

IPCC GUIDELINES

Dealing with allegations of discriminatory
behaviour

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Section 1: introduction

Few complaints about police conduct are as controversial – or as complex to investigate – as those alleging discriminatory behaviour.

There have been significant changes to the police complaints system since 2003. The creation of the Independent Police Complaints Commission (IPCC) was one of those changes. The publication of three major reports and reviews of the police service have brought with them a shift in attitudes and ethos, along with changes to the high standards expected of the police service.¹

The introduction of reforms to the police misconduct system on 1 December 2008 brings a cultural change to dealing with police complaints, with emphasis now placed firmly on learning and development. Where individual misconduct may be a factor, the processes for the handling of complaints are designed to be proportionate to the seriousness of the allegations and alleged behaviour.

Increasing public confidence in the police complaints system is a key responsibility for the IPCC. In comparison to the number of police complaints recorded, those alleging discriminatory behaviour are relatively few in number. Yet public confidence surveys carried out by the IPCC in 2004 and 2007 indicate that discriminatory behaviour is perceived to be one of the top reasons for making a complaint.

Alleged discrimination by the police, real or perceived, has the potential to damage the reputation of the police service. It can also have a considerable impact on relations with communities. Research conducted by the IPCC identified a number of groups that are likely to have less confidence in the police complaints system – including lesbians and gay men, members of the travelling community, those for whom English was not their first language and minority ethnic groups. Research also indicated a perception among minority ethnic groups of discrimination on the part of police officers; a perception often shared by the wider community even where there had been no personal experience of incivility or abusive contact with the police.

For police officers and members of police staff who are the subject of an allegation of discriminatory behaviour, it is an extremely serious matter. Complainants, officers and police staff alike need to be assured that the handling of a complaint is professional, proportionate and fair. The IPCC recognises that members of police staff have a different discipline system and standards in their terms and conditions of employment. Where allegations against members of police staff are being dealt with, those who handle or investigate complaints should be aware of the terms and conditions of employment for that member of staff when assessing whether there are issues relating to individual conduct and when deciding on any subsequent action. Nevertheless, the IPCC expects any complaint involving police officers and police staff to be dealt with in a way that seeks to achieve equal outcomes regardless of the status of the person complained about.

The priority attached to matters of discrimination by the IPCC is shared by the police service. Yet, paradoxically, the weight attached to discriminatory behaviour can serve as a barrier. An officer is unlikely to make admissions if he or she fears dismissal will result, and an investigator may be reluctant to conclude that discrimination has been a factor if the potential misconduct response may be considered disproportionate.

¹ *The Report of the Stephen Lawrence Inquiry*, William Macpherson (1999)
The Police Service in England and Wales: Final report of a formal investigation by the CRE (2005)
The Bill Taylor Review of Police Disciplinary Arrangements (2005)

These guidelines build on those published by the Police Complaints Authority (PCA) in 2003.² These revised guidelines cover allegations relating to age, religion and belief, disability, gender, race and sexual orientation, as appropriate. Currently, age discrimination legislation applies only to the workplace. The Equality Bill aims to extend protection against discrimination on the grounds of age to the provision of goods and services. Each complaint, conduct or death and serious injury matter should be assessed in light of its facts and the law that applies to it. The guidance contained in these guidelines should assist investigators to assess individual allegations and take a proportionate and professional approach to whatever process is applied. The same principles in reaching decisions on the handling and outcome of complaints will apply regardless of whether Local Resolution or investigation is used.

These guidelines have been developed to reflect general good practice for investigations. They take on board the principles applied within discrimination law. Employment Tribunals have built up a body of case law on allegations of discrimination. Although this case law does not necessarily apply to the investigation of public complaints (whereas it will be relevant to the investigation of internal dispute resolution), it can be helpful as an aid when gathering relevant evidence and reaching conclusions. Actions taken in the civil courts also provide guidance that may be relevant – but, unfortunately, these cases are not as widely reported.

The process for handling allegations of discriminatory behaviour should be proportionate and fair. Investigations that are demonstrably fair will, whatever the outcome, promote trust. Although the issue of whether disclosing material causes harm must be considered, experience shows that trust is further enhanced if investigations – especially those that may have an impact on wider communities – are carried out in a climate of openness and transparency.

However, investigating allegations of any type of discrimination does have an additional dimension. These guidelines place particular emphasis on the need to look for evidence from which a conclusion may be drawn. It is rare that objective evidence of direct discrimination exists. In some investigations it may be reasonable, for example, to look at a pattern of behaviour and to consider whether this pattern supports an allegation of discriminatory behaviour.

The new standards of professional behaviour, coupled with an emphasis on learning, should help to ensure a consistent approach throughout the police service. Now that managers at all levels will be dealing with public complaints, it has become even more important that there is a shared understanding of the issues throughout all levels of the police service. It is important that those who assess a matter as an opportunity for learning are confident that chief officers would support that assessment.

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. Recognition should also be given to those circumstances where the facts of the case indicate that an officer has behaved with evident integrity, but the outcome was unfair. 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. Each allegation needs to be assessed according to the relevant facts.

These guidelines will enable people dealing with complaints, wherever they are within a police authority, police force or the IPCC, to review and develop current practice and expertise. The IPCC, along with the police service, will be looking for evidence that these standards have been met. We recommend that the [summary sheet](#) (page 38) should be copied and made available to all investigative staff.

² *Investigating allegations of racially discriminatory behaviour* (2003)

Section 2: legal and decision-making framework

“Public confidence in the police is crucial in a system that rests on the principle of policing by consent. Public confidence in the police depends on police officers demonstrating the highest level of personal and professional standards of behaviour.”

Standards of Professional Behaviour

The new *Standards of Professional Behaviour* set out a framework for police officers and special constables. This framework explains what is, and is not acceptable. These standards generally apply to matters that have come to the attention of the police force or police authority on or after 1 December 2008. The terms and conditions for some police staff also include the *Standards of Professional Behaviour*. Those handling or investigating complaints should make themselves aware of the standards and terms and conditions of employment for the member of staff concerned when assessing whether there are issues relating to individual conduct and when deciding on any subsequent action.

The full range of *Standards of Professional Behaviour* is outlined in the Home Office Guidance on Police Officer Misconduct, Unsatisfactory Performance and Attendance Management Procedures. The *Standards of Professional Behaviour* cover:

- honesty and integrity
- authority, respect and courtesy
- equality and diversity
- use of force
- orders and instructions
- duties and responsibilities
- confidentiality
- fitness for duty
- discreditable conduct
- challenging and reporting improper conduct

For the purposes of these guidelines, the 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.

The expected conduct includes these points:

- *Police officers carry out their duties with fairness and impartiality and in accordance with current equality legislation. In protecting others' human rights, they act in accordance with Article 14 of the European Convention on Human Rights.*
- *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.*

Current discrimination law provides a complex mix of protection against discrimination across the different strands. The law arguably provides the highest levels of protection with regard to gender, race and disability and in these three areas, the law requires public bodies to take positive steps to promote equality.

The *Standards of Professional Behaviour* require police officers to act with fairness and impartiality and to respect all individuals and their traditions, beliefs and lifestyles (insofar as they are lawful). They must also report any behaviour that departs from the standards. In addition, the *Standards* place a duty on managers to support the promotion of equality and to set a good example in their own behaviour. These standards also apply to off-duty conduct in the following circumstances:

- off-duty behaviour which discredits the police service or undermines public confidence – the discredit being to the police service rather than the individual alone
- where an officer acts or is perceived to have acted in an official capacity when off duty and does not follow the *Standards*
- where approved business interests carried out off duty compromise, or are perceived to compromise an officer's impartiality

Operational policing

Police officers make judgements throughout their working day about who to stop, when to use force, and when to arrest. Often, these judgements are made in a split second, based on information available at the time. In addition, police officers have to deal with victims and witnesses of crime.

