

DRAFT IPCC GUIDELINES

Investigating allegations of
discriminatory behaviour

Section 1: Introduction

IPCC research has shown that public confidence in the police complaints system is patchy. The research has identified a number of groups sceptical of, or disinclined, to use the complaints system: one of these groups is ethnic minorities.

The IPCC has conducted two research projects on public confidence: *Confidence in the police complaints system: a survey of the general population* and *Public Perceptions of the Police Complaints System*. www.ipcc.gov.uk The research found that, among young Asian and black males, there was a perception of racism on the part of police officers, and this was possibly the most common reason for the negative attitude to the police.

Participants in the research reported racist abuse, arbitrary arrest or police mistreatment, as well as verbal abuse. The young men felt they were unfairly stereotyped as troublemakers, or people who commit crime. Their perceptions of the police were often shared by the wider community even where there had been no personal experience of incivility or abusive contact with the police.

The following reports all help in understanding perceptions of discrimination in the police service:

- The Report of the Stephen Lawrence Inquiry by William Macpherson ((1999)
- The Police Service in England and Wales: Final report of a formal investigation by the CRE (2005)
- The Morris inquiry, The Case for Change: People in the Metropolitan Police Service (2004)
- The Bill Taylor Review of Police Disciplinary Arrangements. (2005)

In this context, consistent and fair investigations of complaints is essential. Unless complaints, especially complaints of discriminatory behaviour, are vigorously investigated, the complaints process itself may well compound the suspicion and lack of trust that minority communities often express towards the police.

On the other hand, investigations that are demonstrably fair will, whatever the outcome, promote trust. Experience shows that trust is further enhanced if investigations, especially investigations that may have an impact on wider communities, are carried out in a climate of openness and transparency.

The priority attached to matters of discrimination by the IPCC is clearly shared at the highest levels of police forces and police authorities. Yet, paradoxically, the weight attached to discriminatory behaviour can serve as a barrier to proof. An officer is unlikely to make admissions if he or she fears dismissal will result, and an investigating officer may be reluctant to conclude that discrimination has been a factor if the potential disciplinary response may be considered disproportionate. The IPCC believes that the police service should move towards a learning rather than a blame culture.

These guidelines, which build on those that were published by the PCA in 2003, should assist investigating officers in gathering relevant evidence and making sensible decisions based on that evidence. The IPCC expects professional standards officers to have an approach to conduct matters that reflects the standards applied by employment tribunals. This in turn depends on each force setting a framework for discipline that makes it possible to determine that proven allegations of discrimination do not necessarily result in dismissal.

Professional standards investigating officers have told the IPCC that they have felt caught between the PCA guidance and the approach taken by their own chief officers. The significance that is attached by the forces and by the IPCC to allegations of discrimination means that they sometimes hesitate to locally resolve such allegations and would rarely feel able to find an allegation proved and not proceed to put it before a tribunal.

The IPCC is clear that, given all the facts of a case, it may be possible to retain an officer and ensure that the behaviour is not repeated. Indeed, an officer who demonstrates a willingness to learn from a complaint should be better able to serve the public. On the other hand, proven allegations where there is significant detriment or evidence of a repeated discriminatory attitude or behaviour require a more serious misconduct consideration.

In most aspects, these guidelines reflect general good practice for investigations. Taking a comprehensive statement of complaint and conducting PEACE interviews with officers are the foundation of all good complaints investigations. However, investigating allegations of any type of discrimination does have one additional dimension.

These guidelines place particular emphasis on the need to look for evidence from which a reasonable inference may be drawn. The following section, the legal framework, demonstrates that employment case law has established that there is rarely objective evidence of direct discrimination and it is therefore reasonable, for example, to look at a pattern of behaviour and draw the conclusion that this pattern supports an allegation of discriminatory behaviour.

The guidelines will enable PSD Heads to review and develop current practice. The IPCC, in exercising its independent scrutiny role, will be looking for evidence that these standards have been met. We recommend that the summary sheet (page x) should be copied and made available to all investigative staff.

Section 2: Proposed Standards of Professional Behaviour

“Public confidence in the police depends on police officers demonstrating the highest level of personal professional standards of behaviour” Ref: Standards of Professional Behaviour

Following the Taylor review of the police misconduct system the Codes of Conduct will be replaced by *Standards of Professional Behaviour*. These new standards will set out a framework of conduct of what is, and is not acceptable.

The proposed standard of professional behaviour relating to equality and diversity sets out that: **“Police officers act with fairness and impartiality. They do not discriminate unlawfully or unfairly;**

Guidance on the standard includes;

- *Police officers carry out their duties in accordance with Article 14 of the European Convention on Human Rights and current equality legislation.*
- *Police officers need to retain the confidence of all communities and therefore respect all individuals and their traditions, beliefs and lifestyles provided that such are compatible with the rule of law. In particular police officers do not discriminate unlawfully or unfairly when exercising any of their duties, discretion or authority.*
- *Police officers pay due regard to the need to eliminate unlawful discrimination and promote equality of opportunity and good relations between persons of different groups.*
- *Police managers have a particular responsibility to support the promotion of equality and by their actions set a positive example.*
- *Different treatment of individuals which has an objective justification may not amount to discrimination.”*

Two further proposed standards of professional behaviour relevant to this guidance relate to Discreditable Conduct and Challenging and Reporting Improper Conduct.

Discreditable Conduct:

“Police officers behave in a manner which does not discredit the police service or undermine public confidence, whether on or off duty; and

Police officers report any action taken against them for a criminal offence, any conditions imposed on them by a court or the receipt of any penalty notice.”

This standard underpins each individual action and decision made by those serving with the police in the duties they perform.

Challenging and Reporting Improper Conduct:

“Police officers report, challenge or take action against the conduct of colleagues which have fallen below the Standards of Professional Behaviour”

Guidance on the standard includes;

- *Police officers are expected to uphold the standards of professional behaviour in the police service by taking appropriate action if they come across the conduct of a colleague which has fallen below these standards. They never ignore such conduct.*
- *Police officers who in the circumstances feel they cannot challenge a colleague directly, for example, if they are a more junior rank and are not confident, report their concerns, preferably to a line manager. If they do not feel able to approach a line manager with their*

concerns, they may report the matter through the force's confidential reporting mechanism, or to the Police Authority or IPCC.

- *Police officers are supported by the police service if they report conduct by a police officer which has fallen below the standards expected unless such a report is found to be malicious or otherwise made in bad faith.*
- *It is accepted that the circumstances may make immediate action difficult but police managers are expected to challenge or take action as soon as possible.*
- *It is accepted however that it will not always be necessary to report a police officer's conduct if the matter has been dealt with appropriately by a manager in the police service."*

Whereas discrimination law prohibits discrimination against certain groups, the *Standards of Professional Behaviour* will place a positive duty on police officers to act with fairness and impartiality and to report any behaviour that departs from the standards. In addition, there is a new duty placed on managers to support the promotion of equality and to set a good example in their own behaviour.

Operational policing

Police officers make judgements throughout their working day about who to stop, when to use force, when to arrest. Often these judgements are made in a split second, based on experience and intuition. Yet the *Standards of Professional Behaviour* and the law on discrimination require police officers to be able to explain how they reached those decisions.

The IPCC expects police officers to develop the ability to reflect on the judgements they make and learn to recognise what influences their decisions.

Each time someone is stopped, they are being treated differently from the many others who are not stopped. An officer should know for certain, each time, that the quick decision that they have made to treat this person differently can be fully explained and is not in any way influenced by, for example, a difference in race.

In addition, the proposed professional standards make specific reference to the role of supervisors in promoting equality and eliminating discrimination. Supervisors should be able to describe how they have exercised these duties.

Section 3: The legal framework

Defining discrimination

Legal definitions of direct and indirect race discrimination can be found in the Race Relations Act 1976. The definitions of race discrimination are applicable to other forms of unlawful discrimination: for further details go to the websites listed below. (Specific additional issues relating to disability are set out below.)

