

The John Harris Memorial Lecture 2013

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Operational independence and the new accountability of policing

Mr President, ladies and gentlemen, thank you for the courtesy and compliment of your attention, and to the Police Foundation for this opportunity to talk to you.

2. It is a great honour to have been invited to deliver the annual John Harris Memorial lecture at the Police Foundation. John Harris was a very distinguished figure in policing and home affairs, having been an adviser to both Hugh Gaitskell and Patrick Gordon Walker and, when he was Home Secretary and later Chancellor of the Exchequer, Roy Jenkins. In the 1974 Government, he became a life peer and Minister of State for Home Affairs, and was, from 1979, chairman of the Parole Board of England and Wales. Roy Jenkins said of him that he was a counsellor of instinctive political wisdom who made bearable the many vicissitudes of ministerial and political life. Lord Harris of Greenwich saw policing in Britain at the time as lacking an underpinning foundation of intelligence in terms of evidence, analysis and research, and in 1979 he used the model of the American police foundation in the establishment of the body of whose guest we are here tonight. He was clear that the Foundation's purpose must be not to serve the police, but to serve policing, by providing analysis and research, and independent thinking, in the many facets of British policing. We remain very much in his debt, and in the debt of the staff and supporters of the Police Foundation, for the outstanding work they have done, and continue to do, in discharge of that high obligation.

3. The honour is corroborated and intensified not only because of the importance of this annual lecture in the policing and home affairs calendar, but also by the presence of this distinguished audience, including Lady Harris, and because of the distinction of the John Harris lecturers in previous years who include several home secretaries and other senior politicians, a number of the

most eminent English judges, several Commissioners of the Metropolitan Police, and other people of distinction and high achievement in the affairs and controversies of our country. However, it appears that I am the first holder of the office of Her Majesty's Chief Inspector of Constabulary to do this.

4. In past years, the lecturers have discussed sentencing policy, the state of the criminal justice system and of the criminal law, the intensification of the need for freedom under the rule of law, organised crime, the march of technology, the reaction of policing to circumstances of economic austerity, and so on. Rather than a broad sweep of the horizon, lecturers have focused quite specifically on one or two areas of importance. That is what I intend to do this evening.

5. My subject this evening is the constitutional positions of chief constables and police and crime commissioners, in particular their relationship with one another in the context of the power of the police and crime commissioner to remove the chief constable from office. That requires an analysis of the nature and content of the operational independence of the chief constable. Under the statutory regime for the police as it stands today, the Home Secretary, chief constables, police and crime commissioners and Her Majesty's Inspectors of Constabulary all have statutory objectives and obligations in relation to ensuring the efficiency and effectiveness of policing. It is the view of the Inspectors of Constabulary that if the constitutional relationship between a chief constable and a police and crime commissioner is materially misunderstood, neglected, abused or denied, to the point where it becomes fractious and therefore in danger of fracture, that is both a deeply unsatisfactory state of affairs in itself and one which may imperil the efficiency and effectiveness of the police force in question. It is not in the public interest for such a situation to arise or persist.

6. As we all know, in the last few years, the policing landscape has changed very significantly, with the creation of new institutions and bodies such as the College of Policing, the National Crime Agency and a national company concerned with information and communications technology for the police, reforms to pay and conditions of service (including direct entry to higher ranks), considerable pressures of economic austerity, and reforms to the jurisdiction and composition of Her Majesty's Inspectorate of Constabulary.

7. However, the biggest single change of all is the creation by Parliament, in the Police Reform and Social Responsibility Act 2011, of a new genus of local democratic accountability in the form of police and crime commissioners, to take the place of police authorities, themselves created by the Police Act 1964 to replace earlier forms of local accountability of the police¹.

¹ In this lecture, when referring to police and crime commissioners, I include in that term (where relevant) the London Mayor's Office for Policing and Crime, and the Common Council of the Corporation of London. It is acknowledged that the latter are not in law police and crime commissioners, and their functions and obligations are in some respects different.

