

Rt Hon Kit Malthouse MP

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Our ref: MOPAC260422-D4105

5 May 2022

Dear Kit

I am writing in response to the stakeholder consultation on the Policing Protocol Order 2011. I attach an annex containing our response to the specific questions set out in the consultation document. I hope that you find these useful. My team would be happy to discuss our reply in more detail with your officials should that be considered helpful.

However, I would like to note here that I am extremely concerned by the proposed direction of travel and the possible combined effect of the proposed changes. Whilst your consultation document itself notes that the Protocol “cannot create new law, provide actors with powers they do not already have, or take away the discretion of any relevant body to use their existing powers”, it is clearly an important document in framing the operation of the law and powers of relevant actors.

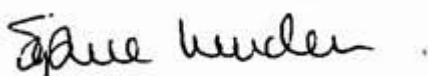
As such, I am worried that the consultation appears to be an attempt to rip up the existing constitutional settlement on policing by repositioning PCCs as accountable to the Home Secretary – and requiring them to implement national policy they may not agree with despite having no legal obligation to do so – as well as undermining the operational independence of Chief Constables. Each is a serious matter in its own right but the combined impact will be far greater.

I cannot believe this is your intention, as if it were, I am sure you would be proposing primary legislation. It also appears, at a strategic level, to run counter to the wider PCC Review that you are conducting, where the outcomes appear to have been aimed at strengthening the PCC model and our ability to hold Chief Constables and the wider justice system to account.

I hope you will reconsider many of the amendments which have been proposed in the consultation document. I would be very happy to continue to engage constructively with you on this and given the importance of this issue, I would welcome a discussion with you on this at the next of our regular meetings.

Thank you again for writing to me

Yours sincerely,



Sophie Linden
Deputy Mayor for Policing And Crime

ANNEX

1. Do you agree/disagree that the Protocol should be updated so that it is clear on its face that it refers to PCCs and Mayors with PCC functions, except where specified that there is a difference?

The existing Protocol already recognises the position of the Mayor's Office for Policing and Crime (MOPAC). We would wish for this to be maintained in any revised version.

However, we endorse the recommendation made by the APCC that the Government consider amending s.79(6) of the Police Reform and Social Responsibility Act 2011, specifically the definition of "relevant persons", so as to explicitly bring Mayors with Police and Crime Commissioner functions into the definition of "*relevant persons*" to whom the Protocol applies.

2. Given that Mayors with PCC functions have a wider set of responsibilities, should we specifically clarify that the remit of the Police and Crime Panel extends only to their PCC functions, and not their wider mayoral functions or powers?

Given the role of the Police and Crime Committee we do not consider this relevant in a London context.

3. Do you agree/disagree with the proposed revised wording on the Home Secretary's role in policing?

We strongly disagree with the proposed amendments on the Home Secretary's role in policing and have serious legal concerns regarding the manner in which the powers of the Home Secretary and the National Policing Board (NPB) are expressed in the amendments, in particular the incorrect representation of the role of the Home Secretary as '*holding PCCs and CCs to account*'. The only people who hold PCCs – or the Mayor in London's case – to account are the electorate and the wider public. Chief Constables are accountable to their PCCs, not the Home Secretary. To suggest otherwise is to fail to recognise the constitutional position established by the Police Reform and Social Responsibility Act 2011.

The NPB is a non-statutory board established by the Home Secretary in 2019. The terms of reference of the NPB states that "*the Board does not affect the statutory responsibilities or powers of individual members*". As the consultation document itself notes at paragraph 2.3, the Protocol "*cannot create new law, [nor] provide actors with powers they do not already have*". This is the correct legal position: s.79(6) of the Police Reform and Social Responsibility Act 2011 makes clear that the Protocol is designed to set how relevant parties exercise their functions, not to determine the nature of what those functions are. The Home Secretary has no power to amend existing powers or functions or to create new powers or functions through the Protocol. Yet this appears to be what is envisaged here. The wording proposed is neither acceptable nor reflective of the current legal position.

We share the APCC's strong opposition to inclusion of the National Policing Board in the Protocol and endorse its position.

4. Do you agree/disagree with the proposed revised wording on the application of the Home Secretary's powers and tools?

We see no reason to change the current wording. We agree with the APCC's position that the Home Secretary's powers should remain exercisable only as a "last resort," in keeping with the principles of devolved local policing. We would also like to understand why the Home Secretary would ever use these powers if not as a 'last resort'? The clear signal this sends is one where the government intends to collaborate less with, and impose more on, policing as a sector. This is unfortunate and unhelpful. Again, we are concerned that the proposed amendment seeks to alter the constitutional relationship between the police, the people, and central government.

The intention here may be for this revised wording to deal with collaboration agreements between policing bodies for national functions, e.g. the National Police Air Service. If that is indeed the case, then the drafting needs to be much clearer. We note that the Home Secretary already has statutory powers in this regard under s.23G of the Police Act 1996 and again, do not understand why the use of this power would not be a 'last resort'.

5. Based on the changes proposed here, can you provide any specific examples, either from previous situations/scenarios or likely future ones, where you would have/would envisage seeking Home Secretary intervention? Please explain why.

We can envisage no situation where we would seek intervention by the Home Secretary, nor do we think such intervention necessary. Our strong view is that it is always preferable for PCCs and Chief Constables to come to agreements on their own volition, rather than have interventions imposed upon them.

6. Do you agree/disagree with the proposed revised wording in relation to the Home Secretary's role in governance arrangements?

We believe the proposed wording misrepresents the correct legal position and seeks to create a new, and dangerous, constitutional position. As such, we are opposed to the proposed revised wording in the strongest possible terms.