The RRA 1976 covers race, ethnic or national origins and colour. It states that:

- direct discrimination occurs when someone is treated less favourably on racial grounds than another person has or would have been treated in comparable circumstances;
- indirect discrimination occurs when a term or condition that is imposed on everybody has a disproportionate negative impact on a particular racial group, when compared to the impact on other groups, and which is not a proportionate means of achieving a legitimate aim;
- harassment is unwanted conduct *on an unlawful ground* that has the purpose or effect of violating a person's dignity and creates what is reasonably perceived to be a hostile, degrading, humiliating or offensive environment;
- victimisation is unfair treatment of an employee who has made a complaint about racial discrimination.

Anti Discrimination law

Discrimination law provides protection from discrimination on the grounds of age, gender, race, disability, religion or belief and sexual orientation. The Commission for Equality and Human Rights for England, Wales and Scotland has a statutory duty to oversee and enforce these laws. The government is planning to introduce a single equality bill that will remove any inconsistencies that exist within current discrimination law. This guidance will be revised when the new legislation is implemented.

Protection at work

It is currently illegal to discriminate against people at work on the grounds of:

- Gender
- Race including ethnic, national origins, colour and nationality
- Disability
- Sexual orientation
- Religion or belief including lack of religion or belief
- Age

This law covers police officers and civilian staff. The chief constable or commissioner is liable for acts of discrimination by individuals employed by his or her police force.

Changes to legislation continue and the relevant organisations are changing too. More detail about the law can currently be found at the following websites, however after October 2007 a full range of information should be available on the website of the Commission for Equality and Human Rights (CEHR) www.cehr.org.uk/

- The Equal Opportunities Commission: www.eoc.org.uk
- The Disability Rights Commission: www.drc-gb.org
- The Commission for Racial Equality: www.cre.gov.uk
- Stonewall (lesbian and gay rights): www.stonewall.org.uk

- Age Positive: www.agepositive.gov.uk
- Human rights: www.humanrights.gov.uk
- Acas: www.acas.org.uk
- Commission for Equality and Human Rights: www.cehr.org.uk

In employment, discrimination means treating someone less favourably on an unlawful ground. The Disability Discrimination Act adds a further requirement that employers make reasonable adjustments if that will then remove the reason for the unfavourable treatment. For professional standards investigating officers, this will have a bearing if, for example, a disabled officer is alleged to have neglected his or her duties, but offers in defence that no reasonable adjustment was made to enable him or her to carry out the duties properly.

Provision of services

The police are subject to laws against discrimination in the provision of services.

For example, the Disability Discrimination Act 1995 (DDA) gives disabled people rights not only in the areas of employment, but also relating to access to goods, facilities and services and in the management, buying or renting of land or property. A disabled person is defined in the Act as “anyone with a physical or mental impairment which has a substantial and long-term adverse effect upon his ability to carry out normal day-to-day activities”.

Physical or mental impairment includes sensory impairments. Hidden impairments are also covered (for example, mental illness or mental health problems, learning disabilities and conditions such as diabetes or epilepsy).

It is unlawful to discriminate against disabled people by:

- refusing to provide a service without justification;
- providing a service to a lesser standard without justification;
- providing a service on worse terms without justification;
- failing to make reasonable adjustments to the way services are provided for disabled people;
- failing to make reasonable adjustments to the physical features of service premises, to overcome physical barriers to access.

The police will be providing a service under the Act when giving advice and information about crime prevention, and have duties under the Act when carrying out functions like arresting and interviewing suspects. Public function duties include making reasonable adjustments to practices, policies and procedures, providing auxiliary aids or services and physical features duties. There are exemptions if the public body is carrying out a judicial act.

Public duties

Following the publication of The Stephen Lawrence Inquiry report in 1999, the issue of racial discrimination within police forces became the subject of considerable public scrutiny. Largely as a result of this report, the government placed new duties to tackle race discrimination on all public bodies, including police forces, through the Race Relations (Amendment) Act 2000 (RRAA). The Act requires all police forces (and other public bodies) to produce a Race Equality Scheme as part of a statutory duty to promote good race relations and equality of opportunity and to eliminate racial discrimination.

The same duty to draw up an equality scheme now applies to gender and disability. Increasingly, public bodies are producing a single equality scheme that includes all three equality strands.

However, there are concerns that in doing so, there will be a loss of focus and depth in each strand.

The IPCC recommends that force equality schemes, whether single or specific, should recognise the crucial role played by professional standards departments in meeting the obligations to identify and eliminate unlawful discrimination.

Institutional racism

The Stephen Lawrence Inquiry report identified institutional racism as a significant factor in the service provided to Stephen Lawrence's family. Police forces have properly responded by reviewing their policies and practices. However, there is no legal concept of institutional racism, instead each individual case must be examined to see if there is discrimination or not. This has been clarified by case law in another employment case, *Morgan v Inland Revenue* (case number EAT/851/99 can be found on the website <http://www.employmentappeals.gov.uk/index.html>).

Human Rights Act 1998

All public bodies must meet the requirements of the Human Rights Act (HRA). (Full details of the law can be found at <http://www.yourrights.org.uk/your-rights/the-human-rights-act/index.shtml>)

In addition to conferring specific rights, the Act is underpinned by ideas of equality, fairness and dignity that public bodies must incorporate into all their activities. So police forces must make sure that not only are they avoiding direct breaches of human rights law, but that they are positively using the human rights framework to provide their service fairly to everyone in the diverse communities they serve.

The articles that are most immediately relevant to policing are

- the right to life
- the prohibition of torture (no one shall be subject to inhuman or degrading treatment)
- the right to liberty and security
- the right to respect for private and family life
- the prohibition of discrimination.

In addition, Article 14, reads:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

The way this works is that Article 14 comes into play if any of the other articles are 'engaged'. A human rights article is engaged if it appears that an action or behaviour could fall within its remit: an easy example would be depriving someone of their liberty by making an arrest. Article 14 says that there must be no discrimination in how this is done.

Section 4: Burden and standard of proof

The burden of proof

Much of the case law on discrimination has been developed in the employment context. Police misconduct procedures are not directly connected with this case law. (See appendix 1 for further details of relevant case law.)

The law recognises that most employers would not admit discrimination, even to themselves, and direct evidence of race discrimination will often therefore not be present. The outcome of a case will therefore usually depend on what inferences it would be proper to draw from the facts that are found in an investigation.

There are a number of helpful rules of thumb that can be used by investigating officers in determining whether an officer's behaviour was discriminatory. These are described in more detail below; they include the formula $Dx3+E$, and the questions:

- Would this have happened *but for* the complainant's race, gender, sexuality, disability, faith, age?; and
- What is the reason why the officer behaved in this way?

Reference to the rules of thumb may be of assistance to investigating officers at each stage of an investigation.

However, employment case law has developed further since this case was reported. If a person can establish facts from which a tribunal could conclude that discrimination or harassment on the grounds of race or sex has occurred, then the employer has to prove that any difference in treatment was not due to discrimination. If the explanation is not satisfactory, the tribunal *must* conclude that unlawful discrimination has occurred. This places a burden on the employer to explain the behaviour.

Standards of proof

Investigating officers will consider whether the initial interview is for criminal and/or disciplinary purposes and produce the interview plan accordingly. The disciplinary level of proof for complaints of discriminatory behaviour is the balance of probabilities, just as it is with any other complaint.

It has been emphasised throughout these guidelines that proven allegations of discrimination will not always mean dismissal. (See *proportionality* p ..) Each case will be judged on its own merits. The standard of proof will therefore be flexible, just as it is with other disciplinary matters. Where an explanation for apparently discriminatory behaviour is unclear, and if there is no apparent explanation from any source for the difference in treatment afforded to the complainant, then, on the balance of probabilities, the complaint is likely to be proved.

Officers under investigation have the right not to comment, however if there is evidence of a difference of treatment, then the interview provides an opportunity for the officer to explain the difference. Officers who are the subject of a complaint of discrimination should be made aware of these guidelines prior to interview so an informed decision can be made as to whether to provide an explanation.