8. The first police and crime commissioners were elected in November 2012. Already they have had to establish their police and crime plans and set the budgets of the police forces in their respective areas.
9. In preparation for the arrival of police and crime commissioners, HMIC did a great deal of work in briefing the candidates for election as well as, later, the people who were elected, on the nature and extent of the powers of HMIC, and how the work of the Inspectors of Constabulary could assist them in the discharge of their statutory functions. HMIC continues to engage with and assist police and crime commissioners, and we have successfully established very good working relationships with the great majority of them.
10. HMIC has a statutory remit - unchanged since its establishment in 1856 – to inspect and report upon the efficiency and effectiveness of police forces in England and Wales; it also has functions in relation to non-Home Office forces.
11. HMIC used to inspect and report upon the activities of police authorities, but that power has not been continued in the new statutory scheme in relation to police and crime commissioners; they are accountable to their electorate and, as I will explain, to the law.
12. HMIC no longer takes part in the appointment of chief constables. In this respect, it is to be presumed that Parliament considered that if the Inspectorate had recommended the appointment of a chief constable who was subsequently appointed, the Inspectorate's objectivity in later criticising the performance of that force would be compromised. It appears to me that is a rational and substantial reason for the decision which was taken.
13. It has been suggested that, despite the statutory removal of the Inspectorate's function in relation to the appointment of chief constables, we should nevertheless provide informal advice to police and crime commissioners about proposed appointments. We will not do this. It is no part of our function to circumvent the will of Parliament, and provide anything other than legitimate, overt and clear written assessments. Whispering behind the tapestries about chief constable candidates would not only be quite unfair to them, but also an action in direct violation of the settled intention of Parliament, expressed in primary legislation.
14. Whilst HMIC's work is closely aligned to the statutory duties of police and crime commissioners, there is nothing in the statutory scheme which renders HMIC the obedient instrument of any police and crime commissioner, or indeed of the Home Secretary. Whilst the Home Secretary and police and crime commissioners can commission work from HMIC, it is HMIC's judgment alone which determines the content of its reports. The increase and intensification of the independence of HMIC under the new regime established by the Police Reform and Social Responsibility Act 2011 is something which has frequently

been insisted upon and repeated by Ministers.

15. It is the policy of the Inspectorate to work closely with police and crime commissioners and chief constables, and thereby to facilitate the achievement of the will of Parliament. That will includes a decision that each police and crime commissioner must hold his or her chief constable to account for the exercise of the chief's functions and the functions of persons under his direction and control.

16. A police force and the force's civilian staff are under the chief constable's direction and control, which must be exercised in such a way as is reasonable to assist the police and crime commissioner in the exercise of his functions. But it is worth emphasising that the direction and control of the police force is the chief constable's, not the police and crime commissioner's.

17. The police and crime commissioner appoints the chief constable and, under section 38 of the 2011 Act, may suspend the chief constable from duty and may call upon him to resign or retire, in which case the chief constable must do so.

18. The statute makes further provision on the manner of appointment, suspension and removal of senior officers. In particular, a police and crime commissioner must not call upon the chief constable to retire or resign until the end of a detailed process involving scrutiny of the police and crime commissioner's proposed decision. That process involves the police and crime panel, which is required to consult HM Chief Inspector of Constabulary. The police and crime commissioner must consider the panel's recommendation but, having done so, he may accept or reject it.

19. The procedure in Schedule 8 to the 2011 Act is supplemented by Regulation 11A of the Police Regulations 2003, which was inserted by the 2011 Act. Regulation 11A provides that if an elected local policing body is proposing to call on a member of the police force to retire or resign under section 38, that body must first obtain the views of HM Chief Inspector of Constabulary in writing and have regard to those views. There are other procedural requirements, ending with an obligation to give the chief a written explanation of the reasons why he still proposes to force his or her removal. That explanation should, in my view, also address any matters which the Chief Inspector of Constabulary has raised in his report to the PCC, particularly if they are matters which stand against the proposal to force the chief out. I shall return to this matter later.

20. It is clear from Schedule 2 to the 2011 Act that the existence of these new statutory powers for the police and crime commissioner to dismiss a chief constable does not affect the applicability to chief constables of the existing statutory regime for disciplining constables under regulations made under section 50 of the Police Act 1996. The current regulations are the Police (Conduct) 2012 Regulations.

21. The 2012 regulations deal with the handling of allegations of misconduct or gross misconduct. They contain a detailed procedure for testing the allegations, with a number of safeguards built in to ensure that the affected officer receives a fair hearing. Allegations are in the first instance investigated, and may then be referred to misconduct proceedings, with hearings involving live witness evidence. For ACPO officers, there is a further meeting or hearing to consider what disciplinary action (if any) should be imposed.

