these are amongst the matters which a court should take into account when deciding whether to grant relief by judicial review when an alternative remedy is available."

Finally, this approach is, I think, consistent with *Reg. v. Inland Revenue Commissioners, Ex parte Preston* [1985] A.C. 835, where Lord Templeman said, at p. 862:

> "Judicial review process should not be allowed to supplant the normal statutory appeal procedure. The present circumstances are exceptional in that the appeal procedure provided by section 462 cannot begin to operate if the conduct of the commissioners in initiating proceedings under section 460 [which relates to the cancellation of tax advantages] was unlawful."

In the same appeal Lord Scarman said, at p. 852:

> "But cases for judicial review can arise even where appeal procedures are provided by Parliament. The present case illustrates the circumstances in which it would be appropriate to subject a decision of the commissioners to judicial review. I accept that the court cannot *in the absence of special circumstances* decide by way of judicial review to be unfair that which the commissioners by taking action against the taxpayer have determined to be fair. But circumstances can arise when it would be unjust, because it would be unfair to the taxpayer, even to initiate action under Part XVII of the Act of 1970."

The statutory scheme for police discipline contained in the Police (Discipline) Regulations 1977 and the Police (Appeals) Rules 1977 (S.I. 1977 No. 759) contemplates a right of appeal to the Secretary of State from a determination by the Chief Constable. Notice of appeal has to be given within 22 days of the officer being informed of the Chief Constable's decision and these applicants in fact gave timeous notice on 4 October 1984. The appeal takes the form of an inquiry by an appeal tribunal consisting of a lawyer and a senior police officer. It can involve a complete rehearing of the charges. There was some dispute as

to how long the process takes and it seems that the Secretary of State has recently taken steps to reduce the time. However, it is not speedy and, even if there had been no application for judicial review, it is not certain that the appeal would have been determined much before the present time. The application for judicial review in fact caused the appeal to be stayed and, on the most optimistic view, it could not be determined in less than five to six months from now.

Mr. Livesey submits that the applicants' complaint of delay in serving the regulation 7 notices and of consequential prejudice should be determined by the appeal procedure provided by Parliament. The appeal tribunal would have a specialised expertise rendering it better able than a court to assess the prejudice. Furthermore, the applicants would be able to raise new points and call fresh evidence directed to the disciplinary charges themselves.

I acknowledge the specialised expertise of such a tribunal, but I think Mr. Livesey's submission overlooks the fact that a police officer's submission to police disciplinary procedures is not unconditional. He agrees to and is bound by these procedures taking them as a whole. Just as his right of appeal is constrained by the requirement that he give prompt notice of appeal, so he is not to be put in peril in respect of disciplinary, as contrasted with criminal, proceedings unless there is substantial compliance with the police disciplinary regulations. That has not occurred in this case. Whether in all the circumstances the Chief Constable, and the Secretary of State on appeal, is to be regarded as being without jurisdiction to hear and determine the charges which are not processed in accordance with the statutory scheme or whether, in natural justice, the Chief Constable and the Secretary of State would, if they directed themselves correctly in law, be bound to rule in favour of the applicants on the preliminary point, is perhaps only of academic

interest. The substance of the matter is that, against the background of the requirement of regulation 7 that the applicants be informed of the complaint and given an opportunity to reply within days rather than weeks, the applicants had no formal notice of the complaints for well over two years. This is so serious a departure from the police disciplinary procedure that, in my judgment, the court should, in the exercise of its discretion, grant judicial review and set aside the determination of the Chief Constable.

I would allow the appeal accordingly.

MAY L.J. This is an appeal from a decision of the Divisional Court of 26 June 1985 refusing judicial review to quash a decision of the Chief Constable of the Merseyside Police following a disciplinary hearing held on 25 and 26 September 1984, when he found certain serious offences proved against five police officers.

The principal ground upon which the court was asked to quash that decision was that there had been a breach of the rules of natural justice - in particular it was said that the applicants had been denied a fair hearing by reason of the fact that they had not been served with notice of the complaints made against them as the result of the relevant incident as soon as was practicable in accordance with regulation 7 of the Police (Discipline) Regulations 1977.

The Divisional Court refused the application for judicial review on the ground that the applicants both have a right of appeal against the Chief Constable's decision under section 37 of the Police Act 1964 and also that they had indeed exercised that right by giving notice in accordance with paragraph 4 of the Police (Appeals) Rules 1977. The procedure under those rules is that the Secretary of State appoints an appeal tribunal, which usually comprises a Queen's Counsel and one of Her Majesty's Inspectors of Constabulary, to hold an inquiry. Where the appeal is against both the findings of the Chief Constable and the punishment imposed, as it is here, the hearing before the appeal tribunal is by way of a rehearing. Thereafter the tribunal are required to make a report to the Secretary of State upon which the latter takes whatever seems to him to be the appropriate action.

I respectfully agree with the Divisional Court that the normal rule in cases such as this is that an applicant for judicial review should first exhaust whatever other rights he has by way of appeal. In *Reg. v. Inland Revenue Commissioners, Ex parte Preston* [1985] A.C. 835, 852, Lord Scarman said:

> "My fourth proposition is that a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge: it is not an appeal. Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision."

In the same case Lord Templeman, with whose speech all the other Law Lords agreed, said, at p. 862C: "Judicial review should not be granted where an alternative remedy is available."

To a normal rule there will of course be exceptions. One of these was exemplified in the decision of the Divisional Court in *Reg. v. Hillingdon London Borough Council, Ex parte Royco Homes Ltd.* [1974] Q.B. 720 upon which counsel for the applicants relied and to which Glidewell L.J. referred in his judgment in *Ex parte Waldron* [1985] 3 W.L.R. 1090. The former was a case in which a planning authority had granted planning permission for the residential development of a particular parcel of land but had sought to impose conditions upon that permission which in the view of the Divisional Court were clearly illegal. After setting out the facts, Lord Widgery C.J. considered in his judgment whether judicial review would go at all to control the activity of a local planning authority. He concluded that it would and said, at p. 728: "In particular, it has always been a principle that certiorari will go only where there is no other equally effective and convenient remedy." However, in my view it would be wrong to conclude from this dictum that in every case where there is an alternative remedy, but one which is not as effective or as convenient as certiorari, this alone is enough to enable the court to put the alternative remedy on one side and to grant judicial review. This I think is clear from the following passage from Lord Widgery C.J.'s judgment in the *Royco Homes'* case. He had considered the system of appeals in planning cases and why in many instances the statutory appeal route was the more convenient to follow, but he then returned to the question of speed and costs, at p. 729:

> "An application for certiorari has, however, this advantage: that it is speedier and cheaper than the other methods, and in a proper case, therefore, it may well be right to allow it to be used in preference to them. I would, however, define a proper case as being one where the decision in question is liable to be upset as a matter of law because on its face it is clearly made without jurisdiction or in consequence of an error of law. Given those facts, I can well see that it may be more efficient, cheaper and quicker to proceed by certiorari, and in those cases when they arise it seems to me proper that that remedy should be available."

In *Reg. v. Paddington Valuation Officer, Ex parte Peachey Property Corporation Ltd.* [1966] 1 Q.B. 380, Lord Denning M.R., had used a similar phrase to that used by Lord Widgery C.J. in the *Royco Homes'* case. He said, at p. 400:

> "Now these cases certainly warrant the proposition that, if the Peachey Property Corporation were attacking the assessment of any one *particular* hereditament, or any small *group* of hereditaments, such as all the houses in a particular terrace, their only

remedy would be that statutory remedy. By which I mean that if and in so far as they are attacking *particular* assessments within a *valid*valuation list, they must go by the remedy which Parliament has provided, namely, to make proposals to alter those assessments. But if and in so far as they are attacking the valuation list itself and contend that the *whole list is invalid* (as they do), then I do not think they are confined to the statutory remedy for the simple reason that the statutory remedy is in that case nowhere near so

convenient, beneficial and effectual as certiorari and mandamus. I suppose that in theory the Peachey Property Corporation might make proposals for the alteration of every one of the 31,656 hereditaments in the list, but that would in practice be impossible. Mr. Blain conceded this; but he suggested that a few test cases might be taken, and proposals could be made for altering those few assessments, and a decision given by the Lands Tribunal. But one side or the other might not agree on what should be taken as test cases. And in any case the procedure would be most deficient because there could be no discovery against the occupiers. I am therefore of opinion that the existence of the statutory remedy is no bar to this application. The case falls within the general principle that the jurisdiction of the High Court is not to be taken away without express words; and this applies both to the remedies by certiorari and mandamus: …"

In the light of these passages from the two earlier cases and bearing in mind that we are considering an exception to a general rule, I think that one must guard against granting judicial review in cases where there is an alternative appeal route, merely because it may be more effective and convenient to do so. In both the cases to which I have referred it is clear that the challenged decisions were in truth ones which had been made without jurisdiction or in consequence of an error of law.

A further indication of when it is legitimate to depart from the general rule can be found in passages in the speeches of Lord Hailsham of St. Marylebone L.C. and Lord Brightman in *Chief Constable of North Wales v. Evans* [1982] 1 W.L.R. 1155. In his judgment in the Court of Appeal in that case Lord Denning M.R. had said (see p. 1173):

"I go further. Not only must he be given a fair hearing, but the decision itself must be fair and reasonable. That is the protection afforded to every servant who is employed under a contract of service. He is protected against unfair dismissal. No less protection should be afforded to a probationer constable."

It was in relation to this dictum that Lord Hailsham of St. Marylebone L.C. said, at pp. 1160-1161:

"There are passages in the judgment of Lord Denning M.R. (and perhaps in the other judgments of the Court of Appeal) in the instant case and quoted by my noble and learned friend which might be read as giving the courts carte blanche to review the decision of the authority on the basis of what the courts themselves consider fair and reasonable on the merits. I am not sure whether the Master of the Rolls really intended his remarks to be construed in such a way as to permit the court to examine, as for instance in the present case, the reasoning of the subordinate authority with a view to substituting its own opinion. If so, I do not think this is a correct statement of principle. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter on which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court."

Lord Brightman in his turn quoted Lord Evershed's reference in *Ridge v. Baldwin* [1964] A.C. 40, 96, to "a danger of usurpation of power on the part of the courts … under the pretext of having regard to the principles of natural justice" and continued, at p. 1173:

> "Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

Finally, he said, at pp. 1174, 1175:

> "There is however a wider point than the injustice of the decision-making process of the chief constable. With profound respect to the Court of Appeal, I dissent from the view that 'Not only must [the probationer constable] be given a fair hearing, but the decision itself must be fair and reasonable.' If that statement of the law passed into authority without comment, it would in my opinion transform, and wrongly transform, the remedy of judicial review. Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made. The statement of law which I have quoted implies that the court sits in judgment not only on the correctness of the decision-making process but also on the correctness of the decision itself. … When the sole issue raised on an application for judicial review is whether the rules of natural justice have been observed, these propositions are unexceptionable. Other considerations arise when an administrative decision is attacked on the ground that it is vitiated by self-misdirection, by taking account of irrelevant or neglecting to take account of relevant factors, or is so manifestly unreasonable that no reasonable authority, entrusted with the power in question, could reasonably have made such a decision: see the well known judgment of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223."

I would also respectfully agree with the dictum from Sir John Donaldson M.R.'s judgment in *Reg. v. Epping and Harlow General Commissioners, Ex parte Goldstraw* [1983] 3 All E.R. 257, 262, to which he has already referred.

In my opinion one must be careful not to allow the exception, particularly as it is one which has the merits of speed and efficiency, to become the rule. On the question of delay itself, we were referred to *Reg. v. Brentford Justices, Ex parte Wong* [1981] Q.B. 445 and *Reg. v. Oxford City Justices, Ex parte Smith* [1982] R.T.R. 201. In the former case the Divisional Court held that if justices found that delay in the prosecution of a summons had amounted to an abuse of the process of the court, then they had jurisdiction to dismiss the summons. In the latter case no mala fides were alleged against the prosecution and the justices were of the opinion that the delay in their case had not been unconscionable and had not amounted to an abuse of the process of the court: however, the Divisional Court disagreed and prohibited the justices from proceeding further. In giving the judgment of the court,

Lord Lane C.J. drew attention to a number of matters which as a result of more than two years' delay the applicant had understandably forgotten and continued, at p. 208:

"He points out that the friends who were with him at the time, even if they could be traced, would doubtless have forgotten them too and, in other words, this is the type of delay by its nature and its length which inevitably, in my judgment, must lead to prejudice, unfairness and injustice to the applicant."

The *Oxford Justices'* case was not drawn to the attention of the Divisional Court later the same year in *Reg. v. Grays Justices, Ex parte Graham* [1982] Q.B. 1239. That was one in which the justices proposed to commit for trial on indictment and the applicant had been questioned about the alleged offences within a fortnight after their commission. Thereafter, however, two years passed before the date of the committal proceedings. An application to prohibit the justices from proceeding further because of the delay failed and the court said, at p. 1247:

"Certainly there must be some abuse of the process of the court, some at least improper and it may be mala fide use of its procedure, before an order of judicial review in the nature of prohibition will be made. In our opinion, although delay of itself, with nothing more, if sufficiently prolonged, could in some cases be such as to render criminal proceedings brought long after the events said to constitute the offence both vexatious and an abuse, we do not think that delay of the order that there has been in and in the circumstances of this case can be so described."

I return finally to *Preston's* case [1985] A.C. 835 and to a passage from Lord Templeman's speech, at p. 862:

"Judicial review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abuses its powers."

In my opinion, if one applies the principles deducible from the cases to which I have referred, prima facie the present applicants should be left to their statutory appeals in the course of which the tribunal can consider not only the point based on the failure to give notice under regulation 7 in time and also the question of delay, but in addition the general merits of the case. Although judicial review can provide an effective, convenient and relatively swift remedy, it should only be granted, particularly where the basis of the application is merely delay in taking the necessary proceedings, where this can properly be described as amounting to an abuse of process. Unnecessary delay in legal and analogous proceedings, such as the disciplinary ones in the instant case, is of course to be deplored, but it does occur and, in the absence of mala fides, should not tempt one to resort to judicial review where no real abuse or breach of natural justice can be shown.

That said, however, I think that abuse can be shown in the instant case. Apart from the failure to give the notices under regulation 7

timeously, over three years passed between the alleged offences and the hearing before the Chief Constable. In that time the radio log sheets and the parade states and other documents which would have shown what other officers were on duty at the relevant time have been destroyed. Although I suspect that the fact that complaints under section 49 of the Police Act 1964 had been made was known shortly afterwards to the applicants, they were never formally warned at that time nor have they been able to obtain the names of or statements from any witnesses that they might have wished to call. Further, the investigating officer did nothing between the end of 1981 and July 1983. In addition, I respectfully do not

think that the Chief Constable appears to have had the question of possible prejudice sufficiently in mind when he rejected the preliminary point on the regulation 7 notices taken by Sergeant Ashton at the start of the original disciplinary hearing. Finally, it is clear that even now it will be at least some months before the appellate tribunal can hear any appeal and even then it has to report to the Home Secretary and he has to consider that report.

For these reasons I too would allow this appeal and grant the judicial review sought.

GLIDEWELL L.J. I agree that this appeal should be allowed for the reasons set out in the judgment of Sir John Donaldson M.R.

I add only that I also agree that, where application is made for judicial review but an alternative remedy is available, an applicant should normally be left to pursue that remedy. Judicial review in such a case should only be granted in exceptional circumstances. If I did not make this clear in my judgment in *Ex parte Waldron* [1985] 3 W.L.R. 1090, to which Sir John Donaldson M.R. has referred, I now repair the omission. The criteria to which I there referred are amongst the matters which, in my view, a court should consider when deciding whether the circumstances are exceptional.

Appeal allowed with costs in Court of Appeal and below.
Order of certiorari granted.
Leave to appeal refused.

Solicitors: *Russell Jones & Walker; County Solicitor and Secretary, Merseyside County Council.*

R. C. W.

R v Chief Constable of the North Wales Police Force ex parte **Connah**

Queen's Bench Divisional Court (Crown Office List)

The Times 21 November 1986, CO/916/86, (Transcript:Marten Walsh Cherer)

HEARING-DATES: 17 November 1986

17 November 1986

COUNSEL:
E Lawson for the Applicant; J Bailey for the Respondent

PANEL: Croom-Johnson LJ, Peter Pain J

JUDGMENTBY-1: CROOM-JOHNSON LJ

JUDGMENT-1:
CROOM-JOHNSON LJ: This is a case in which judicial review is sought by a Sergeant Connah of the Deeside Police Station in which, by leave of McCowan J, he asks for an order of mandamus directed to the Chief Constable of the North Wales Police Force, ordering that he be at liberty to interview potential witneses in respect of a forthcoming disciplinary tribunal privately. Alternatively, he seeks a declaration as to the applicant's entitlement privately to interview witnesses.

The grounds upon which relief is sought come to this. Sergeant Connah says that he has been unfairly and unreasonably hindered in preparing his defence against the disciplinary charges, in breach of natural justice, by the imposition of restrictions.

The whole matter arises out of incidents which took place at the Deeside Police Station on 11th February 1986 and thereafter, in particular on 1st March 1986. It is wholly unnecessary to go into the facts leading to the charges which were formulated against Sergeant Connah save to say that he was duly served with the notice of the charges which were preferred against him on 9th May 1986. As a result of the incidents, he was charged in respect of 11th February with discreditable conduct, in that being a member of the police force, he acted in a manner prejudicial to discipline, that is to say, being insolent in his conduct towards Inspector Hughes. Secondly, he was charged with another charge of discreditable conduct, in that being a member of the police force, he acted in a manner prejudicial to discipline, abusive in his conduct towards Inspector Hughes on 1st March 1986. There are two charges of disobedience to orders, both concerned with disobedience of lawful oral orders alleged to have been given to him by Inspector Hughes on 1st March 1986. The charges of discreditable conduct are of such a nature that they are regarded as serious charges and may, if sufficiently serious, lead to very drastic steps being taken by way of penalty against Sergeant Connah.

In the ordinary way, Sergeant Connah was served with the statements of the witnesses who were going to be called against him at the hearing of the disciplinary proceedings and further statements of witnesses which had been taken, but whom it was not intended to call. So far as all the formalities of the hearing are concerned, there is no complaint save upon the matter which is the subject of this hearing.

Under the Police Discipline Regulations 1985, regulation 11(1)(c), he "shall be invited to state in writing on the discipline form within 14 days from the date on which it was served on him whether he proposes to call any witnesses or relevant facts at the hearing and the names and addresses of any such witnesses whose attendance he wishes the chief officer concerned to take steps to secure." There is a dispute on the facts of the incidents which took place on 11th February and 1st March. That is the primary issue.

There is a secondary issue. In accordance with the proper procedure, Sergeant Connah has been served with the statement of his antecedents. This is, in effect, what in other circumstances would be described in a criminal court (although this is not one) as the antecedents of the accused to be put before the court in the event of his conviction. What has been served on Sergeant Connah in that form is not complimentary, but he has also been supplied, as is proper, with the annual reports which have been made upon him over the last few years, which have had to be shown to him and upon which he has been at liberty to make representations. They are complimentary and Sergeant Connah considers that there is a discrepancy between the antecedent information and the annual reports which requires investigation and clearing up. Accordingly, in order to satisfy regulation 11(1)(c), Sergeant Connah not only wishes to find witnesses who can deal with the facts of the incidents, but he also wishes to find witnesses who can deal with his previous conduct in the North Wales Police Force so as to deal with the question of his character and antecedents if, in the end, the result shall be that he be found guilty of any of the offences with which he is charged.

The question has arisen because the Chief Constable, who is going to be the ultimate tribunal, is under an obligation to make available to him those witnesses who are either members of the police force itself or civilians employed by the police force. What Sergeant Connah wants to do is to have free access to such witnesses as he is minded to see. He does not wish -- and it has been expressly disavowed -- to have access to what may loosely be called "the prosecution witnesses", whose statements have been served upon him, nor is he asking for any relief in these proceedings in relation to civilians who are not employed by the police force. They fall outside the ambit of this case.

