



Report to Cheshire Police & Crime Panel

Response of Police & Crime Commissioner David Keane to questions submitted by Cheshire Police & Crime Panel

Context

Cheshire Police & Crime Panel (PCP) has submitted a range of written questions in relation to the gross misconduct proceedings regarding former Chief Constable Simon Byrne (referred to as Mr Byrne from here on). The PCP has requested a written statement in response. The report provides a written response to all questions submitted.

Other than being numbered consecutively, the questions set out are unedited and are as provided by the PCP.

Regulations referred to are in relation to the Police (Conduct) Regulations 2012 unless stated otherwise.

Questions and Response

Questions relating to the decision to commence a disciplinary procedure

1. How would you define 'misconduct'?

The College of Policing Code of Ethics sets out a code of practice for the principles and standards of professional behaviour for the policing profession in England and Wales. It clearly sets out the following standards:

- Honesty and integrity
- Authority, respect and courtesy
- Equality and diversity
- Use of force
- Orders and instructions
- Duties and responsibilities
- Confidentiality
- Fitness for work
- Conduct
- Challenging and reporting improper behaviour

A significant failure or breach of the Code may be misconduct / gross misconduct and may require formal action such as the application of the Police (Conduct) Regulations.

As the Code of Ethics sets out at 5.1.4 'all officers, staff and, particularly, supervisors and managers have a duty to act where a concern is raised about any behaviour, level of performance or conduct which may amount to a breach of the Code.'

2. Did you make any attempt to discuss the content of the complaints with Mr Byrne prior to initiating proceedings against him and if not why not?

On receiving the allegations via the Police Federation and the IPCC (now IOPC) Intelligence report I took appropriate legal advice. Given the nature and seriousness of the allegations and taking into account the advice I received, it was not appropriate to discuss the matters with Mr Byrne in advance of making a decision as to whether the complaints should be recorded as conduct matters, and given that they were, the subsequent outcome of a referral to the IPCC.

This was to maintain the integrity and confidentiality of any subsequent investigation.

3. What was your relationship with Mr Byrne prior to your initiating the misconduct process?

I believe that I had a positive professional working relationship with Mr Byrne within the context of my role in holding him to account for the delivery of efficient and effective policing for Cheshire residents.

4. Who drew up the list of 74 complaints that formed the content of the notice served on Mr Byrne and what understanding did they have of the College of Policing 2014 Code of Ethics or Home Office guidance on Police Misconduct and standards of professional behaviour?

Queen's Counsel (QC) drafted the regulation 21 particulars. The QC instructed is a lead in the field of police misconduct and has an in-depth and expert understanding of the College of Policing 2014 Code of Ethics and the Home Office guidance on Police Misconduct and standards of professional behaviour.

5. Were any questions asked as to why it took so long for the complaints to be submitted considering many of the alleged incidents took place in a period between June and November 2014?

As Appropriate Authority (AA) I did not, and it would not have been appropriate for me to interview the witnesses in this matter. This was the role of the Investigator. It should be noted that allegations related to low ranking officers and staff against a Chief Constable and to come forward with any such allegations would have taken

some consideration. However, I do not plan to suggest or speculate why witnesses did not have the confidence to report their concerns formally in advance of 2016.

6. Were you aware of or did you consider any options other than the ones you took?

Yes. I took full legal advice and considered all options available to me as the AA throughout the matters, including when making a recoding decision, my case to answer and suspension decisions and following the findings of the panel.

7. Who set out the terms of reference for the North Yorkshire Investigation?

The terms of reference were drafted and agreed in consultation between me as the AA and the Investigator, (former) Chief Constable Dave Jones of North Yorkshire Police.

8. Given that on 20th January 2017 you set out the Terms of Reference, on what basis did you decide that the investigators had not applied the 'case to answer' test properly?

I took full legal advice on this matter. I considered that the Investigator had not asked the correct question for the purposes of regulation 20 of the Police (Complaints and Misconduct) Regulations 2012 (PMCR), namely where there was a case to answer. The Investigator had instead apparently sought to determine what the outcome of the allegation would be if tested evidentially. The "case to answer" test does not involve a determination of whether the case will in fact be proved. Rather it concerns the question of whether a reasonable panel, properly directing itself on the law, could find a case proven.

I have provided a copy of my regulation 19 determination to the PCP which provides a full written rationale for my decision.

Decision to proceed on the basis of gross misconduct, rather than misconduct

9. At what stage was it decided to raise the bar from misconduct to gross misconduct, and what prompted that decision given that the investigating force reported on misconduct only?