22. So, the chief constable may face a formal legal process which could lead to compulsory removal under either section 38 of the 2011 Act or Regulation 11 of the Police Regulations 2003. However, for the reasons which I will explain, these are not interchangeable regimes.

23. First, it is necessary to discuss the constitutional position of the chief constable and his operational independence, and the content of that independence.

24. The 2011 Act was preceded by a White Paper entitled "Policing in the 21st-Century: Reconnecting Police and the People". Under the heading "Role of the chief constable", it said at paragraph 2.13:

"The operational independence of the police is a fundamental principle of British policing. We will protect absolutely that operational independence. Giving Chief Constables a clear line of accountability to directly elected police and crime commissioners will not cut across their operational independence and duty to act without fear or favour. In fact, chief constables will have greater professional freedom to take operational decisions to meet the priorities set for them by their local community – via their Commissioner."

25. The White Paper also said:

"The Government has been clear that the operational independence of chief constables will not be compromised. The long-held principle of operational independence, where those operating in the office of the constable are able to make independent decisions on how to use their legitimate coercive powers on behalf of the state will continue to remain the cornerstone of the British policing model."

26. Under section 79 of the 2011 Act, the Secretary of State was given a duty to issue a document which sets out ways in which relevant persons (including police and crime commissioners and chief constables) should, in the Secretary of State's view, exercise, or refrain from exercising, functions so as to encourage, maintain or improve working relationships (including co-operative working) between relevant persons and/or limit or prevent the overlapping or conflicting exercise of functions. The document is the Policing Protocol Order 2011.

27. Section 79 provides that the Home Secretary, police and crime commissioners and the London Mayor's Office for Policing and Crime, chief officers of police forces and police and crime panels must *have regard to* the policing protocol when exercising their functions.

28. Paragraph 8 of the protocol says that:

"The establishment and maintenance of effective working relationships by these parties is fundamental. It is expected that the principles of goodwill, professionalism, openness and trust will underpin the relationship between them and all parties will do their utmost to make the relationship work."

29. Paragraph 9 provides that: "This Protocol does not supersede or vary the legal duties and requirements of the office of constable. Chief constables remain operationally independent."

30. In paragraph 12 of the protocol, it says:

"The 2011 Act does not impinge on the common-law legal authority of the office of constable, or the duty of constables to maintain the Queen's Peace without fear or favour. It is the will of Parliament and Government that the office of constable shall not be open to improper political interference."

31. The Policing Protocol reminds us that the police and crime commissioner has the legal power and duty to hold the chief constable to account for the performance of the force's officers and staff, and that he has the power to remove the chief constable subject to following the process in the 2011 Act and regulations made under section 50 of the Police Act 1996. But having told us of this considerable power in the hands of the police and crime commissioner, paragraph 18 of the protocol goes back to the issue of independence when it says: "the PCC must not fetter the operational independence of the police force and the chief constable who leads it".

32. The Protocol is explicit in relation to operational independence. At paragraph 22, it says:

"The Chief Constable is accountable to the law for the exercise of police powers, and to the PCC for the delivery of efficient and effective policing, management of resources and expenditure by the police force. At all times the chief constable, their constables and staff, remain operationally independent in the service of the communities that they serve."

33. And if that were not enough, at paragraph 23(j), it provides that the chief constable is responsible to the public ... for ... remaining politically independent of the PCC".

34. In the section of the protocol concerning operational matters, it provides, at paragraph 30:

"The operational independence of the police is a fundamental principle of British policing. It is expected by the Home Secretary that the professional discretion of the police service and oath of office give surety to the public that this shall not be compromised."

35. In paragraph 35, it provides that:

"The PCC and Chief Constable must work together to safeguard the principle of operational independence, whilst ensuring that the PCC is not fettered in fulfilling their statutory role. The concept of operational independence is not defined in statute, and as HMIC has stated, by its nature, is fluid and context-driven."

36. In paragraph 36, the protocol says that:

"The relationship between the PCC and Chief Constable is defined by the PCC's democratic mandate to call the chief constable to account, and by the law itself; primary legislation and common law already provide clarity on the legal principles that underpin operational independence and the office of constable."

37. These very explicit provisions in the policing protocol underscore repeatedly the determination of Parliament and of the Home Secretary that the operational independence of the chief constable must be inviolate. How much clearer could this point have been made?

38. Clearer still, it would appear. The oath of office which every police and crime commissioner is required to take under section 70 of the 2011 Act contains the words: "I will not interfere with the operational independence of police officers."

