

INTERIM SCHEME OF GOVERNANCE – STATEMENT OF PRINCIPLES

Introduction

The aim of this document is to assist police and crime commissioners (PCC's) and Chief Constables (CCs) in relation to the preparation of corporate governance documentation. Any governance documentation will need to be tailored to meet local needs. The intention of this document is, therefore, to set out some overarching principles against which any Schemes of Governance (hereinafter referred to as a 'Scheme') can be framed. It also contains clarification of the relevant legislation, in particular the provisions in the Police Reform and Social Responsibility Act 2011 (referred to as the PRSRA for the remainder of this document).

Any Scheme must be regularly reviewed, updated (as necessary) and widely disseminated across the relevant organisation(s).

The transfer of assets, staff and liabilities from police authorities to PCC's will occur at midnight on 21st November 2012 by way of statutory transfer. The Scheme should, therefore, capture such issues as are required to ensure the robust, effective and transparent exercise of functions after **Stage 1** has taken effect.

Soon after assuming office, the Home Secretary intends to direct each PCC to consult with their chief constable and submit to her a transfer scheme that sets out which staff will be transferred to the employment of the chief constable and which will remain in the employ of the PCC. This is referred to as stage 2 of the staff transfer process. The Home Secretary's direction will be made in accordance with the power taken in Part 3 of Schedule 15 of the Police Reform and Social Responsibility Act 2011. Ministers have indicated that Stage 2 transfers must be implemented no later than 1st April 2014, and have agreed that making the second transfer at the end of a financial year would avoid unnecessary cost and complication.

Each PCC will want to fulfil their statutory functions to secure an efficient and effective force, and each chief constable will want to ensure they are able to exercise direction and control over the force. Therefore the transfer scheme will need to strike the right balance locally for both parties, and without doubt there will be variation in approach dependent on a wide range of circumstances. PCCs will consider which staff would be better transferred to employment by the chief constable taking account of all of these matters.

Statement of the principles of good governance

Any governance framework developed should be based on the six established principles¹ that underpin effective and ethical corporate governance in public service² which are set out in the 2007 CIPFA/SOLACE framework "Delivering Good Governance in Local Government". This framework sets out best practice for developing and maintaining a local code of governance and for discharging accountability for the proper conduct of public business. The six core principles are:

- focus on the purpose of the authority and on outcomes for the community, including citizens and services users, and creating and implementing a vision for the local area,
- elected representatives and officers working together to achieve a common purpose with clearly defined functions and roles

¹The Policing Protocol also requires all parties (including the PCC and their staff) to adhere to the seven Nolan principles of good governance.

² The six core principles are taken from The Good Governance Standard for Public Services [2004] developed by the Independent Commission on Good Governance in Public Services with support from the Office for Public Management and CIPFA (as adapted for local government purposes).

- promotion of the values of the authority and demonstrating the values of good governance through upholding high standards of conduct and behaviour
- taking informed and transparent decisions which are subject to effective scrutiny and management of risk
- developing the capacity and capability of members to be effective and ensuring that officers, including the statutory officers, also have the capability and capacity to be effective,
- engaging with local people and other stakeholders to ensure robust local public accountability.

The Scheme will be a key document in the governance framework and it should ensure that decisions are taken at the most appropriate level, by setting out which functions and by what delegations the PCC has given officers the authority to act.

Corporation Sole

The PCC and the CC will each be a 'corporation sole' pursuant to the PRSRA. Each will be a separate legal entity with their own legal personality. There is a fundamental difference in law between the legal persona of the PCC and/or the CC as a corporation sole and the physical persona.

The term 'corporation sole' is often used in respect of public office (created by statute) that has a separate and continuing legal existence, and only one member (the sole officeholder). Any contract made with a corporation-sole continues from one officeholder to his/her successor or, if made during a vacancy in office, to the appointee.

The concept of a corporation sole allows a corporation to pass vertically in time from one office holder to the next successor-in-office, giving the position legal continuity with each subsequent office holder having identical powers to those of their predecessor.

As separate corporate entities created by statute, a PCC or CC will have those powers:

- expressly stated in legislation,
- necessarily and properly required for carrying into effect the purposes of their incorporation as set out in legislation, and/or
- that may be fairly regarded as incidental to, or consequential on, those things which legislation authorises.

Anything that legislation does not expressly or impliedly authorise is to be taken to be prohibited.