The proposed wording states, "*The Home Secretary is responsible for setting the national, long-term strategic direction of policing and holding the policing sector to account for the delivery of the government's policing commitments*". We draw to your attention s.36 of the Police Act 1996 as concerns the general duties of the Secretary of State and note that we can find no legal basis for this statement. Indeed, Parliament appears to have legislated to explicitly repeal or omit several sections of the Police Act 1996 which may have been relevant in this regard (e.g. sections 36A & 38). As such, we believe this is over-stating the legal powers of the Home Secretary.

The revised wording further states, "*It is the responsibility of PCCs and Chief Constables to reflect on and implement national policy at a local level, in accordance with their police and crime plans*". We strongly object to this statement. The statutory mechanism by which "national policy" can be set by the Home Secretary is through the Strategic Policing Requirement.

PCCs are required by s.5(1) [MOPAC by s.6(1)] of the Police Reform and Social Responsibility Act 2011 to issue a police and crime plan and s.5(5) [s.6(5)] requires PCCs to have regard to the strategic policing requirement in issuing that plan. Similarly, s.37A of the Police Act 1996 makes it clear that a Chief Constable must have regard to the strategic policing requirement in exercising their functions. In both cases, this obligation falls well short of a responsibility to implement national policy at a local level. Such a position has no validity in law and would see a huge and unlegislated transfer of power to government and undermine the operational independence of the police and democratically elected PCCs where their policy position may, for good reason, conflict with the government's position.

Once again, in line with the position outlined in response to question 3, we share the APCC's strong opposition to inclusion of the National Policing Board in the Protocol and agree with its objection to any reference to the NPB as proposed in paragraph 6.11 of the consultation document.

7. Do you agree/disagree with the proposed revised wording regarding the Home Secretary's power to request information about policing matters?

We acknowledge that a power under s.44 of the Police Act 1996 already exists for the Home Secretary to require Chief Constables to provide information to her. This mirrors the power PCCs have.

We would, absent any further detail, question the need for there to be any change to the Policing Protocol and note that when taken together with the changes proposed under question 6, this further gives the impression of eroding the operational independence of the police and undermining the role of the PCCs. We do not believe that is desirable and do not therefore support this proposed revision. We also note that the proposals here represent a missed opportunity to articulate more expansively the powers of PCCs to access information held by police services under s.36 of the Police Reform and Social Responsibility Act 2011.

The revised wording also refers to the Home Secretary asking "PCCs and CCs to report to the National Policing Board". There is no existing statutory power or requirement for PCCs and CCs to do so. We reiterate the previous concerns we have raised in answer to question 3 regarding inclusion of the National Policing Board in the Policing Protocol and any ultra vires attempt through the Protocol to ascribe powers or regulatory functions to the Board.

8. Do you agree/disagree with the revised wording in relation to the role of the Chief Constable?

We do not understand the basis for this being included as we have always found the police to act impartially. We consider the proposed revised wording unnecessary and agree with the APCC's position that the wording adds nothing of substance as the existing reference to acting with "impartiality" inherently requires party political neutrality.

We note in passing that the proposed wording appears to directly contradict the proposals set out in question 6 (to which we strongly object) regarding CCs implementing "national policy".

We propose that if any wording is inserted here in addition to acting with impartiality, then explicit reference should be made to acting in accordance with the Police Code of Ethics.

9. Are there specific changes to the Protocol that we could make to further clarify the distinct responsibilities that the PCC and CC have respectively with regard to policing?

We consider that it would be helpful to clarify that Chief Constables must reply in a timely fashion to any requests for information on policing matters made by a PCC under s.36 of the Police Reform and Social Responsibility Act 1996. This could be done through insertion of a further subclause to this effect in s.17 of the Protocol or insertion of the word “timely” before “access” in paragraph 23(e) of the Protocol. We also suggest that s.17(n) should be amended to reflect changes that to complaints handling arrangements.

We agree with the position adopted by the APCC regarding operational independence of the Chief Constable and democratic oversight of the police. Whilst CCs must be given a margin of discretion for the operational decisions they make, this is not the same as immunity from scrutiny by, and accountability to, PCCs as the High Court made clear in *R(Crompton) v South Yorkshire PCC* [2017] EWHC 1349 (Admin).

10. In updating and refining the Protocol, are there any specific changes that we could make to the document which you consider would further clarify the relationship between the Home Secretary, the PCC and CC?

No but we reiterate our concerns regarding any proposed amendments which seek to alter or undermine the constitutional position of the Home Secretary, PCCs and CCs as laid down in statute by the Police Act 1996 and the Police Reform and Social Responsibility Act 2011 and support the position adopted by the APCC in their response to this question.

11. Do you agree/disagree with the proposed revised wording on operational matters and the role of the Police and Crime Panel?

We do not consider the amendment is necessary. We note the important role played by the London Assembly Police and Crime Committee in London and recognise that under s.33(8) of the Police Reform and Social Responsibility Act 2011, the London Assembly may request the MPS Commissioner to attend proceedings for the purpose of giving evidence.

12 & 13. Do you agree/disagree with the proposed revised wording in relation to schemes of delegation?

MOPAC already operates a Scheme of Consent and Delegation and we are actively reviewing it. Whilst we do not feel particularly strongly about the revised wording for para.17(d) [question 12], like the APCC, we do not consider there to be any basis for the implied suggestion in the proposed revised wording for para.23(m) [question 13] that schemes of delegation could be or have been used as a means to fetter a Chief Constable’s operational independence. We therefore object to this proposed amendment.