The guidance supporting the *Standards of Professional Behaviour* explains that the standards do not restrict police officers' discretion, but define the parameters of conduct in which discretion should be exercised. Police officers should be able to reflect on the judgements they make and see what influences their decisions.

Significant operational policing issues arise in connection to each of the strands of discrimination, but it is those issues connected to race and religion that are the most frequently debated in the wider public arena. The debate is often prompted by concerns in some communities about the use of police powers to stop and search. Interestingly, although young black and/or Muslim men raise this issue frequently in public forums and in IPCC research³, stop and search complaints are rarely referred to the IPCC, although they are still a significant complaint issue⁴.

Nothing in this guidance should prevent a police officer or a member of police staff from carrying out their proper duties and using their discretion as they deal with individuals. The new standards require officers to be fair. Using stop and search as an example, legislation for some stop and search powers, such as section 60 of the Criminal Justice and Public Order Act, does not oblige an officer to provide individuals with an explanation for why they are being stopped – nor do there need to be reasonable grounds to carry out a stop. However, in the interests of fairness any officer exercising a power to stop and search should be able to explain their decision to stop an individual, even if only to themselves.

³ *Public Perceptions of the Police Complaints System (2007)*

⁴ *Police Complaints: Statistics for England and Wales 2007/08*

Defining discrimination

Most anti-discrimination law, aside from the public duties, is framed negatively, ie – it prohibits unfavourable treatment. Human rights legislation, on the other hand, requires the positive act of upholding human rights. The new standards are more in keeping with human rights legislation in that they require police officers, positively to “*carry out their duties with fairness and impartiality*”. The standards require that officers “*do not discriminate unlawfully or unfairly*”.

It is also important to note that some acts are capable of justification. More detailed information can be found on the Equality and Human Rights Commission website at www.equalityhumanrights.com.

Criminal law

The Crown Prosecution Service (CPS) produces specific guidance on the prosecution of hate crime and on how this is applied across the strands. The CPS guidance currently covers racist and religious, homophobic and disability crime⁵.

Civil law

Significant differences currently exist in the legislation covering each of the different strands of discrimination. These differences are likely to be removed in the Equality Bill that is due to be considered by Parliament in spring 2009. However, there are common factors across the current legislation. The definitions listed below are of a general nature and reference should be made to the specific provisions that apply to each situation.

Direct discrimination occurs when a person treats another *less favourably* than they would treat someone else on the ground of, for example, disability.

Indirect discrimination occurs when a term or condition that is imposed on everybody puts one of the groups covered by the legislation at a disadvantage.

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 individual who has made a complaint about discrimination.

The Stephen Lawrence Inquiry report identified institutional racism as a significant factor in the service provided to Stephen Lawrence's family by the police. Police forces have properly responded by reviewing their policies and practices.

As noted, the legislation applies to the different strands of discrimination in different ways. Some behaviour may also be capable of justification.

The diversity strands

This guidance covers different strands of discrimination. Illustrations of complaints can be found at the [websites](#) listed on page 11.

⁵ www.cps.gov.uk

Positive duties placed on public bodies to eliminate discrimination refer only to race, gender and disability. Each of the other diversity strands applies to protection at work, and all but age to the provision of goods and services. (All these differences are likely to be eliminated in planned equalities legislation.)

The Equality Bill

It is understood that the Equality Bill will contain a new streamlined equality duty. This will replace the race, disability and gender equality duties, which will also cover gender reassignment, age, sexual orientation and religion or belief.

It is also expected that the Bill will include powers to outlaw unjustifiable age discrimination by those providing goods, facilities and services in the future, with a possible transition period before the new legal protections from age discrimination are implemented.

Examples of complaints

The following examples are illustrative of police complaints *alleging* discriminatory behaviour. They reflect the types of allegations made **NOT** the proved findings. Allegations can cover more than one diversity strand, a factor often seen where allegations of religious and national bias have been raised.

The examples below illustrate the range of behaviours that are perceived to be discriminatory. It is for the investigation to determine if the allegation is well founded.

Race

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

Allegation: an Asian 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, security checks he was aware his white colleagues from the CPS were not subjected to.

Disability

The Disability Discrimination Act makes it unlawful to discriminate against a disabled person or a person who has had a disability. The legislation contains a list of capacities that form part of the definition.

Assumptions about disabled people may lead to behaviour that is discriminatory. The symptoms of some illnesses may also present themselves in a way that may be misinterpreted – for example, an epileptic seizure being considered as drunken and disorderly behaviour. This could also apply where someone has a learning disability.

Allegation: a complainant with Aspergers Syndrome alleged that police officers did not take their allegation of criminal activity by a registered charity seriously. Having been given the opportunity to provide evidence against the charity and failing to do so, it was believed the police officer's decision to close the case was discriminatory.

Gender

Discrimination on the grounds of sex is based on biological differences; gender is sometimes described as the cultural expression of masculinity and femininity. Sex discrimination includes transgender issues, but the protection afforded to transgender and transsexual people will be developed in the Equality Bill.

Allegation: a transgender complainant alleged discrimination when police officers completed a custody record and custody procedures using their gender at birth as opposed to their preferred gender status.

Sexual orientation

Discrimination can be on the grounds of an individual's sexual orientation towards persons of the same sex, the opposite sex or the same sex and opposite sex; victims of discrimination can be heterosexual as well as lesbian, gay or bisexual.

Allegation: a complainant alleged that during enquiries made by the police about a number of burglaries, a neighbour told her that the police had been asking about her. The neighbour said that during the conversation the police mentioned that the complainant was a lesbian. The complainant considered this to be inappropriate. She felt that this disclosure could put her at risk in her neighbourhood – she had previously had to move home because of homophobic incidents.

Religion and belief

Discrimination on the grounds of religion 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 effect that this can have on people of a specific religion or belief.

Allegation: a detained complainant suffering from a medical condition alleged that his religious and cultural needs were not accommodated having made custody staff aware that he was fasting for Ramadan.

Age

Being treated differently on the grounds of age could as easily refer to the treatment of young people as to older people. The extension of age discrimination in the provision of goods and services is due to be considered in the forthcoming Equality Bill. The handling of allegations of age discrimination and their outcome will have to be considered in this context and in light of the legislation that applies.

Allegation: an 88-year-old man alleged that officers should have taken his age into account when he reported youths causing annoyance by playing football outside his window. The man alleged that the officers told him to deal with the matter himself.

Protection at work

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

- gender (including transgender people)
- race (including ethnic and national origins, colour and nationality)
- disability
- sexual orientation
- religion or belief, including lack of religion or belief
- age

This law covers police officers and police staff. The Chief Constable or Commissioner is potentially liable for acts of discrimination by individuals employed by his or her police force.

The Disability Discrimination Act adds a further requirement: employers have a duty to make reasonable adjustments for disabled job applicants or staff when a policy, practice or something about their premises places the disabled person at a substantial disadvantage. This may 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. All of the facts need to be considered.