When the Deputy Chief Constable, who is the officer concerned with the progress of the hearing, was asked whether there should be access to those witnesses, he replied on 29th May to Mr Templeton of the North Wales Police Federation, who is himself a police officer and has been appointed Sergeant Connah's friend for the purpose of these proceedings. He said: "In so far as the additional police and civilian witnesses are concerned, if you provide me with their details I will arrange for them to be interviewed in your presence" -- namely, Mr Templeton's presence -- "if you wish by the Investigating Officer or an independent Senior Officer." That was in reply to a request made by Mr Templeton on 16th May, when he had asked that he be given permission independently to interview a number of witnesses, police and civilian, who appeared to be able to give evidence which might prove helpful to the accused officer.

That provoked correspondence between solicitors acting now on behalf of Sergeant Connah and the Deputy Chief Constable. It has been suggested that the Deputy Chief Constable was trying to assert property in the witnesses, but that was expressly denied by him and in dealing with that, he said on 17th June: "However, so far as police officers are concerned it has been, and remains, the practice and policy of this force only to allow such officers to be interviewed in the presence of a senior officer. That is the position whether an officer is to be interviewed as a potential witness in criminal or civil proceedings. I see no reason why the established policy and practice should be departed from in connection with disciplinary proceedings."

In July 1985, the Police Federation for the North WAles Police Joint Branch Board had fired what might be called "a sighting shot" at the Deputy Chief Constable in relation to this very matter. In reply to that, in 1986, in matters quite unconnected with the present proceedings, the Deputy Chief Constable had written back to say: "The policy of this force will be that the Investigating Officer or another independent Senior Officer will take any witness statements, in the presence of the 'friend' or accused officer, if requested. Should the accused officer, his 'friend' or his legal representatives raise objections to the presence of the Investigating Officer, then I will consider the matter. I am not prepared, however, for any police officer to be interviewed other than in the presence of the Senior

Officer." That is a standpoint to which the Deputy Chief Constable has adhered.

On 19th June 1986, Sergeant Connah's solicitors wrote again to the Chief Constable challenging the Deputy Chief Constable's ruling as to policy. He said this: ". . . it remains our opinion that an accused officer should be afforded the right to interview potential witnesses other than in the presence of a representative of the investigating department or indeed of any other police officer." That was replied to by the Deputy Chief Constable on 23rd June when, among other matters, he said this: ". . . if Constable Templeton supplies me with the details of the potential witnesses I will arrange for them to be interviewed in his presence by an independent senior officer." There the Deputy Chief Constable was not insisting upon the investigating officer being the person to be present at the interview, but merely an independent senior officer.

The Deputy Chief Constable has sworn an affidavit in this matter. In it, he has called attention to Home Office Circular 81/1967, which was the report of a working party on the supply of information from police records for civil procedure. He has sought to draw comfort from what was in that report. That report, however, was not concerned with disciplinary proceedings within the police force. It was a report as to the circumstances in which the evidence of police officers might be obtained by parties to civil proceedings and the way in which that should be done. It will be common knowledge that if two motorists have an accident, they are very anxious to get hold of the police reports, the evidence of the police officers who attended the scene, and so on and so forth. In order to regularise that procedure, in order to reduce the drain on police officers' time in being interviewed by solicitors and in order to introduce something like a standard charge to civil litigants for the supplying of that information, the working party, and subsequently the General Standing Orders, laid down circumstances in which that evidence should be obtained. One of the matters which arose out of it was that if a police officer is inverviewed, it should be done only in the presence of a senior officer. The reason for that, as stated in the General Standing Orders, is that a senior officer will be present at a subsequent interview to ensure that it does not exceed the proper bounds. This is because those police officers being interviewed may be comparatively junior officers. There are rules as to what they can say in their evidence; fact only and not opinion. In particular, it is most important that they should not disclose to any person without proper authority any information which they have in their possession as members of the police force. That rule is contained in Schedule 1 of the Police Discipline Regulations 1985, paragraph 6. The presence of the senior officer was therefore to see that the officer being interviewed did not go beyond the authority which had been given to him for the purposes of that interview.

That has nothing to do with disciplinary proceedings. Accordingly, we have been asked to rule in this case that in the interests of natural justice or, as it is better described, of behaving fairly, for the purposes of Sergeant Connah's proceedings, he should be able to have free access to police witnesses. We have been asked both by those representing Sergeant Connah and also by counsel representing the Deputy Chief Constable, to give guidance as to the circumstances in which a Chief Constable or Deputy Chief Constable may be free to grant leave to the representatives of the police officer who is subject to disciplinary proceedings to interview witnesses without a senior officer being present.

I am not prepared to do so. I begin by referring to an extract from the publication which was issued with the Home Office Circular No 31/85, dated 17th April 1985. The document is headed "Guidance to Chief Officers on Police Complaints and Discipline Procedures". That covers both disciplinary procedures within the force and complaints from outsiders suggesting offences or bad conduct by police officers in relation to them. It is a large document. We have only seen a small part of it. There is an Annexe H. It is called "Notes on Disciplinary Hearings before the Chief Officer and before a Tribunal". In Annexe H, there is a section headed "Preparation. Rights of the Accused Officer". Parargraph 11 reads as follows: "Every effort should be made to assist an accused

officer, his 'friend' or his legal representative to interview witnesses who might be called for the defence. It is recognised that an investigation officer should ideally be seen by both sides as acting totally neutrally as between an accused officer and the authority presenting the case against him. Chief officers are, however, requested to permit defence interviews of witnesses to take place in the absence of the investigation officer where the accused officer, his 'friend' or his legal representative raises objections to his presence."

I read that paragraph as indicating two things. First, if a police witness is to be investigated in a disciplinary tribunal, application has first to be made to the chief officer for permission. Secondly, if such permission is granted, as I am quite sure it invariably is, the interview normally takes place in the presence of some other officer. Normally, according to this paragraph, it is the investigation officer. I start on that basis. The question that therefore arises is simply whether, on the facts of this particular case, there is good reason for saying that in the interests of fairness or natural justice, it requires that that general rule should be departed from.

At the beginning of the hearing this morning, counsel for the Deputy Chief Constable, indicated that he was prepared to concede the applicant's wishes to this extent; that a senior officer should be present, but not necessarily the person to be asking the questions. That was not acceptable and one can readily see why that should not be acceptable to Sergeant Connah and his counsel. What is feared on the part of the Federation is that if the investigation officer is present, he may be possibly at risk from passing information back, as a result of the witnesses' interviews, to those who are actually handling the charge against the accused officer. That is a matter which is possibly exaggerated in the minds of those complaining of it. It is a risk that one has to concede might possibly and certainly in some circumstances be a real one. On the other hand, if it is not the investigation officer who is present and asking the questions, but some other senior officer, it might very well be that the senior officer would know nothing at all about the facts which were under investigation and it would be pointless to suppose that he would be in a position to ask the questions. What the Deputy Chief Constable wishes in the present case is to have somebody present. The reason it comes, in the end, to why he thinks that there should be a senior officer present is fear that the witness might himself be in breach of the Discipline Code Schedule 1, paragraph 6. He might be exceeding the bounds of what is proper and there might be a conflict between his loyalty to his force, his position as a constable and his need to tell the exact truth about what happened in the incidents under investigation. It might be that he would be put in the position where he would himself be liable to disciplinary proceedings.

All that must be judged upon the facts of the individual case. I am not prepared to give guidance on all the other cases, the facts of which I know nothing at all about and which may have to be dealt with hereafter if it is thought that the circumstances justify the interviews taking place without the presence of a senior officer.

This matter is advanced on behalf of Sergeant Connah on this basis. There must be no unreasonable hindrance to the preparation of this case which would amount to a denial of natural justice against him. He must be given every facility to correct and contradict the evidence which has been marshalled against him. There is no contest about that. What really arises in the present case is what would be an unreasonable hindrance to the preparation of the case, which was being attempted by Sergeant Connah and his legal advisers. That must be judged in all the circumstances of the present case. I think one can fairly start with this. Confidentiality in the obtaining of evidence for one's defence is certainly a great advantage to the defendant. In so far as it is suspected by the Deputy Chief Constable that the witness might exceed his authority to give information on the kind of facts that this case presents, that is something which is really a paper fear. It is said that it might be that a potential witness might be reluctant to give his evidence to Mr Templeton if a senior officer was present, that he might be afraid to be heard to be

criticising perhaps his own senior officers who are concerned in the incidents and therefore he might be very unwilling to "come clean" on the full facts of the events as they took place. I suspect that that is not a very great risk, but one can see that it can be regarded in the present case as a risk where the sergeant is accused of having been insolent and insubordinate to his senior officer. However, when one looks at the facts of this case and sees within what range they took place, one cannot say that harm would be done if the interviews took place without any senior officer being present.

The incident on 11th February simply concerned a discussion between Sergeant Connah and an inspector dealing with the report which somebody had to make on a schoolboy who was attached, for the time being, to the police force for three weeks for experience. There seems to have been some discussion which was said on the one hand to have been insolent and insubordinate and on the other hand to have been a perfectly rational and polite dispute based upon two different views of what ought to be done.

The incident on 1st March, which resulted in the second, third and fourth charges, again arose out of the same matter and was concerned with the filling up of the form which had to be the subject of the report (by somebody) upon the boy. Again, it is suggested by the Inspector that there was disobedience and by Sergeant Connah that there was no disobedience and it had been a misunderstanding. The whole incident happened virtually within the Deeside Police Station. It depends entirely upon the oral evidence of people who were round and about. There is a little documentary evidence which cannot be contradicted, but may be explained if necessary. One cannot see, on the facts of this case, how any police officer or civilian in the station who gave evidence as to what took place could be at any risk of letting any confidential information out of the bag to Mr Templeton, who is Sergeant Connah's friend.

Again, what Sergeant Connah wishes to do with regard to the character evidence and the antecedents is simply to be free to approach other senior officers who have been over him in the past in order to get their evidence and comments on the way in which he has behaved, the way in which he has performed his duties and so forth. One cannot see that there is any real need in getting that evidence for anybody else to be sitting in on the conversation between Mr Templeton, Sergeant Connah and whatever officers he wishes to have interviewed with a view to calling on his behalf should the need ever arise.

Those being the limits of this particular dispute, one cannot see any good reason why there is any need for a senior officer to be present at the hearing of those questions being put to the witnesses. Simply upon that basis and for no other, bearing in mind that it is desirable at any rate that the defendant in proceedings of this kind should feel at liberty to approach anybody that he wants in order to get full and frank information from him in the way of evidence, I should order that this request for judicial review should succeed. I do not think it is necessary to issue an order of mandamus directed to the Chief Constable. I think it is quite sufficient to grant the declaration as to the applicant's entitlement privately to interview witnesses. That is as far as I would go.

JUDGMENTBY-2: PETER PAIN J

JUDGMENT-2:
PETER PAIN J: I agree. This is a case under the Police Discipline Regulations and it is common ground between the parties that the rules of natural justice apply to a police disciplinary hearing. It is part of those rules that the accused should have a reasonable opportunity to prepare his defence and to contradict the allegations against him. We have been referred to a number of documents, but it is clear that there is no settled procedure laid down for the way in which a defendant is to take statements from his witnesses when they are members of the police force or civilians employed by the police force. We have been referred to the procedure which is applicable in the case of civil

proceedings, but it seems quite clear to us that that is not applicable in the case of disciplinary proceedings. The Deputy Chief Constable seems to have based his original objections on the basis that disciplinary proceedings were to be dealt with in exactly the same way.

So far as civil proceedings go, they are between two or more parties who are not members of the police force at all. In regard to them, the police force has to maintain a strictly even balance. Those proceedings take place in public. Disciplinary proceedings take place in private and they are proceedings by which the authority of the police force is charging an individual member of that force with some breach of discipline.

Initially, the Deputy Chief Constable was asked to grant authority for Mr Templeton, the accused's friend in this matter, to see witnesses. He was not prepared to grant permission to see witnesses in private. He indeed had written a letter not in relation to this case, but a letter of statement of general principle on 25th March of this year, saying: "The policy of this force will be that the Investigating Officer or another independent Senior Officer will take any witness statements, in the presence of the 'friend' or accused officer, if requested. Should the accused officer, his 'friend' or his legal representatives raise objections to the presence of the Investigating Officer, then I will consider the matter. I am not prepared, however, for any police officer to be interviewed other than in the presence of the Senior Officer."

That policy has been very considerably modified and we were told in court today that the Deputy Chief Constable was prepared to agree that witnesses might be seen by the friend provided there was a senior officer present. It was said that the statement should be taken by the friend and not the senior officer (who should not be the investigating officer) but it was still maintained that there must be a senior officer present.

The members of the police force who may be thinking of giving evidence are caught by paragraph 6 of the Schedule to the Discipline Regulations, which is the Discipline Code, in that if they do so without permission, they may be committing this offence, namely, "without proper authority communicating to any person any information which he has in his possession as a member of the police force."Therefore, any potential witness says: "I want my chief officer's proper authority before I make a statement." One can well understand that that is a wise course for him to take.

It is quite clear from the documents that we have seen that in the past there has been a practice commonly followed of statements being taken sometimes in the presence of the investigating officer and sometimes in the presence of a senior officer. We have been asked to give general guidance, but for myself, I would not be prepared to go further than to deal with the facts of the present case.

When one looks at the present case, one sees that the charges that were made arose out of matters that appear to be comparatively minor incidents, or at all events, incidents that were confined to a single station. There is no reason, as far as one can see, to think that there are any sensitive police matters that are likely to be dealt with if the friend is allowed to see the witnesses privately. Also, the hearing before the chief officer will be in private.

Mr Bailey, for the respondent, has argued that there would be no prejudice to the accused if the statements are taken in the presence of a senior officer and that if a potential witness cannot stand up to the presence of a senior officer and speak his mind, then he is not likely to be much good as a witness in front of the chief officer at the hearing. That does not seem to me to be a realistic contention. I think it is important that the friend should be able to see the potential witnesses, with or without his accused, in private. The taking of a statement does not consist of someone just rattling off a form of words. It often takes a considerable time to get down just what the witness if

prepared to say and what he is not prepared to say. Indeed, it may result in him being discarded because he is not prepared to give any evidence that will be helpful. However, it is important, to my mind, that that should take place in an atmosphere where the friend can be sure of confidentiality.

On the facts of this case, I do not think it would be fair to insist upon the presence of a senior officer. The hindrance that that would cause to the accused in exercising his rights would not be reasonable. It may well be right that in another case, a balance may have to be drawn between the interests of the police (and therefore the public) in regard to sensitive information and the interests of the accused in preparing his defence in the best possible conditions. That will have to be looked at as and when the matter arises. It may well be a matter that the authorities, who have alreasdy gone into the question of civil procedure quite carefully, may care to consider as a matter of general application. I do not think it would be right for us, having heard of a single, rather minor, case to proceed to lay down any general principles.

In those circumstances, I agree that the plaintiff is entitled to succeed and I agree with my Lord that he should succeed on the basis of a declaration, which may require a little more drafting. It should be to be the effect that he is entitled privately to interview witnesses in the circumstances of this case.

CROOM-JOHNSON LJ: Have you any particular views as to the form of the declaration?

MR LAWSON: No. I take the point. The substance of it appears in the relief sought, but it needs wording a little better. I wonder if it would be convenient to your Lordships --

CROOM-JOHNSON LJ: I think you had better deal with it now.

MR LAWSON: I will deal with it on my feet. The declaration I would suggest would be that the applicant, Sergeant Connah, be entitled privately to interview witnesses in connection with the disciplinary proceedings pending against him. I trust that there will not be any more disciplinary proceedings but perhaps one should specify that they are arising from the discipline charges notified on 9th May 1986.

PETER PAIN J: You would want "Connah and his friend" in the declaration. You would want the friend to take the statement.

MR LAWSON: I am grateful for that suggestion. I wonder if your Lordships would say "the applicant or his representative".

CROOM-JOHNSON LJ: He might want his solicitor.

MR LAWSON: Indeed. I do not think that will cause any difficulty in practice.

MR BAILEY: I think it should be "representatives" as opposed to "representative".

CROOM-JOHNSON LJ: He should be entitled privately to interview witnesses in connection with the disciplinary proceedings pending against him rising from the discipline charges notified to him on 9th May 1986. Mr Bailey, have you any observations on a declaration in that form?

MR BAILEY: I think there should be added to that "concerned with factual disputes on the summary of antecedents served against him".

CROOM-JOHNSON LJ: I cannot see what else they could be concerned with. That is what this application was limited to, was it not?

MR BAILEY: Yes. I would also suggest in the same light that the expression "facts of the disciplinary charges" be added.

CROOM-JOHNSON LJ: "Concerned with the facts of the disciplinary charges".

MR BAILEY: "And disputes as to facts on the statement of antecedents."

CROOM-JOHNSON LJ: It might go beyond that, might it not? He might want to come along with some good character witnesses.

PETER PAIN J: If someone says he is anti-authority, it is not a question of gact, is it? If someone turns round and says he is pro-authority, it is opinion.

CROOM-JOHNSON LJ: How would you like to put it, Mr Lawson?

MR LAWSON: With respect, I would like to put it as I suggested originally.

CROOM-JOHNSON LJ: "Arising from the disciplinary charges notified to him."

MR LAWSON: Yes because the scope of the investigation is necessarily relatively narrow.

CROOM-JOHNSON LJ: It is the facts of the incidents.

MR LAWSON: And matters relating to character.

CROOM-JOHNSON LJ: And matters relating to character. There is nothing else outside, is there?

MR LAWSON: No.

PETER PAIN J: Should one say "potential witnesses" instead of "witnesses" because he may interview them and not want to call them.

MR LAWSON: I am very grateful for that suggestion, yes.

MR BAILEY: I think, on balance, "matters relating to character' suits the position. I am only worried because of those fears that I have not been able to express in precise terms. In fact, it will become anecdotal and information is disclosed. It will be examples of him being insubordinate or not insubordinate in the past.

CROOM-JOHNSON LJ: I do not see how one can control what form the evidence takes. That is the trouble. I suppose eventually it will be for the Chief Constable to say what he considers relevant.

MR BAILEY: Yes. It was for that reason that we were afraid that matters might be disclosed. I am not going to rake over old ground.

CROOM-JOHNSON LJ: I think I would be inclined to grant the declaration simply in the form that Mr Lawson has asked for it. I do not think, with respect, that what you seek to add really adds anything of any significance. We will finish it off with "on 9th May 1986". I think everyone knows what is covered. Indeed, it was all that you asked for in the proceedings, was it not, Mr Lawson?

MR LAWSON: Yes.

CROOM-JOHNSON LJ: Very well, we will have it as I read it out.

DISPOSITION:
Declaration granted

SOLICITORS:
Russell Jones & Walker; Gwilym Hughes & Partners, Wrexham

Status: Judicial Consideration or Case History Available

*1 R. v Howell

Court of Appeal
17 January 2003

[2003] EWCA Crim 01
[2005] 1 Cr. App. R. 1

(Lord Justice Laws, Mr Justice Newman and Sir Richard Tucker):
November 22, 2002; January 17, 2003

Adverse inferences; Jury directions; Legal advice; Police interviews; Right to fair trial; Right to silence; Statements reliance on

H1 EVIDENCE

Interview

Police unable to disclose written statement from complainant— Defendant advised by solicitor to remain silent in interview— Judge directing jury that adverse inferences could be drawn from silence— Whether genuine reliance on advice good reason for silence— Whether absence of written statement good reason— Whether judge's direction rendering trial conviction unsafe— Criminal Justice and Public Order Act 1994 (c.33), s. 34

H2 The appellant was arrested for attacking J with a knife and inflicting serious injury on him. At the police station the appellant's solicitor advised him that since the police were unable to disclose a statement from J the appellant should give a " no comment" interview. At trial the defence case was that it had been J who assaulted the appellant and any injuries sustained by J had been caused by the appellant acting in reasonable self-defence. The appellant gave evidence that he had not told the police the full story because he had been advised not to by his solicitor. In summing up the trial judge told the jury that under s.34 of the Criminal Justice and Public Order Act 1994 [1] they were entitled to draw such inferences as appeared proper from the appellant's failure to mention, on being questioned by the police, that he had acted in self-defence. The judge went on to say that, in the circumstances of the case, the jury might think that it was difficult to see how such advice could have been given, or, if given, acted on. The appellant was convicted and his application for leave to appeal against conviction was dismissed.
The Criminal Cases Review Commission referred the case back to the Court of Appeal on the ground that the appellant's right to a fair trial under Art.6 of the European Convention on Human Rights might have been breached because the trial judge effectively withdrew from the jury the question whether the appellant remained silent because of legal advice.