The PRSRA confers wide general powers on PCCs and CCs:

- A PCC may do anything which is calculated to facilitate, or is conducive or incidental to, the exercise of his functions. This includes entering into contracts and other agreements (whether legally binding or not), acquiring and disposing of property (including land), and borrowing money³.
- A CC may do anything which is calculated to facilitate, or is conducive or incidental to, the exercise of his/her functions. This includes entering into contracts and other agreements (whether legally binding or not), and acquiring and disposing of property (apart from land). The CC may only enter into contracts or agreements or acquire or dispose of property with the consent of the PCC, but this restriction does not apply to contracts or agreements in relation to the employment of police staff.

The CC may not borrow money (paragraph 7 of Schedule 2 PRSR Act).

Legislative context

³ Paragraph 14 of Schedule 1 PRSRA – these powers are subject to any restrictions imposed by other legislation, for example in relation to borrowing.

The core statutory functions of a PCC are to secure the maintenance of the police force, secure that the force is efficient and effective, and hold the CC to account for the exercise of his/her functions and the functions of persons under his/her direction and control.

The CC has the core function of directing and controlling the officers of the force and its civilian staff. The CC's function of direction and control is predicated on the existence of a purpose in pursuit of which the force will be directed and controlled. This purpose is the preservation of the Queen's peace and the enforcement of the law.⁴

Any Scheme must be made by the relevant PCC and the CC in accordance with their respective powers pursuant to the Police Act 1996 (as amended by the PRSRA) and any subordinate legislation thereto. Due regard must also be given to, and any Scheme must be read in conjunction with, all other legal requirements on the PCC and/or CC, and specifically the provisions of: -

- a) the Policing Protocol,
- b) Financial Management Code of Practice ('FMCOP'), and
- c) the Strategic Policing Requirement (SPR) .

It is advisable that any Scheme does not attempt to identify all the statutory functions of the PCC, the CC and the other officers referred to therein, as these are already set out in specific legislation and regulations – the Scheme should, however, indicate that due account must be taken of such provisions⁵.

Discharge of functions by officers/senior staff

A Scheme will set out the standing delegations to senior officers of both the PCC and the CC, which will enable such personnel to discharge the functions of the PCC or the CC.

There are legislative requirements upon the PCC and the CC to appoint certain officers: -

- The PCC must appoint a chief executive who has the duties of a head of paid service under section 4 of the Local Government and Housing Act 1989 and monitoring officer under section 5 of that Act.⁶
- The PCC and the CC must each appoint a suitably qualified chief finance officer who is responsible for the proper administration of the PCC or CC's financial affairs, in accordance with sections 112 to 116 of the Local Government Finance Act 1988 (paragraph 6(1) and (4) of Schedule 1).⁷

The PCC and the CC may appoint such other staff as each thinks appropriate to enable him/her to exercise his/her functions (or, in the case of the CC, to otherwise assist the police force)⁸.

'Delegation' and 'Consent'

Consent, refers to the provision of approval or agreement, particularly and especially after due and thoughtful consideration. Transactions entered into following 'consent' by the PCC to the CC, will be in the CC's own name as a separate legal entity, as opposed to the name of the PCC (as would be the case if the CC was given delegated authority).

In the context of the PRSRA, the term 'consent' is important as the PCC will initially own and fund all assets regardless of whether they are used by the PCC, by the force or by both bodies. However, with

⁴ *R v Metropolitan Police Commissioner, ex p Blackburn* [1968] CA).

⁵ Similarly, in relation to the element of the Scheme which sets out the Standing Orders relating to contracts, this may cross-refer to the corresponding the EU procurement rules.

⁶ Paragraph 6(1) of Schedule 1 and paragraphs 201 and 202 of Schedule 16 PRSRA

⁷ Paragraph 4(1) and (3) of Schedule 2 and paragraphs 186 to 190 of Schedule 16 PRSRA.

⁸ Paragraph 6(3) of Schedule 1 and paragraph 4(2) of Schedule 2 PRSRA

‘consent’ from the PCC (and the terms of this consent must be clearly defined in the Scheme) the CCs can acquire property (other than land or buildings). Similarly, the PCC has overall responsibility for property and contracts but with **consent** from the PCC, the responsibility for carrying out the daily administration of property and contracts can be carried out by the CC or staff of the CC. In addition, with consent from the PCC, CCs can enter into contracts as a corporation sole⁹.

Delegation is the assignment of authority and responsibility to another person to carry out specific activities. However the person who delegated the work remains accountable for the outcome of the delegated work. Delegation therefore empowers another person to make decisions.

