

# **The Police (Conduct) Regulations 2020**

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**ARDL Webinar**

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**Hugh Davies QC & Cameron Brown QC**

## **Police (Conduct) Regulations 2020: wider context and sources**

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### **Regulations**

Police (Conduct) Regulations 2020 ('conduct' matters)

Police (Complaint and Misconduct) Regulations 2020 ('complaint' and Part 3 PRA 2002 investigations)

Police (Performance) Regulations 2020

Police Appeals Tribunals Rules 2020

Police Barred List and Police Advisory List Regulations 2017

### **Guidance** (to be followed unless good reason to depart):

Home Office Guidance 2020 Version 1.0 ('HOG')

('Conduct, Efficiency and Effectiveness: Statutory guidance on Professional Standards, Performance and Integrity in Policing')

College of Policing Code of Ethics

College of Policing Guidance on outcomes in police misconduct proceedings

IOPC statutory guidance

**All hyperlinked at 2/277 of HOG**

## Police (Conduct) Regulations 2020: headline significant features and changes from 2012 regime

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Application:	Matters coming to the attention of the appropriate authority on or after 1 February 2020 (reg 4.6) subject to exceptions (reg. 4.7)
Definitions:	New definitions (reg 2(1) e.g. of 'misconduct'; standards: duties of co-operation as a witness (PCR Schedule 2; HOG [2.24] – [2.25]); for content of witness statements generally see <i>Goodenough</i> [2020] EWHC 695); bases of off duty liability confirmed
Purpose sanction' de facto for	Threshold clearly defined to restrict disciplinary proceedings to conduct which, if proved, would justify at least a written warning (HOG ch. 4, esp. [4.33] – [4.43]; a written warning is a 'significant [4.35] where other measures not sufficient or appropriate [4.36]; deterrence [4.37]; introduction of public interest criteria as to when misconduct proceedings required even where evidential test met gross misconduct (regs 2(1) and 23: HOG [8.46] – [8.93]); introduction of alternatives to disciplinary proceedings ('Practice requiring improvement' process ('PRI'); 'Reflective practice review process' ('RPRP': regs Part 6; HOG [4.44] – [4.64] Section 4, ch. 13)
LQCs	Extended, and earlier, role for legally qualified chairs (e.g. chairing misconduct meetings for senior officers; 'misconduct pre-hearings' and determinations (reg.29)); changes to powers of appointment
IOPC	Extended role in presenting cases at misconduct hearings (reg.24)
Delay	Time periods (with power to extend) as to investigation and post-referral, but no defined sanctions
Outcomes	Written warnings (18 months); final written warning (2 – 5 years); reduction in rank; dismissal without notice. Where neither misconduct nor gross misconduct may be referred to RPRP

## Police (Conduct) Regulations 2020: Preliminary parts of the process

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### Pathways to Part 4 of the Police (Conduct) Regulations

Complaints and DSI: Conduct:	Schedule 3 to the Police (Reform) Act 2002; PCMR 2020; chapter 7 HOG PCR 2020, HOG → Part 4 PCR 2020
Interpretation	Reg. 2
Application v	Reg. 3 ('... the conduct of a police officer'. Excludes pre-attestation conduct: <i>Doughty North Wales Police</i> , Police Appeals Tribunal 2019); former officer conditions; aggregating to single allegation (reg. 3(9))
Standards	Reg. 5 and Schedule 2 (potential discredit <i>Woollard</i> [2012] EWHC 3288 (Admin); off-duty social media <i>C v CC of the Police Service of Scotland</i> [2019] WL 02647971; article 8 <i>R (CC Cleveland Police) v PAT (Rukin)</i> [2017] EWHC 1286 (Admin); racist language <i>Barratt</i> [2019] EWHC 3352 (Admin))
Must/shall	Directory not mandatory: <i>Dorairaj</i> [2018] EWHC 2762 (Admin); <i>Soneji</i> [2005] UKHL 49 (in the event of non-compliance with a 'must' statutory provision, did Parliament intend it to result in a 'total invalidity'?)