*2

H3 **Held,** dismissing the appeal, that there had to be soundly based objective reasons for silence, sufficiently cogent and telling to weigh in the balance against the clear public interest in an account being given by the suspect to the police. It was not unreasonable to expect the suspect to mention the facts in question simply because he had been advised to remain silent. What was reasonable depended on the circumstances. The absence of a written statement from the complainant was not a good reason for silence (providing adequate oral disclosure of the complaint had been given) and it did not become a good reason because a solicitor had so advised. In the circumstances there were no soundly based objective reasons for the appellant's silence (post, paras. 24, 27).
H4 Condron v United Kingdom (2001) 31 E.H.R.R. 1 applied.
R. v Betts and Hall [2001] 2 Cr.App.R. 257, CA not followed.
H5 *Per curiam*. The kind of circumstance which might justify silence will be such matters as the suspect's condition (ill health, in particular mental disability, confusion, shock), or his inability genuinely to recollect events without reference to documents which are not to hand, or communication with other persons who might be able to assist his recollection (post, para.24).
H6 (For s. 34 of the Criminal Justice and Public Order Act 1994, see *Archbold* 2004, paras 5– 414 and following.)

Appeal against conviction

H7 On July 28, 1998, in the Crown Court of Swansea (Judge Martin Stephens Q.C.) the appellant, Jeffrey John Howell, was convicted of an offence of wounding with intent (count 2) and was sentenced to six years' imprisonment. He was acquitted of attempted murder (count 1). On May 19, 1999, the Court of Appeal (Evans L.J., Curtis and Aikens JJ.) refused his renewed application for leave to appeal against conviction. Subsequently, the Criminal Cases Review Commission referred the case to the Court of Appeal, Criminal Division, pursuant to s.9(1) of the Criminal Appeal Act 1995.
H8 The facts and grounds of appeal appear in the judgment of the Court.

H9 Representation

- Linda Dobbs Q.C. and Gillian Jones (instructed by Corker Binning) for the appellant.
- Geraint Walters (instructed by the Crown Prosecution Service) for the Crown.

Cur. adv. vult.

Laws L.J.
January 17, 2003. handed down the judgment of the Court.

1 On July 28, 1998 before Judge Martin Stephens Q.C. at the Swansea Crown Court this appellant was convicted by the jury of an offence of wounding with intent, charged in count 2 of the indictment, and was sentenced to six years' imprisonment. He was acquitted of attempted murder (charged in count 1). On May 14, 1999 the full court (Evans L.J., Curtis and Aikens JJ.), at a hearing not attended by counsel, refused his renewed application for leave to appeal ***3** against conviction. However those advising him at length took up his case with the Criminal Cases Review Commission (" the Commission"). The Commission has now referred the case to this court pursuant to s.9(1) of the Criminal Appeal Act 1995. The Commission's Statement of Reasons shows that, in summary, they entertained two concerns: (1) The appellant's right to a fair trial under Art.6 of the European Convention on Human Rights (the Convention) was arguably violated in that the trial judge effectively withdrew from the jury the question whether the appellant had remained silent in his police interview because of advice given to him by his then legal adviser, a Mr Owens of Messrs Avery Naylor Wilson. (2) His Art.6 rights may have been violated by a failure to adduce before the jury certain evidence which could have been given by Mr Owens, which would have supported the appellant's contention that he remained silent on the basis of legal advice. However, as we shall show, the grounds of appeal advanced by counsel on the appellant's behalf run wider than the concerns of the Commission.
2 The outline facts were these. The appellant and the complainant, one Kevin Johns, were friends. They both lived in a house made up of bed-sitting rooms. The Crown's case was that on February 9, 1998 while both of them were watching television in the lounge, the appellant without any provocation attacked Mr Johns with a knife and inflicted very serious injuries upon him. It was alleged that a knife with droplets of water upon it was later found in the appellant's wardrobe, and that this was the knife used in the attack. Blood had been washed off it by the appellant. The defence case was that an incident had indeed taken place in the lounge that evening, but that the attacker had been the complainant Mr Johns; it was he who had assaulted the appellant with a knife. Any injuries sustained by Mr Johns had been caused by acts of reasonable self defence on the appellant's part. It was suggested as part of the defence case that Mr Johns might have attacked the appellant in an attempt to rob him so as to get money to relieve some of Mr Johns' debts. The appellant admitted that the knife found in the wardrobe belonged to him, but denied that it had been used in the attack. He had not washed it; he said that particles of glue had been mistaken for droplets of water.
After the fight had ended Mr Johns raised the alarm by banging on the door of one of the other residents of the house, a Miss Richardson. He said to her " Jeff stabbed me with his knife" . A few minutes before Mr Johns knocked Miss Richardson had heard a bang and a shuffle coming from upstairs, which later she assumed had been the noise of the fight taking place. Her partner Mr Manley believed that the time gap was rather longer; he put it at about 20 minutes. The police attended. Mr Johns was taken to hospital. The appellant had left the house; two hours later he arrived at the casualty department at Singleton Hospital in Swansea. He was asked what he did during the two hours. He said " I just walked … thought what to do … I just did not know what to do" . While he was at the hospital he was seen by police making a telephone call, apparently trying to call his solicitor. The police went up to him. They found out who he was. Then arrested him at 11.50 pm. When he was cautioned he replied, " nothing at all at the moment until I see my solicitor" . He was told he was going to be searched in order to discover whether he was in possession of a knife, and he said " OK but I did not have any knife" .

*4

3 It is right to observe that Mr Johns' injuries were much more severe than those sustained by the appellant. Mr Johns suffered an injury to the right abdominal wall below the ribs, which spurted blood on examination. The doctor was able to penetrate the wound with his finger by about 4 inches. A scan revealed that although the abdominal wall had been penetrated, no damage had been caused to the organs; the doctors thought that this was miraculous in the circumstances. The nature of the injury might have been occasioned by the force of a blow, or the effects of a struggle while the knife was actually in the wound. Considerable force would have been required to get the knife past the ribs. There was a second wound, by which the knife had penetrated Mr Johns' chest cavity and caused the collapse of the lung. That was life-threatening. Further there were numerous lacerations to the hands and the head, and a gash over the eye. There were abrasions to various areas of the body, and a bite mark on each shoulder. An injury to the face appeared to be a slash wound. As for the appellant, he had sustained lacerations and swelling to the right eye and right index finger, both of which needed around 3 sutures. The eye injury could have been caused by a head butt; however it was more consistent with a punch. The doctor examining him thought that the finger injury had been caused by a sharp instrument, and not a bite.

4 After he had been treated for his injuries, the appellant was taken to the police station where he asked to see a solicitor. On February 10, 1998 Mr Owens attended at the police station before the appellant was interviewed under caution. He took a detailed statement from the appellant, in which the appellant gave an account to the effect that Mr Johns was the attacker, with the knife, and he had done no more than defend himself. It is unnecessary to set out the detailed terms of this statement, but we must refer to it further in due course.

5 Then on the same day the appellant was sought to be interviewed by the police. There is a *pro forma* document which under the heading " record of agreed course in interview" , has these words in Mr Owens' writing:

> " After receiving legal advice I have decided to make a no comment reply on the basis there is no written statement from the injured party."

Then there follows the appellant's signature. The appellant proceeded to give a no comment interview. On April 7, 1998 Mr Owens prepared a witness statement by way of explanation as to why Mr Howell was advised to give a " no comment interview" when he was seen by police officers at 13.56 on February 10, 1998. He states that two police officers had given him " a detailed verbal account of what took place" (sc. in the incident in question). Then the statement includes this observation:

> " At no time during this did the officers refer to statements or pocket notebooks. I requested that I be shown a statement of complaint … The officers … informed me that the hospital stated the complainant … will not be able to make a statement for a couple of days … I referred the fact to the officers that they appeared to have got quite a detailed account from the complainant already … I conferred with Mr Howell where I discussed the problem with *5 lack of disclosure from the officers. Mr Howell stated he was unsure as to whether the complainant would withdraw his complaint. I advised therefore that until we had full disclosure from the officers we would give a no comment interview. Mr Howell fully agreed …" .

6 At his trial the appellant gave evidence in his own defence. As we have said his case was that Mr Johns was the attacker; and in his testimony he imputed a robbery motive to him. With the judge's permission he was thereafter cross-examined about certain previous convictions of his, including matters recorded against him a very long time ago which were by then spent within the meaning of the Rehabilitation of Offenders Act 1974. One of these was a conviction in 1968 for an offence of wounding. We mention this because one of the complaints raised in the grounds of appeal is to the effect that the judge, while he possessed a discretion to let in these very old convictions because the appellant had attacked Mr Johns' character, should in justice not have done so. We were not persuaded by this ground of appeal, nor by certain others which in truth are at the periphery of the case. We shall refer to all of these, which we may call the subsidiary grounds, briefly later in this judgment.

More important is the course of Crown counsel's cross-examination of the appellant relating to the no comment interview. First, we should indicate that in chief the appellant had said:

> " I was advised by Mr Andrew Owens not to make any no comment interview at all, because lack of disclosure …" . [Clearly he meant that he was advised to make no comment.]

He added that he had followed this advice. Then in cross-examination Crown counsel took the appellant through every one of his " no comment" answers. We need only set out this following passage, close to the end of that part of his evidence:

> " Q Why did you not answer that question, ' Did you try and kill Kevin Johns?' Why did you not answer that question?
> A I would have liked to have answered any of the questions, Sir, but I was advised not to by my solicitor, Mr Andrew Owens.
> Q That was advice. You knew that you were entitled to answer their questions if you wanted to do so, did you not?
> A Well, what was the point of me having a solicitor there, if I wasn't going to actually take his advice?
> Q Because, and this is my final question about that interview, if you were an innocent man you would not have wanted your solicitor to advise you, you would have leapt at the chance to deny the allegations and to give your side of the story, if you were an innocent man. But you did not, did you?
> A I kept to what Mr Owens had told me, a ' no comment' interview. That's why the gentleman was there representing me, sir.
> Q Yes, and of course —
> A But I wouldn't have objected to any of them if I hadn't had a solicitor."

*6

> 7 In re-examination the appellant was not asked to give any evidence of the statement he had made to Mr Owens on February 10, 1998, and the jury were at no stage apprised of the existence of that document. Mr Owens was not called as a defence witness to explain that he had indeed advised the appellant to offer no comment at interview, or why he had done so. These circumstances, together with the learned trial judge's treatment of the no comment interview in the course of his summing-up, together form the principal basis upon which the appeal is put forward, consistently with the concerns expressed by the Commission. In that context it is appropriate at this stage to refer to a document in the handwriting (it would appear) of junior defence counsel, and signed by the appellant on July 23, 1998, which was the last day of evidence and indeed the day on which the appellant's evidence before the jury was concluded. The document reads as follows: " I Jeffrey John Howell have carefully considered whether I want Andrew Owens called as a witness in my defence.
> I do not want him called. I fully realise that the court ie the prosecution and the judge in his summing-up will tell the jury that my ' no replies' can be held against me. Indeed Mr Rouch QC has actually read the terms of the direction out to me.
> But having considered the matter I remain of the view that I do not want him called. I fully realise the consequences of this decision."

The document is counter-signed by junior defence counsel and a representative of the defence solicitors and there is a footnote in brackets, which reads:

> " PR QC [leading defence counsel] had been present in con. but left before signed instructions taken" .

8 The Commission recorded in its Statement of Reasons (para.10.1) that junior trial counsel for the defence had indicated in a statement that the decision not to seek to adduce the February 10, 1998 statement in evidence, or to call Mr Owens as a defence witness, were decisions taken by the appellant himself. They state that junior counsel " said that the decision was taken following consultation with leading counsel and it was considered that any inconsistencies between the original statement and Mr Howell's evidence in chief would have been elicited by Crown counsel in cross-examination of Mr Howell and used to undermine his case" .

9 On July 23, 1998, after the end of the evidence, defence counsel submitted to the judge that s.34 of the Criminal Justice and Public Order Act 1994 (which we set out below) had no application to the case. The suggestion was that the police should not have interviewed the appellant at all, because the officer, PS Jones, believed before the interview started that he already had sufficient evidence to charge the appellant; and so under Police and Criminal Evidence Act 1984, Code C16.1 the appellant should have been brought without delay — and thus with no intervening interview — before the custody officer. The judge held that PS Jones was quite right to interview the appellant in this very serious case: he might for example have wished to raise an issue of self defence, or *7 have other important things to say.

Complaint is made in one of the subsidiary grounds of appeal that this submission to the judge should have been made earlier, before the appellant gave his evidence or upon a *voir dire* being held no doubt with PS Jones in the witness box. Had the submission been made then and succeeded, the appellant would not have been cross-examined about his interview at all. We can say at this stage that there is in our view nothing whatever in this point. The judge correctly held that it was the officers' right and duty to interview the appellant. That being so, whenever this point had been taken, the appellant would in any event have been subjected to cross-examination about his interview. Section 34 of the Act of 1994 is, however, very important for the resolution of the true issues in the case concerning the February 10, 1998 statement, Mr Owens' advice, and the judge's summing-up. It is convenient therefore to set out its terms so far as relevant:

> " 34.(1) Where, in any proceedings against a person for an offence, evidence is given that the accused —

(a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings …

> being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned … subsection (2) below applies.
> (2) Where this subsection applies —

…
(d) the court or jury, in determining whether the accused is guilty of the offence charged,

> may draw such inferences from the failure as appear proper."

Section 35 of the 1994 Act deals with the different case where inferences may be drawn against an accused by reason of his failure to testify at his trial.

> 10 We turn to the summing-up. The relevant passage is: " Mr Howell in this court has relied on self-defence. He says that he was attacked by Mr Johns and that any injuries Mr Johns received were caused in the course of the struggle that followed when Mr Howell was doing no more than lawfully defending himself. He admits that he did not mention those highly relevant facts when he was interviewed. The prosecution case is that that in the circumstances of this case he could reasonably have been expected to mention those matters in his interview the afternoon after the event …. You must therefore decide whether in the circumstances these were matters which he could reasonably have been expected then to mention. If that is your decision the law is this, that you may draw such common sense conclusions as appear to you proper from his failure to mention those matters at the time he was interviewed. Failure to mention those matters cannot on its own prove guilt, but depending on the circumstances you ***8*** may hold it against him when deciding whether he is guilty. You can take it into account as some additional support for the prosecution's case. You are not bound to do so, it is for you to decide whether it is fair to do so.
> There is evidence before you, on the basis of which Mr Rouch invites you not to hold it against the defendant that he failed to mention these matters in his interview, and that is Mr Howell's evidence that his solicitor advised him not to answer questions, and if you think that this amounts to a reason why you should not hold the defendant's failure against him, do not do so. On the other hand, if you are sure that the real reason for his failure to mention these facts was that he then had no innocent explanation to offer you may hold it against him, it is a matter for you. No reason, members of the jury, has been given as to why such advice was given. The solicitor has not given evidence, has not come before you to explain why he advised Mr Howell in the light of that caution which I have just read to you not to answer questions, and the law now on this matter is clear, and the caution or warning was fully explained to the defendant by the policeman. The prosecution say that in the light of that caution, and in the particular circumstances of this case, this was not a man charged with an offence (or arrested for an offence, rather) at which he was not present or relating to conduct over a long period of time or relating to documents which he may not have seen recently, this was a case where the defendant was present at the scene of the crime that was alleged, and allegedly the victim of a vicious attack by a man with a knife, and only as he now says, acting in self-defence. The prosecution say that in the light of all those circumstances it is unbelievable that the defendant should not have given his explanation to the police when he was questioned.
> You should consider whether or not he was able to decide for himself what he should do, or having got a solicitor to advise him he would not challenge that advice in the light of the specific warning in

the caution. The defendant told you, ' I asked a solicitor's advice, he gave it, I accepted it. I would have told the police the full story if I hadn't been advised to say nothing' . You may think, but it is entirely a matter for you, that in the circumstances of this case it is difficult to see how such advice could have been given, or if given, acted on. The prosecution asked ' why should an innocent man, indeed a victim of crime, not say what happened when asked about it?' The reason they claim is that he is not an innocent victim, but a man who has committed a grave crime. That is why he kept quiet they say, he had not yet thought up his defence. You will decide what you make of the arguments on both sides."

11 We now turn to the grounds of appeal (the grounds are all pre-fixed with the number 3, as they appear in the third section of a composite document put in by counsel for the appellant). We will deal first with what we have called the subsidiary grounds. We have already disposed (para.9) of the argument that the submission to the effect that s.34 of the 1994 Act did not apply to the case should have been made at a different stage. That was Ground 3(ii)(a). We have also indicated (para.6) that we are not persuaded by the submission (Ground 3(i)(c)) that the judge should have declined to allow the Crown to cross-examine the appellant ***9** on his previous convictions for offences which went back a long distance in time. The suggestion here (section 5 of counsel's Grounds document, para.5.7) is that the judge failed to apply the " proper test" — a reference to the exhortation to judges in the Practice Direction relating to spent convictions (Practice Direction (Spent Convictions) (1975) 61 Cr.App.R. 260) not to let in such convictions unless it is in the interests of justice to do so. But the judge plainly thought that the interests of justice would be served by cross-examination of the appellant on these convictions. We cannot say he was wrong. This ground is linked to three others: (a) failure by the judge to warn defence counsel during the cross-examination of Mr Johns that questions put to him suggesting a robbery motive would likely result in the loss of the appellant's shield against the admission of his previous convictions (Ground 3(i)(b)) — however Miss Dobbs Q.C. for the appellant made it clear that she did not pursue this argument: she was plainly right to abandon it; (b) error by defence counsel in putting the robbery motive at all (Ground 3(ii)(e)); and (c) error by counsel in making reference, in the course of the appellant's evidence in chief, to a pending drink-driving charge (Ground 3(ii)(g)). These remaining points are in our view wholly unsustainable. The alleged robbery motive was put to Mr Johns on the appellant's express written instructions (in a note signed by himself and junior counsel and the solicitor for the defence), and he had obviously been given advice about it. The point about the drink-driving charge is frankly ephemeral. We should add that the argument that the judge should not have let in the appellant's previous convictions was one of the grounds upon which the full court originally refused leave to appeal on May 14, 1999. Now, once a reference has been made to this court by the Commission, the appeal may be on any ground relating to the conviction whether or not the ground is related to any reason given by the Commission for making the reference (Criminal Appeal Act 1995 s.14(5)). But where such an ancillary ground is, as here, unrelated to the basis for the Commission's reference and has already been dismissed by this court upon an earlier application for leave to appeal, it is very unlikely to receive other than short shrift at the later appeal consequent on the Commission's reference.

12 Ground 3(i)(a) is to the effect that the judge erred in allowing the Crown to withhold from the defence certain details of Mr Johns' medical records. It is said that any information relating to Mr Johns' physical or mental condition was relevant to the defence in various respects, not least as potentially offering an explanation why he might attack the appellant without the least provocation. In fact, a document in redacted form (which had been approved by the judge) was provided to the defence. We understand that no suggestion was made at the trial to the effect that it was inadequate. We see no reason why such a point should be taken now.

13 Before coming to the substance of the case, there remains only Ground 3(ii)(f), which accuses trial counsel and solicitors of failing " to ensure that the [appellant] fully understood the ramifications of instructions said to have been given by him" , and failing to give him proper advice about the effect of any instructions he gave. But there is nothing whatever in the papers on which to build such an argument.