I made my "case to answer" regulation 19 Determination on 17 August 2017. I have covered the matter of the incorrect test applied by the Investigator at question 8. I approached my regulation 19 task by carefully reading and considering the following materials:

- a. The Investigator's report, including Mr Byrne's regulation 18 PCMR response;
- b. The statements and duty reports (in relation to 26 individuals)
- c. The exhibits (62 exhibits)

I also had regard to the College of Policing's Code of Ethics dated July 2014.

I concluded that Mr Byrne had a case to answer for breaches of the two following standards of professional behaviour:

- a. Authority, Respect and Courtesy
- b. Discreditable conduct

I did not seek to compartmentalise or separate each and every one of the numerous discrete allegations made by the witnesses. Instead I looked at the overall evidential picture conveyed by the statements and exhibits, as I was permitted to do so under regulation 5(2).

I have provided a copy of my regulation 19 determination to the PCP which provides a full written rationale for my decision.

10. What facts led you to decide to proceed on the basis of gross misconduct?

Much of this covered in my answer to question 9.

As set out in my regulation 19 determination, I carefully examined the assertions in the statements and read the accompanying exhibits. I noted that many of the witnesses spoke, with varying degrees of passion and/or detachment, to Mr Byrne's negative personal behaviour and the duration of this behaviour.

I noted that Mr Byrne's regulation 18 PCMR response outlined a stark difference between his position and evidence, and the evidence concerning his behaviour and the appropriateness of his behaviour. This was something I considered needed to be tested in misconduct proceedings.

I have provided a copy of my regulation 19 determination to the PCP which provides a full written rationale for my decision.

11. What advice did you consider when coming to that decision?

I took full legal advice including consultation with Queen's Counsel on 31 July 2017, to ensure that I was undertaking my duties as AA in relation to regulation 19 in line with the law.

12. Did you relay your decision to the North Yorkshire investigator? If yes what did they say and if not why not? (detective Superintendent Shirley Taylor has stated that the first she knew about the change was when she read it in the newspaper)

Yes, this was completed confidentially by the OPCC lead via telephone on my behalf with the Investigator. I was not involved in the call but I have been informed it

was a short call which detailed a summary of the case to answer decision and rationale.

Detective Superintendent Taylor was the Deputy Investigator working for the Investigator, (former) Chief Constable Jones. My understanding is that DS Taylor provided evidence to the April 2018 hearing that she was on holiday abroad during the relevant period in August 2017 and thus found out the news via the media.

13. The Hearing Panel's report criticised North Yorkshire Police for their failure to carry out a thorough investigation, by not obtaining all the evidence they might from those who worked in the ACPO office nor Mr Byrne. Did anyone review this investigation in order to ensure that it was thorough as the failure to initially interview Mr Byrne would be a clear pointer to there being something amiss?

The investigation by North Yorkshire Police was led by their then Chief Constable and I was entitled to expect that someone in such a senior role could undertake a proper investigation. As the PCP will be aware, representatives from all sides have been clear in their view regarding the sub-optimal nature of the investigation.

As AA it would not have been appropriate for me to interfere with the day to day operation of the investigation. It was the appointed Investigator's responsibility to undertake the investigation and report its findings to me as the AA. That being said and whilst not being an investigator, I did identify and remedy failings where I reasonably could but the reality is that not all could be addressed as we were overtaken by the complex and bureaucratic timetable governing the process.

14. If you read the investigation report you will have been aware that North Yorkshire Police did not interview Mr Byrne. Taking into account the seriousness of the charge of gross misconduct, did you not consider referring the matter back to them or even to the IOPC for further investigation?

As the PCP is aware that I undertook a referral to the IOPC (IPCC as it was then) at the outset. The IOPC decision was to confirm that an investigation into the matters was required under paragraph 14 of Schedule 3 of the Police Reform Act 2002 and that it should be a "local" one conducted under paragraph 16 of Schedule 3 of the Police Reform Act 2002. I was not advised that a re-referral to the IOPC was appropriate at any point.

When reading the Investigator's report it did appear that Mr Byrne had not been interviewed. This took me by surprise and I wrote to the Investigator in a letter dated 17 August 2017 to ascertain written confirmation of this for completeness.

This did not prevent me from making my regulation 19 determination having considered all the information outlined in the report and its supporting materials, having had regard for the rank of Mr Byrne and having considered the evidence.

The PCP will have noted that during the hearing in April 2018 evidence was provided to the Independent Panel by the Investigator and Deputy Investigator that it was North Yorkshire Police practice to request a written response rather than formally interview a subject when investigating a matter of misconduct. With hindsight the Deputy Investigator acknowledged that a request for Mr Byrne to attend a formal interview would have been more appropriate.