Current Home Office guidance on the burden and standard of proof when deciding the outcomes of hearings explains:

“In deciding matters of fact the burden of proof lies with the presenting officer and the misconduct hearing/tribunal must apply the standard of proof required in civil cases, that is, the balance of probabilities. Conduct will be proved on the balance of probabilities if the adjudicator is satisfied by the evidence that it is more likely than not that the conduct occurred. The more serious the allegation of misconduct that is made or the more serious the consequences for the individual which flow from a finding against them, the more persuasive (cogent) the evidence will need to be in order to meet that standard.” (Home Office Guidance on Police Misconduct and Unsatisfactory Performance Procedures)

Home Office guidance also considers the situation where there has been an acquittal in criminal proceedings that may need to be taken into account when considering misconduct and whether to continue. The guidance explains that each case must be considered on its merits and an ‘overly-prescriptive formula should not be adopted’. The impact on the complainant and the officer should be considered with thought being given to whether the alleged conduct reflects on the officer’s responsibility to carry out the duties of a member of the police service.

Section 5: Different forms of discrimination

Language

The (alleged) use of specific words and phrases may indicate discriminatory behaviour but must always be considered in context. There are terms that are commonly recognised as being offensive and officers should be expected to avoid their use. However, there are other words and phrases which are inoffensive in themselves, but, when heard in context, can reasonably be perceived as *violating a person's dignity and creating a hostile, degrading, humiliating or offensive environment* (definition of harassment).

Reference to a person's nationality may ordinarily be inoffensive, but the context in which it is used, for example during an arrest, may reasonably lead a complainant to believe that their nationality affected the interaction or encounter in a negative way. **Understanding why an allegation of discriminatory behaviour has been made is crucial to an investigation** and for future learning for the police service or those against whom complaints have been made.

The proposed *Standards of Professional Behaviour* require all officers to promote good relations between people of different groups, so there is an expectation that they will be mindful of the impact of careless comments.

The six diversity strands

This guidance covers the six diversity strands: race, gender, sexual orientation, religion and belief, disability and age. Further illustrations of what might constitute discrimination within each strand can be found at the websites listed on [p. 10](#).

Only race, gender and sexual orientation apply to public services (each of the others applies to protection at work). However, the proposed standards of professional behaviour state that officers *do not discriminate unlawfully or unfairly when exercising any of their duties, discretion or authority* (our emphasis).

The six strands therefore remain a good guide to what is unfair discrimination.

The following examples are illustrative of complaints about discriminatory behaviour. They reflect the allegations, not the proved findings.

Race

Race includes ethnic and national origins, colour and nationality affecting many groups including the treatment of refugees, asylum seekers and Gypsies and Travellers.

Allegation: A CPS representative who regularly attended a police station alleged race discrimination by police officers and staff due to the high number of security checks he experienced when arriving at the police station.

Disability

The Disability Discrimination Act provides a legal definition of who is a disabled person for the purposes of the legislation. Assumptions about disabled people may lead to behaviour that is considered to be discriminatory.

Allegation: A complainant, along with a group of friends, witnessed an assault on a member of the public and police officers were called to deal with the incident. The complainant alleged that police officers took details and statements from his friends but were patronising and uncivil towards him and did not take a statement. The complainant had a physical disability for which he required a wheelchair. The complainant felt that because of the wheelchair, an assumption was made he also had mental disabilities.

The symptoms of some illnesses may also present themselves in a way that may be misinterpreted, e.g., an epileptic seizure being considered as drunken and disorderly behaviour. This could also apply where there is a mental impairment.

Allegation: A complainant with learning difficulties felt that he was not taken seriously when he reported that his bus pass had been stolen and he was told he would require a social worker to make a complaint on his behalf.

Gender

Sex discrimination includes transgender issues. Discrimination on the grounds of sex is based on biological differences; gender is the cultural expression of masculinity and femininity.

Allegation: A complainant who is male to female transgender alleged that she was placed inappropriately in the male wing of the custody suite.

Sexual Orientation

Allegation: A complainant who is gay alleged that police, when responding to a dispute that he and his partner had with their neighbours, took the side of their neighbours.

Religion and belief

Discrimination on the grounds of religion may be simpler to recognise and will normally take the form of specific words or failure to account for practices relating to a religion or belief.

Allegation: A Jewish complainant alleged that, following arrest, the custody sergeant was wearing a visible badge showing the Palestinian and Lebanese flags. The complainant found this offensive. Allegations were also made that the timing of the police interview coincided with the start of the Sabbath.

What is often more difficult to assess is the impact that a particular policy or form of police action takes and the affect this can have on those of a specific religion or belief.

Allegation: A complainant of the Sikh faith alleged that a stop under Terrorism legislation was based only on his Asian appearance and faith.

Allegation: The complainant was subject of a planned firearms operation and was identified as a possible suspect for the London bombings. The complainant alleged he was treated and reported as a terrorist despite there being no evidence to support this.

Age

Age discrimination could as easily refer to the treatment of young people as to older people.

Allegation: a 78 year old man alleged that officers should have taken account of his age when they arrested him and should not have used so much force.

Section 6: Step by step response to allegations of discriminatory behaviour

Initial handling of the complaint

The initial response to the complaint will inevitably affect the complainant's confidence in any subsequent investigation or local resolution. Officers who record complaints should therefore receive appropriate training to enable them to respond openly to complainants.

People who believe they have been discriminated against may be unwilling to express their opinion about why the officer treated them badly until they are confident that they will be heard respectfully. It is therefore crucial that the recording officer is able to provide appropriate encouragement.

It may not be until the complainant speaks to the investigating officer that he or she makes an allegation of discrimination.

The officer that records the complaint should take active steps to promote trust and confidence in a fair investigation. Some examples:

- never assume that a complainant's partner is of the opposite sex;
- if a complainant says that she or he is lesbian or gay, find an opportunity to show that you accept this information without judgement;
- if the complainant is clearly of a specific faith and you do not already know whether this means officers should behave in certain ways (such as removing shoes if entering their home), ask and make a note of any comments in the file (so that the complainant is not required to explain the same thing more than once);
- the complainant may not speak English fluently and may require an interpreter or other assistance;
- if the complainant has a disability, check how this may affect your future contact: for example, ease of travel to the police station, use of telephone, ease of reading. Record any adjustments that should be made.

If the complainant has not identified the officer subject of complaint by name or number, any detail that can help to identify the officer at this early stage should be recorded.

Record the complaint in the person's own words. Take as much detail as possible, especially in the field that relates to discrimination. Consider taking a witness statement even at this early stage. This will provide a common understanding of the exact complaint.

Standards for recording complaints

Each force should have appropriate systems for recording and monitoring all allegations of discrimination.

All complaints where there are allegations of police misconduct should be recorded in line with the allegations. This is in accordance with IPCC statutory guidance and national recording standards.

The principle set out in the ACPO Hate Crime Manual for the recording of a hate incident or crime can equally be applied to allegations of discrimination against a police officer or member of police staff:

'Any incident, which may or may not constitute a criminal offence, which is perceived by the victim or any other person, as being motivated by prejudice or hate.'

This means it is the complainant's perception of discrimination which is crucial in the recording of the complaint. At this stage, any apparent lack of supporting evidence is not relevant.

Even if the complainant does not make an allegation of discriminatory behaviour, the investigating officer may nonetheless decide that discrimination could be a factor and should be recorded and included in the investigation plan.

It will be necessary to review the recorded data as more information about the complaint is revealed.

PSD gatekeeper

The PSD gatekeeper plays a crucial role and should receive appropriate training to ensure that he or she is able to assess accurately the gravity of the allegation and assign the right officer/s to the case.

Allegations of discrimination are not inevitably at the most serious end of the spectrum: all allegations must be assessed individually. However, an allegation of incivility could be more serious if, for example, it could have sparked public disorder, or if the allegation has become the focus of public concern, or if the incident may demonstrate that an officer's subsequent decision making may have been influenced by discriminatory attitudes.