***10**

14 That brings us, then, to the nub of the case, which concerns the no comment interview. There are three aspects to it. First, it is said that counsel should have called Mr Owens to give evidence to the effect that he had advised the appellant not to answer questions in interview, and why (Ground 3(ii)(b)). Secondly, counsel should during the appellant's re-examination have adduced his statement given to Mr Owens on February 10, 1998 (Ground 3(ii)(d)). Then at Grounds 3(iii)(a)– (c) three linked complaints are made as to the passage in the summing-up which we have set out. Together they amount to this. The judge failed to make it clear to the jury that there was evidence before them, coming from the appellant,

that he had remained silent at interview because he had been advised to do so by his solicitor, and the reason for the advice was that there had at the time been a failure of disclosure by the police; and the judge should have directed the jury that if they felt that he may have remained silent because he was acting on his solicitor's advice, no adverse inference should be drawn against him. Instead, the judge gave a strongly worded, unbalanced and misleading direction which all but withdrew from the jury's consideration the crucial explanation for the appellant's silence, namely the solicitor's advice. The critical passage is repeated for convenience:

> " The defendant told you, ' I asked a solicitor's advice, he gave it, I accepted it. I would have told the police the full story if I hadn't been advised to say nothing' . You may think, but it is entirely a matter for you, that in the circumstances of this case it is difficult to see how such advice could have been given, or if given, acted on. The prosecution asked ' why should an innocent man, indeed a victim of crime, not say what happened when asked about it?' The reason they claim is that he is not an innocent victim, but a man who has committed a grave crime. That is why he kept quiet they say, he had not yet thought up his defence."

15 The complaints against counsel and those against the judge are linked: Miss Dobbs would I think say that if Mr Owens' evidence and the appellant's previous statement had been before the jury, the judge would have been obliged to refer to those materials in terms as showing (a) that it was beyond question that the appellant had received professional advice to remain silent and there were solid reasons for it, and (b) that it was also entirely plain he had not made up his story of self defence at some stage after the interview. And I think Miss Dobbs would add that in those circumstances there was really no scope for an adverse inference to be drawn from the appellant's silence, and the judge should have indicated as much.

16 We shall deal first with the complaints against counsel. In a letter to the Commission junior trial counsel indicates that the appellant's signed instructions (see para.7 above) to the effect that he did not want Mr Owens called were taken after his evidence had been completed, and following careful discussions in consultation with leading counsel. As it is put in the letter: ***11**

> " Any differences of account, emphasis and detail whether by way of omission or addition between [the appellant's] account at the police station [sc. to Mr Owens] and his evidence from the witness box could be particularly damaging to his case."

Miss Dobbs says that any inconsistencies between the appellant's testimony and the statement he gave to Mr Owens (which had formed the basis of his proof of evidence at trial) were minor at most. Mr Walters for the Crown was disinclined to accept as much. In any event, as we see the matter, the defence would not in fact have been entitled to adduce the earlier statement in evidence in the course of the appellant's re-examination: it was a previous consistent statement which could not properly have been admitted save to rebut an allegation of recent fabrication. Neither in the passage we have cited above at para.6, nor elsewhere in the Crown's cross-examination of the appellant, was it suggested that his account in evidence was a late or recent invention. The point being put was, importantly, a different one. It was to the effect that he " would have leapt at the chance to deny the allegations and to give [his] side of the story, if [he] were an innocent man" . It is true that the judge characterised the Crown's case in part as being that " he had not yet thought up his defence" , but that was not right (and we must separately consider whether that comment in the summing-up of itself affects the safety of the conviction).

17 Given that the defence could not for their part have put in the statement of February 10, 1998, it remains to consider what might have been the effect of calling Mr Owens. He might of course have referred to the statement, but that would have been at the behest of questions from the Crown. Such questions would almost certainly have revealed the essential basis of his advice (whose privilege would manifestly have been waived) that his client should make no comment in interview. It appears from Mr Owens' own statement of April 7, 1998 which we have already cited:

> " Mr Howell stated he was unsure as to whether the complainant would withdraw his complaint. I advised *therefore* that until we had full disclosure from the officers we would give a no comment interview. Mr Howell fully agreed …" (our emphasis).

In our judgment it is by no means to be assumed that Mr Owens' presence in the witness-box, with the proper opportunities that would have afforded the Crown to explore the basis of his advice to the appellant and the nature of the instructions he was getting on February 10, would have told in the appellant's favour. Nor would it necessarily have led the judge to fashion his summing-up on the issue of

the appellant's silence at interview into a shape which would be relatively — far less, absolutely — favourable to the appellant.

18 In the result we do not consider that the criticisms of counsel on this part of the case begin to assault the safety of the conviction. We turn to the criticisms of the summing-up.

19 Here there are important issues of principle involved. Miss Dobbs has relied in particular on authority of the European Court of Human Rights and of this court ***12*** to establish the proposition that where the reason for a suspect's silence at interview is a genuine reliance on a lawyer's advice that he should keep silent, that is at least a very powerful reason why the jury at the trial should draw no adverse inferences from his silence. It is convenient first to refer to the case of R. v Condron, which was the subject both of an appeal in this Court ([1997] 1 Cr.App.R. 185) and an application to the European Court of Human Rights (Condron v United Kingdom, (2001) 31 E.H.R.R. 1, [2000] Crim. L.R. 679). The appellants and a co-accused were arrested for drugs offences. At the police station the appellants' solicitor advised them not to answer questions: he considered that they were unfit to be interviewed because of their drug withdrawal symptoms (though the police doctor thought they were fit). Accordingly they gave no comment interviews. Their appeals against conviction were dismissed by this court (Stuart-Smith L.J., Mantell and Moses JJ.), which held that the trial judge had been right to leave it open to the jury to draw an adverse inference from the appellants' failure to answer questions, notwithstanding the solicitor's advice. The Strasbourg court found a violation of European Convention on Human Rights Art.6(1), holding that " the terms of the judge's direction to the jury left them at liberty to draw an adverse inference even if they had been satisfied that the applicants remained silent for good reason on the advice of their solicitor. As a matter of fairness, the jury should have been directed that if they believed that the applicants' silence during the police interview could not sensibly be attributed to their having no answer to the questions, or none that would stand up to cross-examination, they should not draw an adverse inference" (Criminal Law Review headnote).

20 The judgment of the European Court of Human Rights in Condron contains, with respect, this important passage at para.61:

> " … provided appropriate safeguards were in place an accused's silence in situations which clearly call for an explanation, could be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution against him … However, in the instant case the applicants put forward an explanation for their failure to mention during the police interview why certain items were exchanged between them and their co-accused … They testified that they acted on the strength of the advice of their solicitor who had grave doubts about their fitness to cope with police questioning."

21 Before setting out our reasoning and conclusions on this important part of the appeal we should collect the principal strands in two of the domestic cases on s.34, starting with this passage from the judgment in R. v Argent [1997] 2 Cr.App.R.27, delivered by Lord Bingham C.J. (as he then was) at 35G–36B:

> " … under section 34, the jury is not concerned with the correctness of the solicitor's advice, nor with whether it complies with the Law Society's guidelines, but with the reasonableness of the appellant's conduct in all the circumstances which the jury have found to exist. One of those circumstances, and a very relevant one, is the advice given to a defendant. There is no reason to doubt that the advice given to the appellant is a matter for the ***13*** jury to consider. But neither the Law Society by its guidance, nor the solicitor by his advice can preclude consideration by the jury of the issue which Parliament has left to the jury to determine."

22 Miss Dobbs draws particular attention to R. v Betts & Hall [2001] 2 Cr.App.R. 257, which she says builds on Condron, and so far as the authorities go represents, we think, the high water mark of her case. The critical passage in the judgment of the court delivered by Kay L.J. is at paras 53– 54:

> " In the light of the judgment in Condron v United Kingdom it is not the quality of the decision [sc. not to answer questions] but the genuineness of the decision that matters. If it is a plausible explanation that the reason for not mentioning facts is that the particular appellant acted on the advice of his solicitor and not because he had no, or no satisfactory, answer to give then no inference can be drawn.
>
> That conclusion does not give a licence to a guilty person to shield behind the advice of his solicitor. The adequacy of the explanation advanced may well be relevant as to whether or not the advice

was truly the reason for not mentioning the facts. A person, who is anxious not to answer questions because he has no or no adequate explanation to offer, gains no protection from his lawyer's advice because that advice is no more than a convenient way of disguising his true motivation for not mentioning facts."

23 In seeking to articulate the true impact of s.34 upon cases like the appeal in hand, it is we think salutary to go back to the words of the section. It empowers the jury to draw proper inferences from a failure " to mention any fact relied on in his defence … *being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention* …" (emphasis added). It seems to us that this provision is one of several enacted in recent years which has served to counteract a culture, or belief, which had been long established in the practice of criminal cases, namely that in principle a defendant may without criticism withhold any disclosure of his defence until the trial. Now, the police interview and the trial are to be seen as part of a continuous process in which the suspect is engaged from the beginning. Of course he retains a right to silence, which the statute protects: not in absolute terms, but by providing, in the words we have emphasised, that adverse inferences may be drawn only in those cases where he could reasonably have been expected to mention the facts in question.

24 This benign *continuum* from interview to trial, the public interest that inheres in reasonable disclosure by a suspected person of what he has to say when faced with a set of facts which accuse him, is thwarted if currency is given to the belief that if a suspect remains silent on legal advice he may systematically avoid adverse comment at his trial. And it may encourage solicitors to advise silence for other than good objective reasons. We do not consider, *pace* the reasoning in Betts & Hall, that once it is shown that the advice (of whatever quality) has genuinely been relied on as the reason for the suspect's remaining silent, adverse comment is thereby disallowed. The premise of such a position is that in such ***14** circumstances it is in principle not reasonable to expect the suspect to mention the facts in question. We do not believe that is so. What is reasonable depends on all the circumstances. We venture to say, recalling the circumstances of this present case, that we do not consider the absence of a written statement from the complainant to be good reason for silence (if adequate oral disclosure of the complaint has been given), and it does not become good reason merely because a solicitor has so advised. Nor is the possibility that the complainant may not pursue his complaint good reason, nor a belief by the solicitor that the suspect will be charged in any event whatever he says. The kind of circumstance which may most likely justify silence will be such matters as the suspect's condition (ill-health, in particular mental disability; confusion; intoxication; shock, and so forth — of course we are not laying down an authoritative list), or his inability genuinely to recollect events without reference to documents which are not to hand, or communication with other persons who may be able to assist his recollection. There must always be soundly based objective reasons for silence, sufficiently cogent and telling to weigh in the balance against the clear public interest in an account being given by the suspect to the police. Solicitors bearing the important responsibility of giving advice to suspects at police stations must always have that in mind.

25 We should say that we consider this approach to be perfectly consistent with Condron on a proper reading of the Strasbourg judgment. The holding in that case referred to the applicants remaining silent *for good reason* on the advice of their solicitor. Moreover since the hearing we have seen the recent decision of the European Court of Human Rights in Beckles v United Kingdom (2002) 36 E.H.R.R. 162, another case in which the applicant remained silent on his solicitor's advice. At paras 58– 59, after referring to Condron, the court said this:

" 58 … it is obvious that the right [sc. to silence] cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution …

59. For the Court, whether the drawing of adverse inferences from an accused's silence infringes art 6 is a matter to be determined in the light of all the circumstances of the case, having regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation … Of particular relevance are the terms of the trial judge's direction to the jury on the issue of adverse inferences."

26 Adopting the approach we have outlined to the present case, we do not consider that the terms of the judge's direction to the jury begin to render this conviction unsafe. There was here no soundly based objective reason for silence. The jury were perfectly entitled to draw adverse inferences from the

appellant's no comment interview. It is true that the judge should not have spoken in terms which suggested the possibility of recent fabrication. But on all the facts that cannot on its own suffice to assault the safety of the conviction.

*15

27 The appeal against conviction will be dismissed.

Appeal dismissed.

1. Criminal Justice and Public Order Act 1994, s.34: see post, para.9.

Case No: C1/2005/0862

Neutral Citation Number: [2005] EWCA Civ 1605
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
Mr Justice Munby
[2005] EWHC 587 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 21st December 2005

Before :

THE MASTER OF THE ROLLS
(The Rt Hon Sir Anthony Clarke)
LORD JUSTICE RIX
and
LORD JUSTICE RICHARDS

- -

Between :

	The Queen (on the application of AN)	**Appellant**
	- and -	
	The Mental Health Review Tribunal (Northern Region) **- and -** **(1) The Secretary of State for the Home Department** **(2) Mersey Care Mental Health NHS Trust** **(3) MIND (The National Association for Mental Health)**	**Respondent** **Interested Parties**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr Paul Bowen (instructed by **Bindmans**) for the **Appellant**
Mr Angus McCullough (instructed by **The Treasury Solicitor**) for the **Respondent**
Mr Tim Ward (instructed by **The Treasury Solicitor**) for **Secretary of State**
The second and third interested parties did not appear on the appeal

- -

Judgment
As Approved by the Court

Lord Justice Richards : 1. This is the judgment of the court. The appellant, AN, is detained at Ashworth Hospital pursuant to a hospital order under section 37 the Mental Health Act 1983 ("the Act"). He is also subject to a restriction order under section 41. On 14 August 2004 the Mental Health Review Tribunal decided not to direct his discharge under section 73. AN brought judicial review proceedings to challenge that decision, contending that the tribunal had erred in its approach to the standard of proof. The challenge was dismissed by Munby J in a lengthy judgment handed down on 11 April 2005. Permission to appeal to this court was granted on the basis that Munby J's judgment was likely to be applied by tribunals hearing applications around the country and there were compelling reasons why the court should consider whether that judgment was correct.

2. There were in fact two applications for judicial review before Munby J. The other application was brought by an applicant called DJ, who was also detained under section 37 but who was not the subject of a restriction order under section 41. In his case, because there was no restriction order, the decision not to direct discharge was made under section 72 rather than section 73. Munby J dismissed that application too, for materially identical reasons. DJ had been discharged from hospital prior to the hearing before Munby J and does not pursue an appeal. It is necessary, however, to consider the position under section 72 as well as section 73, since the two sections are closely related and the relevant principles are common to both.

The statutory framework

3. Before the Crown Court or a magistrates' court can make a hospital order under section 37 (1) of the Act, the conditions in section 37(2) must be satisfied. By section 37(2):

> "The conditions referred to in subsection (1) above are that -
>
> (a) the court is satisfied, on the written or oral evidence of two registered medical practitioners, that the offender is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment and that either –
>
> (i) the mental disorder from which the offender is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and, in the case of psychopathic disorder or mental impairment, that such treatment is likely to alleviate or prevent a deterioration of his condition; or
>
> (ii) in the case of an offender who has attained the age of 16 years, the mental disorder is of a nature or degree which warrants his reception into guardianship under this Act; and
>
> (b) the court is of the opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section."

4. A restriction order under section 41 imposes special restrictions upon a patient's release. The circumstances in which such an order can be made are set out in section 41(1):

> "Where a hospital order is made in respect of an offender by the Crown Court, and it appears to the court, having regard to the

nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm so to do, the court may, subject to the provisions of this section, further order that the offender shall be subject to the special restrictions set out in this section, either without limit of time or during such period as may be specified in the order; and an order under this section shall be known as 'a restriction order'."

5. Applications for discharge are made to the tribunal. An application by a patient subject to a hospital order but not subject to a restriction order is made under section 66. An application by a patient who is also subject to a restriction order is made under section 70. The relevant powers and duties of the tribunal are set out in sections 72 and 73 respectively.

6. Section 72 provides, so far as material:

"(1) Where application is made to a Mental Health Review Tribunal by or in respect of a patient who is liable to be detained under this Act, the tribunal may in any case direct that the patient be discharged, and –

…

(b) the tribunal shall direct the discharge of a patient liable to be detained otherwise than under section 2 above if they are not satisfied –

(i) that he is then suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment or from any of those forms of disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or

(ii) that it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment …."

7. Section 73 provides, so far as material:

"(1) Where an application to a Mental Health Review Tribunal is made by a restricted patient who is subject to a restriction order, or where the case of such a patient is referred to such a tribunal, the tribunal shall direct the absolute discharge of the patient if –

(a) the tribunal are not satisfied as to the matters mentioned in paragraph (b)(i) or (ii) of section 72(1) above; and

(b) the tribunal are satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment.

(2) Where in the case of any such patient as is mentioned in subsection (1) above –

(a) paragraph (a) of that subsection applies; but

(b) paragraph (b) of that subsection does not apply,

the tribunal shall direct the conditional discharge of the patient."

8. Under both section 72 and section 73 the tribunal *must* direct discharge if it is *not* satisfied as to the specified matters. Thus the burden is on the detaining authority to satisfy the tribunal as to those matters. Prior to November 2001 there was a burden on the patient to establish that at least one of the criteria for his continued detention was not satisfied, and thus to disprove the lawfulness of his detention. In *R (H) v. London North and London East Region Mental Health Review Tribunal* [2001] EWCA Civ 415, [2002] QB 1, the Court of Appeal held that such provisions were contrary to article 5 of the European Convention on Human Rights and granted a declaration of incompatibility under section 4 of the Human Rights Act 1998. Sections 72 and 73 in their present form embody the legislative changes that were made in response to that ruling.

The tribunal's consideration of AN's case

9. The background to AN's case was summarised as follows in para 5 of Munby J's judgment:

> "In January 1984 AN carried out the particularly unpleasant and frenzied killings of a mother and her two children. He was found unfit to plead and admitted in March 1985 to what is now Ashworth Hospital following a direction made under section 5 of the Criminal Procedure (Insanity) Act 1964. Having subsequently been found fit to plead he was convicted at the Central Criminal Court in November 1987 on three counts of manslaughter on the ground of diminished responsibility. He was made the subject of a hospital order under section 37 and a restriction order under section 41 of the Mental Health Act 1983. He has remained in Ashworth Hospital ever since. Applications to the Tribunal for his discharge were refused in 1987 (twice), 1989, 1993, 1997, 1999 and 2001. He made a further application under section 70 of the Act in 2004. The Tribunal convened on 27 July 2004 and heard a considerable body of evidence over 5 days. On 14 August 2004 the Tribunal decided that AN should not be discharged."

10. The evidence placed before the tribunal included that of Dr Mulligan, who was AN's responsible medical offer and a consultant forensic psychiatrist; Dr McInerney, a consultant forensic psychiatrist instructed by the Home Office; and Dr Ireland, a chartered forensic psychologist employed by Ashworth. All three supported the view that the criteria for detention continued to be met. Evidence in support of AN's application for discharge was given by three independent consultant forensic psychiatrists: Dr Williams, Dr Lomax and Professor Sashidharan.

11. For the purposes of its decision under section 73, and in the light of the evidence before it, the tribunal had to determine the following issues:

(1) Was AN suffering from a "psychopathic disorder" within the meaning of the Act? Such a disorder is defined in section 1(2) as "a persistent disorder or disability of mind … which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned". On the first limb of that definition the issue was whether AN suffered from a personality *disorder* (which it was accepted would amount to a persistent disorder or disability of mind) or merely had certain personality *traits* but no personality disorder. On the second limb of the definition, the

issue was whether the disorder, if established, had resulted in abnormally aggressive or seriously irresponsible conduct in the past and there was a real risk that, if treatment in hospital were discontinued, it would do so in the future (see *R (P) v. Mental Health Review Tribunal* [2002] EWCA Civ 697). In paras 2-7 of its statement of reasons the tribunal gave detailed reasons for preferring the evidence of Dr Mulligan, Dr McInerney and Dr Ireland and for concluding that AN was suffering from a psychopathic disorder as defined.