39. Police and crime Commissioners have heavy responsibilities, and are very dependent upon chief constables to give them timely and reliable information in relation to the performance of the force. However, under section 54 of the Police Act 1996, a police and crime commissioner can also *request* HMIC to carry out an inspection of the force, or any aspect of the force's operations. HMIC has statutory powers to obtain information, if necessary using coercive means. So the police and crime commissioner is not wholly dependent on the chief for information, and has access to an independent and expert outside body, with real powers, not only to verify what the chief constable is telling the police and crime commissioner, but to inspect anything and everything else connected with the efficiency and effectiveness of the police force.

40. It is very clear that a police and crime commissioner has no power to give orders to the chief constable in relation to any operational matters. This is neither new nor surprising. The common law position of the chief constable – which the Government has rightly insisted is unaltered - is that he, like all police officers, is essentially a constable. As was said by Viscount Simonds in Attorney General -v- New South Wales Perpetual Trustees Co [1955] AC 457, a constable is an officer whose "authority is original, not delegated, and is exercised at his own discretion by virtue of his office".

41. The constable has an underlying independence as a constitutional officer of the Crown, acting in his own discretion to perform his duty of keeping the peace. He is not subject to control by any political authority. The case law in this respect is long established.

42. In Fisher -v- The Mayor of Oldham 143 LTR 281, the High Court said that "a full measure of [local authority] control over the arrest and prosecution of all offenders [that is to say, matters of operational policing] ... would... involve a grave and most dangerous constitutional change", a statement later approved of by the Judicial Committee of the Privy Council in the New South Wales case.

43. Professor Bryan Keith-Lucas, in his seminal article "The Independence of Chief Constables" (Public Administration, March 1960, Volume 38, Issue 1), discusses the right of an elected local policing body (in those days, a watch committee) to dismiss a chief constable as "a power available only in extreme cases, and one which cannot otherwise justify any interference with the chief constable's independence". He adds that the legal position of the chief constable vis-a-vis the elected local policing body is probably that:

"in all operational matters [the chief constable] is independent, and in no way under the orders of the Watch Committee; but that if he shows himself to be unfit for his duties, on grounds of incompetence, political or personal bias, or otherwise, the Committee may dismiss or suspend him. Furthermore, the members of the Committee are at liberty to advise him or to criticise his conduct, but he is not obliged to obey their orders or comply with their wishes."

44. Since elected policing bodies have no power to issue orders to chief constables, it could not be the case that a chief constable could be validly criticised for not obeying any such orders when in law he is not bound to carry them out.

45. So, a police and crime commissioner cannot control a chief constable in any operational matters. Police and crime commissioners are not regulatory authorities with powers to issue enforcement orders, establish, amend, supplement or abolish rules as to operating practices, policies or procedures, and

direct compliance with them. The 2011 Act has given police and crime commissioners far more strategic powers in relation to policing in their local areas, including deciding the budget and allocating assets and funds to the chief constable, and setting the precept for the force area, entering into collaboration agreements with others, providing a local link between the police and communities, and scrutinising, supporting and challenging the overall performance of the police force against the priorities in the police and crime plan. That is a considerable range of heavy responsibilities, but it does not amount to a power of direction and control when it comes to operational policing.

46. As I have said, one of the most significant powers in the hands of the police and crime commissioner is the right to dismiss the chief constable or force his retirement. It has recently been stated to a Parliamentary committee that this right is thought to be unfettered. That is a remarkably misconceived notion, for the reasons I intend to give here.

47. I believe that it is essential, in the interests of the public who are served by the police, that there are no such misconceptions or misapprehensions in relation to this power. The operational integrity and independence of chief constables is sacrosanct, and *in law* it has not been, as indeed it must not be, compromised or violated. It is important that chief constables understand the true nature and extent of their operational freedom, as well as the powers of their police and crime commissioners, so recently established by Parliament, properly to hold them to account. As John Locke pointed out, the powers of government (and that includes the coercive power of the state, in the hands of the police) are conferred by the community, because they belong to the community, and it is entirely necessary as well as rational that those who possess those powers, in trust, are properly held to account for their use.