Changes to legislation continue and the relevant organisations are changing too. More detail about the law can currently be found at the websites listed below. On 1 October 2007, the Equality and Human Rights Commission (EHRC) was set up as a single body with responsibility to oversee and enforce discrimination law. The creation of this single Commission incorporates the work previously covered by the Equal Opportunities Commission, the Disability Rights Commission and the Commission for Racial Equality.

Further information is available from the following national organisations and from local police staff associations:

- Equality and Human Rights Commission: www.equalityhumanrights.com
- Acas: www.acas.org.uk
- Stonewall (lesbian and gay rights): www.stonewall.org.uk
- Age Positive: www.agepositive.gov.uk
- Human rights: www.humanrights.gov.uk
- National police staff associations
- Home Office: <http://www.homeoffice.gov.uk>
- Government Equalities Office: www.equalities.gov.uk

Provision of services

The diversity strands currently covered by anti-discrimination law in the provision of services are: disability, race, gender, sexual orientation and religion and belief. Age is likely to be added in the forthcoming equality legislation. As a general rule, the law currently requires that, with regard to these strands, a service must not exclude, or offer less favourable treatment.

There are additional *positive* requirements regarding race, gender and disability.

Disability is defined in the Disability Discrimination Act 1995 (DDA) as: “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 a matter for the courts to decide who has a disability within the meaning of the legislation.

As a general rule, it is unlawful to discriminate against disabled people by treating them unfairly in terms of the service provided and to fail to make reasonable adjustments to the physical features of the service premises or the way in which a service is provided.

The requirement to make reasonable adjustments is specific to disability legislation. The police will generally be considered to be providing a service under the Act when giving advice and information about crime prevention.

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, positive duties to tackle race discrimination on all public bodies, including police forces, through the Race Relations (Amendment) Act 2000 (RRAA). This was followed by similar legislation covering gender and disability. The law requires all police forces (and other public bodies) to produce Equality Schemes that set out their plans to meet the requirements of the legislation. Increasingly, public bodies are producing a single equality scheme that includes all three equality strands.

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 also 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

Article 14, relating to the prohibition of discrimination, 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 example would be unlawfully imprisoning a person simply on the grounds of their race.

Relevance of civil law

Investigators are looking for evidence that will show whether an officer's or member of police staff's conduct has been consistent with the *Standards of Professional Behaviour* or terms and conditions of employment, as appropriate. Under the new misconduct system, this means establishing whether the officer has demonstrated respect for 'all individuals and their traditions, beliefs and lifestyles'. In addition, investigators must consider whether the officer has behaved with fairness and impartiality.

The fundamental question to be posed is: *has the officer behaved in keeping with the standards?*

It is also worth noting that the standards include a requirement not to discriminate unlawfully or unfairly, and the approach taken by employment tribunals and civil courts can be helpful here.

Investigators should bear in mind that internal matters in which a member of staff or an officer complains that they have been the victim of discrimination could be considered by employment tribunals. Further, applications for damages could be made to the civil courts relating to circumstances that have also been subject to investigation. The evidence gathered by the investigator may be subject to disclosure in such proceedings.

Cases from the county courts are not widely reported. Information about high court judgments and appeals heard at the higher courts can be found at: www.hmcourts-service.gov.uk.

Cases heard by Employment Appeals Tribunals are recorded and are important in the development of this area of law. They are reported at: www.employmentappeals.gov.uk. Up-to-date information can be found at the Advisory, Conciliation and Arbitration Services (ACAS) and EHRC websites: www.equalityhumanrights.com and www.acas.org.uk.

Developments in employment case law are worth bearing in mind, partly because they may become pertinent if a case is headed towards an employment tribunal, but also because they may assist investigators in gathering and weighing evidence. Updates can be found on the National Police Improvement Agency (NPIA) website: www.npia.police.uk.

Employment case law recognises that most employers would not admit discrimination, even to themselves, and direct evidence of discrimination will rarely exist. The outcome of a case will therefore usually depend on what conclusions it would be proper to draw from the facts that are found by an investigation.

One well-known case considered by an Employment Appeal Tribunal in 1991 used a formula, **D**x3+E, to reach a conclusion: evidence of **D**ifference in race, etc; evidence of **D**ifference in treatment; evidence of **D**etriment; plus no **E**xplanation (King v The Great Britain-China Centre [1991] IRLR 513). This was subsequently adopted as a guide in certain cases. Later decisions have asked: 'why did someone behave in this way'? Another useful question is: 'would this incident or behaviour have happened *but for* the factor of one or more of the diversity strands?'

Standard of proof

All police misconduct matters are determined on the balance of probabilities.

Current Home Office guidance on the standard of proof for hearings explains:

"In deciding matters of fact the misconduct meeting/hearing 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 person(s) conducting the meeting/hearing is/are 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 him or her, the more persuasive (cogent) the evidence will need to be in order to meet that standard.

Misconduct meetings/hearings should bear in mind the fact that police officers may be required to deal with some people who may have a particular motive for making false or misleading allegations against the police officer.

Therefore in making a decision whether the alleged conduct of a police officer is found or not, the person(s) conducting the misconduct meeting/hearing will need to exercise reasonable judgement having regard to all circumstances of the case.”

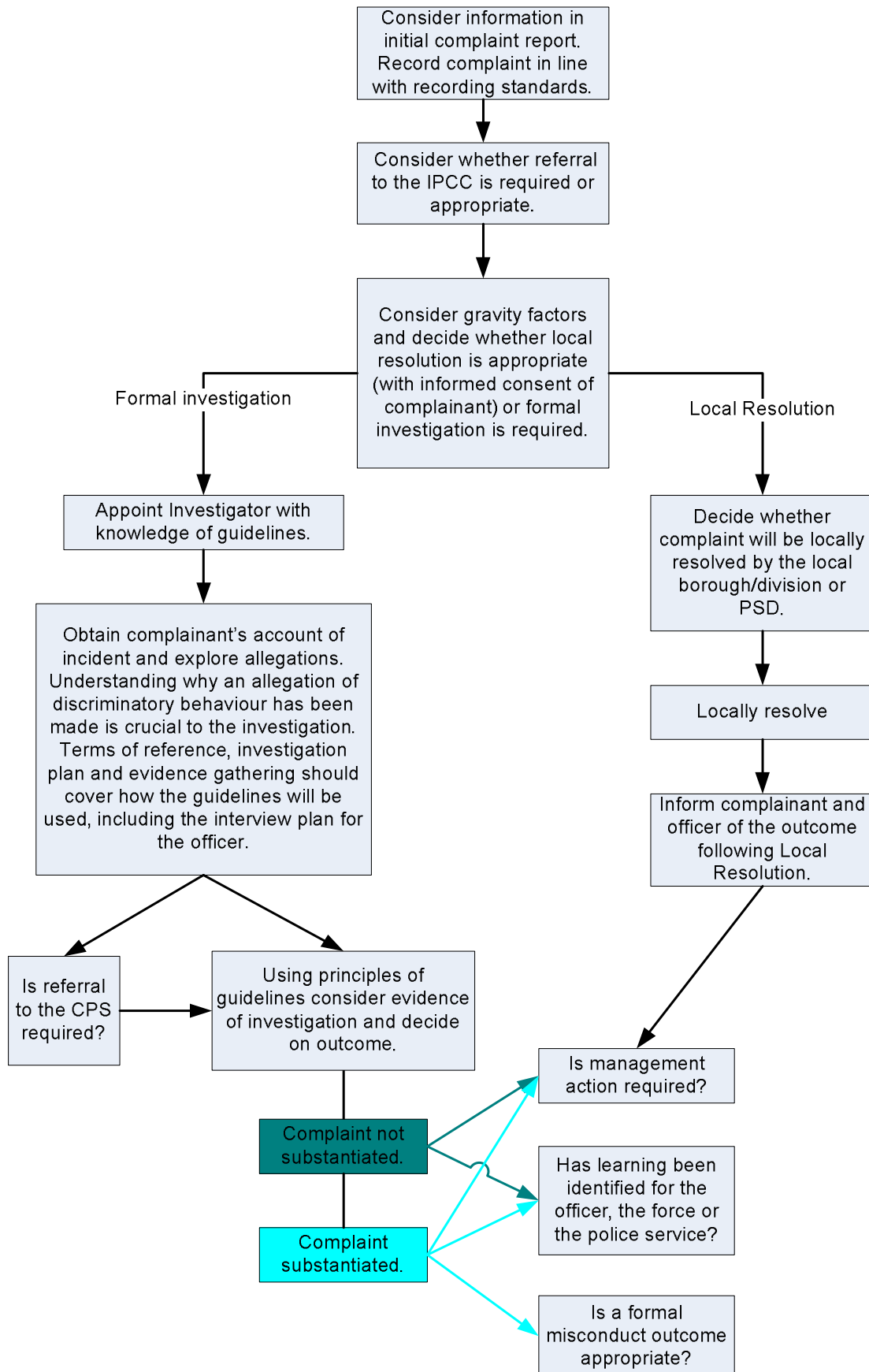
(Home Office Guidance: *Police Officer Misconduct, Unsatisfactory Performance and Attendance Management Procedures*)