(2) If AN suffered from a psychopathic disorder, was the condition "treatable" in the sense that treatment was available in hospital which was likely to alleviate or prevent a deterioration of the disorder? Although there is no express requirement as to treatability in section 73, the requirement applies to the making of a hospital order in the first place under section 37 and it was not in dispute that, following *Reid v. Secretary of State for Scotland* [1999] 2 AC 512, it is also imported into section 73. It does not matter for this purpose whether it is treated as a discrete criterion or as an aspect of the appropriateness criterion considered in sub-para (3) below. The case advanced on behalf of AN before the tribunal was that further detention in hospital would be counter-productive and that any treatment that might benefit him could only be given in the community. The tribunal rejected that argument, stating in para 8 of its reasons that it had no hesitation in concluding that AN was treatable.

(3) If AN suffered from a psychopathic disorder, was it "of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment"? In para 9 of its reasons the tribunal stated that AN's lack of insight and the amount of work to be done meant that it was not only appropriate but necessary for him to be detained for such treatment. It added in para 10 that AN's view of his ability to cope in the community was unrealistic and that it was satisfied that there was a serious risk of relapse should he not receive further treatment in hospital to prepare him to manage relevant risk factors.

(4) Was it "necessary for the health and safety of the patient or for the protection of other persons" that he should receive such treatment in hospital? The tribunal stated at the end of para 10 of its reasons that it followed from its previous findings that it was satisfied that the criterion was met.

12. The tribunal's findings on those four issues meant that it was satisfied as to all the criteria for continued detention. That made it unnecessary for it to consider a further issue under section 73(1)(b) as to the appropriateness of AN remaining liable to be recalled for further treatment, though it was in fact conceded by AN that, if discharged, he should remain so liable and that his discharge should be subject to conditions. A final issue, which is not material for present purposes, was whether, if it did not direct discharge, the tribunal should make a non-statutory recommendation for transfer to conditions of lesser security: at paras 11-12 it recommended a trial move to a medium secure unit.

13. The tribunal had been addressed by counsel for AN on the question of standard of proof, though the submissions were much less elaborate than those now made to this court. In para 1 of its reasons the tribunal set out the approach it had adopted in reaching its decision:

> "We firstly considered interesting submissions on the standard of proof to be applied to our deliberations and concluded that in relation to an assessment of conflicting expert opinions and diagnoses a balance of probabilities is the realistic standard. However we consider that in accordance with our normal [practice] whenever it is necessary to resolve important issues of fact upon which important consequence[s] flow a much higher standard, akin to the criminal standard, is both fair and reasonable. This has been our approach throughout our consideration of the evidence in this Application."

14. The correctness of that approach was the question for determination in the judicial review

proceedings.

The judgment of Munby J

15. In addition to submissions from those who have appeared before us, Munby J heard submissions from counsel for MIND. MIND had filed evidence in the form of statements by a number of mental health professionals identifying a variety of concerns. There were said to be uncertainties among practitioners as to the appropriate standard of proof, and a lack of consistency between tribunals. There were also concerns about the basing of decisions on hearsay evidence, linked with a perception on the part of some that tribunals tended to prefer the evidence of professional witnesses over the evidence of the patient even if the patient was the only person present with personal knowledge of the matter in dispute. The more a patient protested that something had been wrongly recorded in his notes, the more he might be faced with the accusation that he was failing to take responsibility for his actions and failing to acknowledge the "truth". One of the suggestions was that the imposition of a higher standard of proof was necessary to protect patients from those supposedly undesirable practices.

16. Having set out the background, Munby J identified two main issues (para 23). The first related to the standard of proof to be applied by the tribunal, in so far as the concept of "proof" was relevant. The second related to the question of whether and to what extent the nature of the task upon which the tribunal was engaged involved a standard of proof at all.

17. On the first issue, the judge started (at paras 24-29) with what he described as some basic or general principles and with some *obiter dicta* in existing authorities to the effect that the standard of proof in this statutory context is the balance of probabilities. He then examined and rejected (at paras 30-47) the primary case advanced before him on behalf of AN and MIND, that the relevant standard was the criminal standard of proof beyond reasonable doubt rather than the civil standard of proof on a balance of probabilities. He looked next (at paras 49-71) at the alternative case advanced by AN and MIND that, if the relevant standard of proof was not the criminal standard, it was or ought to be the standard of "clear and convincing evidence" applied by the US Supreme Court in *Addington v. Texas* (1979) 441 US 418. It was held in *Addington v. Texas* that to commit an individual to a mental institution in civil proceedings, the state was required by the "due process" clause of the US Constitution to prove by clear and convincing evidence the statutory preconditions to commitment. That was an intermediate standard, between proof beyond reasonable doubt and proof on the preponderance of the evidence, which was held to strike a fair balance between the rights of the individual and the legitimate concerns of the state. Whilst quoting extensively from *Addington v. Texas*, Munby J stated that English law did not recognise the intermediate standard and that the case did not assist AN or MIND. He also examined various decisions of the English and Strasbourg courts on the application of the ECHR, and various Commonwealth authorities, all of which he likewise found not to assist.

18. Following that exegesis of the authorities, the judge expressed his conclusion on the first issue as follows:

> "71. In my judgment the applicable standard of proof is the ordinary civil standard of proof 'on a balance of probability'. That is consistent with authority and principle. It accords with the dicta in *Reid v Secretary of State for Scotland* [1999] 2 AC 512 and in *R (H) v London North and East Region Mental Health Review Tribunal (Secretary of State for Health intervening)* [2001] EWCA Civ 415, [2002] QB 1. And, as Mr McCullough submits, … it is confirmed by a purposive construction of the Act and a consideration of the statutory context in which the Tribunal operates."

19. He added that in the not wholly dissimilar context of the Parole Board the civil standard had been held to apply and he could think of no good reason why the tribunal should adopt a different standard from that applied by the Parole Board: both bodies had to conduct very similar exercises in not very different contexts.

20. Munby J then moved to consider (at paras 75-116) the second main issue, namely the extent to which the nature of the task on which the tribunal was engaged involved a standard of proof at all. He referred to the subtlety and complexity of the task faced by doctors and tribunals when considering issues of the kind identified by sections 72 and 73, and to the position of patients who are subject to restriction orders, where it is necessary to balance the interests of the patient against those of public safety. He described the procedure of the tribunal as being to a significant extent inquisitorial, referred to authorities on the proportionality balancing exercise, and observed that in approaching its task the tribunal must use its expertise and look at the reality of the situation. At para 87 he stated:

> "I have said enough to show that in many aspects of its task the Tribunal is not concerned so much with finding facts which are capable of exact demonstration by 'hard' science but rather with a process of judgment, evaluation and assessment which involves the appreciation and evaluation of inherently imprecise and often differing or conflicting psychiatric evidence. Moreover the Tribunal is necessarily peering into an as yet unknown and unknowable future and, particularly in the case of a restricted patient, seeking to evaluate, assess and minimise future risks – risks of medical relapse and, it may be, risks of re-offending."

21. He referred to analogous situations, including the work of the Parole Board and the assessment of danger to national security in deportation cases. He then returned specifically to sections 72 and 73 and expressed his conclusions as follows:

> "100. As Mr Bowen correctly observes, under section 72 the Tribunal has to consider a number of issues, including:
>
> (i) Does the patient suffer from mental illness, psychopathic disorder, severe mental impairment or mental impairment or from any of those forms of disorder?
>
> (ii) If so, is it of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment?
>
> (iii) Is it necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment, that is, treatment in hospital?
>
> In the case of a restricted patient there is a further issue to be considered under section 73:
>
> (iv) Alternatively, is it appropriate for the patient to remain liable to be recalled to hospital for further treatment (and therefore to be conditionally rather than absolutely discharged)?
>
> To what extent, if at all, are any of these issues susceptible to

proof?

> 101. In my judgment issue (i) involves matters which are, in principle, susceptible to proof and which therefore fall to be determined by reference to the civil standard of proof 'on a balance of probability'. Whether someone is suffering from some (and if so what) form of mental illness or mental disorder is a question of fact – present fact. The nature and degree of a patient's condition, although involving questions of diagnosis and matters of medical opinion, are nonetheless matters of present fact which are, in principle, amenable to proof in the same way as any other matter of past or present fact. Bryan CJ in 1477 may have observed (I translate the law French) that 'the Devil himself knoweth not the thought of man' (YB 17 E4 Pasch fo 2 pl 2), but it has been trite law ever since 1885, as Bowen LJ famously said in *Edgington v Fitzmaurice* (1885) 29 ChD 459 at p 483, that:
>
> > 'the state of a man's mind is as much a fact as the state of his digestion.'
>
> 102. Issues (ii), (iii) and (iv), however, of their very nature raise quite different questions. In large measure they are all looking not just to the present but also to the future. More significantly, they are all issues which involve an evaluative judgment and which are not susceptible to a defined standard of proof. They are, in my judgment, issues to be determined not by the application of the civil (or indeed any other) standard of proof but, as I have already indicated, by a process of evaluation and judgment. The Tribunal is not here concerned so much with finding facts which are capable of exact demonstration but rather with a process of judgment, evaluation and assessment which involves the appreciation and evaluation of inherently imprecise and often differing or conflicting psychiatric evidence. Moreover the Tribunal is necessarily peering into the future and, particularly in the case of a restricted patient, seeking to evaluate, assess and minimise future risks – risks of medical relapse and, it may be, risks of re-offending."

22. The judge acknowledged that the burden (which he thought it more accurate and appropriate to describe as the "onus" or "persuasive burden") lay on the detaining authority to establish all the relevant criteria, but did not consider this to affect his conclusion. He observed that the fact that an applicant has the burden of persuading the court of something before he can obtain the order he seeks does not of itself mean that he necessarily has to persuade the court of that "something" to some standard of proof: it all depends upon the particular statutory or other context. Likewise he observed that the mere fact that a statute requires a court to be "satisfied" of something before it makes an order does not mean that it necessarily has to be satisfied to the civil standard of proof: it all depends upon the nature of the matter about which the court has to be satisfied.

23. The judge held that if, in relation to the issues that the tribunal has to decide, a specific allegation of past conduct is relied on, the tribunal must decide as a matter of fact, and applying the ordinary civil standard of proof, whether the allegation has been proved: if it is not proved, then it cannot of itself be the basis for any continuing detention of the patient. But however many allegations of past conduct may fail to be proved, this does not mean that the tribunal is bound to order the patient's discharge. For the tribunal is looking to what may happen in the future rather

than to what has happened in the past. It must examine the case as a whole, recognising that the range of facts which may properly be taken into account is infinite; it must attach appropriate weight to all the relevant facts when coming to an overall conclusion; and it must reach an assessment or judgment on the particular issue by asking itself whether or not, adopting a global approach and having regard to the cumulative effect of all the relevant facts, it is satisfied.

24. The judge then set out the questions that the tribunal must ask itself when considering applications under section 72 and section 73, and what he considered to be the "default position" under each:

> "117. Under section 72 the Tribunal has to ask itself the following questions when considering an application for the discharge of a patient who is subject to a hospital order but is not a restricted patient:
>
> (i) Are we satisfied (see section 72(1)(b)(i)) that (a) the patient is now suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment or from any of those forms of disorder (b) of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment?
>
> (ii) Are we satisfied (see section 72(1)(b)(ii)) that it is necessary (a) for the health or safety of the patient or (b) for the protection of other persons that he should receive such treatment?
>
> The onus of establishing this is on the detaining authority. If the answer to *both* these questions is 'No, we are not satisfied' then the Tribunal must discharge the patient: section 72(1)(b). If the answer to *either* question is 'Yes, we are satisfied', then the Tribunal is not obliged to discharge the patient but may nonetheless decide to do so: see the opening words of section 72(1). …
>
> 118. The 'default position' under section 72, therefore, is this. If the Tribunal is not satisfied of the matters referred to in *either* 72(1)(b)(i) or section 72(1)(b)(ii) – if, in other words, the detaining authority fails to establish its case under section 72(1)(b)(i) *and* fails to establish its case under section 72(1)(b)(ii) – then the Tribunal must direct the discharge of the patient. In any other case it may direct his discharge.
>
> 119. Under section 73 the Tribunal has to ask itself the following questions when considering an application for the discharge of a restricted patient:
>
> (i) Are we satisfied (see sections 73(1)(a) and 72(1)(b)(i)) that (a) the patient is now suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment or from any of those forms of disorder (b) of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment?
>
> (ii) Are we satisfied (see sections 73(1)(a) and 72(1)(b)(ii)) that it is necessary (a) for the health or safety of the patient or (b) for the

> protection of other persons that he should receive such treatment?
>
> (iii) Are we satisfied (see section 73(1)(b)) that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment?
>
> The onus of establishing the matters referred to in questions (i) and (ii) is on the detaining authority. The onus of establishing the matter referred to in question (iii) is on the patient. … If the answer to *both* question (i) and question (ii) is 'No, we are not satisfied' – if, in other words, the detaining authority fails to establish its case under section 72(1)(b)(i) *and* fails to establish its case under section 72(1)(b)(ii) – *and* if the answer to question (iii) is 'Yes, we are satisfied' – if, in other words, the patient does establish his case under section 73(1)(b) – then the Tribunal must direct the absolute discharge of the patient: see section 73(1). If the answer to *both* question (i) and question (ii) is 'No, we are not satisfied' *but* the answer to question (iii) is also 'No, we are not satisfied' – if, in other words, the detaining authority fails to establish its case under section 72(1)(b)(i) and fails to establish its case under section 72(1)(b)(ii) but at the same time the patient fails to establish his case under section 73(1)(b) – then the Tribunal must direct the conditional discharge of the patient: see section 73(2). In any other circumstances the Tribunal will not direct the discharge of the patient.
>
> 120. The ultimate 'default position' under section 73, therefore, is this. If the Tribunal is not satisfied of *any* of the matters referred to in either limb of section 72(1)(b) or in section 73(1)(b), then it must direct the conditional discharge of the patient."

25. In the last part of his judgment (from para 121) Munby J considered the concerns expressed by MIND about the approach of tribunals to the assessment of evidence, in particular hearsay evidence, and gave guidance on the approach that should be adopted. He emphasised that a decision under section 72 or 73 is a matter of extreme gravity not merely for the patient but also for the general public. On the one hand are the patient's claims not merely to liberty but also to autonomy and bodily integrity. On the other hand there are powerful interests that may pull in the other direction: not merely the public interest in safety, but also the patient's own interest in treatment which may protect him from the risk of harm or self-harm and may remove or reduce the prospect of future compulsory detention. The judge concluded by saying that bearing in mind the gravity – typically both for the patient and for the public – of the issue with which it is grappling, the tribunal will always want to bring to its task particular care and consideration and will want to scrutinise the evidence with especial care.

26. The overall conclusion expressed in para 137 of the judgment was that the only misdirection by the tribunal in the case of AN was favourable to the patient and that the application for judicial review must be dismissed.

The issues on the appeal

27. There are three issues on the appeal:

(1) Did the judge err in holding that the correct standard of proof, in relation to those issues under sections 72 and 73 that are susceptible to proof to a defined standard, is the ordinary civil

standard of proof on the balance of probabilities?
(2) Did the judge err in holding that certain issues under sections 72 and 73 are not susceptible of proof to a defined standard but are to be determined by a process of evaluation and judgment?
(3) Did the judge err in his formulation of the "default position" under sections 72 and 73?
28. To the extent that Munby J's judgment ranged more widely than those issues, it has not been the subject of consideration in argument before us.

Issue (1): standard of proof

The appellant's case

29. Mr Bowen submits that Munby J was wrong to hold that the applicable standard of proof is "the ordinary civil standard of proof 'on a balance of probability'" (para 71). Equally, the *obiter dicta* in *Reid v. Secretary of State for Scotland* [1999] 2 AC 512, 539 and *R (H) v. London North and East Region Mental Health Review Tribunal* [2002] QB 1 at para 32, to the effect that proof is on a balance of probabilities, are mistaken. The issue of standard of proof in this context has not previously been the subject of a considered decision.
30. Drawing on an article by Dr Mike Redmayne, *Standards of Proof in Civil Litigation* (1999) MLR 167, and observations of Burger CJ in *Addington v. Texas* (cited above), Mr Bowen submits that the ordinary civil standard of proof on the balance of probabilities represents an equal sharing (50:50) of the litigation risk between the parties, on the basis that the same utility may be ascribed to one party wrongly (i.e. unjustly) winning a case as to another wrongly losing it. The criminal standard, on the other hand, places almost the entire litigation risk on the state, on the basis that there is an interest of transcending value at stake (the liberty of the accused) and society places a much higher value upon ensuring that the innocent are not convicted than it does upon ensuring that the guilty are convicted.
31. Mr Bowen submits that there are, however, many circumstances in which an interest of transcending value falls to be determined in a civil context where an equal sharing of the litigation risk is not appropriate. The common law has long recognised that in certain contexts the ordinary civil standard of proof may accordingly require modification, as where serious allegations of a criminal nature are made in civil cases or the consequences of a finding one way or the other will be particularly grave for the individual concerned, for third parties or for the general public. In some cases more than one such feature may exist and the competing utilities of the individual's rights and those of third parties or the wider public interest may have to be balanced.
32. Mr Bowen suggests that four different solutions have been adopted as regards the standard of proof in such cases:
(1) The "flexible standard" approach, in which the civil standard, while expressed as balance of probabilities, is nevertheless capable of a range of differing degrees of probability, from "more likely than not" to something approaching the criminal standard of "beyond reasonable doubt". Cases in this category are said to include *Bater v. Bater* [1951] P 35, *Hornal v. Neuberger Products Ltd.* [1957] 1 QB 247, *Blyth v. Blyth* [1966] AC 643 and *R v. Secretary of State for the Home Department, ex p. Khawaja* [1984] AC 74. A similar approach has been adopted in Australia (see *Briginshaw v. Briginshaw* [1938] CLR 336, which has been the basis of State and Federal legislation) and Canada (see *Smith v. Smith* [1952] 2 SCR 312).
(2) The "fixed civil standard", where the standard of proof remains fixed but the degree of evidence needed to satisfy it varies because events such as serious criminal offences are said to be less probable. Cases in this category are said to include *Re Dellow's Will Trusts* [1964] 1 WLR 451, *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 and *Secretary of State for the Home Department v. Rehman* [2003] 1 AC 153.
(3) The "quasi-criminal standard" approach, in which the "flexible standard" approach is said to be taken to its logical conclusion so as to encompass the criminal standard. Cases placed in this

category include *B v. Chief Constable of Avon and Somerset* Constabulary [2001] 1 WLR 340, *Gough v. Chief Constable of the Derbyshire Constabulary* [2002] QB 1213 and *R (McCann) v. Crown Court at Manchester* [2003] 1 AC 187.

(4) The "single third standard of proof", which rests between a bare civil standard and the criminal standard. This was rejected in this jurisdiction in *In re H* but has been recognised in the USA as the standard of "clear and convincing evidence" and is applied to cases involving infringements of fundamental rights, including mental health cases: see, for example, *Addington v. Texas*.

33. Reference is also made to the "convincing evidence" standard ("convincingly established") that has been applied by the ECtHR when determining whether an interference with various qualified rights under the ECHR is necessary and proportionate. The same approach has been adopted by the ECtHR, and in this jurisdiction by the Court of Appeal in *R (N) v. M* [2003] 1 WLR 562, in determining whether there is a medical necessity for compulsory medical treatment that would otherwise amount to a violation of article 3. It is submitted that, although the question has not been directly answered in the Strasbourg case-law, the same standard should apply under article 5 to the justification of a detention in hospital on grounds of unsoundness of mind.

34. By analogy with those situations where a higher standard of proof has been held to be appropriate (quasi-criminal cases, disciplinary proceedings, contempt proceedings) and by reference to the approach adopted in other common law jurisdictions, it is submitted that the transcending values of liberty and autonomy are such that the social cost of erroneous detentions must be seen as greater than that of erroneous decisions to release. While the potential cost of erroneous decisions to release is that patients so released will harm themselves or others, in the generality of cases that is an extremely small risk.