48. The relative positions of these two immensely important public authorities must be clearly understood by everyone concerned. It is not a fragile boundary between them, and it will not break, provided those on both sides of it are clear as to its nature and position, and neither attempts improperly to alter it or place it under undue pressure. For the reasons which I will give, such an unjustifiable state of affairs could amount to a dangerous politicisation of the police, something which neither the Government nor Parliament ever intended.

49. The 2011 Act contains no express provisions defining the circumstances in which, or the grounds on which, the new section 38 power - for a police and crime commissioner to require a chief constable to retire or resign - may be exercised. However, it most certainly does not follow that the power may be exercised for any reason (or at will). The question of the circumstances in which the power may be exercised must be determined on consideration of the language and purpose of the 2011 Act read as a whole, in the light of the pre-legislative materials and the policing protocol, and of the 2012 Regulations, which still apply to chief constables.

50. It is important to note, however, that under the 2011 Act, as I have said, the obligation of the chief constable, in exercising its functions, is to have regard to the police and crime plan; that is not an obligation simply to do whatever the plan may provide for. A police and crime plan must state the police and crime commissioner's police and crime objectives, the policing which is to be provided, the financial and other resources which are to be provided to the chief constable, the means of reporting by the chief constable to the police and crime commissioner on the provision of policing, the means of measurement which will apply to police performance, and the crime and disorder reduction grants which the police and crime commissioner is to make. A police and crime plan may not specify how the chief constable is to discharge his overriding obligation to uphold the law and keep the peace. Nor can it require the chief constable to violate that obligation.

51. The case law demonstrates that the courts will accord a considerable margin of discretion to chief constables if a legal challenge is brought in respect of their operational decisions, for example as to the level of policing to provide where protests are anticipated (for example R -v- Chief Constable of Sussex, ex p International Trader's Ferry [1999] 2 AC 418). In that case, the House of Lords held that the duty of the police to uphold the law was subject to a wide discretion on the part of the chief constable. Lord Slynn explained:

"In a situation where there are conflicting rights and the police have a duty to uphold the law the police may, in deciding what to do, have to balance a number of factors ... That balancing involves the exercise of judgment and discretion."

52. In that case, their Lordships referred with approval to the judgement of Lord Denning in R -v- Commissioner of Police of the Metropolis, ex parte Blackburn [1968] 2 QB 118, which explained again the width of the chief constable's discretion in discharging his duty to enforce the law and keep the peace².

53. There is nothing in principle which prevents the Home Secretary or a police

² "Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner of Police of the Metropolis, or the Chief Constable, as the case may be, to decide in any particular case whether enquiries should be pursued, whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter. He can also make policy decisions and give effect to them, as, for instance, was often done when prosecutions were not brought for attempted suicide. But there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere. Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than £100 in value. I should have thought that the court could countermand it. He would be failing in his duty to enforce the law."

and crime commissioner, using powers expressly conferred upon them by Parliament, setting strategic or financial objectives which may have an effect upon areas within the chief constable's operational independence. An obvious example is the police budget. However, that is because the chief constable will still retain the ultimate decision-making power in relation to issues within his operational independence. He must turn his mind to those goals and factor them into his decision-making, but he is not bound to divert his resources to meet them if he concludes that doing so would undermine his other obligations, and in particular his overriding duty to ensure that the law is upheld in his policing area.

54. The correctness of this approach can be demonstrated by this simple example. A police and crime commissioner might have been elected on the basis that he would institute a policy that 80% of police officers will be allocated to special antisocial behaviour patrols. Once elected, he attempts to implement that. It is within the power of the chief constable to disregard that policy if, in his expert view, doing so would compromise other aspects of his duty to uphold the law, for example combating serious violent or sexual offences. The chief constable would be obliged to take into account the public view, expressed through the democratic process, that antisocial behaviour must be given particular attention, but it is for the chief constable to determine the best operational method of achieving that objective, alongside the competing demands on policing resources. If the chief constable did not retain the ultimate decision-making power over issues within his operational control, it would be open to police and crime commissioners to set mandatory strategic targets the direct consequence of which would be to vitiate the chief constable's ability to comply with his overriding duty to uphold the law in his policing area.

55. Using the extreme example that I have postulated, if the chief constable were obliged to devote 80% of his officers to antisocial behaviour duties, he would be bound to compromise policing in other areas. He may not, for example, be able properly to investigate allegations of rape or threats to kill, or deal with serious organised crime, or devote appropriate resources to child protection, burglary or fraud. The chief constable would retain legal liability for any failure properly to investigate those crimes, even though the police and crime commissioner had compelled him not to do so. That would mean the chief constable would have been forced into acting in a way which is both contrary to his overriding duty and likely to result in his office being stigmatised with legal liability that he is powerless to avoid.