Gravity factors

The application of a gravity matrix could help to ensure consistency in deciding how to proceed with a complaint. The factors to be considered include:

- Where does the allegation sit on a spectrum of inappropriate words through to physical assault?
- Did the incident take place in private or in public?
- Has the impact of the incident spread to the wider community?
- Is there a recognised local issue that this complaint touches upon?
- How did the evidence come to light, for example, did another officer report the matter?
- Is there likely to be strong supporting evidence?
- Is there anything relevant known about the officer?
- Has there been any significant delay in making the complaint?
- Are there any additional aggravating factors?

IPCC referrals

If the matter meets the IPCC threshold for referrals, then a referral must be made.

Mandatory referrals to the IPCC

The requirement for mandatory referrals to the IPCC can be found in regulations 2 and 5 of the Police (Complaints and Misconduct) Regulations 2004. In particular, regulation 2(2) (a) (iv) and regulation 5(1) (d) provide that any complaints or conduct matters alleging conduct which constitutes;

(iv) a criminal offence or behaviour which is liable to lead to a disciplinary sanction and which in either case was aggravated by discriminatory behaviour on the grounds of a person's race, sex, religion, or other status identified in guidance by the Commission; must be referred to the Commission.

Should the complaint be referred to the IPCC?

The first test: is the behaviour liable to lead to a disciplinary sanction?

When looking at 'is liable to lead to' the consideration should be: in the event that the conduct is proved it is likely to lead to disciplinary sanctions. A disciplinary sanction, for these purposes, is any sanction imposed through formal misconduct proceedings including written warnings under the 2004 regulations.

The question to ask is, if an allegation were proved, then would disciplinary sanctions be likely to follow? No assessment is required of the likelihood of proof; however, at this stage the behaviour to be considered is the main offence, before the 'aggravation' is taken into account.

The second test: is the offence aggravated by discriminatory behaviour?

This test applies to the complaint or allegation rather than the available proof. Using racism as an example, the complainant may allege direct racist behaviour or language, or they may say that the officer's actions resulted from racial discrimination. It is equally possible that the complainant does not allege discrimination, but that the investigating officer believes discrimination is a factor. In any of these circumstances the second test would be met.

Voluntary referral

There are allegations that might not meet the criteria for mandatory referral but should nonetheless be considered for voluntary referral to the IPCC.

The questions to ask are:

- are there serious concerns or exceptional circumstances that may have a significant impact on public confidence?
- is there a particular public concern?
- is there any reason why this allegation might be difficult to investigate locally?

Example of appropriate voluntary referral: A complainant alleges he has been stopped on so many occasions over a short period of time that the only possible conclusion is that the police force's actions are discriminatory. The complainant states that others within the local community have had similar experiences and this has been reported in the local newspaper and to the police authority.

Forces may choose to refer internal conduct matters if they feel the criteria are met. However, the IPCC is mindful of the risk of 'raising the stakes' identified in the Taylor review:

"Where race, gender (etc) issues are central (or in some way involved) the result, too often, can be 'to raise the stakes' or push decision making responsibility to an unnecessarily high level. Real and anecdotal evidence confirm this contributes to the concerns about disproportionality from Black and ethnic minority officers. In essence there is a 'fear of getting it wrong'. The pressure to

have taken the investigation to its limits (in order to clear or confirm an allegation) is great, as a 'very thorough' investigation is seen as a measure for the investigator and the organisation."
Taylor Review of Police Disciplinary Arrangements

The IPCC encourages forces to take careful account of the need for proportionality with internal conduct matters as with public complaints.

Monitoring

The IPCC encourages the monitoring of complaints and allegations of discriminatory behaviour. In line with its guardianship function, the IPCC may conduct dip sampling exercises of discrimination complaints and allegations recorded within individual police forces.

Local resolution

Local resolution can, if handled sensitively and professionally, have a positive impact for both the complainant and the officer and provide a learning tool for the police service.

Local resolution is not part of the discipline process and outcomes arising from local resolution should never be used or regarded as a disciplinary sanction.

Allegations of discrimination may be locally resolved if the complainant consents to this and understands the options available for dealing with a complaint. However, it is important to weigh up the advantages and disadvantages of this approach and to record the decision making process.

Reference to the gravity factors (see p ..) will help to establish whether the matter is suitable for local resolution.

Consideration should be given to the possibility that the force could lose an opportunity to learn from any wider issues that the complaint reveals.

Record the decisions that are taken regarding local resolution and the reasons for them. Establish a review process with an officer of an appropriate rank to determine that local resolution remains the appropriate outcome. This should be done within the Professional Standards Department.

If a decision is taken to proceed with local resolution, it is essential that the process has the confidence of the complainant and the officer involved. The officer who undertakes local resolution must have the additional skills needed for dealing with complaints in this way, these include problem-solving and customer service.

Local resolution can include appropriate management action. Managers may decide, as a result of the complaint, that an officer requires close supervision or further training. It may be appropriate to make a record in the officer's personal file or PDR.

If an officer is to learn from the complaint, then it is essential that any record of the action should be reviewed to ensure that his or her career is not determined by this single event. If an officer can demonstrate an ability to learn and change his or her behaviour, then this should be acknowledged as a real benefit to the force.

Checklist before proceeding with local resolution:

- Does the complainant consent to local resolution, having been informed of all options for dealing with the complaint?

- Has the local resolution process been explained in terms of what will happen, when and how this will be concluded?
- Does the complainant understand that an officer cannot be obliged to apologise?
- Is there a clear understanding that the process and the outcome are about learning and not formal discipline?
- Have the expectations of the complainant and the concerns of any officer involved been addressed?

These considerations apply as much to the officer against whom the allegations have been made as to the complainant. Officers may feel, because discrimination has been alleged, that they do not want to be involved in the local resolution process. To ensure confidence in the process, those conducting local resolution have a duty to both the complainant and the officer to make it clear what is involved. It is appropriate to encourage participation where the outcome could result in a quick and relatively straightforward way of providing an explanation and understanding of the complaint and the actions that led to a complaint being made.

There may be occasions where the complainant has opted for local resolution but where a pattern of behaviour is identified for a particular officer or staff member and those making the initial assessment of the complaint should consider carefully whether local resolution remains appropriate. This does not exclude the use of local resolution but there may need to be consideration of whether there are underlying reasons for the pattern of behaviour that local resolution will not address.

The IPCC & police authority each have duties to monitor local resolution. The IPCC considers appeals against the local resolution process.

Investigating officer

If it is decided that the matter should be investigated, the important next step is to assign the investigating officer. Whenever there is an allegation of discrimination, the investigating officer must have received training that will enable him or her to respond effectively to the complainant and to identify relevant evidence.

Initial response to the complainant

The guidance for the officer who records the complaint (see above) is equally applicable to the investigating officer. He or she must listen actively and demonstrate an open, non judgemental attitude.

Some people will have experienced discrimination so often in their lives that they will reasonably anticipate it from people in authority. The investigating officer has a responsibility to actively overcome these fears and anxieties.

Even at this early stage, the statement or account taken from a complainant should explore the impact as well as the detail of the allegation, particularly where the alleged discrimination is about perceived behaviour of harassment and not direct discrimination.

Example: a complainant has alleged that the cumulative affect of being stopped and searched frequently over a period of time has resulted in the feeling that there can have been no other reason for being stopped other than racial stereotyping. The personal impact is anxiety about leaving the house and a developing negative view of the police and how they act.

Victims' Code obligations

The Victims' Code is a set of statutory obligations. It applies to victims of crimes that would be recorded under the National Crime Recording Standard, with a few minor exceptions. The code does extend to victims of racist or homophobic insults.

It is rare that a complaint against a police officer is recorded separately as a crime, however, the standards in the code reflect simple good practice and should be applied.

The principal purpose of the code is to ensure that victims receive appropriate support and that they are properly informed about the progress of their case. The code states that enhanced services must be provided for vulnerable or intimidated victims.

Regular communication

Whether or not the Victims' Code must be applied, regular communication will assist in building trust and confidence. Complainants and officers alike will be reassured to know about the progress of the complaint.

Decision log

A decision log should be established at the outset of an investigation. There is considerable public interest and concern regarding allegations of discriminatory behaviour and those investigating should be in a position to justify the decisions they take in any investigation of such allegations.