Personally, I would have liked Mr Byrne to have been interviewed so that he could hear the allegations and respond to them and so that the investigator could fairly and properly test the allegations in the spontaneity of an interview.

As outlined above, whilst not being an investigator, I did identify and remedy failings where I reasonably could but the reality is that not all could be addressed as we were overtaken by the complex and bureaucratic timetable governing the process

Following service of the regulation 21 notice the matter was referred back to North Yorkshire Police for additional statements to be taken to enable the further particularisation of the charge, which was subsequently served.

15. Given that the final report from the Hearing Panel said that around half or the complaints either did not happen or 'the incidents happened but there was no misconduct', and the fact that Mr Byrne's QC, Gerry Boyle, referred to the process as "persecution not prosecution", how would you respond to a suggestion that the process amounted to being a case of 'constructive dismissal'?

I am not aware of anyone making such a suggestion.

Multiple allegations were made against the former chief constable. When faced with such allegations against the county's Chief Constable, I believed I had no realistic alternative but to place the matter before an independent panel for determination of the facts. The process was undertaken in line with the appropriate regulations and I took full and proper legal advice to ensure I undertook my duties in line with the law.

Any other course would have been against my core values of fairness and openness, and I will not oversee a police service where such allegations aren't taken seriously.

Welfare issues and engagement with Mr Byrne

16. Mr Byrne was suspended from duty in August 2017. Would you tell us what welfare support you put into place for the complainants in this case

Witnesses in this case were updated as frequently as possible regarding progress and with information that was appropriate to share. Witnesses were provided advice that any concerns could be discussed with their staff association or trade union

representative (contacts were provided for Unison or Police Federation), with their line manager or with the OPCC lead. Witnesses were also advised that Cheshire Constabulary also provides an Employee Assistance Program, run by CiC, which is an independent, free and completely confidential advice service. The offer of this service was also extended to those witnesses who had left Cheshire Constabulary.

In advance of public publication of documentation, such as the regulation 21 particulars and their attendance at the hearing, witnesses were advised that they could apply to the Chair of the panel for their name to be anonymised and for special measures, such as screens to be in place when they gave evidence. The OPCC also offered to support witnesses to visit the venue in which the hearing was being held so they could familiarise themselves with the venue.

On the morning of, and in advance of the announcement and notification of the findings of the Independent Panel, witnesses were invited, if they so wished, to attend the OPCC to read a copy of the outcome report in private. Staff association or trade union representatives arranged to be available to provide additional support if required.

17. What support was put in place for Mr Byrne?

When I wrote to Mr Byrne at the end of November 2016 to advise him of the allegations, my recording decision and the decision of the IPCC following my referral, I advised him to contact his staff association, the Chief Police Officer Staff Association (CPOSA), for their support. In addition, when making my decision regarding suspension I identified my Chief of Staff as a specific welfare contact should Mr Byrne require it.

As the PCP will be aware, Mr Byrne was allocated a CPOSA 'friend' to provide support throughout and at the hearings. Mr Byrne also engaged full legal support, although clearly this was not put in place by me as AA.

I encouraged a positive and professional relationship between my office and Mr Byrne's representatives so that any issues could be dealt with as quickly and as sensitively as practicable. I believe this was achieved.

18. Was Mr Byrne given an opportunity to make representations to you before for decided to escalate the allegation to gross misconduct? If not why not?

Mr Byrne made representations through his regulation 18 PCMR response which was included in the Investigator's report. As detailed in my response to question 9 I fully consider this in my decision making.

19. What did you understand to be Mr Byrne's legal right in relation to knowing the allegations he faced?

Following my regulation 19 "case to answer" determination, Queen's Counsel was instructed to prepare the necessary particulars of the allegations Mr Byrne faced under regulation 21(1)(a)(ii). This was completed and then served on 29 September 2017. Mr Byrne had the opportunity to reply in full in a regulation 22 response, which he did so on 3 November 2017.

20. Policing, by its very nature, has to be and is a disciplined service. As such, did you take into account that this will be reflected within the work environment and therefore, you over-reacted to the situation with which you were faced?

I undertook my role as AA in this matter in a considered and professional way, taking appropriate legal advice. As detailed in the response to previous questions I took into account the Code of Ethics which sets out a code of practice for the principles and standards of professional behaviour for the policing profession in England and Wales.

21. Did you at any time carry out any performance reviews with Mr Byrne and if so, what were the outcomes?

My duty as Police & Crime Commissioner is to hold the Chief Constable of Cheshire Constabulary to account for the delivery of effective and efficient policing on behalf of Cheshire residents. I undertake this through both public and private scrutiny board meetings where the performance of the Constabulary and by extension the Chief Constable is scrutinised and reviewed.