56. That is not to say that the decision-making of the chief constable in areas within his operational independence cannot be challenged when it is procedurally flawed (if, for example, he does not take into account the objectives stated in the police and crime plan), where it is irrational (so unreasonable that no reasonable chief constable would have reached that decision), but within those confines he retains a discretion.

57. It appears to me that there is no doubt that if Parliament had intended to intrude upon, dilute or diminish the overriding duty of the chief constable – and indeed any constable, because the jurisdiction of a constable is an original one, and not a delegated one – and to alter the nature or scope of his operational independence, it would have done so in the clearest possible terms. It did not do so.

58. In making the chief constable accountable to a directly elected police and crime commissioner, Parliament did not intend to affect or diminish the operational independence of the police, which remains a fundamental principle of British policing. The concept of a chief constable being accountable to the police and crime commissioner does not mean that he or she is not independent of the police and crime commissioner. The relationship between the two offices is not a constables being unaffected by the new statutory scheme is reinforced by the pre-legislative materials which I have discussed, which confirm that operational independence is a fundamental principle that will be "protected absolutely" (White Paper, paragraph 2.13) and "will not be compromised" (summary of government consultation responses and next steps, paragraph 2.3). Further support is provided by the Policing Protocol Order 2011. Paragraph 12 of the protocol says that the 2011 Act does not impinge on the common-law legal authority of the office of constable or the duty of constables to maintain the Queen's Peace without fear or favour. Paragraph 33 of the protocol explains that the direction and control of a chief constable includes decisions concerning the configuration and organisation of policing resources, and the decision whether or not to deploy police officers and staff, total discretion over investigations, decisions taken with the purpose of balancing competing operational needs within the framework of priorities and objectives set by the police and crime commissioner, operational decisions to reallocate resources to meet immediate demand, and the allocation of officers' specific duties and responsibilities to meet the strategic objectives set by the police and crime commissioner. The protocol also says that the police and crime commissioner and chief constable must work together to safeguard the principle of operational independence, and that primary legislation and common law already provide clarity on the legal principles that underpin operational independence and the office of constable.

60. In that light, I now return to the removal of a chief constable by a police and crime commissioner.

61. The new power under section 38 of the 2011 Act does not give the police and crime commissioner an unfettered discretion to remove a chief constable "at will", in the sense that the police and crime commissioner need not have any good reason (or any reason at all) for requiring the chief constable to retire or resign. There are at least three interlocking reasons why this is so.

62. First, such a position would be inconsistent with the intention of Parliament, as I have explained, that the fundamental principle of the operational

independence of the police should not be affected or diminished by making the chief constable of the police force accountable to a directly elected police and crime commissioner. Sufficient security of tenure is essential to safeguard those aspects of a chief constable's role that relate to operational independence. Operational independence would be seriously compromised by a power for a police and crime commissioner to dismiss the chief constable "at will".

63. It might appear somewhat inconsistent for Parliament to have intended that the 2011 Act should have no effect on operational independence whilst at the same time enacting the section 38 power. The mere existence of the power could be viewed as infringing on operational independence to some degree. Nevertheless, Parliament evidently did intend that the power should be limited so as to be compatible (at least as far as possible) with that independence.

64. Secondly, it is axiomatic as a matter of public law that no power conferred by Parliament is unfettered. In the case of R -v- Tower Hamlets London Borough Council ex p Chetnik Ltd [1988] AC 858 at 872B-F, Lord Bridge approved the following analysis:

"[I]n a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose, everything depends upon the true intent and meaning of the empowering Act. ... [A] public authority [must] act reasonably and in good faith and upon lawful and relevant grounds of public interest. Unfettered discretion is wholly inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good."

65. This point has been emphasised by the courts in many cases. For example, in the House of Lords case of R (Spath Holme) -v- Secretary of State for the Environment, Transport and the Regions [2001] 2 AC 349 at 381B, Lord Bingham said: "no statute confers an unfettered discretion on any minister". In the same case, Lord Nicholls said "[n]o statutory power is of unlimited scope", and Lord Cooke said "no statutory discretion is unlimited", and Lord Hope added: "[n]o minister who seeks to exercise discretion which legislation has conferred on him can claim that the discretion, however widely expressed, is unfettered or unlimited". In these instances, for Minister you can read any public authority, and that includes a police and crime commissioner.