People who are under investigation may decide not to answer questions. However, if there is evidence of discriminatory behaviour, or of unfairness or a lack of impartiality, then the interview provides an opportunity to explain. Therefore, if such evidence exists **and** the officer chooses not to provide a credible explanation for their behaviour, this could lead to a conclusion that the behaviour was unfair or discriminatory. The evidence should be considered in the new context of the positive responsibility to behave fairly and impartially, as appropriate. Further, under the new misconduct system, if an officer does not mention something in an interview which he or she then later raises in misconduct proceedings, then the panel may draw inferences from the officer's earlier silence.

For example, an approach to prove discriminatory behaviour once the type of allegation, the test applied and response given have been considered may include these questions:

1. Does it appear that the officer has treated the complainant less favourably than he or she would treat other members of the public who do not fall into the same equality strand in similar circumstances?
2. If yes, why is that?

Section 3: handling allegations of discriminatory behaviour



Initial handling of the complaint

The new approach to public complaints means that many matters that fall under the new misconduct system will be dealt with outside Professional Standards Departments. Managers at all levels will be required to develop their skills, especially in matters of discrimination. In order to assist managers who may not be familiar with the investigation of public complaints, this guidance includes the first steps that need to be taken when dealing with a complaint. Further information about IPCC investigation standards can be found at: <http://statguidance.ipcc.gov.uk>.

If it is decided that the matter should be investigated, the next step is to assign the investigator. Whenever there is an allegation of discrimination, the investigator should have the necessary skills and resources to respond effectively to the complainant and to identify relevant evidence.

Recording the complaint

The initial response to the complaint will inevitably affect the complainant's confidence in any subsequent investigation or local resolution. The impact of this first impression will be crucial. Openness and respect when taking details of the complaint will be required. Where it becomes apparent that those taking complaints are dealing with a vulnerable or intimidated complainant it may be more appropriate to take an initial account and make further arrangements to enable a fuller account to be taken by those with relevant experience or training.

People who believe that they have been discriminated against may be unwilling to express their opinion about the alleged discriminatory behaviour. It is therefore crucial that the recording officer is able to evoke confidence and reassure the complainant in order that they feel able to explain the reason for their complaint.

The officer who records the complaint should take active steps to promote trust and confidence in a fair investigation.

Some examples:

- showing professionalism and reassurance when taking details of any allegation of discrimination is important
- make no assumptions or judgements about the complainant. For example, where a complainant discloses, or is perceived to have, a mental health problem or learning disability do not make judgements about the information they give or their ability to make a complaint. Where support during the complaint process is requested, whether through a carer, family member or independent advocate, details should be noted. A further example would be where a complainant discloses that she or he is lesbian or gay
- 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), make a note of any information given or comments made by the complainant 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 disclosed 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 preferences that the complainant has expressed

If the complainant has not identified the officer who is the subject of their complaint by name or number, any detail that can help to identify the officer at this early stage should be recorded. The Police Reform Act still applies even where the identity of the officer is unknown.

Record the complaint in the person's own words. Take as much detail as possible about the alleged conduct and its impact. This will provide a common understanding of the exact complaint. A witness statement may not be required at this early stage. If the complainant has made specific requests about future contact or given details of other people who need to be involved, this information should be made prominent for any future investigator dealing with or involved in the complaint.

Standards for recording complaints

All complaints which involve allegations of inappropriate police conduct should be recorded in line with the allegations. Each force should have appropriate systems for recording and monitoring all allegations of discrimination. Recording should be in accordance with IPCC statutory guidance and IPCC Operational Advice Note, *Guidance on the Recording of Complaints under the Police Reform Act 2002*: www.ipcc.gov.uk/recording.

The IPCC guidance mirrors the principle set out in the ACPO Hate Crime Manual for the recording of a hate incident or crime: “*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.*”

Any apparent lack of supporting evidence is not relevant.

Even if the complainant does not make an allegation of discriminatory behaviour, the investigator may nonetheless decide that discrimination could be a factor and this 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.

Monitoring of complaints

The IPCC encourages the monitoring of complaints and allegations of discriminatory behaviour within police forces. This encourages the review of types of complaints being made and any emerging trends. Learning from complaints is an important element of the complaint system. Where trends and learning are identified, this can provide an important tool to aid understanding of why complaints are made and prevent further complaints from being made.

Police authorities have a statutory responsibility to keep themselves informed about the handling of complaints by the force they maintain.

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

Assessing complaints and gravity factors

An important element in the handling of all complaints is the ability to assess the gravity of the allegation; decide whether a complaint is suitable for Local Resolution or formal investigation, and the level of that investigation. Then the right investigator, who can respond effectively to the case, is assigned.

Allegations of discrimination are not inevitably at the most serious end of the spectrum: all allegations must be assessed individually. The process for handling allegations of discriminatory behaviour should be proportionate and fair. Complaints and conduct matters are subject to a number of tests to assess the level of handling required. For matters that are dealt with under the provisions of the Police Reform Act, there is a test that establishes whether the issue is suitable for Local Resolution. Where an investigation into a complaint is required, a special requirements test will determine whether there are criminal or disciplinary matters to consider, and, if indicated, a severity assessment is carried out to establish whether the alleged conduct is misconduct or gross misconduct. Both the requirements test and severity assessment should be conducted for both complaint and conduct investigations. Misconduct means a breach of the *Standards of Professional Behaviour*. Gross misconduct means a breach of the *Standards of Professional Behaviour* serious enough to justify dismissal.

Of course, judgements made at this point may well change in the light of the evidence. An allegation of discrimination 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.