Section 18 of the PRSRA permits a PCC to delegate his/her functions. The PCC is however prohibited from delegating his/her function(s) to:

- a) A constable (whether or not in England and Wales)
- b) Another PCC
- c) The Mayor’s Office for Policing and Crime
- d) The Deputy Mayor for Policing and Crime
- e) The Mayor of London
- f) The Common Council of the City of London
- g) Any other person or body which maintains a police force
- h) A member of staff of any person/body referred to in (a) to (g) above.

The PCC is also prevented from arranging for another person to exercise any of the following functions:

- a) issuing a police and crime plan
- b) Determining police and crime objectives
- c) Attending meetings of a police and crime panel in compliance with a requirements by the panel to do so (pursuant to section 29 of the PRSRA)
- d) Preparing an annual report to a policing and crime panel
- e) Appointing and suspending the CC or calling upon the CC to retire or resign
- f) Calculating a budget requirement (pursuant to section 43 of the Local Government Finance Act 1992).

Part 6 of the Local Government Act 1972, which allows a police authority to arrange for its functions to be discharged by the CC, a member of the police force or an employee of the police authority who is under the direction and control of the CC, does not apply to a PCC.¹⁰

At Stage 1 all police staff (including those under the direction and control of the CC) will remain employed by the PCC (as the police authority’s statutory successor). This will enable a PCC to make delegations to such staff in the same way as he/she would delegate functions to his/her Chief Executive and Chief Finance Officer (see above)¹¹ and the Scheme should record such specific delegations.

At Stage 1, it is recommended that the PCC adopts a ‘scheme of delegation’ as part of the Scheme which is similar to that adopted by their predecessor body. Such a Scheme would be prepared on the basis that at Stage 1, the PCC will own all assets and liabilities and will be the legal contracting body in relation to all contracts, agreements, licences etc being entered into in the name of the PCC. The PCC is required to arrange for the Chief Finance Officer of the force, and other staff employed solely to assist the force, to come under the direction and control of the CC. If the recommended approach is adopted, the Chief Finance Officer of the force can be delegated the authority to act on behalf of the PCC. The advantages of such approach include:

⁹ It is anticipated that this will take place in Stage 2

¹⁰ Paragraph 105 and 106 of Schedule 16 PRSRA.

¹¹ There is no restriction (pursuant to section 18) on a PCC delegating to staff within his/her own employment.

- Administrative expediency and reduced disruption to the operation of business by providing a framework which is already familiar,
- Reduced risk of officers inadvertently operating outside their remit following the introduction of a new model of accountability,
- An opportunity for a PCC to take stock of their governance arrangements and ensure that they have an understanding of the business prior to modifying any governance arrangements further.

This is an interim position and should be contrasted with the Scheme that will be required at Stage 2 (as this will need to set out matters in respect of which general consent is given without the need to seek prior approval – for example in relation to the procurement of goods or services of particular types, or up to particular values). Such Scheme will be distinguishable from the schemes of delegation currently utilised by police authorities, as it will give *consent* for the CC to exercise the CC's powers on his/her own behalf (as a Corporation Sole), rather than giving him/her *delegated authority* to exercise the police authority's powers on their behalf. After Stage 2 it will no longer be possible for the PCC to delegate the exercise of their functions to police staff under the direction and control of the CC, to the extent that these staff will then be employed by the CC.

General Principles

- As stated above, a Scheme must be made in accordance with the respective powers of the PCC and CC pursuant to the Police Act 1996 (as amended by the PRSRA) and any subordinate legislation thereto. Any powers delegated or otherwise allocated pursuant to the Scheme must also be exercised in accordance with the provisions of any policies, procedures, precedents, plans, strategies and budgets of the relevant PCC and the CC (including without limitation the provisions of the Police and Crime Plan).
- The PCC and/or the CC may also include a requirement that specific matters must be referred to him/her for decision and not dealt with pursuant to the provisions of this Scheme.
- The allocation of powers to officers pursuant to any Scheme should also not prevent an officer from referring a matter to the PCC and/or to the CC for decision if the officer wishes or considers it appropriate. It is anticipated that the PCC and the CC will expect their respective officers to draw to his/her attention sensitive issues or any matter which may have a significant financial implication.
- Any Scheme should also be without prejudice to the ability of the PCC to arrange for his/her deputy police and crime commissioner (if appointed) to exercise any function of the PCC in accordance with section 18(1)(b)¹².
- Any Scheme should also be without prejudice to the ability of a deputy CC to exercise and perform all or any of the functions of the CC pursuant to section 41 of the PRSRA.
- Any Scheme must clarify that officers, who may give advice to the PCC, cannot formally act on behalf of the PCC unless it is on the explicit and demonstrable basis that they are acting on behalf of the PCC (namely that there is a specified delegation of authority). A Scheme should also provide that any officers will be responsible for ensuring that the provisions and obligations of the Scheme are properly drawn to the attention of members of staff under his/her direction and control. A Scheme may also clarify that (save for such matters as are specifically reserved) any person, with appropriate authority, may delegate a matter further¹³.