35. In these circumstances it is submitted that a higher than ordinary civil standard of proof should be applied to decisions under sections 72 and 73. In the course of his submissions Mr Bowen put forward various formulations of an appropriate self-direction by the tribunal. By the end of his reply he had refined them into four possibilities, all of which were said to meet the requirements of fairness and of article 5, though the first was preferred: (i) the tribunal must be satisfied to a high degree of probability that the criteria for detention are made out; (ii) the tribunal must be so satisfied by convincing evidence; (iii) the tribunal must be so satisfied by clear and convincing evidence; and (iv) the tribunal must be so satisfied to the civil standard of proof with the strictness appropriate to the seriousness of the matters to be proved and the implications of proving them.

The main English authorities

36. We think it helpful to start by looking at the main English authorities chronologically rather than by reference to the classifications adopted by Mr Bowen, though we leave to one side, for the time being, the cases dealing specifically with the ECHR.

37. *Bater v. Bater* [1951] P 35 concerned a wife's petition for divorce on the ground of cruelty. The Court of Appeal held that it was not a misdirection for the trial judge to have stated that the petitioner must prove her case beyond reasonable doubt. Bucknill LJ, with whom Somervell LJ agreed, considered that "a high standard of proof" was required because of the importance of such a case to the parties and the community. Denning LJ stated (at pages 36-37):

> "The difference of opinion which has been evoked about the standard of proof in recent cases may well turn out to be more a matter of words than anything else. It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of

proof within that standard.

> As Best CJ and many other great judges have said, 'in proportion as the crime is enormous, so ought the proof to be clear'. So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion. Likewise, a divorce court should require a degree of probability which is proportionate to the subject-matter."

38. The issue in *Hornal v. Neuberger Products Ltd.* [1957] 1 QB 247 was the standard of proof in a civil claim for fraudulent misrepresentation. The Court of Appeal held that the trial judge had directed himself correctly by reference to the balance of probability. Denning LJ referred back to the views he had expressed in *Bater v. Bater*. Hodson LJ expressed his complete agreement with those views, adding (at page 264):

> "Just as in civil cases the balance of probability may be more readily tilted in one case than in another, so in criminal cases proof beyond reasonable doubt may more readily be attained in some cases than in others."

39. Morris LJ's observations (at page 266) are particularly illuminating:

> "It is, I think, clear from the authorities that a difference of approach in civil cases has been recognized. Many judicial utterances show this. The phrase 'balance of probabilities' is often employed as a convenient phrase to express the basis upon which civil issues are decided. It may well be that no clear-cut logical reconciliation can be formulated in regard to the authorities on these topics. But perhaps they illustrate that 'the life of the law is not logic but experience.' In some criminal cases liberty may be involved; in some it may not. In some civil cases the issues may involve questions of reputation which can transcend in importance even questions of personal liberty. Good name in man or woman is 'the immediate jewel of their souls.'
>
> But in truth no real mischief results from an acceptance of the fact that there is some difference of approach in civil actions. Particularly is this so if the words which are used to define that approach are the servants but not the masters of meaning. Though no court and no jury would give less careful attention to issues lacking gravity than to those marked by it, the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities. This view was denoted by Denning LJ when in his judgment in *Bater v. Bater* he spoke of a 'degree of probability which is commensurate with the occasion' and of 'a degree of

probability which is proportionate to the subject-matter.'

> In English law the citizen is regarded as being a free man of good repute. Issues may be raised in a civil action which affect character and reputation, and these will not be forgotten by judges and juries when considering the probabilities in regard to whatever misconduct is alleged. …"

40. The factual background to *In re Dellow's Will Trusts* [1964] 1 WLR 451 was that a husband and wife, having made mutual wills each leaving their estate to the other, had been found dead in their home from coal gas poisoning. The husband was presumed to have died first. The question then arose as to whether the wife had feloniously killed him. As regards the standard of proof, Ungoed-Thomas J referred to the observations of Morris LJ in *Hornal v. Neuberger Products Ltd.* and continued (at pages 454-455):

> "It seems to me that in civil cases it is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue, but, as Morris LJ says, the gravity of the issue becomes part of the circumstances which the court has to take into consideration in deciding whether or not the burden of proof has been discharged. The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it. This is perhaps a somewhat academic distinction and the practical result is stated by Denning LJ: 'The more serious the allegation the higher the degree of probability that is required: but it need not, in a civil case, reach the very high standard required by the criminal law.' In this case the issue is whether or not the wife feloniously killed the husband. There can hardly be a graver issue than that, and its gravity weighs very heavily against establishing that such a killing took place, even for the purpose of deciding a civil issue."

41. The issue in *Blyth v. Blyth* [1966] AC 643 was the standard of proof applicable to the question whether adultery had been condoned. The House of Lords held by a majority that it was the balance of probability. Lord Denning, referring back to *Bater v. Bater* and to *Hornal v. Neuberger Products Ltd*, said this (at page 669):

> "In short it comes to this: so far as the *grounds* for divorce are concerned, the case, like any civil case, may be proved by a preponderance of probability, but the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear. So far as the *bars* to divorce are concerned, like connivance or condonation, the petitioner need only show that on balance of probability he did not connive or condone as the case may be" (original emphasis).

42. In *R v. Secretary of State for the Home Department, ex p. Khawaja* [1984] AC 74 it was held by the House of Lords that, on an application for judicial review of an order detaining a person as an illegal entrant, it was for the executive to prove to the satisfaction of the court, on the balance of probabilities, the facts relied on by the immigration officer as justifying his conclusion that the applicant was an illegal entrant. Lord Scarman dealt at length with the standard of proof. Having cited *Bater v. Bater*, *Hornal v. Neuberger Products Ltd.*, *In re Dellow's Will Trusts* and *Blyth v. Blyth*, he continued (at pages 113F-114C):

> "My Lords, I would adopt as appropriate to cases of restraint put

> by the executive upon the liberty of the individual the civil standard flexibly applied in the way set forth in the cases cited: and I would direct particular attention to the words of Morris LJ already quoted. It is not necessary to import into the civil proceedings of judicial review the formula devised by judges for the guidance of juries in criminal cases. Liberty is at stake: that is, as the court recognised in *Bater v. Bater* [1951] P. 35 and in *Hornal v. Neuberger Products Ltd.*[1957] 1 Q.B. 247, a grave matter. The reviewing court will therefore require to be satisfied that the facts which are required for the justification of the restraint put upon liberty do exist. The flexibility of the civil standard of proof suffices to ensure that the court will require the high degree of probability which is appropriate to what is at stake. "... the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue": Dixon J. in *Wright v. Wright* (1948) 77 C.L.R. 191, 210. I would, therefore, adopt the civil standard flexibly applied in the way described in the case law to which I have referred. And I completely agree with the observation made by my noble and learned friend, Lord Bridge of Harwich, that the difficulties of proof in many immigration cases afford no valid ground for lowering the standard of proof required.
>
> Accordingly, it is enough to say that, where the burden lies on the executive to justify the exercise of a power of detention, the facts relied on as justification must be proved to the satisfaction of the court. A preponderance of probability suffices: but the degree of probability must be such that the court is satisfied. The strictness of the criminal formula is unnecessary to enable justice to be done: and its lack of flexibility in a jurisdiction where the technicalities of the law of evidence must not be allowed to become the master of the court could be a positive disadvantage inhibiting the efficacy of the developing safeguard of judicial review in the field of public law."

43. Lord Fraser expressed agreement with Lord Scarman on that issue, stating (at page 97G):

> "the appropriate standard is that which applies generally in civil proceedings, namely proof on a balance of probabilities, the degree of probability being proportionate to the nature and gravity of the issue. As cases such as those in the present appeals involve grave issues of personal liberty, the degree of probability required will be high."

44. Similarly, Lord Bridge, with whom Lord Templeman expressed agreement, concluded (at page 124E):

> "the civil standard of proof by a preponderance of probability will suffice, always provided that, in view of the gravity of the charge of fraud which has to be made out and of the consequences which will follow if it is, the court should not be satisfied with anything less than probability of a high degree."

45. The next authority in the chronological sequence is one of central importance. *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 concerned section 31 of the Children

Act 1989 which, in summary, empowers the court to make an order placing a child in the care of the local authority if satisfied that the child (i) is suffering significant harm or (ii) is likely to do so. The mother in that case had four children, all girls. The local authority applied for a care order in respect of the three youngest girls, basing its application solely on allegations of sexual abuse of the eldest girl. The House of Lords held by a majority that, just as there must be facts, properly proved to the court's satisfaction if disputed, on which the court can properly conclude that a child "is suffering" harm, so too there must be facts from which the court can properly conclude that a child "is likely to suffer" harm (i.e., as was also held, that there is a real possibility that the child will suffer harm in the future); and here too, if the facts are disputed, the court must resolve the dispute so far as necessary to reach a proper conclusion on the issue.

46. That is the context within which their Lordships considered a further issue, as to the standard of proof required to prove relevant facts, such as the allegations of sexual abuse on which the application was founded. On that issue Lord Nicholls stated, in a passage at pages 586C-587E that we think it necessary to quote almost in full:

> "Where the matters in issue are facts the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability. This is the established general principle. There are exceptions such as contempt of court applications, but I can see no reason for thinking that family proceedings are, or should be, an exception. … Family proceedings often raise very serious issues, but so do other forms of civil proceedings.
>
> The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A step-father is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
>
> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J expressed this neatly in *In re Dellow's Will Trusts* [1964] 1 WLR 451, 455: 'The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged

and thus to prove it.'

> This substantially accords with the approach adopted in authorities such as the well known judgment of Morris L.J. in *Hornal v. Neuberger Products Ltd*. [1957] 1 QB 247, 266. This approach also provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters.
>
> No doubt it is this feeling which prompts judicial comment from time to time that grave issues call for proof to a standard higher than the preponderance of probability. … The law looks for probability, not certainty. Certainty is seldom attainable. But probability is an unsatisfactorily vague criterion because there are degrees of probability. In establishing principles regarding the standard of proof, therefore, the law seeks to define the degree of probability appropriate for different types of proceedings. Proof beyond reasonable doubt, in whatever form of words expressed, is one standard. Proof on a preponderance of probability is another, lower standard having the in-built flexibility already mentioned. If the balance of probability standard were departed from, and a third standard were substituted in civil cases, it would be necessary to identify what the standard is and when it applies. Herein lies a difficulty. If the standard were to be higher than the balance of probability but lower than the criminal standard of proof beyond reasonable doubt, what would it be? The only alternative which suggests itself is that the standard should be commensurate with the gravity of the allegation and the seriousness of the consequences. A formula to this effect has its attraction. But I doubt whether in practice it would add much to the present test in civil cases, and it would risk causing confusion and uncertainty. As at present advised I think it is better to stick to the existing, established law on this subject. I can see no compelling need for a change."

47. Lords Goff and Mustill agreed with Lord Nicholls. Lord Browne-Wilkinson, although dissenting in part on other issues, agreed with Lord Nicholls that "the standard of proof is the ordinary civil standard, i.e. balance of probabilities" (page 572E).

48. *In re H* was considered in *Secretary of State for the Home Department v. Rehman* [2003] 1 AC 153, which concerned the making of a deportation order under section 3(5)(b) of the Immigration Act 1971 on the ground that deportation would be conducive to the public good in the interests of national security. The Special Immigration Appeals Commission held that the Secretary of State had not established to a high degree of probability that the applicant had been or was likely to be a threat to national security. The Court of Appeal allowed the Secretary of State's appeal. The House of Lords, in upholding the Court of Appeal's decision, held that the concept of standard of proof was not applicable to the evaluation of whether the risk to national security was sufficient to justify deportation, but that where past acts were relied on they should be proved to the civil standard of proof. As to that, Lord Hoffmann stated:

> "55. I turn next to the Commission's views on the standard of

> proof. By way of preliminary I feel bound to say that I think that a 'high civil balance of probabilities' is an unfortunate mixed metaphor. The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586, some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not."

49. Lords Clyde and Hutton agreed with Lord Hoffmann. Lord Slynn, with whom Lords Steyn and Hutton agreed, referred simply to the need to prove facts "to the civil standard of proof" (para 22).

50. In view of the submissions made by Mr Bowen, we should note that *Ex p. Khawaja* was not cited to the House of Lords in *In re H* (though all the other cases that we have mentioned so far in this chronological survey were), but that it was cited in *Rehman*.

51. The next case to consider is *B v. Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340, which arose out of an application to the magistrates' court for a sex offender order under section 2 of the Crime and Disorder Act 1998. On such an application it must be proved that the conditions mentioned in section 2(1) are fulfilled, namely "(a) that the person is a sex offender; and (b) that the person has acted, since the relevant date, in such a way as to give reasonable cause to believe that an order under this section is necessary to protect the public from serious harm from him". The Divisional Court held that such an application was properly characterised as a civil, not a criminal, proceeding and that the justices were accordingly required to apply the civil standard of proof. As to that standard, however, Lord Bingham CJ, giving the leading judgment, went on to observe:

> "30. It should, however, be clearly recognised, as the justices did expressly recognise, that the civil standard of proof does not invariably mean a bare balance of probability, and does not so mean in the present case. The civil standard is a flexible standard to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matters: *Bater v Bater* [1951] P 35, *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, and *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74.
>
> 31. In a serious case such as the present the difference between the two standards is, in truth, largely illusory. I have no doubt that, in deciding whether the condition in section 2(1)(a) is fulfilled, a magistrates' court should apply a civil standard of proof which will for all practical purposes be indistinguishable from the criminal standard. In deciding whether the condition in section 2(1)(b) is fulfilled the magistrates' court should apply the civil standard with the strictness appropriate to the seriousness of the matters to be

proved and the implications of proving them."

52. It should be noted that, although earlier cases were referred to in para 30 of Lord Bingham's judgment, neither *In re H* nor *Rehman* was cited to the court.

53. The subject matter of *Gough v. Chief Constable of the Derbyshire Constabulary* [2002] QB 1213 was an application to a magistrates' court for a banning order under section 14B of the Football Spectators Act 1989. The Court of Appeal held that proceedings under that section were civil in character. As regards the standard of proof, however, Lord Philips MR, giving the judgment of the court, stated:

> "90. It does not follow from this that a mere balance of probabilities suffices to justify the making of an order. Banning orders under section 14B fall into the same category as antisocial behaviour orders and sex offender orders. While made in civil proceedings they impose serious restraints on freedoms that the citizen normally enjoys. While technically the civil standard of proof applies, that standard is flexible and must reflect the consequences that will follow if the case for a banning order is made out. This should lead the justices to apply an exacting standard of proof that will, in practice, be hard to distinguish from the criminal standard: see *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340, 354 and *R (McCann) v Crown Court at Manchester* [2001] 1 WLR 1084, 1102.
>
> 91. Thus the necessity in the individual case to impose a restriction upon a fundamental freedom must be strictly demonstrated. The first thing that has to be proved under section 14B(4)(a) is that the respondent has caused or contributed to violence or disorder in the United Kingdom or elsewhere. Mr Pannick conceded that the standard of proof of this is practically indistinguishable from the criminal standard.
>
> 92. The same is true of the next requirement, that imposed by section 14B(4)(b), though this is less easily derived from the language of the statute. The court must be 'satisfied that there are reasonable grounds to believe that making a banning order would help to prevent violence or disorder at or in connection with any regulated football matches'. In practice the 'reasonable grounds' will almost inevitably consist of evidence of past conduct. That conduct must be such as to make it reasonable to conclude that if the respondent is not made subject to a banning order he is likely to contribute to football violence or disorder in the future. The past conduct may or may not consist of or include the causing or contributing to violence or disorder that has to be proved under section 14B(4)(a), for that violence or disorder is not required to be football related. It must, however, be proved to the same strict standard of proof. Furthermore it must be conduct that gives rise to the likelihood that, if the respondent is not banned from attending prescribed football matches, he will attend such matches, or the environs of them, and take part in violence or disorder.
>
> 93. These matters are not readily susceptible of proof. We can well understand the practice that is evidenced by this case of using

> a football intelligence service to build up profiles of 'football prominents'. Such a practice may well be the only way of assembling evidence sufficiently cogent to satisfy the requirements of section 14B(4)(b). Those requirements, if properly applied in the manner described above, will provide a satisfactory threshold for the making of a banning order."

54. Lord Phillips referred in para 90 to the decision of the Court of Appeal in *R (McCann) v. Manchester Crown Court*. *McCann* was the subject of a further appeal to the House of Lords, whose decision is reported at [2003] 1 AC 787. The case concerned an application to the magistrates' court for anti-social behaviour orders under section 1 of the Crime and Disorder Act 1998. Again this was held to be a civil proceeding. Nevertheless their Lordships went on to hold that the standard of proof to be applied to allegations about the defendants' past behaviour was the criminal standard. Lord Steyn stated:

> "37. Having concluded that the relevant proceedings are civil, in principle it follows that the standard of proof ordinarily applicable in civil proceedings, namely the balance of probabilities, should apply. However, I agree that, given the seriousness of the matters involved, at least some reference to the heightened civil standard would usually be necessary: *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586D-H, per Lord Nicholls of Birkenhead. For essentially practical reasons, the Recorder of Manchester decided to apply the criminal standard. The Court of Appeal said that would usually be the right course to adopt. Lord Bingham of Cornhill has observed that the heightened civil standard and the criminal standard are virtually indistinguishable. I do not disagree with any of these views. But in my view pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 apply the criminal standard. …"

55. Lord Hope gave the following reasons for endorsing the approach of applying the criminal standard:

> "82. Mr Crow for the Secretary of State said that his preferred position was that the standard to be applied in these proceedings should be the civil standard. His submission, as it was put in his written case, was that although the civil standard was a single, inflexible test, the inherent probability or improbability of an event was a matter to be taken into account when the evidence was being assessed. He maintained that this view was consistent with the position for which he contended, that these were civil proceedings which should be decided according to the civil evidence rules. But it is not an invariable rule that the lower standard of proof must be applied in civil proceedings. I think that there are good reasons, in the interests of fairness, for applying the higher standard when allegations are made of criminal or quasi-criminal conduct which, if proved, would have serious consequences for the person against whom they are made.
>
> 83. This … was the view which the Court of Session took in *Constanda v. M* 1997 SC 217 when it decided that proof to the

> criminal standard was required of allegations that a child had engaged in criminal conduct although the ground of referral to a children's hearing was not that he had committed an offence but that he was exposed to moral danger. There is now a substantial body of opinion that, if the case for an order such as a banning order or a sex offender order is to be made out, account should be taken of the seriousness of the matters to be proved and the implications of proving them. It has also been recognised that if this is done the civil standard of proof will for all practical purposes be indistinguishable from the criminal standard: see *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340, 354, para 31, per Lord Bingham of Cornhill CJ; *Gough v Chief Constable of the Derbyshire Constabulary* [2002] QB 1213, 1242-1243, para 90, per Lord Phillips of Worth Matravers MR. As Mr Crow pointed out, the condition in section 1(1)(b) of the Crime and Disorder Act 1998 that a prohibition order is necessary to protect persons in the local government area from further anti-social acts raises a question which is a matter for evaluation and assessment. But the condition in section 1(1)(a) that the defendant has acted in an anti-social manner raises serious questions of fact, and the implications for him of proving that he has acted in this way are also serious. I would hold that the standard of proof that ought to be applied in these cases to allegations about the defendant's conduct is the criminal standard."

56. The other members of the House in *McCann* agreed with Lord Steyn and Lord Hope.

57. Finally in this chronological survey, reference should be made to the decision of the Privy Council in *Campbell v. Hamlet* [2005] UKPC 19. In that case there had been a finding of professional misconduct by an attorney. One of the issues on the appeal was the correct standard of proof to apply to such proceedings. At para 14 of the judgment, Lord Brown stated that their Lordships entertained no doubt that the criminal standard was the correct standard. He continued:

> "17. It has, of course, long been established that there is flexibility in the civil standard of proof which allows it to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matters."

58. He then referred with evident approval, at paras 17-19, to passages that we have already cited from *B v. Chief Constable of Avon and Somerset Constabulary*, *Gough v. Chief Constable of the Derbyshire Constabulary* and *R (McCann) v. Crown Court at Manchester* in which it was indicated that, in the situations there under consideration, the civil standard of proof would for all practical purposes be indistinguishable from the criminal standard.