22. Would you explain to the panel in what way you applied the Nolan Principles of, openness and objectivity throughout this process?

Objectivity

Holders of public office must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias.

Openness

Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing.

I have applied and met the principles in the following manner:

- On receipt of the allegations advice was sought from HMIC, the IPCC (as it was at the time, now the IOPC) and from the then Chief Executive of the Office of the Police and Crime Commissioner.

- Legal advice was obtained from leading Queen's Counsel immediately when the allegations were brought to my attention, and throughout each and every stage of the process. I sought Counsel's advice on the allegations made in terms of their nature, severity and the applicable processes and procedures to be followed.
- Having considered the allegations, I recorded the allegations as conduct matters within the meaning of the Police Reform Act 2002.
- Having recorded the matters, I referred them to the IPCC on a discretionary basis under paragraph 13(2) of Schedule 3 to the Police Reform Act 2002.
- The IPCC, confirmed that an investigation into the matters was required under paragraph 14 of Schedule 3 of the Police Reform Act 2002 and that it should be a "local" one conducted under paragraph 16 of Schedule 3 of the Police Reform Act 2002.
- An external police force, North Yorkshire Police, was appointed to conduct this. The necessary conflict of interest and qualification checks were undertaken.
- The terms of reference sets out that the investigation must be demonstrably fair to all concerned and compliant with the statutory pathway. In addition, it outlined that the Investigator was required to undertake a thorough, proportionate and timely investigation into the allegations, act at all times in accordance with the relevant legislation and as soon as practicable submit a report on the investigation to the PCC in accordance with paragraph 22 of Schedule 3 PRA.
- The regulation 19 case to answer determination was undertaken in compliance with the law and considering the Investigator's report and supporting materials.
- The matter was referred to a misconduct hearing to be conducted by a panel properly constituted under regulation 26 in public.
- In advance of the hearing I undertook my obligations to publish a public notice, including the details of the charge and the time, date and venue of the hearing, under regulation 27A, well in advance of the minimum 5 working days as stipulated.
- The outcome reports prepared by the Panel have been published on my public website.

- I chaired a public hearing in line with regulation 34 to announce the outcome and findings of the independent panel.
- As agreed I have provided a breakdown of the costs of the proceedings for the PCP which will be published.
- I have attended PCP meetings on the 14 December 2018 and 8 February 2019 to answer questions from the PCP on the proceedings.

Actions following the Findings of the Disciplinary Panel

23. Why did you pick December 11th, the scheduled date for the Brexit debate in the House of Commons, to release the findings of the Hearing Panel?

The independent panel delivered their final report on 8 November 2018. I then took steps to arrange a hearing to be held in line with regulation 34. My office wrote to Mr Byrne's representatives on 15 November 2018 confirming a hearing date of 11 December 2018.

This was in advance of the Government's announcement regarding their intention to hold a debate and vote on this date.

As I am sure the PCP will acknowledge the two are unconnected.

24. Do you think that the Panel got it wrong, if so why?

I do not intend to enter into any public debate regarding personal views on the Panel's decision and findings.

25. In light of the findings of the Disciplinary Panel do you think that you got it wrong?

Multiple allegations were made against the former chief constable. When faced with such allegations against the county's Chief Constable, I believed I had no realistic alternative but to place the matter before an independent panel for determination of the facts. The process was undertaken in line with the appropriate regulations and I took full and proper legal advice to ensure I undertook my duties in line with the law.

Any other course would have been against my core values of fairness and openness, and I will not oversee a police service where such allegations aren't taken seriously.

26. With the benefit of hindsight would you now do things differently?

Please see my answer to question 25.

27. Given the outcome of the misconduct hearing, is it your intention to issue any form of apology?

Please see my answer to question 25.

Financial Implications (may be dependent on what is discussed in relation to the precept)

28. You have provided a breakdown of the financial costs of and relating to the disciplinary process. Does that represent everything?

As reported to the PCP the costs shared were the position as of 10 January 2019. As far as I am aware they represent everything. There may be some minor additions due to payment periods but there will not be any substantial or significant changes to the best of my knowledge.

29. Do you think that represents good value for the residents of Cheshire?

It is undeniable that this process has been time-consuming and costly due the complexities of the Police (Conduct) Regulations 2012. Value for money in the context of police accountability and transparency is a personal judgement. I am clear, when faced with serious allegations, any other course would have been against my core values of fairness and openness, and I will not oversee a police service where such allegations aren't taken seriously.

30. Have you factored into your costings any contingency funding should the former Chief Constable decide to take any legal action?

No.

Conclusion

As Commissioner, I have taken every step to assist the PCP in responding to their questions in the fullest possible manner.