## Police (Conduct) Regulations 2020: Preliminary parts of the process

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### Investigation stages

Regulation 14	Severity assessment by appropriate authority and [4.33] – [4.43] HOG (cf. [5] and [6] of Schedule 3 PRA 2002, and reg. 5 of PCMR 2020 ('an <u>indication</u> that a person serving with the police <u>may</u> have behaved in a manner that would justify disciplinary proceedings ...')); must be based on conduct and not the preferred range of outcomes ( <i>French</i> [2011] EWHC 546 (Admin))
Regulation 15	Appointment and qualifications of investigator for misconduct or gross misconduct
Regulation 16	Investigation (purpose; duties re terms of reference; timescales)
Regulation 17	Written notices (of investigation): reg. 6 'harm test'; particularity required; duties to notify affected officer of progress (reg. 17(7))
Regulation 18	Representations to the investigator
Regulation 19	Timeliness: prejudice to whom? (cf. reg. 13 PCMR 2020; <i>Birks (2)</i> [2018] EWHC 807 (Admin))
Regulation 20	Interview: pre-interview disclosure HOG [7.65] – [7.69] – yes 'if there is no good reason' to withhold (IOPC Guidance at [13.71] reproduces the older more restrictive test)

**Police (Conduct) Regulations 2020:**  
**Preliminary parts of the process:**  
**Regulation 21 report of investigation;**  
**Engagement of accelerated procedure under Part 5;**  
**The decision to bring disciplinary proceedings**

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Regulation 21

Basic obligations:	Written report of investigation to appropriate authority (21(1)) meeting requirements under reg. 21 (2)
‘Special conditions’	Reg. 21(3) (or if DG IOPC has certified under [20A] of Schedule 3) engages ‘accelerated procedure under’ Part 5
Accelerated hearing	HOG Section 3, chapter 12 HOG [12.5] – [12.7] on intended application of ‘special conditions’: ‘where the evidence is incontrovertible ...’ and sufficient without further evidence (see <i>Kay</i> [2009] EWHC 1835 (Admin); <i>Gannon</i> [2009] EWHC 2133 (Admin))
Decisions	Part 3 PCR 2020 and local investigations under [16] of Schedule 3 PRA: appropriate authority ‘Directed investigations’ and ‘independent’ investigations under Schedule 3: IOPC
Criteria:	Reg. 23(1)(b) and 23(2)(c) ‘... and, if so, whether or not misconduct proceedings should be brought ...’: HOG chapter 8 [8/79] ff (detailed criteria)

## Police (Conduct) Regulations 2020: Part 4: misconduct proceedings: background points

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Regulation 24	Presentation of case by Director General IOPC (conditions)
Regulation 25	Joint misconduct proceedings: 'same matter or incident' Cannot mix senior (above Chief. Supt.) and non-senior officers (regulation 25(6)) Director General must consult with the appropriate authority
Regulation 27	Withdrawal of misconduct proceedings (reg. 2 'a misconduct meeting or hearing', so not the misconduct pre-hearing) and may be addressed by RPRP
Criminal acquittal:	HOG [8.81] ff – 'presumption in favour of proceedings' where case to answer [but to be read down now according to a proportionate, RPRP, approach discharging public interest and need for at least written warning under the regulations] HOG [7.88] – [7.96]; Different purposes and standards of proof: <i>R (Redgrave) v MPS</i> [2003] 1 WLR 1136, CA, [37] - [39] → HOG may not fully reflect <i>Redgrave</i> but may affect proportionality/public interest → proportionality: HOG [1.5]; [2.7]; [4.3]; [4.38] – [4.40]; [13.12]

**Police (Conduct) Regulations 2020:**  
**Part 4: misconduct proceedings:**  
**Disclosure**  
**Regulation 30 notice of referral**

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Reg. 30      Subject to the harm test, 30(1)(c)(ii) ‘any other document which might reasonable be considered capable of undermining or assisting the case’  
→ detailed provisions HOG [9.18] – [9.26]  
→ essentially CPIA  
→ see also reg. 51(1)(c)(ii) under accelerated procedure cases

Redactions: as to material contended to be inadmissible as unfairly prejudicial, the officer should request redactions in representations to the appropriate authority at point of service of the regulation 31 response (HOG [10.7]) ‘... for the avoidance of doubt the investigator’s opinion as to whether or not conduct amounts to misconduct, gross misconduct or neither is not admissible material’

→ positive duty on decision-maker when redactions are sought to act fairly. Is the material sought to be redacted (i) relevant; (ii) admissible; and (iii) relied on as part of the case against the officer? If not, and prejudicial, why include it in material sent to LQC?