Reference to gravity factors can provide a guide to ensure consistency in deciding how to proceed. Gravity factors should be revisited and reassessed as more information becomes available. The following list is not intended to be definitive or prescriptive. Some factors to consider include:

- Does the alleged discriminatory behaviour involve words, attitude or actions?
- What was the impact of the alleged behaviour on the complainant?
- What is the nature of the evidence supporting the alleged behaviour and what other evidence is likely to be found in establishing what happened during the incident?
- Was the alleged behaviour raised by the complainant; someone on their behalf or someone who observed the incident, or reported by another officer?
- What does the complainant expect as an outcome for dealing with the alleged discrimination?
- Has, or is it likely that, the impact of the incident will affect the wider community; or have a negative impact on views about the police service?
- Is anything relevant known about the police force or local police area that would impact on the degree of investigation required?
- Is anything relevant known about the officer that would impact on the degree of investigation required?
- Is anything relevant known about the complainant that would impact on the degree of investigation required?
- Were there any delays in receiving details of the complaint, and will there be subjudice considerations that could have an impact on the progress of an investigation or the collection of evidence?
- Does the complaint raise other issues that will impact on how it is dealt with?

IPCC referrals

Mandatory referral

Current legislation provides that an allegation of a criminal offence or behaviour *which is liable to lead to a disciplinary sanction* has to be referred to the IPCC if it appears to be aggravated by discriminatory behaviour on the grounds of a person's race, sex, religion or other status identified by the IPCC.

The following considerations will apply when deciding whether mandatory referral is required:

- *Is the alleged criminal offence or behaviour aggravated by discrimination?*

The trigger for mandatory referral is that there is an alleged criminal offence or behaviour aggravated by discrimination. Whether the aggravating discrimination is alleged or apparent, it does not need to be proved. The form of the alleged discrimination may be direct through language or behaviour – for example, the use of offensive and discriminatory words or use of stereotypes to describe individuals. The complainant may allege that the criminal offence or behaviour was motivated by discrimination. The complainant may allege discriminatory treatment compared to others. It is equally possible that the complainant does not allege discrimination, but the investigator believes discrimination is a factor.

For example, a complainant alleges his arrest only happened because he was a member of a minority group. This would not be referable because what is alleged is not underpinned by an allegation of a criminal offence or behaviour liable to lead to a 'disciplinary sanction'. However, had the allegation been that the arrest was an abuse of power and unlawful and that unlawful action was motivated by discriminatory behaviour then it would be referable.

- *Is the conduct liable to lead to a disciplinary sanction?*

With the introduction of a new police misconduct system in December 2008, what is meant by 'disciplinary sanction' for these purposes will depend on when a complaint or matter came to the attention of the police service or IPCC:

- for 2004 misconduct system referrals, written warnings and any sanction imposed through formal misconduct proceedings will apply
- for 2008 misconduct system referrals, the conduct is likely to result in a meeting or hearing for misconduct or gross misconduct

Mandatory referral to the IPCC is therefore only required if the assessment indicates that:

- a criminal offence is alleged, and that criminal offence is aggravated by the use of discriminatory language or other discriminatory conduct
- a behaviour is alleged, aggravated by the use of discriminatory language or other discriminatory conduct, which is likely to result in a meeting or hearing for misconduct or gross misconduct (2008 misconduct system); or a written warning or any sanction from a discipline hearing (2004 misconduct system)

The assessment should take account of what the complainant alleges was said or done that was discriminatory. However, the allegation will need to be specific about the behaviour that is discriminatory. Referral may not be mandatory if a complainant is unhappy with the treatment received, but is unable to point to anything discriminatory said or done, unless there are other factors suggesting a discriminatory motivation.

If further evidence is later provided indicating that an incident was more serious than first thought and if it meets the criteria for referral under the above test, the matter should be referred to the IPCC. Similarly, further evidence might prompt re-referral so that the mode of investigation can be reconsidered if an earlier referral had resulted in an IPCC decision to refer back to the police force for local investigation. Where a referral is made some time after the original incident, an explanation should be given indicating the evidence that has come to light requiring referral (or re-referral) of the matter.

Voluntary referral

There may be allegations involving discrimination where there are no underlying criminal offences or behaviour. In such cases, the police force/police authority should consider referring the matter to the IPCC voluntarily. Clear reasons for referring the matter should be explained when a voluntary referral is made. Relevant issues to be covered include not just the nature of the allegations, but any serious concerns or exceptional circumstances having an impact on the complainant and the community, and why independent oversight is needed.

Using Local Resolution

Local Resolution will only be considered appropriate after it has been assessed that the alleged actions of the police officers or police staff should not result in criminal or disciplinary proceedings. Where there are allegations that could result in criminal or disciplinary proceedings, but the complainant consents to Local Resolution, an application for Local Resolution should be sent to the IPCC for consideration. The IPCC may approve the use of Local Resolution, under the new misconduct system, where it is satisfied that the conduct complained of would not justify the bringing of criminal proceedings or disciplinary proceedings that would result in dismissal or the giving of a final written warning. The IPCC may also approve Local Resolution where it would not be practicable to bring criminal proceedings that are likely to result in a conviction or disciplinary proceedings that would be likely to result in dismissal or the giving of a final written warning.

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 not be used or regarded as a disciplinary outcome. Where Local Resolution of an allegation identifies an unrelated matter not connected to the initial complaint the new matter could result in discipline process considerations.

It is important to weigh up the advantages and disadvantages of the Local Resolution approach and to record the decision-making process. Reference to the [gravity factors](#) (see page 18) will help to establish whether using Local Resolution is appropriate.

Allegations of discrimination may be locally resolved if the complainant consents to this. Complainants can only give meaningful consent if they understand what will happen during the Local Resolution process. They must also understand all the options available for dealing with their complaint.

Where allegations of discriminatory behaviour are dealt with by Local Resolution, the force should be mindful of the 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. If necessary, establish a review process to determine that Local Resolution remains the appropriate outcome.

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 necessary skills for dealing with complaints in this way, which 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 or member of staff requires close supervision or further training. It

may be appropriate to make a record of any further training or supervision in the personal file or Personal Development Record (PDR).

If an officer or staff member is to learn from the complaint or recordable conduct matter, 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 about the Local Resolution process and its outcomes?
- 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 be absolutely clear about what is involved. It is appropriate to encourage participation where this approach could result in a quick and relatively straightforward way of providing an explanation and understanding of the complaint, and of 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. The person responsible for making the initial assessment of the complaint should consider carefully whether Local Resolution remains appropriate in such a case. 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 and the police authority each have duties to monitor Local Resolution. This is one of the duties that police authorities have in their police oversight role. Where the IPCC receives an appeal against the Local Resolution process and discrimination has been alleged, the IPCC, when considering its decision on the appeal, will be mindful of the information provided to the complainant prior to agreeing to Local Resolution and during the process.

Aims of an investigation

The aim of investigations will be to find out if anything has gone wrong. A fair investigation should lead to conclusions and recommendations that are evidence based. An investigation may identify misconduct or criminal offences – equally, the evidence may show that the allegations are unfounded.

The investigation may also identify learning or operational lessons. Ultimately, the investigation should seek to understand why the complaint has been made and provide answers for the complainant that respond to and address the concerns raised and the allegations made.

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, whether this is in the form of a decision log for the investigation or a record providing the rationale for the decisions taken.

Terms of reference

The terms of reference for any investigation into allegations of discriminatory behaviour should always include reference to this guidance. Examples this could cover might include use of the guidelines in the context of the interview plan for the officer or, where comparator evidence will be used, to explore broader discrimination issues arising from the allegations. The investigating officer should consider whether there is any additional guidance that may be relevant, such as the ACPO Hate Crime Manual.

In the interests of transparency, and subject to applying the harm test, the complainant should be provided with a copy of the terms of reference.