¹² As restricted by the provisions of section 18(7)] of the PRSRA

¹³ In addition to the specific delegations in the Scheme authorising specified officers to undertake certain functions, there is case law (DPP v Haw [2007]) that where the responsibilities of an office created by statute are such that delegation is inevitable, there

- It is also advisable that any Scheme provides that any officers will, when considering a professional or technical matter that is within the sphere of competence of another officer, consult with the appropriate professional officer before authorising the action.

Issues to be addressed in a Scheme

The Scheme should identify those powers which may be exercised by the PCC but which, for the benefit of good practice, may be exercised by their officers. It should also set out any constraints on those powers, including requirements to report back or advise the PCC, and should address circumstances which will require consultation between the officers of the PCC and the CC¹⁴.

The FMCOP clarifies that a 'Scheme of Consent' should provide an opportunity to set out in more detail, should it be deemed necessary, any terms on which the respective functions of the PCC and the CC will be exercised in order to achieve the objectives set out in the PCC's Police and Crime Plan.

Key elements of an integrated Scheme of Governance (during Stage 1) will be comprised of: -

1. Scheme of delegation
2. Financial regulations
3. Standing Orders relating to contracts

The advantages of an integrated Scheme of Governance are that the constituent elements will meet the requirements of the PRSRA and the FMCOP, and also that it would:

- (a) Enable PCC's to set out a high level statement regarding good governance based on CIPFA / SOLACE Principles, whilst emphasising the importance of PCCs and CCs working together.
- (b) Contain a detailed statement of relevant roles and responsibilities.
- (c) Include 'delegations' from the PCC to the Deputy PCC, Chief Executive Officer and Chief Finance Officer (and to other force civilian Chief Officers during the Stage 1 Period)
- (d) Provide clarification regarding PCC 'consents' to issues being dealt with by the CC.
- (e) Provide an integrated scheme to ensure clarity between statements of roles, delegation, and consents, which would in turn avoid overlaps and inconsistencies between different documents.
- (f) Provide a good basis in readiness for Stage 2 in the transition process.

The Scheme should¹⁵, as a minimum, set out how: -

- the PCC expects the funds provided to the CC for policing to be applied;
- the PCC will hold the CC to account for the day to day management of those funds;
- the CC will carry out their duty to assist in the exercise of the PCC's functions;
- the CC will exercise their power to do anything calculated to facilitate the exercise of their own functions;
- the PCC will exercise their power to delegate the exercise of their functions to their own staff, and
- any conditions which may be attached by PCC to the use of the financial and other resources provided to the CC (*albeit that this may be more relevant by Stage 2*).

is an implied power to delegate. In such circumstances there is a presumption that, where statutory powers and duties are conferred, there is a power to delegate the same unless the statute conferring them expressly or by implication provides to the contrary

¹⁴ The PRSRA (and the FMCOP), contemplate that a 'Scheme of Consent' is established to set out the extent of, and any conditions attaching to, the PCC's consent to the CC's exercise of the powers to enter into contracts and acquire or dispose of property. The Scheme should also specify the extent of (and conditions attaching to) any delegations made to other officers/staff.

¹⁵ As set out in the Financial Management Code of Practice

The financial limits in any Scheme will be a matter for local determination by the PCC, which will ensure that cognisance is given to the variation between the budgets of large forces and those that are smaller. It is suggested that in determining appropriate financial limits:

- a) the PCC should be advised by the CFO (PCC) and that any limits are set following consultation with the CC and the CFO (CC),
- b) The financial limits inherited from the Police Authority could be used as a starting point for discussion,
- c) It may be prudent for the two CFO's (PCC and CC) to jointly prepare a range of financial threshold options for the PCC to consider (and to highlight the perceived advantages/disadvantages of each option).