(High test for recusal for bias by LQC restated: *R (Short) v CC of Bedfordshire* [2020] 2 WLUK 73)

Fairness:      HOG [1.4]; [5.6]; [9.8]



## Police (Conduct) Regulations 2020:

### Part 4: misconduct proceedings:

#### regulation 31 reply; regulation 32 witnesses and documents to be supplied

#### Delay

#### Sanctions for defined failures to follow the intended and prescribed framework

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Regulation 31

Detailed  
Adverse inferences (as throughout regulations)

Regulation 32

Documents and witnesses

Delay/stays

Differentiate:

(1) 'Abuse of process' in criminal proceedings (see *Merrill*). Applications for stays in misconduct are on a distinct basis;

from

(2) no fair hearing possible in practical terms because delay has produced a loss of evidence (whether documentary or witnesses) such that no proper determinations of fact are possible ('evidential prejudice');

and

(3) although a hearing is possible in evidential terms, there has been a history of delay (or other sufficiently serious failure to follow the intended and prescribed framework of the regulations) such that the public interest in the proper conduct of those investigating and conducting such allegations outweighs the competing public interest in a determination of the merits of allegations of (serious) misconduct

(2) and (3) are freestanding bases: prejudice from delay + culpable failures under (3) may promote an overall evaluation of fairness

## Police (Conduct) Regulations 2020:

### Part 4: misconduct proceedings:

#### Delay

#### Sanctions for defined failures to follow the intended and prescribed framework

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##### Adverse effect of delay on evidence

The weight of authority generally supports proceedings continuing, since the tribunal can make due allowance for the practical effect: *AG's ref No 1 of 1990*; *ex parte Hay*; etc. A tribunal can also keep the practical effect under consideration as the evidence develops.

##### Merrill/Wilkinson

- As to culpable departure by the investigating and/or presenting parties, the power of the Chair of a misconduct meeting or hearing to stay proceedings without hearing the evidence is necessary and intrinsic to role. It is contended (some disagree) that the balance set out in *Merrill* [1989] 1 WLR 1077 at 1085 F-G and *Wilkinson* [2002] 2353 (Admin) at [56]; [75] remains valid. If not, there appears to be no other basis for intervention by the tribunal for any failures by the appropriate authority or IOPC, however objectively serious or deliberate. Recent history is littered with inexcusable delays to investigations/proceedings. These cause serious harm to affected officers (career progression and mental health) and their families

At [75] of *Wilkinson* Davis J addressed the argument against the affected officers that their objective was 'to avoid a hearing, thereby avoiding an adjudication of the matter'. He said (emphasis added):

'I am not much moved by that. In cases of this kind there is, of course, what has been called the familiar triangulation of interests, of which the public interest is one side. Further, the need in the public interest for there to be hearings of such matters on the facts and merits is reflected by the burden of proof being initially, and subject to the burden thereafter shifting in an appropriate case, on an applicant to justify a stay. But that public interest must ordinarily be subordinated to the greater public interest that there should be no hearing where it is not fair that there should be one or where a fair hearing simply cannot be had.'

Proceedings were 'unfair' if the *Merrill* criteria were met (significant departure, etc). See also *R (Aziz) v GMC* [2005] EWHC 2695 (Admin) at [25] – [26]

**Police (Conduct) Regulations 2020:**  
**Part 4: misconduct proceedings:**  
**Role of chair regulation 28**  
**Misconduct pre-hearing: regulation 33**

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Reg. 30      Role of chair of misconduct hearing

Reg. 33      Misconduct pre-hearing

# Main Areas of Change - Hearings

- Regulation 29 - Speed
- Regulation 33 - Pre Hearings
- Regulation 42 - Outcome
  - Outcomes
  - Report writing

# Speedy Resolution? LQC Pressure

## Regulation 29: -

(1) Chair **must** must take appropriate action to ensure **the efficient and effective bringing of the proceedings** and that they are conducted in a **timely, fair and transparent manner**.

(2) The chair must ensure that the **first day** of the misconduct hearing **is not more than 100 working days** beginning with the day after the date on which **notice is given under regulation 30(1)**.