See appendix 2 (p..) for decision flowchart

Aims of the investigation

The IPCC has set a framework of values for professional standards investigations that they should be about a search for the truth, rather than blame. A fair investigation should aim equally to prove or disprove the allegations. If it is possible to exonerate the officer, then this too is in the interests of justice.

Terms of reference

The terms of reference for any investigation into allegations of discriminatory behaviour should always include reference to this guidance. The investigating officer should consider whether there is any additional guidance that may be relevant, such as the ACPO Hate Crime Manual.

In supervised investigations, terms of reference will be agreed by the IPCC and may have some IPCC input. In managed investigations the IPCC will set the terms of reference in consultation with the police force.

In the interests of transparency, consideration may be given to providing the complainant with a copy of the terms of reference.

Independent advice

The relationships between officers and people from minority groups will be affected by local circumstances. Investigating officers who are carrying out an investigation in another force, should first inform themselves about this local knowledge and understanding.

If the complaint is sufficiently serious, it may be appropriate to establish an independent advisory group (or a community reference group in the IPCC). The alleged discriminatory behaviour may have had a significant impact within the wider community or, more directly, on the complainant and their immediate family. The gravity of the matter should be assessed (see p .. for *gravity factors*) and the decision recorded in the log.

These are factors to be considered in deciding whether independent scrutiny, advice or consultation with external agencies is required.

- Would a community reference group allay any lack of confidence that there will be an effective investigation?
- Would such a group assist the investigation by providing advice on local community concerns or advice on specific areas of discrimination?
- Is family liaison an appropriate response? This may not be proportional in many investigations but may need to be considered where there is likely to be a significant impact on individuals and the community.

An IAG can bring the benefits of independent oversight. However, it is essential that the group's strategic role is not compromised by straying into operational activity and determining the course of the investigation. The investigating officer must be clear about the purpose of the IAG and state this in the decision log. It is equally important that the independent members of the group are clear about the purpose. IAG members must know their remit, in particular, they should understand that they have a strategic role and they will not be asked to contribute to the investigation plan.

It may be advantageous that an officer who is senior to the investigating officer manages this process so that there is a gap between the investigation and the strategic issues.

There should be a careful assessment of the information that will be provided to the IAG. Evidence given to the Morris Inquiry revealed that officers have felt exposed by details of their case being provided to people in the local community via the IAG.

Early contact with police associations and those supporting officers against whom allegations have been made may be beneficial. Their expertise and advice can cover issues such as the service of notices and interviewing of officers.

The investigating officer may seek expert advice from a range of sources. There may well be officers or staff within the force who are able to provide expert advice about the area of discrimination connected with the complaint. There are also a number of independent consultants who may assist in identifying lines of enquiry.

Local organisations such as the race equality council may assist with advice, but it is important to establish that there will be no conflict of interest. However, their support for the complainant can be equally helpful.

Investigation plan

The investigation process is a search for the truth - to establish what happened during an incident. Primary accounts from the complainant, witnesses and the officers may not be sufficient where allegations of discrimination have been made.

These are considerations for the plan:

- i. What needs to be done immediately
- ii. Which (senior) officer will review the investigation and at what stages
- iii. What documentary evidence is available to be recovered – everything should be considered and decisions should be recorded
- iv. Forensic considerations
- v. Covert opportunities (in serious cases)
- vi. Comparison/history
- vii. Identifying officers subject of complaint and those to be treated as witnesses
- viii. Liaison with CPS, if relevant, to establish points to prove
- ix. Establish appropriate welfare support for complainant and officer

Collecting evidence

Available evidence might include pocket books / notes / stop search slips / original call CAD / crime reports / anything where the officer recorded the incident / CCTV / forensic.

The investigating officer should consider establishing whether there are intelligence reports about the officer or whether there might be anything recorded on his or her personal files. However, there are data protection issues here and the investigating officer must be able to justify any reference to this personal data (see Data Protection Act 1998 and also the ACPO *Data Protection Code of Practice*).

Similarly, covert methods of gaining evidence (telephone logs, surveillance, integrity testing) should be considered, but only if there is an allegation of a criminal offence and the circumstances would be justified under RIPA (Regulation of Investigatory Powers Act 2000). Again, the decision, which must be proportionate, should be recorded in the decision log. If the investigation is being conducted locally, the investigating officer should refer to the professional standards department on these decisions.

There may be potential witnesses not immediately identified within the vicinity of an incident. Appeals for witnesses or house to house enquiries may be necessary.

If the allegation indicates that there may be a systematic failure in policing, then it may be appropriate to extend consideration to a particular division or area within the police force. This may include consideration of local or national policies adopted by that force either in relation to a particular area or more generally on a community relation level.

The potential relevance of national guidance should be considered. For example, the ACPO *Hate Crime Manual* may apply to an allegation that officers did not respond appropriately to a reported incident of racist abuse.

Complainant's statement

The basis for any effective investigation is a primary assumption of good faith on the part of the complainant. The primary assumption of good faith does not minimise an investigating officer's proper commitment to establishing the facts.

People from minority groups are often reluctant to express their belief that a problem they have experienced is rooted in discriminatory attitudes. This is partly a reaction to the widely held view to the contrary – 'playing the race card' - and complainants may fear that their perception will be dismissed out of hand. Lesbian and gay complainants may be reluctant to express their perception of discrimination because this requires them to disclose their sexuality to the investigating officer.

The investigating officer should therefore be positive in enabling complainants to explain any concerns they may have about why an officer behaved the way they did. Investigating officers need to be alert to clues or hints that provide an opportunity to demonstrate a readiness to accept and investigate this aspect of the allegation.

If a complainant does identify unlawful discrimination as a factor in the incident, a statement which reads 'they treated me differently because I am black/gay etc' could never assist an investigation. The investigating officer needs to take time to explore what it was about the officer's behaviour that gave rise to this impression.

Investigating officers are properly reluctant to put words into a complainant's mouth, but open questions that demonstrate a willingness to record all aspects of the complaint will build trust. The statement should be seen as the common understanding between the complainant and the investigating officer regarding what has taken place. The fuller the statement, the better. The statement may include hearsay and other issues that the investigator may consider not direct evidence but will assist decision makers that perhaps do not have direct access to the complainant.

It is essential that allegations of discrimination are given in detail, noting exactly why the complainant believes that discrimination was a factor. In particular:

- What was it that made the complainant believe the officer's words or actions were discriminatory?
- Did the complainant note any differences in the way they were treated compared with others?
- Did the complainant note any differences about how this officer behaved compared with other officers (either on this occasion or previous occasions)?
- Was there anything about the officer's language that the complainant noted?
- What was the impact on the complainant?
- Any background that may be relevant to the impact on the complainant.
- Any other issue that the complainant considers relevant to the complaint

When the statement of complaint has been taken, the investigating officer should review the recorded allegations. He or she should also review the gravity factors and reconsider whether the matter should be referred to the IPCC.

Complainant's history

What matters most in weighing the balance of probabilities is the evidence of the case. Nonetheless, it is appropriate to check the criminal records of the complainant and the officer.

However, the investigating officer should be clear about what might be relevant to the complaint. A conviction for perjury might reasonably affect the balance of probabilities, but a history of crime does not necessarily mean that the complaint is fabricated. Indeed, if someone has had a great deal of contact with the police and yet this is their first complaint, this might weigh in favour of their account.

Witness statements

Primary accounts should fully reflect the perspectives of all those spoken to during an investigation. For the more serious allegations, it may be appropriate to tape interviews with witnesses.

There may be sensitive issues of confidentiality, for example if witnesses are lesbian or gay but are not open about their sexuality.

Officers who are witnesses

Officers who have witnessed the incident under investigation may be supported to give evidence. These officers should be reminded of the public duties imposed on police forces to eradicate certain forms of discrimination and could be encouraged to share this responsibility. They should also be reminded of their personal duty to report wrong doing (now included in the *standards of professional behaviour*). It may be appropriate to acknowledge the value of officers who do assist with investigations by formally commending their honesty and integrity.