Investigation plan

Some investigators will be very familiar with the framework for an investigation plan, but for those who are less experienced in the investigation of public complaints, the framework is included here.

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 some considerations that the investigation plan could cover:

- 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 evidence required/relevant history of officer or complainant
- 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
- x. Is advice required from police staff associations or other group/individual?
- xi. Are there any media considerations?

A hypothetical example

Mrs A has a mental health problem. She alleges that one of the officers who came to her home after complaints from her neighbours showed a lack of respect towards her and used excessive force in her arrest. She complains that the officer treated her in this way because she has a mental health problem.

Under the new misconduct system, the first question is, does the complaint indicate criminal proceedings or behaviour justifying disciplinary proceedings? Secondly, would this amount to misconduct or gross misconduct?

If an investigation is required, the investigation plan will address the need to establish:

- what happened
- whether there was a lack of respect
- whether excessive force was used
- if there was a lack of respect or excessive use of force, was the breach of the standards *on the grounds of* the complainant's mental health – ie why did the officer behave in this way?

In order to find out why the officer behaved as he or she did, the investigation may require comparative evidence. This could include comparisons with the behaviour of other officers who attended this incident and comparisons with this officer's behaviour in similar situations (in this case, neighbour disputes).

Asking an officer to recall how they have behaved in similar circumstances does not mean that other incidents may become part of the investigation: the reflection provides insight into an officer's usual approach to such incidents and helps to determine if he or she behaved differently on the occasion under investigation.

Evidence will include witness statements from other officers who attended this incident and any others who may have attended in the past. It will also be important to explore the officer's motivation in interview or statement.

Complainant's statement

A statement may not be required where a clear account of the alleged behaviour and impact has already been provided by the complainant – for example, a letter or earlier account provided when the complaint was made. Where a statement will be taken from the complainant, the guidance provided in *initial handling of the complaint* applies equally to the investigator conducting the investigation. He or she must listen actively and demonstrate an open, non-judgemental attitude.

Where a solicitor is representing a complainant, or the complainant wishes to provide their account through a third party, the investigator should emphasise the importance of their own involvement in this process. The investigator will need to understand why the complaint has been made, and the impact, to determine the level and direction of the investigation and the evidence required. The investigator may have questions that they wish to ask that have not been covered in any statement provided through a third party.

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 investigator's proper commitment to establishing the facts.

Some people will have experienced discrimination so often in their lives that they will reasonably anticipate it from people in authority. The investigator has a responsibility to actively overcome these fears and anxieties. It may be necessary for an appropriate adult to be present, which is something the complainant themselves may have requested.

Example of a complaint: 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 discrimination. The personal impact is anxiety about leaving the house and a negative view of the police and their actions.

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 overt discrimination.

People from minority groups are often reluctant to express their belief that a problem they have experienced is rooted in discriminatory attitudes. 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. A complainant may be reluctant to disclose a mental health problem for fear that this could affect the investigator's attitude to the merit of a complaint.

The investigator should therefore be positive in enabling complainants to explain any concerns they may have about why an officer behaved the way that they did. Investigators 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 complaint does identify unlawful discrimination as a factor in the incident, the investigator needs to take time to explore what it was about the officer's or member of police staff's behaviour that gave rise to this impression.

Investigators 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 statement may include hearsay and other issues that the investigator may consider not to be direct evidence, but the inclusion of such details 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, the following information should be recorded:

- What was it that made the complainant believe the officer's or member of police staff's words or actions were discriminatory?
- Did the complainant note any differences in the way that they were treated compared with others?
- Did the complainant note any differences in the way that this officer or member of police staff behaved compared with other officers (either on this occasion or on previous occasions)?
- Was there anything about the officer's or member of police staff's language that the complainant noted?
- What was the impact on the complainant?
- Did anyone else witness the incident and were any comments or reactions expressed to the complainant at the time or since?
- Any background information that may be relevant to the impact on the complainant.
- Any other issue that the complainant considers to be relevant to the complaint.

When the statement of complaint has been taken, the investigator 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.

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 in discrimination law).

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 to future learning for the police service or those against whom complaints have been made.

The *Standards of Professional Behaviour* under the new misconduct system 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.

Regular communication

The Victims' Code, *The Code of Practice for Victims of Crime*, is a set of statutory obligations. The Victims' Code requires services to be given to any person who has made an allegation to the police, or had an allegation made on his or her behalf, that they have been subjected to criminal conduct. This will include cases where the person has alleged they have, for example, been subjected to racist or homophobic insults.

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.

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

When investigating a matter under the Police Reform Act, consideration should be given to the duty to disclose information under section 20 and section 21. Further information about communication and the right to information can be found at: <http://statguidance.ipcc.gov.uk>.

Collecting evidence

One of the first requirements will involve the collection of evidence from named and identified witnesses. This will be in addition to documentary evidence associated with the incident from which the complaint has arisen.

Where comparator evidence is required, considerations that may assist in making comparisons that help to establish whether the alleged behaviour would have happened 'but for' the complainant's gender, for example, includes:

- how any other officers or members of police staff who were present behaved at the incident
- how other members of the public were treated at the same incident
- how this officer or member of police staff has behaved in similar circumstances
- how this complainant has been treated at other, similar incidents

The investigator may also ask – how would a reasonable officer or member of police staff with similar levels of training and experience have behaved in these circumstances? If most would usually have done something quite different in the same circumstances, then the need for a convincing explanation becomes more pressing.

Allegations of discriminatory behaviour may sometimes require wider evidential considerations, particularly where broader allegations of discrimination are made against a police force or an area within a police force.

Proportionality and the seriousness of the allegations will be key factors when deciding what evidence should be collected. Evidence that could be considered might include:

- The investigator should consider establishing whether intelligence reports exist about the officer(s) or whether there might be anything recorded on his or her personal files. (See *Patterns of Behaviour*, below.) However, there are data protection issues here and the investigator 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*). Reference should be made to force policy documents.
- 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 investigator 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 broader allegations of discrimination are indicated, 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 hate incident or crime.
- Comparable evidence may have to be considered – for example, where an officer(s)' behaviour has been alleged to have been discriminatory, how an officer has dealt with other people as a comparison or other incidents similar in nature to that from which the allegations have been made may be helpful. (As stated above, asking an officer to recall how they have behaved in similar circumstances does not mean that other incidents become part of the investigation: the reflection provides insight into an officer's usual approach to such incidents and helps to determine if he or she behaved differently on the occasion under investigation.)

Patterns of behaviour

Employment tribunals consider patterns of behaviour; indeed the matter before the tribunal may rest on a number of instances. This is relevant for police managers and investigators when they deal with internal grievances that may result in tribunal proceedings.

Matters of public complaint specify an incident or a related series of incidents and consideration needs to be given to each part as appropriate.

It may also be relevant to look at an officer's record. The officer's history cannot usually by itself be drawn on to prove that his or her conduct was misconduct or gross misconduct, but it may add to grounds for suspicion that the conduct was a breach of the professional standards.

In addition, while the history cannot be drawn on for proof, it is entirely relevant in considering management action with regard to an officer's behaviour. This is consistent with the expectation that officers and members of police staff should learn from mistakes.

Witness statements

Primary accounts should fully reflect the perspectives of all those spoken to during an investigation. In cases concerning 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; or where witnesses are sought in areas such as gay pubs, clubs or public sex environments. Assumptions should not be made that potential witnesses are either openly gay or identify as being gay.

