

EXPLANATORY MEMORANDUM TO
THE POLICE (CONDUCT, COMPLAINTS AND MISCONDUCT AND APPEAL
TRIBUNAL) (AMENDMENT) REGULATIONS 2017

2017 No. 1134

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The purpose of this instrument is to enable disciplinary proceedings to be taken against former members of police forces and former special constables (“former police officers”). The instrument establishes how the disciplinary proceedings will work for police officers who have left the police force. They also establish the procedure where an allegation or complaint is made against a police officer and they choose to leave whilst proceedings are ongoing.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 Part 2 of and Schedule 3 to the Police Reform Act 2002 (“the 2002 Act”) set out the requirements for the handling of public complaints and conduct matters concerning individuals serving with the police. Section 23 of the Act confers on the Secretary of State a power to make changes to the Police (Complaints and Misconduct) Regulations 2012 (“the Complaints and Misconduct Regulations”) concerning the handling of public complaints and conduct matters where individuals are serving with the police including the reference and handling of complaints to the Independent Police Complaints Commission (“the Commission”). Section 23(2)(k) of the 2002 Act confers a power on the Secretary of State to make regulations on conduct matters in relation to persons who have ceased to serve with the police since the time of the conduct. This includes regulation 27 which sets out where Part 2 of the 2002 Act applies to a complaint or conduct matter relating to a person who has ceased to serve with the police.
- 4.2 Under the powers conferred by sections 50, 51 and 84 of the Police Act 1996, the Police (Conduct) Regulations 2012 (“the Conduct Regulations”) set out the processes that 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. Regulation 10A of the Conduct Regulations (as inserted by the

Police (Conduct) (Amendment) Regulations 2014) prevents the officer concerned from giving notice to resign or retire where an allegation of gross misconduct has come to the attention of the appropriate authority.

- 4.3 Section 29 of the Policing and Crime Act 2017 confers a power to allow regulations under sections 50 and 51 of the Police Act 1996 to be made concerning disciplinary proceedings against former police officers.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is England and Wales.
5.2 The territorial application of this instrument is England and Wales.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 A public perception that officers who have committed serious wrongdoing can avoid accountability through resignation or retirement has caused damage to public confidence. Currently, where a complaint or allegation of gross misconduct comes to light after an officer has left the police force, it cannot lead to disciplinary proceedings. The purpose of these Regulations is to allow appropriate investigation following complaints or allegations made against a person who has ceased to serve with the police and, where appropriate, hold former police officers to account where they have a case to answer for gross misconduct.
- 7.2 A previous measure to prevent officers retiring or resigning to avoid disciplinary proceedings was the introduction of regulation 10A of the Conduct Regulations which prevents the resignation or retirement of police officers subject to an investigation or disciplinary proceedings following an allegation that could result in dismissal. A consequence of this restriction is an increased financial burden and pressure placed on police forces because of the need in most cases to continue to pay the officer while restricting their duties. It causes doubt and frustration for the officer concerned who is unable to retire or move to alternative employment during what can be a lengthy investigative process. Regulation 6 revokes regulation 10A thus allowing a police officer who is under investigation and currently subject to the restrictions of that regulation preventing their departure to resign or retire and for the investigation to continue to a conclusion.
- 7.3 The purpose behind these regulations therefore is to strengthen accountability within policing and specifically in cases involving former police officers, where an individual leaves whilst subject to proceedings or in circumstances where allegations are received post-departure. This is important as it will ensure that officers can continue to be held to account for the most serious cases of wrongdoing, irrespective of when such allegations are received and preventing police officers from evading scrutiny or accountability by resigning or retiring during the course of an investigation or proceedings.