On the other hand, if there is objective evidence to support an allegation and an officer has witnessed the incident but has declined to come forward, the investigating officer should consider management action for such officers. Consideration should also be given to taking a negative statement: for example, "I was there and I didn't see anything".

Supporting witnesses

It may be appropriate to accept a witness's reluctance to give evidence (whether an officer or a member of the public). Their account could be given as a covert human intelligence source (CHIS). This will help to establish the circumstances and may provide a reasonable basis for further investigations that could lead to reliable evidence.

A witness may initially be reluctant but, with support from local organisations or from police associations, they may later come forward. Making sure that they understand the police complaints system and how it works could help them to feel confident about coming forward.

Interviewing officers

If the allegation is at the more serious end of the spectrum then considerations set out in ACPO's strategy on Investigative Interviewing may be required. If the matter is serious, only officers who have received the appropriate training should undertake the interview(s).

All interviews should follow an interview plan that allows the officer to explain what happened and is focused on the points to prove. The investigating officer should be able to demonstrate in the interview plan the ways in which the officer's motivation will be explored.

This is ordinary good practice in line with PEACE interviews. ‘Did you use these words?’ and ‘Did you treat the complainant differently because he is black?’ are just as likely to be met with a denial as ‘Did you threaten or insult him?’ The approach to interviewing an officer under investigation for discriminatory behaviour is the same as in any other investigation.

The officer should be invited to:

- describe in detail what took place
- describe his or her perceptions of the complainant and the incident
- reflect on what may have prompted the complaint
- reflect on their behaviour in the light of the relevant professional standards

Reference to the Dx3+E formula (see below) is essential in planning the interview. The investigating officer should consider whether the 3 Ds are in place:

- difference in race/sex/age/ etc from either a real or hypothetical person in a similar situation
- difference in treatment
- detriment (including hurt feelings).

If the 3 Ds can be established, then the investigating officer should look for a satisfactory explanation for the difference in treatment.

However, it is just as important to be able to answer the question – why did the officer behave in this way? This question of *why* is one that employment tribunals address when considering allegations of discrimination; this is *after* they have reached their conclusions about what it is that was said or done.

Reaching conclusions

First consider the individual factors that contributed to the allegation(s). It is possible that, taken separately, there is no evidence of discrimination; however, the matters should then be considered as a whole and the pattern of behaviour may reveal that the officer’s explanation is inadequate.

Any prima facie evidence of a crime should be referred to CPS.

The facts of the matter must be determined *before* considering the disciplinary outcome. The conclusion must be based on the balance of probability (see *Standard of Proof* p..).

It may be helpful to bear in mind that when employment tribunals consider evidence that shows that discrimination *could* be a reason for the behaviour and there is no satisfactory alternative explanation, then they must conclude that discrimination was a factor.

Using the formula: Dx3+E

This formula is simply a tool to help identify discrimination. It should not become a straightjacket that prevents investigating officers from making sensible decisions based on the evidence.

- Difference in race
- Difference in treatment
- Detriment for the complainant +

- no Explanation for these differences is available from any source.

Difference in race

This is the difference in race (or sex, sexual orientation, disability, religion or age) between the member of the public subject to the officer's behaviour and another member of the public in a similar situation – either real or supposed. The officer and the member of the public could be of the same race and there could still be an allegation of discrimination.

Difference in treatment

There is a range of ways that difference in treatment may be identified:

- Were other members of the public present at the same incident who were treated differently?
- Were other officers present who treated the complainant differently from the officer who is complained about?
- Has the complainant been in contact with the police previously and been treated differently from how they were treated on this occasion?
- If there are no actual comparitors, how would you expect a member of the public to be treated in the same circumstances?

This last consideration does not require the investigating officer to make a judgement ahead of the investigation, it is simply a means of establishing whether discrimination could possibly be a factor. The most important part of the equation is the explanation – the question 'why?'

Detriment

There may have been tangible detriment, such as loss of liberty. However, detriment can also include loss of dignity and hurt feelings. For example, someone who has been stopped frequently has experienced a detriment in having been prevented, however briefly, from going about their business and in the experience of vulnerability that may arise from feeling 'picked on' by police.

No Explanation

This is the most challenging aspect of the equation and requires considerable judgement on the part of investigating officers (and disciplinary panels). Officers subject to complaints of discriminatory behaviour are almost certain to offer alternative explanations for their conduct, and may even be willing to admit generally poor performance rather than accept that they discriminated against an individual.

The IPCC acknowledges that a finding of discriminatory behaviour will have a significant impact on an officer's career and that this inevitably has an impact on the cogency of the evidence required. Home Office guidance states: "...*The more serious the allegation of misconduct that is made or the more serious the consequences for the individual which flow from a finding against them, the more persuasive (cogent) the evidence will need to be in order to meet that standard.*"

Nonetheless, the officer must still provide an explanation for their behaviour that is acceptable. If the explanation is that they were having a bad day, or they generally do things this way, they will need to show that this behaviour was not exceptional. For example, if the complaint is about racial discrimination, if this was 'a bad day', why was it that the complainant (and not a white person who was dealt with that day) took the brunt? Similarly, if the officer accepts that he or she was negligent, why were they negligent with this complainant?

The question why must have a satisfactory answer.

Investigation report

This report is open to scrutiny and should be written according to the IPCC statutory guidance (*Making the New Police Complaints System Work Better 2005*).

Outcomes

Referral to CPS

If the conduct indicates that a criminal offence has been committed then the matter should be referred to the CPS.

Aggravation/Mitigation

Determining the outcome will depend on the aggravating and mitigating factors. Here are some examples, but they are not absolute - as an illustration, lack of training may not serve in mitigation if the officer should have known that the language he or she used was inappropriate.

Aggravation

- Unwillingness to learn (as demonstrated in interview)
- Seniority
- Complaint history
- Role
- Impact on the individual or community
- Abuse of authority
- Dishonesty

Mitigation

- Willingness to learn
- Honesty
- No previous history
- Lack of training (see above)
- Lack of experience
- Positive history/ evidence of good character

Training

Training may be appropriate, but it should not be an automatic response to proved allegations of discrimination. Did the officer behave inappropriately because he or she did not know how to behave? Did the officer demonstrate a lack of skills that could be improved with training? Has the officer recently received training that addressed the issues in the complaint? These questions should be considered before recommending training as the best outcome.

Supervision

Close supervision may be needed for an officer who has behaved, for example, with a lack of courtesy. In this case it is important that the supervisor knows how the officer's behaviour can be managed. Any decision regarding supervision should be made with the explicit agreement of the supervisor. Does the supervisor have the skills to identify discriminatory behaviour?

Making a record

It may also be appropriate to record the matter on the officer's PDR or personal file or to ensure there any intelligence is captured. (See *Local Resolution* p. for further guidance on making a record),

Section 7: Misconduct action

Proportionality

One of the many beneficial outcomes of the Report of the Stephen Lawrence Inquiry is that there is now far less public tolerance of overt discrimination. But this has meant allegations of discriminatory behaviour are likely to rest on perceptions rather than specific language or actions. Proving an allegation becomes commensurately harder.

Recommendation 57 of The Stephen Lawrence Inquiry report states, *“the police service should, through the implementation of a Code of Conduct or otherwise, ensure that racist words or acts proved to have been spoken or done by police officers should lead to disciplinary proceedings, and that it should be understood that such conduct should usually merit dismissal”*.

This approach highlighted the need to deal robustly with discriminatory behaviour. However, the impact on investigating these allegations has been that they are rarely proved. For whenever a proved allegation could lead to dismissal, a high level of cogency is required for proof (see *standard of proof* [p.](#)) The difficulties are compounded if an officer fears that any evidence of racism could result in them losing their job as they inevitably become highly defensive.

On occasion it will be entirely appropriate that an officer should face a tribunal for complaints of discriminatory behaviour, but in those instances where the behaviour is clearly unwitting, there needs to be a disciplinary response that is closely directed at changing the behaviour or attitudes. The Home Office response to Recommendation 57 accepted the recommendation in principle with a clarification that it *“cannot be applied in a generalised way in practice, because each case must be decided on its merits, taking account of any mitigating factors and the seriousness of the behaviour alleged.”*

In more recent times, the report of the Morris Enquiry, the CRE formal report on the police service and the Taylor review of the police misconduct system have all commented that a proportionate and considered assessment of the evidence is required with an appropriate sanction applied. All expressed the view that there should not be a fixed penalty for racial or other discriminatory misconduct.