Respecting confidentiality is crucial. It is vital to explain to witnesses the reason for seeking their evidence, how this will be used during the investigation and any subsequent proceedings, and what will be disclosed.

Officers who are witnesses

Officers who have witnessed the incident under investigation should be reminded of their personal duty to challenge wrongdoing (now included in the *Standards of professional behaviour*). They should also be reminded that the public duties imposed on police forces to promote equality of opportunity and eliminate discrimination are now reflected in the professional standards. 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 investigator should consider what action may need to be taken 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 is important to explore the reluctance of the witness, establish what their concerns are in relation to giving evidence, and assess how vital their evidence is to the investigation (whether the witness is an officer or a member of the public).

Considerations will include:

- Does the witness understand why their evidence has been sought?
- Does the witness understand the complaint investigation process and how the information they provide as a witness will be used?
- Does the witness understand what information would have to be disclosed?
- How crucial is the witness’s evidence to the investigation?
- Would the support of a local organisation or police staff association assist?

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

Reluctance to give evidence if there are particular sensitivities or confidential information may have a significant detrimental impact on the complaint process.

Interviewing officers or members of police staff

Where a decision is made to interview an officer(s) or member of police staff and if the allegation is at the more serious end of the spectrum, then the considerations set out in ACPO's strategy on *Investigative Interviewing Techniques* may be required. This strategy covers video interviewing, cognitive interviewing and interviewing vulnerable and significant witnesses. Only investigators who have received the appropriate training should undertake the interview(s) if a specific type of interview is required.

All interviews should follow an interview plan that allows the officer to explain what happened. Interviews should focus on the points to prove. The investigator should be able to demonstrate in the interview plan the ways in which the officer's motivation will be explored and how the evidence from the investigation will be tested.

This is ordinary good practice in line with PEACE⁶ interviews. It is essential to identify probing questions, particularly in those complaints where the only evidence available is from the complainant and the officer.

The plan should be clear about what needs to be established in order to conclude whether the officer has behaved in accordance with the professional standards. The interview plan should be developed in the context of the relevant standards. In the context of these guidelines, the investigator is aiming to establish whether the officer has:

- carried out his or her duties with fairness and impartiality and in accordance with current equality legislation
- shown respect for all individuals and their traditions, beliefs and lifestyles – provided that such are compatible with the rule of law
- not discriminated unlawfully or unfairly when exercising any of his or her duties, discretion or authority
- paid due regard to the need to eliminate unlawful discrimination and promote equality of opportunity and good relations between persons of different groups

The interview should therefore establish the officer's account of what took place *and* the reason **why** the officer behaved in the way he or she did.

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
- describe their training and experience
- reflect on their understanding of their public duties to eliminate discrimination and promote equality
- provide a more detailed examination of the impact of the allegation of discrimination and examination of the interaction with the complainant from this perspective

Complainant's history

An investigator may need to note relevant information about the complainant's history.

⁶ Planning and preparation; Engage and explain; Account; Closure; Evaluation

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. Nor should assumptions be made about complainants who have a history of making complaints. This may indicate a pattern of behaviour experienced by the complainant or may be a result of frequent interactions with the police – for example, experienced by someone with severe mental health problems who has been detained under s.136 of the Mental Health Act. A great deal of care needs to be exercised when handling such information.

The investigator should be clear about what might be relevant to the complaint, mindful that what matters most in weighing the balance of probabilities is the evidence of the case.

Independent advice

The relationships between officers and people from minority groups will be affected by local circumstances. Investigators who are carrying out an investigation in another police area should first inform themselves about local issues and experiences.

If the complaint is sufficiently serious, it may be appropriate to establish an independent advisory group (IAG)⁷. 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 page 18 for [gravity factors](#)) and the decision recorded in the log.

Consider the following list of factors when 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 the appointment of a family liaison officer or manager 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 involvement in operational processes and the running of the investigation. The investigator must be clear about the purpose of the IAG and record this in the decision log. It is equally important that the independent members of the group are clear about their purpose and the terms of reference. They should understand that they have a strategic role and that they will not be asked to contribute to the investigation plan.

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

The information that will be provided to the IAG should be assessed carefully. Evidence given to the Morris Inquiry⁸ revealed that officers felt exposed by details of their case being provided to people in the local community through the IAG.

⁷ A community reference group in the IPCC.

⁸ *The Case for Change. People in the Metropolitan Police Service. The Report of the Morris Inquiry (2004)* – which was an independent inquiry commissioned by the Metropolitan Police Authority into professional standards and employment matters in the Metropolitan Police Service.

Early contact with police staff 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 and police staff.

The investigator 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.

Local organisations or support groups may assist with advice, but it is important to establish that there will be no conflict of interest and to clarify whether they will be advising the complainant or supporting the complainant throughout the complaint process.

Section 4: reaching conclusions and outcomes

Reaching conclusions

The conclusion must be based on the balance of probability (see [Standard of Proof](#), page 13).

There are several aspects to the standard on equality and diversity and each should be addressed. The questions to answer are:

- have officers carried out their duties with fairness and impartiality?
- have they shown respect to all individuals and their traditions, beliefs and lifestyles – provided that such are compatible with the rule of law?
- have they discriminated unlawfully or unfairly when exercising any of their duties, discretion or authority?
- have they paid due regard to the need to eliminate unlawful discrimination and promote equality of opportunity and good relations between persons of different groups?

An officer who has behaved with fairness and impartiality will not have discriminated against a member of the public. However, it is possible for an officer who is found not to have discriminated against someone to be found to have behaved unfairly.

Equally, taken separately, the evidence on each aspect of a complaint may not indicate discriminatory behaviour; the matters should then be considered as a whole and the pattern of behaviour may reveal that the officer's explanation is inadequate.

Using considerations from discrimination law

Although the 'King formula' is no longer the only authority setting out the principles that may apply in employment matters, it may be used as a tool to help in organising evidence. The context in which this formula was created related to race discrimination, but the questions can also be applied to the other strands of discrimination. However, it should not become a straightjacket that prevents investigators from making sensible decisions based on the evidence. Other questions such as: 'why did the person behave in this way?' are pertinent, but the formula remains helpful in answering that question.

- Difference in identified diversity strand
- Difference in treatment
- Detriment for the complainant +
- No explanation for these differences is available from any source

Difference identified diversity strand

This is the difference between the member of the public subject to the officer's behaviour and another member of the public in a similar situation. If no other member of the public was part of the incident, then the investigator can use a hypothetical person put in the same situation who is not, for example, black. The officer and the member of the public could be of the same race and there could still be a finding 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 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 comparators, how would you expect a member of the public to be treated in the same circumstances?

This last consideration does not require the investigator 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 is the explanation in response to the allegation of discrimination – 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, if an officer were to use excessive or inappropriate precautions in the arrest of a person with HIV, this may have a demeaning and therefore detrimental impact on the arrested person. Each situation needs to be assessed.

No explanation

This is the most challenging aspect of the equation and requires considerable judgement on the part of investigators (and those holding a misconduct hearing or misconduct meeting). Officers and members of police staff 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. In ‘discipline only interviews’ – where an officer may not give an account – they should be invited to provide an explanation.

An investigator will have to make an assessment about whether the evidence and explanation provided is adequate, reasonable and justified in the circumstances. In addition to this, where there are serious allegations to consider, 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 him or her, the more persuasive (cogent) the evidence will need to be in order to meet that standard.*”

If the explanation is that they generally do things this way, then they will need to show that this behaviour was not exceptional. For example, was it the case that the complainant received less favourable treatment than another person who was dealt with by the officer that day? Similarly, if the officer accepts that he or she was negligent, why were they negligent with this complainant?