# Quick listing of Pre Hearings

## Regulation 29: -

(3) The chair **must decide**, before the end of **5 working days** beginning with the first working day after the day **on which the documents were supplied to the chair** under regulation 32(6), **whether to conduct a misconduct pre-hearing, in order to agree directions and to fix a date for the hearing in accordance with regulation 33.**

(4) Where the chair decides **not** to conduct a misconduct pre-hearing, **the chair must determine the date, time and duration of the misconduct hearing, following consultation with the parties by telephone or by such other electronic means as may be agreed between the parties or, where the parties fail to agree, as decided by the chair.**

(5) Subject to paragraphs (6)(b) and (7), where paragraph (4) applies, the **misconduct hearing must take place before the end of the period of 30 working days beginning with the first working day after the day on which the documents were supplied to the chair** under regulation 32(6).

# Extensions

## Regulation 29

(6) Where the chair considers that it would be in the interests of justice to do so, the chair **may extend**—

(a) the **period of 100 working days** specified in paragraph (2);

(b) the period of **30 working days** specified in paragraph (5).

(7) Any of the parties may apply to the chair for the misconduct hearing to take place later than is provided for in paragraph (5).

# Pre Hearings

## Regulation 33:-

- Must take **place 15 days** after the LQC was supplied with documents (unless this time period is extended);
- Must be **in private** – Lawyers and Police friend only;
- Can make use of telephone – agreement between parties – if cannot agree – decided by Chair;
- Main hearing must take place within 30 days of misconduct pre hearing – unless extended.



# Pre Hearings 2

- Matters to be covered in pre hearings –
  - Date, time and length of hearing;
  - Witnesses
  - Review of the documents – potentially admissibility arguments in relation to what is included in the bundle.
  - Critically, any procedural or preliminary points of law raised and whether appropriate for those matters to be dealt with at the misconduct pre hearing or the misconduct hearing.
  - Disclosure
  - Conditions in relation to the hearing, including exclusion, conditions and publication
  - May issue directions to the above – but not limited to those matters.
  - **Within 5 days – must serve on the parties a summary of the key matters discussed and record of directions**
  - Parties must comply with directions

# Mitigation

**Per regulation 42 (14) (d):-**

- where representations are received in relation to mitigating circumstances: -
  - (i) must consider whether those circumstances **have been mentioned at an earlier stage** in the proceedings and, if they have not been so mentioned, whether the officer **could reasonably have been expected to so mention them**, and
  - (ii) in the light of their conclusions under paragraph (i), may determine that it is appropriate to place **less weight** on those circumstances.

# Outcome 1 - Misconduct

## Regulation 42: -

- The disciplinary action available at a misconduct hearing is—
  - (a) where the person conducting or chairing the misconduct proceedings decides the conduct of the officer concerned amounts to **misconduct**, in accordance with regulation 41(15)—
    - (i) a written warning;
    - (ii) a final written warning;
    - (iii) **reduction in rank, where paragraph (5) or (6) applies;**
    - (iv) **dismissal without notice, where paragraph (5) or (6) applies;**

# Outcome 2 – Gross Misconduct

- (b) where the person conducting or chairing the misconduct proceedings decides the conduct of the officer concerned amounts to **gross misconduct**, in accordance with regulation 41(15)—
  - (i) a final written warning;
  - (ii) reduction in rank;
  - (iii) dismissal without notice.
- (4) The disciplinary action referred to in paragraph (3) has effect from the date on which it is notified to the officer concerned.

# Outcome 3 - Reduction In Rank

- **Operational Impact:** Reduction in rank may **only be imposed** under this regulation where the persons imposing the disciplinary action consider this is an appropriate sanction, taking into account the views of the appropriate authority or, as the case may be, the originating authority, **including in relation to the likely operational impact – per r 42 (12)**
- **Not a remedy available twice:** **Where,** on the date of the severity assessment under regulation 14(1) of these Regulations or under regulation 16 of the Complaints and Misconduct Regulations, **the officer concerned had been reduced in rank under the Police (Conduct) Regulations 2004 or under these Regulations,** a reduction in rank may not be imposed – **per r 42 (13).**

# The Report

(1) The person conducting or chairing the misconduct proceedings must, before the end of a period **of 5 working days** beginning with the first working day after the completion of the misconduct hearing or misconduct meeting, submit a report to the appropriate authority or, where functions have been delegated under regulation 26(1), to the originating authority setting out—

- (a) **the finding of the person or persons conducting the misconduct proceedings;**
- (b) **the reasons for that finding;**
- (c) any disciplinary action imposed;
- (d) any direction that the matter be dealt with under the reflective practice review process.