“It is perhaps not entirely unsurprising that [...] upward referral occurs when matters involving those important and sensitive issues can ‘by definition’ be classed as serious or aggravating factors that justify being handled as, in effect, gross misconduct. If discrimination is always serious to the extent that it is always gross misconduct then upward referral may be the regular but unintended consequence. Has not society and policing moved forward since such an approach was obviously necessary to get the matters ‘on the radar screen’ and for action to be taken. If the proposals in this review are to be adopted it will mean that the assessment is individual and proportionate in each case. Should not the classification of discrimination issues as always serious be re-visited to reflect the reality of the individual incident?”

The Taylor Review of Police Disciplinary Arrangements (2005)

The IPCC wants to see an increase in public and police confidence through the effective handling of allegations of discriminatory behaviour. Police officers under investigation should want to co-operate with those investigating so that the allegations can be explored. The fear that any disclosure could lead to dismissal can prompt a vehement denial of discriminatory behaviour with

no further reasoning provided. This is not helpful in finding the reason for the behaviour and it can block an opportunity to provide the complainant with an explanation.

From the complainant's point of view, recent reports have shown that confidence in dealing with issues of discrimination was low, particularly where internal conduct matters were identified.

Bill Taylor stated in his *Review of Disciplinary Arrangements* that, "Initial reports (whether from members of the public or internally generated) must be formally 'assessed' with the full range of options available for responding. (For example, crime investigation, misconduct, gross misconduct, unsatisfactory performance, grievance and mediation.) While initial reports need to be formally assessed, they need not necessarily be dealt with by way of formal procedures. In some cases a simple apology may suffice."

These guidelines therefore recommend that, in cases of discriminatory behaviour, as in any other disciplinary matters, the penalty should take account of the officer's attitude when faced with a substantiated finding.

On some occasions, an officer may be found to have behaved inappropriately but the behaviour may have been fully in line with force practice. The lessons learned from these cases should be recorded and necessary changes should be implemented and monitored.

Evidence for a tribunal

In those instances where officers attend misconduct hearings, it is important that the members of the tribunal who hear the evidence should fully understand the principles that are outlined here. Chief officers should receive these guidelines as part of any pre-hearing bundle to assist them in determining guilt regarding charges of discriminatory behaviour.

Learning lessons / other conduct matters

The IPCC will welcome a proactive approach to tackling discrimination. Investigating officers may find that an officer has not breached the standards of professional behaviour, but that nonetheless the complaint has raised important questions about the need for training or a review of practice. This is common practice in other, more technical, areas of policing and the IPCC encourages PSDs to extend this approach to the promotion of race equality.

Complaints provide an important opportunity to review public services. There will be occasions when an officer's attitude appears to reflect a similar attitude within the team or department. Investigating officers have a responsibility to explore these wider issues.

In those cases where the investigation leads to recommendations for changes to force policies and/or practice, there should be a clear process for review to ensure that the recommendations are carried out.

No misconduct

An investigation might show that there were no failings in individual conduct, yet despite this there had evidently been a general failure in service towards a complainant.

An investigating officer should consider

- Does the force owe an apology to the complainant for failings in service?

- Did the force meet its positive duties under the Human Rights Act to deliver fairness, equality and dignity?
- Are there practices within a team or division that should be reviewed?
- Do any force policies have a disproportionate impact on a specific group (indirect discrimination)

Supervision

If the investigating officer's report recommends close supervision for an officer subject to complaint, does the supervising officer have the skills that are necessary to provide the supervision?

Section 8 Implementing these guidelines

Training

Concern about race discrimination is an issue that is familiar to all professional standards officers. However, it does not follow that investigating officers have a common understanding of how race discrimination, or indeed any other form of discrimination, might be identified. It is essential that they, along with their supervisors, develop their knowledge and skills in this area. Put simply, they need to know and agree what they are looking for. Heads of Professional Standards Departments have a pivotal leadership role in this development.

Just as there are specific issues relating to disability and the law, there are particular concerns about widespread homophobia within police forces. This has manifested itself in disturbing cases of bullying and harassment of lesbian and gay officers, but can also be identified in apparently low level behaviour. The IPCC expects professional standards officers to employ their leadership and guidance role in explicitly challenging homophobic behaviour at all levels.

Police forces are delivering diversity training to all their officers, but this training might not meet the specific needs of PSDs. Developing a personal awareness and acceptance of different cultures and communities is not the same as identifying discrimination by individuals and institutions. The Stephen Lawrence Inquiry report draws a helpful distinction between awareness training and anti-racism training.

The IPCC recommends that PSD officers (and investigative support staff) should receive specific formal and informal training to develop their ability to identify discrimination. This is in addition to the cultural awareness and race and diversity objectives for all officers. The arrangements for this training as it relates to race, disability and gender must (under the public duty) be set out in the force's equality schemes. This recommendation reflects the recommendations made by HMIC in their report 'Diversity Matters'.

The development of the PSD team should be undertaken in the context of force priorities and concerns on discrimination issues and with an awareness of any specific initiatives to promote equality.

Community involvement is essential in this aspect of the department's development (also recommended by HMIC). Engaging with local people's perceptions of policing will help enormously to make the development effective. Some forces, usually those that are more urban, have easy access to community groups, other forces may need to take initiatives to build links. www.raceactionnet.co.uk is a network that links police forces and enables them to share experiences and good practice on race issues: this can be a particularly helpful resource for rural forces.

Appeals

It is recognised that the majority of allegations of discriminatory behaviour will be dealt with locally by the police service. There is an appeal process to the IPCC following a local investigation of a complaint and the considerations for such an appeal cover the findings of the investigation; the proposed outcome and the information provided to the complainant.

Where an appeal is received and the investigation involved an allegation of discriminatory behaviour, the IPCC will be reviewing whether or not this guidance has been referred to within the

terms of reference and the extent, taking account of what is proportionate, of the application of the guidance.

Section 9: Glossary of useful contacts

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Section 10: List of abbreviations

ACPO	Association of Chief Police Officers
CAD	Computer Aided Dispatch
CPS	Crown Prosecution Service
CRE	Commission for Racial Equality
HRA	Human Rights Act 1998
IAG	Independent Advisory Group
IPCC	Independent Police Complaints Commission
PCA	Police Complaints Authority
PDR	Personal Development Record
PEACE	Planning & preparation; Engage and explain; Account; Closure; Evaluation
PSD	Professional Standards Department
RRA	Race Relations Act 1976
RRAA	Race Relations Amendment Act 2000

Section 11: Summary of guidelines (these will be amended when the document is in its final draft)

Mandatory referrals

Legal framework

- The force Race Equality Scheme should include reference to the crucial role played by Professional Standards Departments in promoting race equality.
- Investigating officers should develop their knowledge of the legal and policy frameworks that have an impact on these investigations.

Team development

- All PSD officers and staff should receive appropriate training to help them understand what is an allegation of racial discrimination and conduct an effective investigation.
- The knowledge and experience of local people should be drawn on as part of the team's development.

Identifying racism

- PSD officers and staff should develop a shared understanding of racial discrimination and how it might be identified. They should build this understanding on a recognition of specific local issues.
- Each force should give priority to the development of an effective Race Equality Scheme.
- Investigating officers should be aware of their responsibilities within their own force's Race Equality Scheme.
- If the Race Equality Scheme is to be effective, all police officers should have an awareness of the race equality principles and procedures that are in place locally.
- Investigating officers who are working in an outside force, should first inform themselves about local force developments in this area.

Interviewing the complainant

- PSDs should develop a departmental culture that assumes all allegations are made in good faith.
- Investigating officers and staff should conduct PEACE investigations and should be supervised on this basis.
- Investigating officers should make positive efforts to enable complainants to express their thought and feelings about why an officer behaved the way they did.
- The IPCC will place great emphasis on the quality of the detail that is made available in the statement of complaint.