Discussion

59. We have set out those authorities in chronological order because, in our judgment, it helps to show that Mr Bowen's submissions seek to impose an unwarranted straitjacket of classification upon them. Certainly there are differences in the language used and the rationalisations given over time; but the essential point that runs through the authorities is that the civil standard of proof is flexible in its application and enables proper account to be taken of the seriousness of the allegations to be proved and of the consequences of proving them.

60. Whatever differences in expression there have been over time, it was laid down clearly by the House of Lords in *In re H* and *Rehman* that in English law the civil standard is one single

standard, namely proof on the balance of probabilities (or preponderance of probability). The other standard is the criminal standard of proof beyond reasonable doubt. There is no intermediate standard, nor is the civil standard to be broken down into sub-categories designed to produce one or more intermediate standards. (We leave out of account for the purposes of this analysis the standards applicable in certain specific statutory contexts, such as a "reasonable likelihood" of persecution in asylum cases. The present case is governed by the general rules.)

61. We reject Mr Bowen's contention that the decision in *In re H* might have been different if *Khawaja* had been cited in it. Lord Nicholls in *In re H* considered his approach substantially to accord with that in *Hornal*, which was approved in *Khawaja* and which Mr Bowen would place in the same category as *Khawaja*. In any event *Khawaja* was cited in *Rehman*, where *In re H* was followed. The point might equally be made that *In re H*, in turn, was not cited in *B* or *Gough*, though it was in *McCann*, and that *Rehman* was not cited in any of those three cases. In our view, however, this does not mean that successive cases have been decided *per incuriam* or that the law has been getting into a state of confusion. Full citation of earlier authorities has not been necessary in these cases, for the very reason that their broad thrust has been the same (albeit that, as we explain below, slightly different language might sometimes have been used if *In re H* had been cited in some of the more recent cases).

62. Although there is a single civil *standard* of proof on the balance of probabilities, it is flexible in its *application*. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.

63. The flexibility that exists in the application of the standard is clear from *In re H* itself, where Lord Nicholls, whilst affirming the existence of a single civil standard, stressed that it had "a generous degree of flexibility" in respect of the seriousness of the allegation (page 586F – see also his reference, at page 587E, to "the in-built flexibility already mentioned").

64. It is true that the rationalisation put forward in *In re H* and followed in *Rehman* focused on the seriousness of the allegation rather than on the seriousness of the consequences if the allegation is proved. The reasoning was that the more serious the allegation the less likely it is that the event occurred, and that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. In general, the seriousness of an allegation is a function of the seriousness of its consequences, and *vice versa*, so that the rationalisation in *In re H* and *Rehman* will take due account of the seriousness of the consequences if an allegation is proved. We accept Mr Bowen's submission, however, that there will be cases where proof of an allegation may have serious consequences even though it cannot be said that the matter alleged is inherently improbable. It seems to us that the same general approach must apply in such cases, even though the rationalisation put forward in *In re H* does not readily accommodate it. The more serious the consequences, the stronger the evidence required in practice to prove the matter on the balance of probabilities.

65. In terms of outcome, and however difficult it may be to accommodate it within his reasoning, that conclusion accords with the way in which Lord Nicholls evidently thought of the matter in *In re H*. The alternative, intermediate standard which he formulated for consideration but then rejected was "commensurate with the gravity of the allegation *and the seriousness of the consequences*" (page 587E, emphasis added). In rejecting it, however, he doubted whether in practice it would add much to the balance of probability standard. Moreover Morris LJ in *Hornal*, with whose judgment Lord Nicholls considered his own approach substantially to accord, was plainly of the view that the seriousness of the consequences, whether for liberty or reputation, was

a matter to be taken into account when deciding on the balance of probabilities (see the latter part of the passage quoted at para 39 above).

66. The more recent cases provide uniform confirmation of the need to take account of the seriousness of the consequences or implications of what has to be proved when applying the civil standard: see *B v. Chief Constable of Avon and Somerset Constabulary* at para 30, *Gough* at para 90 and *McCann* at para 83. The relevant passages are set out above and we do not need to repeat them.

67. Some of the language used in those cases might be thought to have the potential for confusion. For example, Lord Bingham said in *B v. Chief Constable of Avon and Somerset Constabulary* that the civil standard of proof "does not invariably mean a bare balance of probability" (para 30), and Lord Steyn referred in *McCann* to "the heightened civil standard" (para 37). Such observations are an echo of references in some of the earlier cases to higher degrees of probability being required where the allegations are more serious. In *Rehman*, however, Lord Hoffmann took issue with that kind of language, which does not sit comfortably with a single standard of balance of probabilities. If *Rehman* had been cited in the later cases, or indeed if *In re H* had been cited in *B v. Chief Constable of Avon and Somerset Constabulary*, it may well be that different words would have been used. But in our view it is only a matter of words. We do not think that anything said in the later cases affects the substance of the position as set out in *In re H* and *Rehman*.

68. In all of this we take comfort from Morris LJ's observations in *Hornal*, quoted at para 39 above, that it may well be that no clear-cut logical reconciliation can be formulated in regard to the authorities, but perhaps they illustrate that "the life of the law is not logic but experience"; and that the words which are used to define the approach must be the servants not the masters of meaning.

69. Although there remains a distinction in principle between the civil standard and the criminal standard, the practical application of the flexible approach demonstrated in the authorities means that they are likely in certain contexts to produce the same or similar results. Indeed, there are exceptional situations in which, for reasons of policy or pragmatism, the actual criminal standard is used in civil proceedings, as in contempt of court (*In re Bramblevale Ltd.* [1970] 1 Ch 128), the making of anti-social behaviour orders (*McCann*) or certain disciplinary contexts (*Campbell*). These are exceptions to the general rule. Mr Bowen has not argued before us that the mental health context constitutes a further exception in which the criminal standard applies, and we are sure he is right not to have done so.

70. To recapitulate, we do not accept Mr Bowen's submission that the House of Lords in *In re H* somehow took a wrong turn, reflecting only one strand in the earlier case-law and resulting in the erroneous adoption of a fixed standard instead of a flexible standard; or that there is an irreconcilable conflict between *In re H* and later cases such as *McCann*. *In re H* is in line with the overall thrust of the case-law, whilst analysing the matter in terms of a single civil standard (balance of probabilities) which is to be applied flexibly according to the seriousness of the matters to be proved and the consequences of proving them. The reasoning in support of the adoption of a single standard may not provide a complete explanation of that flexibility in its application, but the seriousness of the consequences if a matter is proved is nonetheless a factor to be taken into account when deciding in practice whether the evidence is sufficiently strong to prove that matter on the balance of probabilities.

71. We have not spent time on the Commonwealth authorities, such as *Briginshaw*, to which Mr Bowen referred us, but due account is taken of them in the English cases that we have examined. Although the US cases are of no direct assistance, since they were decided in the somewhat different context of the "due process" clause of the US Constitution and they lay down an intermediate standard which, as *In re H* makes clear, is no part of English law, they do focus on a similar problem and it seems to us that the "clear and convincing evidence" test in *Addington v. Texas*, the language of "reliably shown" or "convincingly shown" in the ECHR context, and the flexible application of the balance of probabilities standard may all lead to much the same result in

practice.

The application of the standard of proof

72. Given that the standard of proof is flexible in its application, there remains the question whether evidence of an especially high strength or quality is required to meet the standard in the context of sections 72 and 73 of the Act (to the extent that the issues arising under those sections are susceptible of proof to a defined standard at all). We take it as axiomatic, and it is not in dispute, that cogent evidence will in practice be required in order to satisfy the tribunal, on the balance of probabilities, that the conditions for continuing detention are met. But we would not put it any higher than that.

73. As submitted by Mr McCullough on behalf of the tribunal, the mental health context is very different from other situations where individual liberty is at stake. The unwarranted detention of an individual on grounds of mental disorder is a very serious matter, but the unwarranted release from detention of an individual who is suffering from mental disorder is also a very serious matter. The decision of the US Supreme Court in *Addington v. Texas*, quoted extensively by Munby J at paras 51-57 of his judgment, is valuable for its discussion of the competing interests of the individual and the State in this area. The court concluded that the individual's interest was of such weight and gravity that clear and convincing evidence was required to justify his involuntary confinement. Although the court dealt with the matter in terms of an intermediate standard of proof, its reasoning is relevant to the strength of the evidence required in the flexible application of the English balance of probabilities standard. In our view it supports a requirement of cogent evidence but does not compel a more demanding evidential requirement than that.

74. Several considerations weigh against pitching the evidential requirement unduly high. One of the points made by Burger CJ in rejecting the criminal standard of proof was that: "One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma …. It cannot be said, therefore, that it is much better for a mentally ill person to 'go free' than for a mentally normal person to be committed." Furthermore the consequences that may flow from the release of a person suffering from mental disorder include not only a risk to the individual's own health and safety (e.g. self-harm, even suicide), but also a risk of harm to other members of the public. It is not to be forgotten that a person whose case is being considered under section 73 was detained in the first place pursuant to a hospital order under section 37 following conviction for a criminal offence, often an offence of violence: the appalling facts of AN's own case are very much in point. Some of those whose cases are considered under section 72 will also have been detained pursuant to section 37. All those factors are taken into account in the operation of the statutory machinery under the 1983 Act.

75. The matter is expressed very well by Munby J at para 71 of his judgment. In the continuation of the passage quoted at para 18 above, the judge said:

> "I agree with [Mr McCullough] that to raise the standard of proof above the ordinary civil standard of proof would subvert the obvious purpose of the Act, which seeks both to protect the interests of the individual whose ability to act in his own best interests is impaired and at the same time enable a *proportionate* balance … to be struck between individual and public interests. It would, as Mr McCullough submits, relegate the interests of the patient, as objectively ascertained, and of the public, to a position subsidiary to the principle of personal autonomy – an approach for which there is no principled basis. And it would thereby create a heightened risk to patients and the public – contrary, as it seems to me, to the very scheme and purpose of the Act."

That was said in support of the judge's conclusion that the applicable standard of proof is the ordinary civil standard of proof on the balance of probabilities; but it also tells against demanding an especially high evidential requirement in order to meet that standard.

76. Turning to the actual decision in the present case, the tribunal was faced with competing expert opinions as to whether AN was suffering from a psychopathic disorder within the meaning of the Act. Directing itself by reference to the balance of probabilities, it gave a reasoned basis for preferring one group of experts over the other, concluding in effect that the diagnosis of psychopathic disorder was more likely than not to be the correct one. The body of evidence it preferred was plainly cogent and it is clear from the tribunal's reasons that its preference was reasonably clear-cut. The tribunal's approach cannot be faulted. The position would have been the same, however, even if *both* sets of competing opinions could fairly have been described as cogent and the decision between them had been a finely balanced one. We do not think that more is required than that the decision is based on cogent evidence which is accepted as correct on the balance of probabilities. It is not necessary, for example, for one body of evidence to have a much higher degree of cogency before it can be accepted on the balance of probabilities.

77. The same general considerations apply to the determination of other disputed issues of fact such as whether the patient has behaved in a particular way or said a particular thing in the past. The tribunal was wrong to adopt a standard of proof "akin to the criminal standard" (though, as Munby J held, it was an error favourable to AN and cannot help him in these proceedings). The tribunal's approach not only expresses the standard of proof incorrectly, but also suggests an evidential requirement higher than is appropriate for the proper application, in the present context, of the correct standard of proof. As regards the cogency of evidence required, we see no reason to disagree with the guidance given by Munby J at paras 121 et seq. of his judgment, where he dealt in particular with the evaluation of hearsay evidence; though we should stress that the detail of the points covered in that part of the judgment has not been the subject of argument before us.

Conformity with the ECHR

78. In our judgment, the conclusion we have expressed above is in full conformity with the requirements of the ECHR.

79. In determining whether a detention on grounds of mental illness complies with article 5, the ECtHR has consistently applied the test laid down in *Winterwerp v. Netherlands* (1979) EHRR 387. For example, in *HL v. United Kingdom* (application no. 45508/99, judgment of 5 October 2004), the court stated at para 98:

> "It is recalled that an individual cannot be deprived of his liberty on the basis of unsoundness of mind unless three minimum conditions are satisfied: he must reliably be shown to be of unsound mind; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder (the *Winterwerp* judgment, at para 39 …)."

The court examined the material on which the applicant's detention had been based, and found that "the applicant has been reliably shown to have been suffering from a mental disorder of a kind or degree warranting compulsory confinement …" (para 101).

80. It seems to us that full effect is given to the *Winterwerp* test by the application of a standard of proof on the balance of probabilities and a recognition that cogent evidence will in practice be required to meet that standard. We note, too, that in *Reid v. United Kingdom* (2003) 37 EHRR 9, where the court repeated the *Winterwerp* test (see para 70 of the judgment), there was no

suggestion that the standard of proof on the balance of probabilities was inappropriate or incompatible with the requirements of the ECHR, even though the court gave specific consideration to the two cases containing *obiter dicta* in support of that standard, namely *Reid v. Secretary of State for Scotland* and *R (H) v. London North and East Region Mental Health Review Tribunal*.

81. Mr Bowen has cited cases concerning the standard of proof required in other ECHR contexts. For example, in *R (N) v. M* [2003] 1 WLR 562 it was common ground, in the light of the decision of the ECtHR in *Herczegfalvy v. Austria* (1992) 15 EHHR 437, that the standard of proof for the purposes of determining whether medical treatment to which the patient does not consent is compatible with article 3 is that the medical necessity has been "convincingly shown": see the judgment of the Court of Appeal at para 17. At para 18 the court rejected a contention that the test was in effect the same as the criminal standard of proof, stating that no useful purpose is served by importing the language of the criminal law, that the phrase "convincingly shown" is easily understood and that the standard is a high one but it does not need elaboration or further explanation. In *R (B) v. Dr SS* [2005] EWHC 1936 (Admin), Charles J considered, but left open, the relationship between the "convincingly shown" standard adopted in *R (N) v. (M)* and the decision of the House of Lords in *In re H* as to the civil standard of proof in English law. He proceeded on the basis of the "convincingly shown" standard, treating it (as the parties had apparently agreed) as lying between the English civil standard and criminal standard.

82. Although the "convincingly shown" standard is arguably different from "reliably shown" and it is not necessary to decide whether that is so or not for the purposes of this appeal, it seems to us, as indicated above, that they are not likely to produce materially different results from each other or from the "clear and convincing evidence" test in *Adddington v. Texas*. Indeed, it seems to us to be desirable, so far as possible, for one single (though flexible) approach to be adopted for these different problems in the civil law.

83. However that may be, the language of "reliably shown" has been consistently applied under the ECHR for many years in the context of detention on grounds of mental health. It must be taken as the correct test, and the application of the standard of proof on the balance of probabilities in the way we have described is capable of meeting it.

Issue (2): issues susceptible to proof to the defined standard

84. All parties accept that Munby J was right to hold that, whatever standard of proof is determined under issue (1) to be the correct standard in this context, it can and should be applied to the question whether a person is suffering from a mental disorder within section 72(1)(b)(i) (including, as we understand the concessions, the nature and degree of that disorder) and to any issue of past conduct that the tribunal may have to determine.

85. Mr Bowen submits, however, that the judge was wrong to hold that the remaining issues under sections 72 and 73 are not susceptible to proof to a defined standard but are to be determined by a process of evaluation and judgment. His case is that the same standard of proof is applicable to the tribunal's determination of all the issues that arise under those sections.

86. This question is not governed by any binding authority, though Mr Bowen draws support from *obiter dicta* in two cases. In *Reid v. Secretary of State for Scotland*, Lord Clyde evidently considered there to be a burden on the patient to satisfy the decision-maker on the balance of probabilities as to each of the conditions contained in the Scottish equivalent of section 72 (see p. 539F). The case pre-dated the amendment to the Act which placed the burden of proof on the detaining authority; but whether an issue is susceptible to proof to a particular standard should not depend on where the burden of proof lies. There was, however, no argument on the standard of proof or its scope. Similarly, in *R (H) v. London North and East Region Regional Mental Health Review Tribunal* the Court of Appeal referred in general terms to the relevant conditions being demonstrated on a balance of probability (see para 32 of its judgment), but again this was *obiter*

and there was no argument on the point.

87. In developing his submissions, Mr Bowen takes as his starting-point the proposition that there is a *burden* on the detaining authority to satisfy the tribunal that the conditions for detention are met. The existence of that burden is common ground and is supported by *R (H) v. London North and East Region Mental Health Review Tribunal* and by the decision of the ECtHR in *Reid v. United Kingdom* (at least to the extent that the issues that arise under sections 72 and 73 are also within the scope of article 5 ECHR). The existence of the burden is unaffected by the fact that aspects of the tribunal's procedures are inquisitorial in nature (for example, the requirement of a medical examination by the medical member of the tribunal and the power to require the attendance of witnesses and to call for further information).

88. Mr Bowen's essential argument is that where there is a burden of proof, there must be a corresponding standard of proof. If no standard applies, then there is in truth no burden of proof. It makes no sense to talk in terms of a burden of proof unless there is a standard by reference to which the matter must be proved; and if a standard does apply, it must be the same standard as that held to apply to the determination of issues of fact.

89. We are not persuaded by the logic of that argument. It is inherent in the statutory language that the detaining authority has to satisfy the tribunal that the relevant conditions are met: "the tribunal shall direct the discharge of a patient … if they are not satisfied" as to the appropriateness and necessity, etc., of continuing detention. If the authority fails to satisfy the tribunal as to any of the conditions, the tribunal must order discharge. Thus the authority has the burden of persuading the tribunal to form the requisite judgments. Munby J preferred to describe this as an onus or persuasive burden (see para 106 of his judgment). Whether or not one prefers that language, the point of substance is the same. The existence of a burden does not mean that there must be a particular standard of proof in play.

90. The point can be illustrated by reference to *McCann*, upon which the judge relied as authority at the highest level against Mr Bowen's argument. We have already explained that *McCann* concerned applications for anti-social behaviour orders. Such an application is made by a local authority to a magistrates' court. Section 1(4) of the 1998 Act provides that "if, on such an application, it is proved that the conditions mentioned in subsection (1) are fulfilled", the court may make an order. The conditions in subsection (1) are "(a) that the person has acted … in an anti-social manner …; and (b) that such an order is necessary to protect persons … from further anti-social acts by him". Having held that pragmatism favoured the adoption of the criminal standard of proof under section 1, Lord Steyn continued (at the end of para 37):

> "If the House takes this view it will be sufficient for the magistrates, when applying section 1(1)(a) *to be sure* that the defendant has acted in an anti-social manner …. The inquiry under section 1(1)(b), namely that such an order is necessary to protect persons from further anti-social acts by him, does not involve a standard of proof: it is an exercise of judgment or evaluation" (original emphasis).

We have set out previously the passage in para 83 where Lord Hope expressed a similar view (see para 55 above). We have also pointed out that the rest of their Lordships expressed agreement with both Lord Steyn and Lord Hope.

91. Mr Bowen seeks to deflect the force of *McCann* by submitting, as a matter of inference, that their Lordships considered that neither a burden nor a standard of proof was applicable under section 1(1)(b). That cannot be right. It is plain from the terms of section 1(4) that there is a burden on the local authority to prove that the conditions in section 1(1) are met. The effect of *McCann* is that, in order to prove that the condition in section 1(1)(b) is met, the local authority

must persuade the court to form a judgment that an order is "necessary". Standard of proof does not come into it, but there is still a burden of proof.

92. There are other statutory contexts in which it has been held that the concept of standard of proof is inapplicable or unhelpful in relation to questions of judgment or evaluation, especially as regards the assessment of future risk.

93. Munby J, at paras 91-93 of his judgment, cited passages from the decisions of the Court of Appeal and the House of Lords in *Rehman*. A sufficient flavour is given by this passage from the speech of Lord Hoffmann (at para 56):

> "In any case, I agree with the Court of Appeal that the whole concept of a standard of proof is not particularly helpful in a case such as the present. In a criminal or civil trial in which the issue is whether a given event happened, it is sensible to say that one is sure that it did, or that one thinks it more likely than not that it did. But the question in the present case is not whether a given event happened but the extent of future risk. This depends upon an evaluation of the evidence of the appellant's conduct against a broad range of facts with which they may interact. The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee."