Standing Orders relating to Contracts – this should refer to the EU procurement rules (without re-stating the contents of the same). As a minimum, it should emphasise that for complex procurements or those exceeding the relevant threshold, legal and procurement advice should be sought. Advice should always be sought before relying on any exemptions to EU Procurement rules. Legal advice should also be sought if procurement plans involve the transfer of police staff¹⁶.

Review of the Scheme:

The Scheme should be reviewed annually at the start of each financial year - with a 'light touch' review at the beginning of the 2013/14 financial year as:

- a) the PCC will only have been in office for just over 4 months and
- b) such review will take place early during the Stage 1 period, at which time it is envisaged that the PCC will employ all staff, will be the legal contracting body and will own all assets and liabilities.

By Stage 2, it is envisaged that:

- a) the CC will enter into contracts and other agreements as a corporation sole (with the consent of the PCC),
- b) The CC will acquire and dispose of property (except land) with the consent of the PCC, and
- c) The CC will employ police staff (negotiations for the transfer of the same having taken place between 22 November 2012 and 31 March 2014) as set out in the transfer scheme submitted to the Home Secretary for approval.

By Stage 2, the prohibition set out in Section 18 of the PRSRA on delegating to staff employed by the CC will come into sharper focus, and a revised Scheme will need to be prepared in respect of matters during Stage 2 and beyond. The review/changes made to the scheme at the beginning of the 2014/15 financial year will therefore be fundamental.

Decision making

There are high expectations (and statutory requirements) in relation to the availability and access to information held by public bodies. The work of the PCC (and the provisions of any Scheme) will need to take account of such expectations and it is anticipated that PCC's will want to demonstrate the highest levels of transparency.

The statutory framework of the Elected Local Policing Bodies (Specified Information) Order 2011, the Freedom of Information Act 2000 and the Data Protection Act 1998 set minimum standards for publication.

¹⁶ Specifically due regard should be given to the Cabinet Code of Practice on Workforce Matters in Public Sector Contracts and the requirements of TUPE

It is recommended that a process is established (as part of the Scheme) to ensure that any action taken under delegated authority or 'consent' is properly recorded and undertaken in accordance with corporate procedure. Such process should ensure that relevant legal, financial and other considerations and consultations (as may be required by the terms of the delegation) have been properly recorded and considered *prior* to a decision being taken.

Any Scheme should clarify that all decisions made by officers pursuant to the provisions of such Scheme should be properly documented and available for inspection at any time by the PCC and/or the CC, as appropriate. It is important that both the PCC and the CC can evidence that decisions taken are informed and 'reasonable'¹⁷.

It is advisable to ensure consistency in such decision making/recording and publication. One proposal is that:

- information should be presented in a consistent format e.g. a succinct two or three pages which provides the background information (as well as a summary of the relevant legal, financial and other considerations and consultations), options and recommendations
- a record of each decision taken be maintained and each allocated a unique reference number and
- such details entered into an electronic register.

As well as using the above process to record decisions by a PCC, the Scheme should clarify that action taken under delegated authority should be reported in the same format (for information) to the PCC (who granted the delegation).

Proposed Contents of the Scheme:

It is proposed that any Scheme entered into in relation to Stage 1 should contain the following:

1. Outline of legislative context/definitions
2. Key roles of the PCC
3. Functions designated to the Deputy Police and Crime Commissioner (if any)
4. Functions designated to the Chief Executive
5. Functions designated to the Chief Finance Officer (PCC)
5. Matters delegated to other senior officers (e.g. during Stage 1 it is contemplated that this will include the CFO (CC) and other civilian directors of the force (e.g. Directors of Legal and/or HR)
6. Financial Regulations
7. Standing Orders relating to Contracts

17th August 2012.

¹⁷ The standard applied should be that used in assessing an application for the judicial review of a public authority's decision (i.e. a reasoning or decision is 'Wednesbury unreasonable' if it is so unreasonable that no reasonable person acting reasonably could have made it (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948))

Useful Guidance:

CIPFA/OPM 'The Good Governance Standard for Public Services' [2004]

CIPFA/SOLACE Framework 'Delivering Good Governance in Local Government' [2007]

Association of Chief Police Officers 'The National Decision Making Model'

APACE - Interim Guidance and Practice Advice "Good Governance in the Office of Police and Crime Commissioners" [Version 2.0]

APACE – Interim Guidance and Practice Advice "Decision Making in the Office of Police and Crime Commissioners" [Version 4.0]