66. The third reason why there are limits on the section 38 power is the existence of the separate statutory regime under the 2012 Regulations. It has been recognised that the court might in an appropriate case conclude that Parliament could not have intended that a power in one statute be exercised in a way that would defeat the purpose of another statute (R (OneSearch Direct Holdings Ltd) -v- York City Council [2010] EWHC 590 (Admin) at para 24). That principle applies with some force here. Parliament's decision to continue to apply

the regime under the 2012 Regulations to chief constables is inconsistent with an intention that chief constables could be dismissed for misconduct by a police and crime commissioner without enjoying the procedural protections conferred by those regulations.

67. It follows that section 38 does not bestow an unfettered discretion on the police and crime commissioner to require a chief constable to retire or resign.

68. The statutory context of section 38 indicates that Parliament intended the power of the police and crime commissioner to remove the chief constable to be related to his performance of the duties and functions attached to that role, and the effect that that performance may have on the police and crime commissioner's own duties and functions regarding achievement of local policing needs and related priorities. Dismissal of a chief constable for a serious failure in the performance of his duties and functions, which jeopardises the achievement of those priorities and needs, was envisaged as an option of last resort for holding the chief constable to account, in accordance with the police and crime commissioner's duties to secure that the police force is efficient and effective.

69. A purported exercise of the section 38 power for reasons unrelated to the performance by the chief constable of his duties and functions, and the achievement of local policing needs and related priorities, would be open to challenge by way of judicial review on the grounds that the statutory power was not being used in accordance with the purpose for which it was conferred by Parliament. That would be an instance of what public law describes as an improper purpose. A statutory provision which confers a discretion on a public authority must be exercised for the purpose for which was conferred, and in a manner that promotes rather than frustrates the legislative purpose.

70. It follows that the section 38 power can only properly be exercised for reasons which are related to the performance by the chief constable of these duties and functions and which affect the achievement of local policing needs and related priorities, and not misconduct.

71. It is of course difficult to establish in the abstract the precise nature of the connection that must be present to activate the section 38 power. It is clear that Parliament did intend that the police and crime commissioner, as the locally elected community representative, should have a discretion to determine whether the chief constable's performance has been so unacceptable, by reference to local needs and priorities, as to compromise the efficiency and effectiveness of the police force and therefore justify his dismissal. However, the police and crime commissioner would have to reach that conclusion in good faith and have a reasonable basis for doing so, by reference to the ordinary public law principles of rationality. Other public law principles, such as legitimate expectation or the failure to have regard to relevant considerations, could also potentially be relied upon by a chief constable to challenge a section 38 dismissal, depending on the

particular facts of the case.

72. The standard of justification needed to establish the reasonableness of the decision in this context would be relatively demanding, given the importance of the decision for the chief constable, who stands to lose his office and livelihood, and the need to avoid any risk of compromising or being seen to compromise operational independence.

73. The need for a proper justification is reinforced by the statutory procedure, which includes the obligation of the police and crime commissioner to provide written reasons for his proposal, and for those reasons to be made available to the chief constable and others, to ensure that the reasons are properly articulated and scrutinised.

74. It would also be reasonable for the police and crime commissioner to assume that his decision will be subject to review by reference to the more exacting standard of proportionality. There are a number of means by which a chief constable who wishes to challenge a police and crime commissioner's decision could conceivably gain access to the proportionality standard of review, including under Article 1 of Protocol 1 to the European Convention on Human Rights, where the European Commission on Human Rights indicated that rights flowing from an employment contract may be regarded as a "possession". Other Convention rights could conceivably also be affected by dismissal, depending on the facts of the particular case, for example freedom of expression (Article 10) and freedom of association (Article 11). For example, in *Redfearn -v- United Kingdom* (2013) 57 EHRR 2, the European Court of Human Rights held that there had been a violation of Article 11 in relation to the applicant's dismissal on grounds of his political opinion or affiliation. Police and crime commissioners cannot therefore use the section 38 power of dismissal because of a straightforward political disagreement with the chief constable, for example in relation to the wisdom of Parliament in creating police and crime commissioners in the first place.