# Publication of the Report - 1

Subject to the harm test and to paragraph (10), the person chairing a misconduct hearing **must require** the appropriate authority or, as the case may be, the originating authority, **to publish the report submitted under paragraph (1).**

(7) Where the appropriate authority or, as the case may be, the originating authority is required to publish the report in accordance with paragraph (6), **it must do so as soon as practicable** after the officer has been notified of the outcome of the proceedings under paragraph (2).

(8) Where the appropriate authority or the originating authority publishes a report in accordance with paragraph (6), it must publish the report on its website for a period of not less than 28 days.

# Publication of the Report - 2

(9) Prior to publication of a report under paragraph (6) the appropriate authority or, as the case may be, the originating authority may, subject to paragraph (12), **redact the document—**

(a) in so far as the authority considers redaction is—

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

(vi) **otherwise in the public interest, and**

(b) in line with any restrictions imposed on the disclosure of information during the course of the proceedings.



# Non Availability of Counsel

## Regulation 8 (2): -

- Unavailability of chosen counsel – not a ground for delaying a misconduct hearing – where an alternative relevant can be found
- Can certainly see cases where LQC given an available date and that may result in chosen Counsel being lost.

# As You Were – ‘Nothing to see here’

- Adjournments
- Adverse Inferences
- Standards of Behaviour

# No change - Adjournments

## Regulation 41:-

(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 the person to be necessary or expedient to do so.

(4) The misconduct proceedings must not, except in exceptional circumstances, be adjourned solely to allow the complainant or any witness or interested person to attend.

# No change - Adverse Inferences

## Regulation 41: -

- (12) Where evidence is given or considered at the misconduct proceedings that the officer concerned—
- *(a) on being questioned by an investigator at any time after the officer was given written notice under regulation 17(1) of these Regulations or regulation 17(1) of the Complaints and Misconduct Regulations, or*
- *(b) in submitting any information or by not submitting any information at all under regulation 18(1) or 31(2) or (3) (or, where paragraph (13) applies, regulation 54) of these Regulations or under regulation 20 of the Complaints and Misconduct Regulations, failed to mention any fact relied on in the officer's case at the misconduct proceedings, being a fact which in the circumstances existing at the time, the officer could reasonably have been expected to mention when so questioned or when providing such information, paragraph (14) applies.*
- (14) Where this paragraph applies, the person or persons conducting the misconduct proceedings **may draw such inferences from the failure as appear proper.**

# No change - Standards of Behaviour

## Regulation 5: -

- No changes to the standards of behaviour
- Apply to on and off duty conduct – made clear in 2020 HOG (§2.17 - §2.20)
- Do have right to private life – subject to restrictions.
- C v Chief Constable of the Police Service of Scotland (2019) WL 0264971 – Officers using ‘What's App’ for sexually explicit messages. The Court of Session held as serving Police Officers, their article 8 rights had not been infringed.
- But see also The Queen (on the application of the Chief Constable of Cleveland Constabulary) v PAT, 2017 EWHC 1286 – PAT upheld Officer’s appeal against finding of gross misconduct – Panel in essence appears to have considered there was no such thing as private conduct.

# Profile of the Speakers

## **Hugh Davies OBE QC – 3 Raymond Buildings**

- Hugh specialises in criminal and professional misconduct proceedings. He has extensive experience advising and representing police officers at public inquiries; inquests; during IPCC investigations; internal disciplinary proceedings; and associated judicial review proceedings, and is co-author of the leading OUP practitioner textbook, *Police Misconduct, Complaints, and Public Regulation*

## **Cameron Brown QC – Red Lion Chambers**

- Cameron specialises in serious and complex criminal fraud and corruption cases. He sits as a Legally Qualified Chair for the Metropolitan, City of London and Ministry of Defence Police. He also sits as a Legally Qualified Chair for the Lawn Tennis Association and England Golf and as a Legal Assessor for the HCPC.

## **Paul Ozin QC – 23 Essex Street**

- (23 Essex Street Chambers) is the Chair of ARDL's Seminar Committee and ARDL's Vice-Chair. He specialises principally in the fields of financial and business crime, regulatory and disciplinary proceedings and related public law and civil actions, including police cases. He is the co-author of OUP's *'PACE – A Practical Guide to the Police and Criminal Evidence Act 1984'* and the Consulting Editor of Blackstone's *Police Operational Handbook (2021-)*. He leads the 23 Essex Street Regulatory and Disciplinary team.