Interviewing the officer

- Investigating officers should be alert to the range of approaches that may elicit evidence of racist attitudes or behaviour.
- The interview plan should follow the PEACE guidance.
- The interview should explore motivation.

Gathering evidence: Guidelines

- Investigating officers should seek appropriate comparative evidence.

Standard of proof

- Investigating officers should draw on the Dx3+E formula.

- The standard of proof is the balance of probabilities, just as it is with all complaints.
- Chief officers should receive appropriate training to enable them to reach informed decisions at tribunals.

Ancillary Matters: guidelines

- Investigating officers should routinely consider whether the conduct they have investigated reveals a need for training or supervision.
- These considerations should extend to an officer's colleagues and supervisors. The IPCC will encourage investigating officers to note the reasons why, in each case, they believe it would be disproportionate to extend the investigation.

Disciplinary Action: guidelines

- The IPCC and forces should work together to develop a more subtle and varied response to substantiated allegations.

Case summaries

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] IRLR 285, para 8

The House of Lords said that tribunals may find it helpful to consider first the reason why a particular act occurred and then to go on to consider whether this amounted to less favourable treatment using a comparator. Indeed it is sometimes only possible to find a suitable comparator after the reason why has been established. Posing the question why, places the burden on the employer to provide an explanation.

Wong v Igen Ltd (formerly Leeds Career Guidance) [2005] EWCA Civ 142, [2005] IRLR 258

This case has led to what are known as the *Igen guidelines* which assist tribunals in reaching conclusions about allegations of discriminatory behaviour. The guidelines state that tribunals should first consider the facts and then go on to determine what inferences may be drawn from those facts. The tribunal is entitled to draw inferences from evasive or equivocal replies made by the employer.

Where the claimant proves facts from which the tribunal could reach the conclusion that the claimant had been treated less favourably, then the burden of proof passes to the respondent.

King v Great Britain-China Centre
[1991] IRLR 513 CA

The following principles and guidance can be extracted from the authorities:

(1)

It is for the applicant who complains of racial discrimination to make out his or her case. Thus if the applicant does not prove the case on the balance of probabilities he or she will fail.

(2)

It is important to bear in mind that it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption "he or she would not have fitted in".

(3)

The outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.65(2)(b) of the 1976 Act from an evasive or equivocal reply to a questionnaire.

(4)

Though there will be some cases where, for example, the non-selection of the applicant for a post or for promotion is clearly not on racial grounds, a finding of discrimination and a finding of a difference in race will often point to the possibility of racial discrimination. In such circumstances the tribunal will look to the employer for an explanation. If no explanation is then put forward, or if the tribunal considers the explanation to be inadequate or unsatisfactory, it will be legitimate for the tribunal to infer that the discrimination was on racial grounds. This is not a matter of law but, as May LJ put it in *Noone*, "almost common sense".

(5)

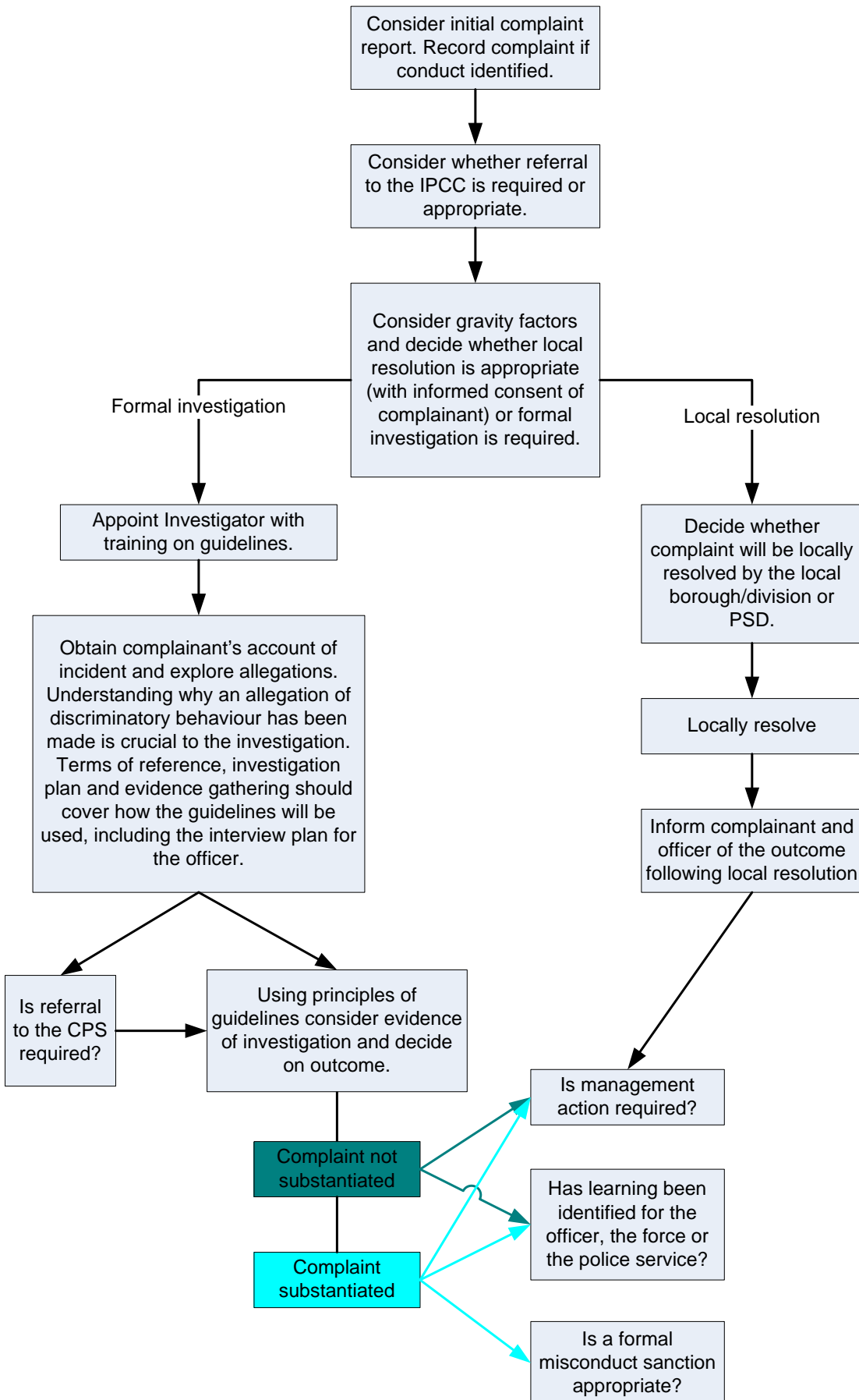
It is unnecessary and unhelpful to introduce the concept of a shifting evidential burden of proof. At the conclusion of all the evidence the tribunal should make findings as to the primary facts and draw such inferences as they consider proper from those facts. They should then reach a

conclusion on the balance of probabilities, bearing in mind both the difficulties, which face a person who complains of unlawful discrimination and the fact that it is for the complainant to prove his or her case.

Anya v University of Oxford and another [2001] EXCA Civ 405, [2001] IRLR 377, [2001] ICR 247
Lord Justice Sedley emphasised that because very little direct discrimination today is overt or even deliberate, the court should look at all the evidence surrounding a case, including indicators from before and after the particular action or decision.

Richardson v West Midlands Police [1997] Employment Tribunal case number 67433/95
The numerous relevant findings of this employment tribunal include that the respondent officer was 'acting in the course of his duty' even when off-site and off duty (so that the Chief Constable was still vicariously liable) and that the complainant officer still suffered discrimination by way of verbal racial abuse even when she was not present but heard about it afterwards. The tribunal also found to be discriminatory the force's complaints section's 'What do you want us to do about it?' attitude and their failure to keep the applicant informed of progress or to advise her personally of their decision not to uphold her complaint. (The findings of a tribunal are not binding on other tribunals or courts, but the case does contribute to the development of the law as it is applied.)

Appendix 2



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