75. If a chief constable could show that the police and crime commissioner's decision to dismiss him interferes with his enjoyment of one of his Convention rights, the burden would fall on the police and crime commissioner to justify the dismissal as a proportionate means of meeting a legitimate aim. In general terms, this would require the police and crime commissioner to demonstrate that the dismissal pursues a legitimate aim, is rationally connected to that aim and is reasonably necessary in order to achieve the aim (in that less intrusive measures would not be sufficient), and that the disadvantages caused by the dismissal do not impose an excessive burden on the chief constable.

76. The role of the Chief Inspector of Constabulary under the dismissal or forced retirement regime is a substantial one. Under Regulation 11A of the Police Regulations 2003, the police and crime commissioner must obtain the views of

the Chief Inspector of Constabulary in writing and have regard to those written views. It is clear from the statutory scheme that the chief inspector should be expected to express a view on the proposal to dismiss or force the chief constable's retirement only when he knows what the police and crime commissioner's reasons for it are. The Chief Inspector of Constabulary may be expected to require that the police and crime commissioner provides a written explanation of the reasons and any underlying material on which he relies, before producing his report.

77. The statutory scheme does not provide any details on the types of view that the Chief Inspector of Constabulary might be expected to give either to the police and crime commissioner or to the police and crime panel. To a large extent, the nature of what the chief inspector does when consulted will depend on the facts of the particular case. However, it is reasonable to expect that the chief inspector will examine the reasons put forward by the police and crime commissioner, and any underlying material relied upon, and if possible express a view on the cogency of those reasons and the robustness of the evidence on which the police and crime commissioner relies. There is also the possibility of the chief inspector and his fellow Inspectors of Constabulary carrying out an *ad hoc* inspection of the relevant force, to establish the validity of the police and crime commissioner's criticisms or objections, and whether there are other factors which have a relevant bearing on the issue. The statute does not prescribe what must go into a chief inspector's report, and that is understandable. The breadth and depth of the report is a matter for the discretion of the chief inspector, having regard to the particular facts of the case. It should contain the chief Inspector's views on all relevant matters, including for example whether the force is a failing force or a successful one. If the Chief Inspector of Constabulary's report were to conclude, on the basis of evidence, that the objections and criticisms of the force which are relied upon by the police and crime commissioner were unjustified, exaggerated or otherwise insupportable, it would of course say so in clear terms. In such a case, the prospects of a successful challenge of the police and crime commissioner's decision nevertheless to proceed with a section 38 removal, on the grounds of irrationality, would almost certainly be appreciably increased.

78. Independence is precious and must be preserved, protected and defended. However, it is never validly a convenient means of insulation from the public which chief constables serve, now through their police and crime commissioners, nor from Parliament and its committees, or from the Home Secretary who has reserve powers, or from public criticism in the media and elsewhere, or from the attentions of the Inspectorate of Constabulary. I know of no serving chief constable who believes that public accountability is either unnecessary or an impertinence. I know of many who fully understand and support proper scrutiny of their actions in a democratic environment, as essential parts of the checks and balances in a system under which enormous power has been entrusted to them, to use for the protection and safety of the public.

79. The high degree of operational independence which chief constables have is a precious asset which must be nurtured. Its integrity and value is protected when it is used for the benefit of the public, efficiently and effectively.

80. The statutory scheme of local accountability established in the Police Reform and Social Responsibility Act 2011 is, on its face and, I believe, in its substance, a coherent and rational one. The replacement of police authorities by police and crime commissioners is a new means of providing the always necessary democratic accountability of the police, not as means of control of the police, but of ensuring the accountability to the community of the police for the power invested in the police by the community. As John Locke made clear in the context of governmental power – and police power is part of governmental power – these are powers belonging to the community which have been delegated to the police. They are not powers possessed by the police as of right, and their responsible, lawful, proportionate and rational use is something for which the police will always, rightly, be held to account.

81. The new model of democratic accountability of the police, in the shape of police and crime commissioners, has the capacity to be a very great success, provided everyone in the system has a full and proper appreciation of its checks and balances, and the limits of power, and respects those fundamental and essential characteristics. It is not in the public interest for that appreciation and respect to be less than complete. There is a clear and present danger that just such a situation may have begun to be established.

82. It is perhaps apposite to finish this lecture with words dear to the heart of the 1985 John Harris lecturer – Lord Denning, perhaps the greatest English judge of the 20th century - who was fond of quoting the 17th century historian and writer Thomas Fuller, who famously said: "Be you ever so high, the law is above you."