- 7.4 These changes are intended to improve public confidence which can be seriously damaged when an individual, whilst exercising the powers and duties of a police constable, is later able to avoid appropriate scrutiny and, where justified, sanction. They will mean that in the future, investigations and proceedings can be properly concluded and, where there is a case to answer for gross misconduct, allow for a panel to determine whether that is proven and whether the sanction that the officer would have been dismissed is justified. Where there is such a finding, the individual will be added to the Police Barred List and barred from future service in policing.
- 7.5 Regulation 5 defines the three conditions in relation to a former police officer for the purpose of the change and who can be subject to disciplinary proceedings post-departure from the police force. The three conditions are Condition A, where the person ceases to be a police officer after the allegation first comes to light; Condition B, where the person had ceased to be a police officer before the allegation first came to the light but the period between the person having ceased to be a police officer and the allegation first coming to the light did not exceed 12 months; and Condition C, where (a) the person had ceased to be a police officer before the allegation comes to light; (b) the period between the person having ceased to be a police officer and the allegation first coming to light exceeded 12 months; and (c) the alleged misconduct, inefficiency or ineffectiveness is such that, if proved, the person could have been dealt with by dismissal if the person had still been a police officer.
- 7.6 The criteria for the Condition C special determination is set out in Schedule 3 to the 2002 Act. This is to ensure that disciplinary proceedings are only taken in the most serious and exceptional cases of misconduct likely to do damage to public confidence in policing. Under paragraph 4A, the Commission will determine whether the taking of disciplinary proceedings would be reasonable and proportionate having regard to;
- the seriousness of the alleged gross misconduct;
 - the impact of the allegation on public confidence in the police; and
 - the public interest.
- 7.7 Paragraph 4B sets out the procedure for making the special determination which includes the Commission giving notification to the complainant, any interested person (within the meaning of section 21 of the 2002 Act) and the police officer concerned. Persons notified may provide a written statement and any document that they wish the Commission to take into account in the special determination. The Commission may also consult any person it thinks fit and take into account any other relevant evidence.
- 7.8 The purpose of the special determination is to allow the Commission to consider, where an allegation is received after 12 months, whether it is reasonable and proportionate for disciplinary proceedings to be brought against the person. The intent here is that only the most serious and exceptional cases would then be referred to disciplinary proceedings based on that key test linked to the seriousness, impact on public confidence and public interest. This mechanism ensures adequate accountability and safeguards to allow former police officers to be appropriately held to account in a manner that is proportionate and targeted on the most serious matters.
- 7.9 Where investigations conclude, modifications to the Conduct and Complaints and Misconduct regulations clarify that the report of an investigation into the conduct of a former police officer must indicate whether there is a case to answer for gross misconduct or no case to answer. Referral to misconduct proceedings for former police officers will only occur where there is a case to answer for gross misconduct.

Where there is no case to answer for gross misconduct, the report of an investigation will state whether there may nevertheless be a breach of the Standards of Professional Behaviour. Where the police officer falls within the definition of a Condition C person and disciplinary proceedings cannot be brought, the report should indicate whether there has been a breach of the Standards of Professional Behaviour and whether that breach was so serious that the person would have been dismissed if they were still serving. This is to ensure that investigations which do not lead to a hearing reach a clear conclusion as to whether there may have been a breach of the Standards of Professional Behaviour which would mean that if the officer were still serving that there would be a case to answer and the matter would be referred to disciplinary proceedings.

Consolidation

7.10 There are no plans for consolidation.

8. Consultation outcome

8.1 These Regulations have not been subject to public consultation.

8.2 Nevertheless, in accordance with requirements under the Police Act 1996, the Secretary of State consulted with the Police Advisory Board of England and Wales (PABEW) and its Discipline Sub-Committee on these regulations. In agreement with the Independent Chair of PABEW and its members, the consultation period on the draft Regulations was from 13 September to 13 October 2017, as well as at a meeting of the PABEW, and its Discipline Sub-Committee during the course of the consultation. Members of PABEW have also been part of other Home Office policy forums and have had the opportunity to input their views throughout the development of these Regulations which has delivered significant engagement and informal consultations on draft versions of the Regulations.

8.3 PABEW made representations in several areas and these were taken into consideration in finalising the Regulations including the Commission's Special Determination for Condition C cases which were incorporated into the final draft. All representations were assessed and responded to and with explanations as to policy intent and action taken in response to those representations where appropriate.

9. Guidance

9.1 The Home Office guidance on police misconduct, unsatisfactory performance and attendance management procedures has been updated to reflect these changes.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is minimal and is limited to the police and the Commission.

10.3 An Impact Assessment was prepared for the extension of disciplinary powers to former officer as part of the impact assessment for the [Policing and Crime Bill – Reform of the Discipline system](#).

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 The Home Office will keep the operation of this instrument under review.

13. Contact

13.1 Rupert Bailey, Head of Police Discipline at the Home Office telephone 0207 035 0076 or email: Rupert.bailey@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.