94. It must be borne in mind that in *Rehman* the primary decision-maker was the Secretary of State, who had to form an executive judgment as to whether there was a danger to national security, and that the House of Lords was considering the correct approach of the Special Immigration Appeals Commission when reviewing the Secretary of State's decision. So there is not a precise parallel with the present situation, where the detaining authority has the burden of satisfying the primary decision-maker, the tribunal, that certain conditions are met. Nevertheless, *Rehman* is important for the contrast it draws between matters of fact, which the Secretary of State had to establish to the civil standard of proof (see also per Lord Slynn at pp.184H-185A), and matters of judgment and evaluation, in relation to which the concept of standard of proof was considered to be not particularly helpful.

95. Munby J also referred to a number of cases concerning the approach of the Parole Board in determining whether it is safe to release a prisoner. In *R v. Lichniak* [2003] 1 AC 903, at para 16, Lord Bingham doubted "whether there is in truth a burden on the prisoner to persuade the Parole Board that it is safe to recommend release, since this is an administrative process requiring the board to consider all the available material and form a judgment". In *R (Sim) v. Parole Board* [2003] EWCA Civ 1845, [2004] QB 1288, at para 42, Keene LJ accepted that "the concept of a burden of proof is inappropriate when one is involved in risk evaluation". That was followed in *R (Brooks) v. Parole Board* [2004] EWCA Civ 80, where Kennedy LJ stated at para 28 that what the Parole Board must do is to decide in the light of all the relevant material placed before it whether, in the terms of section 28(6)(b) of the Crime (Sentences) Act 1997, it "is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined". Although Munby J considered this to be the most obvious analogy with the present case, we accept Mr Bowen's point that the relevant function of the Parole Board is treated as an administrative decision-making process in which the burden of proof has no part to play, so that it does not help directly with the question whether a standard of proof applies where there is a

burden on the detaining authority. Nevertheless, it seems to us that the reasoning in such cases provides support also for the view that a risk evaluation of the kind engaged in by the Parole Board is not susceptible to proof to a defined standard.

96. On the other hand, it would seem that in *B v. Chief Constable of Avon and Somerset Constabulary* Lord Bingham considered that the magistrates' court could apply the civil standard of proof ("with appropriate strictness") in deciding whether the defendant "has acted … in such a way as to give reasonable cause to believe that an order … is necessary to protect the public from serious harm from him" (para 31, quoted above). A similar point may be made in relation to *Gough v. Chief Constable of Derbyshire* (see paras 90-93, quoted above), where the magistrates' court had to be satisfied *inter alia* "that there are reasonable grounds to believe that making a banning order would help to prevent violence or disorder …". In each case, as para 92 of *Gough* brings out, the focus is on evidence of past conduct, in relation to which there is no difficulty in applying a standard of proof. But in each case there is also an additional element of judgment and evaluation of risk. Yet no distinction was drawn in either case between that element and the fact-finding element as regards the applicability of the civil standard of proof.

97. Against that background we turn to consider the conclusion reached by Munby J at paras 101-102 of his judgment, to the effect that issues under sections 72 and 73 as to the appropriateness and necessity of continuing detention (as well as the alternative question under section 73 as to the appropriateness of the patient remaining liable to be recalled) are not susceptible to a defined standard of proof.

98. We agree with the judge that, in relation to those issues, the tribunal "is not … concerned so much with finding facts which are capable of exact demonstration but rather with a process of judgment, evaluation and assessment" (para 102). We also agree that this is very similar in nature to the process of judgment or evaluation referred to in cases such as *McCann*, *Rehman* and the Parole Board cases.

99. We would accept that the concept of a standard of proof is "not *particularly* helpful" (per Lord Hoffmann in *Rehman*, with emphasis added) in relation to such a process. But we would not go so far as to hold that there is no room for its application at all. An opinion on the appropriateness or necessity of continuing detention may in principle be held with different degrees of certainty, and it may be important for the tribunal to know what degree of certainty is called for. Under sections 72 and 73 the tribunal has to be "satisfied" as to the relevant matters. As Lord Lloyd observed in *In re H* (at p.576D-G), "is satisfied" is an expression with a range of meanings covering the criminal standard of proof ("satisfied so as to be sure"), through the civil standard ("satisfied on a balance of probabilities") to being a synonym for "concludes" or "determines" and therefore having an entirely neutral function. We see no absurdity in a tribunal having some doubt as to the appropriateness or necessity of continuing detention, yet being satisfied on the balance of probabilities that it is appropriate and necessary. Accordingly, as it seems to us, the standard of proof has a potential part to play in the decision-making process even in relation to issues that are the subject of judgment and evaluation. In practice, we would expect the tribunal generally either to form the requisite judgment or not to form it, without needing to have specific regard to any standard of proof. But the standard of proof provides a backdrop to the decision-making process and may have an important role in some cases.

100. Analysis of this issue is not helped by the fact that "proof" in the phrase "standard of proof" and "probabilities" in the phrase "balance of probabilities" are words which go naturally with the concept of evidence relating to fact, but are less than perfect with evaluative assessments. That is why the courts have started to speak of the "burden of persuasion". Where a court has to be satisfied "on balance" in evaluative matters, it needs to be satisfied on the balance of the argument, where the argument depends in part on evidence (there is always going to be some factual substratum) and in part on evaluation. Since the evidence cannot be divorced from the argument, and since there is also argument on pure issues of fact, it is perfectly acceptable to refer to the whole process as one in which the court has to be satisfied on the balance of probabilities. In

relation to the evaluative part of the process that may involve an element of shorthand, but it gives rise to no conceptual or practical difficulty.

101. A related consideration is that one of the issues arising for determination in the present context, namely the question under section 72(1)(b)(i) whether the person is suffering from a mental disorder "of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment", is a mixed question of fact and judgment or evaluation. The nature and degree of the mental disorder is a question of fact and is accepted to be susceptible to proof on the balance of probabilities. There is a certain artificiality in applying a standard of proof to that question but not to the related question whether the nature and degree of the disorder make detention appropriate. For example, a modest parallel can be drawn with the apparent view of the court in *B v. Chief Constable of Avon and Somerset Constabulary* that a standard of proof should be applied to the entire question whether the defendant "has acted … in such a way as to give reasonable cause to believe that an order … is necessary to protect the public from serious harm from him".

102. We bear in mind too that, although the observations about the standard of proof in *Reid v. Secretary of State for Scotland* and *R (H) v. London North and East Region Regional Mental Health Review Tribunal* were *obiter*, in each case the court evidently saw no difficulty in applying the standard of proof to the full range of issues to be decided by the tribunal.

103. We also think it likely that the tribunal's task will be made easier if, instead of dividing up the issues into matters that are susceptible to proof to a defined standard and those that are not, it approaches the entire range of issues by reference to the standard of proof on the balance of probabilities, whilst recognising that in practice the standard of proof will have a much more important part to play in the determination of disputed issues of fact than it will generally have in matters of judgment as to appropriateness and necessity.

104. For all those reasons, we respectfully differ from the conclusion reached by Munby J on this issue. We would hold that the tribunal should apply the standard of proof on the balance of probabilities to all the issues it has to determine. We would not, however, expect the difference between that approach and the approach favoured by Munby J to have much practical significance, given the limited role that the standard of proof will have in relation to matters of judgment and evaluation. Nor does the difference affect the outcome of the present appeal, since the tribunal appears to have applied the standard of proof on the balance of probabilities to all issues save the factual issues to which it applied a standard akin to the criminal standard.

Issue (3): the default position under sections 72 and 73

105. This issue arises out of the passage at paras 117-120 of Munby J's judgment which we have quoted fully at para 24 above. In effect, the judge states in that passage that the tribunal is obliged to discharge a patient under section 72 or section 73 only when the detaining authority fails to satisfy it *both* as to the section 72(1)(b)(i) criterion *and* as to the section 72(1)(b)(ii) criterion.

106. As all parties before us accept, that is an error. The correct position is that those two criteria are cumulative and the tribunal is obliged to discharge a patient if the detaining authority fails to satisfy it as to *either* of them: see *Reid v. Secretary of State for Scotland* at pages 539-540.

107. Nothing, however, turns on this slip. The judge's observations about the default position were unnecessary for his decision and do not impact on the reasoning in the main part of the judgment. All that is needed, therefore, is to note the error so as ensure that it does not give rise to any confusion in the future.

Conclusion

108. Although our reasoning differs in some respects from that of Munby J, we are in agreement with his conclusion that the only misdirection by the tribunal in the case of AN was favourable to the patient and that AN's judicial review application fell to be dismissed. It follows that this appeal

must also be dismissed.

*13 R. v Robert John Newton

Court of Appeal
7 December 1982

(1983) 77 Cr. App. R. 13

The Lord Chief Justice, Mr. Justice Talbot and Mr.Justice McCowan
December 7, 1982

Sentence— Practice— Plea of Guilty— Divergence Between Prosecution and Defence as to Facts— Proper Approach by Trial Judge to Task of Sentencing.

Where there is a plea of guilty but a conflict between the prosecution and defence as to the facts, the trial judge should approach the task of sentencing in one of three ways: a plea of not guilty can be entered to enable the jury to determine the issue, or the judge himself may hear evidence and come to his own conclusions, or the judge may hear no evidence and listen to the submissions of counsel, but if that course is taken and there is a substantial conflict between the two sides, the version of the defendant must so far as possible be accepted.

[For a plea of guilty and sentence on determination of disputed facts, see Archbold (41st ed.), para. 4-475 .]

Appeal against sentence.

On February 1, 1982, at the Central Criminal Court (Judge Argyle, Q.C.) the appellant, who had on January 6, 1982, pleaded guilty to buggery with a woman (count 1), was sentenced to eight years' imprisonment. A plea of not guilty to assaulting the same woman, his wife, occasioning her actual bodily harm (count 2) was accepted to the extent that the matter was ordered not to be tried but left on the file upon the usual terms.

The facts leading up to sentencing appear in the judgment, and the case is reported solely on the ground that on a plea of guilty, where there is a divergence between the prosecution and defence as to the facts, what is the proper approach to be taken by the trial judge when dealing with the task of sentencing the defendant.

The following cases were cited in argument: French (1982) 4 Cr.App.R.(S) 57; Gortat and Pirog [1973] Crim.L.R. 648; Huchison (1972) 56 Cr.App.R. 307 and Stosiek (1982) 4 Cr.App.R.(S) 205. *14

A. W. Palmer, Q.C. and *R. S. Harper* (both assigned by the Registrar of Criminal Appeals) for the appellant. *David P. Spens* for the Crown.

The Lord Chief Justice:

On February 1, 1982, at the Central Criminal Court this appellant, Robert John Newton, who had earlier pleaded guilty to a charge of buggery with a woman on count 1 of the indictment, was sentenced to eight years' imprisonment.

He now appeals against that sentence by leave of the single judge.

The facts leading up to the sentence were somewhat out of the ordinary and will have to be set out in order that the case may be understood. It was on January 6, 1982, before another judge, Judge Underhill, that this appellant pleaded guilty to count 1 of the indictment and not guilty to count 2, which was a charge of assault occasioning actual bodily harm on the same victim, who was his wife. The prosecution were prepared to accept those pleas, but Judge Underhill took the view that, because of the sharp conflict between the prosecution's version of events and the defendant's version of events, there should be a trial on count 2, the assault charge. The case was therefore adjourned.

On January 28, 1982, this time before Judge Argyle, the prosecution at first maintained their position, but Judge Argyle felt that it would be proper for a plea of not guilty to count 2 to be accepted and for this count to lie on the file. There were certain discussions which took place in chambers, and Judge Argyle said that he proposed to consult Judge Underhill, a perfectly proper course for him to take. There were submissions, into which it is not necessary to go, but in the event that is in fact what happened, namely a plea of not guilty to count 2 was accepted to the extent that the matter was not to be tried but was to lie on the file upon the usual terms.

The conflict of versions between the two sides was this. The appellant and his wife were married in 1976 and it had been a stormy marriage which was, at the time these events happened, if not in the process of breaking up at least near to foundering. According to the wife what happened was this. On the evening of September 24, 1981, the appellant came home the worse for drink and demanded intercourse with her. She was not willing. He tried unsuccessfully to have intercourse, but could not achieve an erection. He

then tried unsuccessfully to make her have oral sex with him. He had intercourse eventually by her sitting on top of him. According to her there was another attempt to have oral sex, but she ran out of the bedroom. He caught her when she got to the front door, and a large bruise which was eventually discovered upon her thigh she said was caused when he slammed the door upon her leg. According to her he then dragged her back into the flat, punched her on the head and kicked her. After that, under threats of further violence by him, she was compelled to undergo a series of sexual indignities: first of all he buggered her, then he inserted objects into her vagina. Then there was a second act of buggery, then he had ordinary intercourse through her vagina followed by oral sex, during the course of which, according to her, he ejaculated.

According to his version of events, sexual relationship between the two of them had always been slightly bizarre to ordinary ways of thinking, but that on the occasion in issue, she had consented to everything that had happened. She had certainly consented to the buggery which, according to him, she enjoyed. There was only one act of buggery, not two. There was no question of any assault or violence of any sort: there was nothing indeed to which she had not consented.

It was about as sharp a divergence on questions of fact as could possibly have been imagined. In those circumstances what was the judge to do? Of course there was no ***15** question other than a plea of guilty to the buggery. The fact that a woman consents to an act of buggery is still no defence in this country as it is in the case of buggery between certain males. But there it is, that is how the law stands. On his own story he had to plead guilty to buggery, which left the vital issue of consent unresolved and, on the count of buggery, unresolvable by a jury.

There are three ways in which a judge in these circumstances can approach his difficult task of sentencing. It is in certain circumstances possible to obtain the answer to the problem from a jury. For example, when it is a question of whether the conviction should be under section 18 or section 20 of the Offences against the Person Act 1861, the jury can determine the issue on a trial under section 18 by deciding whether or not the necessary intent has been proved by the prosecution.

It was suggested by Mr. Palmer in the present case, and indeed supported by Mr. Spens on behalf of the prosecution, that this problem could have been resolved by a jury in the present case by adding a second count of assault. We disagree with that point of view. If the second count of assault occasioning actual bodily harm had been tried, and if he had been found guilty, that would have meant that he had possibly caused the huge bruise on his wife's leg, that he had possibly caused the bruise on the back of her head, which, it was accepted, existed; but it would not, by any means, necessarily have decided the vital question, did she consent to the act of buggery?

It is further suggested by Mr. Palmer that the matter could have been made more clear to the judge if a further count of buggery had been put in the amended indictment. The reason for that somewhat startling proposition is this. She said that there were two acts of buggery, he said there was only one. Accordingly, the suggestion is that if the jury came to the conclusion about the second act of buggery, that would help the judge in deciding the knotty problem of consent or no consent. We find that further suggestion to be unrealistic. We very much doubt whether the verdict of the jury one way or another would have been a sufficient indication to the judge as to what the jury felt to be consent to the act of buggery.

The second method which could be adopted by the judge in these circumstances is himself to hear the evidence on one side and another, and come to his own conclusion, acting so to speak as his own jury on the issue which is the root of the problem.

The third possibility in these circumstances is for him to hear no evidence but to listen to the submissions of counsel and then come to a conclusion. But if he does that, then, as Judge Argyle himself said in a passage to which reference will be made in a moment, where there is a substantial conflict between the two sides, he must come down on the side of the defendant. In other words where there has been a substantial conflict, the version of the defendant must so far as possible be accepted.

The way in which Judge Argyle put it in ruling on the submissions made to him by counsel was this: " Quite apart from that important factor, having considered the authorities which learned counsel Mr. Spens has put before me, I propose to proceed to sentence Newton on the count of buggery and on the well-known basis that the Crown is entitled to put its case forward on the evidence disclosed in the depositions, the defence is entitled to put forward its mitigation provided it is not clearly at issue with the facts. I must then pass sentence. Where I find there is substantial conflict between the two versions, then it is incumbent upon me, as one would expect in this country, to take the more lenient view, to accept the accused's version so far as possible and to pass sentence accordingly." ***16**

It is quite plain from what he said when he came to pass sentence, that he did not in fact carry out that perfectly proper exposition of the law which I have just read, because this is what he said: " Robert John Newton, you pleaded guilty to an offence of buggery with your wife on the 24th September of last year. The act of buggery in this case, almost certainly committed twice, was of quite awful violence. There were other appalling sexual features which are not part of the offence of buggery with your wife. The use of the

leather bottle, glass stopper and various other somewhat perverted sexual acts are not directly connected with the offence of buggery. The fact remains that in the inspector's experience, certainly in mine, this is far and a way the worst case of buggery that has ever been my misfortune to listen to. The mitigating circumstances here are few. Sometimes drink is a mitigating circumstance, but not in this case. I do not believe for one moment that your wife consented to what happened, except in the sense that she was terrified of you and interested only in attempting to bring the matter to an end."

Then the judge goes on, " The fact remains that this is an appalling case, in my view far worse than the ordinary case of rape which attracts so much publicity at the present time."

It is plain from what I have read, and indeed as accepted by learned counsel for the Crown, that the judge failed to adopt one of the three courses open to him, or the one that he did adopt was wrongly performed by him. The answer is, so far as the sentence of eight years is concerned, that that must be quashed. It is plain that in the circumstances of this case the appellant has already served too long in prison, and we propose therefore to substitute for the sentence of eight years' imprisonment such sentence as will result in his release today.

Representation

• Solicitor: Director of Public Prosecutions, for the Crown.

Appeal allowed. Sentence varied.

***17**

DEATH FOLLOWING POLICE CONTACT

FEDERATION ADVICE

INITIAL ACTIONS

If you are involved in any way in an incident which has resulted or could result in the death of a person you should seek immediate advice from a Federation Representative and/or a Solicitor.

The Investigating Officer and the IPCC will be involved at a very early stage and have a roll to perform which does not necessarily include your welfare.

They have to consider whether you are a suspect or a witness but they may ask you to provide an initial account of events at an early stage prior to making this decision in order to commence their investigations.

YOU ARE STRONGLY ADVISED TO SEEK ADVICE FROM THE POLICE FEDERATION PRIOR TO GIVING AN INITIAL ACCOUNT

Your Federation Representative will give initial advice and secure you the services of a Solicitor who can advise you further and protect your interests.

INVESTIGATION

You cannot be both a suspect and a witness. If you are being requested to provide your clothing or equipment or being asked for samples then you are clearly being regarded as a suspect and you must ensure that your rights and entitlements under PACE are respected. You may experience some tension and conflict with the Investigating Officers and you must be prepared to stand your ground and seek advice where necessary.

YOU ARE STRONGLY ADVISED TO SEEK ADVICE FROM THE POLICE FEDERATION BEFORE PROVIDING ANY SAMPLES

You need to be aware that stressful incidents can affect your ability to recall what may be important details. Medical advice suggests that you will be better able to give a full account after a period of at least 24 hours rest.

The investigating officer and the IPCC will want to know what happened and may state that they need some form of account from you in order to properly commence enquiries. This is understandable; however the information they require may be available from another source without you having to give an early first account. Even if you believe you have done nothing wrong, prior to giving an early account be guided by the advice given to you by your Federation Representative and/or Solicitor who are there to represent your interests.

DUTY STATEMENTS

You cannot lawfully be required to provide a duty statement if you are or may be investigated for criminal or misconduct matters.

If you are asked to provide a first account or a duty statement you should make it clear to the Investigating Officer(s) that you intend to reserve your position until you have had the benefit of independent advice from a Federation Representative and/or Solicitor.

Contact in the first instance should be through the local Police Federation offices or the on call Federation Representative (if out of hours), however if this is not possible then contact should be via the Federation's retained solicitors, Russell Jones & Walker (out of office hours emergency contact number 0800 908 977).