The explanation will be more difficult for the investigator to assess where the officer has provided no explanation for the alleged behaviour. Comparator evidence, in these circumstances, may be helpful to the investigator as a means of determining whether discrimination was a factor.

The question ‘why?’ must have a satisfactory answer.

Investigation report

The report is open to scrutiny and should be written according to the IPCC statutory guidance (*Making the New Police Complaints System Work Better*, 2005), Home Office Guidance, and the legislation that applies to the matter subject to investigation, as appropriate.

Proportionality

The Stephen Lawrence Inquiry report stated that proven discriminatory words or acts should be dealt with at the more serious end of the spectrum in terms of disciplinary action.

Since this report was published, there has been far less tolerance of overt discrimination. In recent years, allegations of discriminatory behaviour have been more likely to rest on perceptions rather than on overtly discriminatory language or actions. Proving an allegation becomes commensurately harder. The impact on investigating these allegations has been that they are rarely proved. The difficulties are compounded if an officer fears that any evidence of discrimination could result in them losing their job and they inevitably respond defensively to the allegations.

On occasion, it will be entirely appropriate that an officer should face disciplinary proceedings for complaints of discriminatory behaviour. But in cases where the behaviour is clearly unwitting and not motivated by lack of respect for specific groups of people, the response should focus on changing the behaviour or attitudes.

In more recent times, the report of the Morris Inquiry, the CRE formal report on the police service, and the Taylor review of the police misconduct system have each commented that a proportionate and considered assessment of the evidence is required. They each expressed the view that there should not be a fixed penalty for 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 revisited 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, whether by Local Resolution or through a more formal investigation. Police officers and police staff 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. It can block an opportunity to provide the complainant with an explanation and represent a loss of opportunity to learn.

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 complaint matters, the outcomes should take account of the officer's attitude.

Outcomes

The processes in the Police Reform Act (as amended) need to be followed. This is not an exhaustive guide, but it touches upon issues that may or may not be relevant to the process adopted. A matter may be subject to appeal to the IPCC or the IPCC may make a recommendation or direction on certain matters and this should be remembered when communicating outcomes.

Referral to the CPS

Under the new misconduct system legislation cases should currently be referred to the CPS where:

- the report indicates that a criminal offence may have been committed, and
- in the opinion of the police force (or the IPCC in managed and independent investigations) it is appropriate for the matters in the report to be considered by the Director of Public Prosecutions

Evidence presented to misconduct meetings and hearings

In those instances where officers attend misconduct meetings or hearings under the new misconduct system, it is important that the person(s) conducting the meeting or hearing who hear the evidence fully understand the principles that are outlined here. Anyone who conducts meetings or hearings should receive these guidelines as part of any pre-hearing bundle to assist them in reaching a finding about allegations of discriminatory behaviour.

Aggravation/mitigation

Determining the outcome will depend on the aggravating and mitigating factors. Some examples are listed below, 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? Consider these questions 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. If the investigator's report recommends close supervision for an officer subject to complaint, does the supervising officer have the skills necessary to provide the supervision?

Learning lessons

The IPCC welcomes a proactive approach to tackling discrimination. Investigators 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. The IPCC encourages the police service to extend this approach to the due regard to promote equality of opportunity and eliminate unlawful discrimination.

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 that can be learned and implemented from complaints where a force practice requires change is an equally important outcome and one that builds confidence in the police service. Complaints provide an important opportunity to review public services.

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.

There will be occasions when an officer's attitude appears to reflect a similar attitude within the team or department. Investigators have a responsibility to explore these wider issues.

Making a record

It may also be appropriate to record the matter on the officer's PDR or personal file or to ensure that any intelligence is captured. (See [Local Resolution](#), page 20, for further guidance on making a record.)

Keeping records of discrimination complaints at a Professional Standards Department (PSD) or local level also provides an opportunity to keep intelligence on complaints of discriminatory behaviour, and provide a means to consider how, and whether, the number of complaints can be reduced.

No misconduct

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

An investigator should consider the following questions:

- Does the force owe an apology to the complainant for failings in service?
- Should certain practices within a team or division be reviewed?
- Do any force policies have a disproportionate impact on a specific group (indirect discrimination)?

Section 5: implementing these guidelines

Training

Concern about discrimination is an issue that is familiar to all professional standards officers. However, it does not follow that investigators have a common understanding of how 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.

The IPCC expects the police service to employ its leadership and guidance role in explicitly challenging discriminatory behaviour at all levels, ensuring that officers and staff are aware of the specific issues related to each of the diversity strands.

Police forces are delivering diversity training to all their officers, but this training might not meet the specific needs of those investigating complaints alleging discrimination. 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 those officers and staff dealing with police complaints should, in addition to training on the processes for dealing with police complaints, receive specific formal and informal training to develop their ability to identify discrimination. This would supplement the cultural awareness and diversity training 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 Her Majesty's Inspectorate of Constabulary (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. www.raceactionnet.org.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.

Appeals

It is recognised that the majority of allegations of discriminatory behaviour will be dealt with locally by the police service, as appropriate. The implementation of these guidelines for the IPCC will be relevant when considering appeals to the IPCC following a local or supervised investigation.

Where an appeal is received and the investigation involved an allegation of discriminatory behaviour, the IPCC will review whether this guidance has been applied to the handling of the complaint.

Section 6: summary of guidelines

On receipt of a complaint

- The record of the complaint should include full details of the alleged discrimination and the impact of the alleged behaviour.
- Decide if this is a matter that should be referred to the IPCC.
- Establish whether the matter is suitable for Local Resolution.

Local Resolution

- Consider whether the IPCC needs to approve the use of Local Resolution and make an application, as appropriate.
- Discuss the Local Resolution process and likely outcome with the complainant before obtaining consent.
- Record the actions taken during the Local Resolution process.
- Record, where appropriate, any decisions about learning or development for the officer or member of staff.
- Record and monitor any planned developments that arise for the individual or the police service.

Investigating allegations

- Does the matter indicate that a criminal offence has been committed or that disciplinary proceedings are justified (meets special requirements)?
- Determine whether the conduct amounts to misconduct or gross misconduct (severity assessment).
- Investigators should take active steps to enable complainants to express their thoughts and feelings about the alleged conduct, and their perceptions of why an officer or member of staff behaved the way they did.
- The investigation should first establish what happened and then, when considering the allegation of discriminatory behaviour, focus on the question '*why* the officer or member of staff behaved as they did'.
- Based on the assessment of the alleged conduct, consider what evidence is required to investigate the allegation of discrimination.
- Is comparative evidence required? (How did other officers or members of staff behave at the same incident? How has this individual behaved at similar incidents?)
- Would the investigation benefit from independent oversight or advice from, for example, an Independent Advisory Group, police staff association or support group?

The officer's or member of police staff's account

- Determine whether an interview is required or whether a statement is sufficient.
- Any interview plan should focus on what is needed to establish what took place and what motivated the officer or member of police staff to behave as they did.
- An officer may decide not to comment on the allegation, but an absence of explanation for behaviour that **is evidenced** to be unfair can reasonably lead to a conclusion that the behaviour was discriminatory.

Making a decision

- The standard of proof is the balance of probabilities.
- Determine whether anything at all went wrong.
- Does the evidence indicate that the officer or member of staff unlawfully discriminated against the complainant?
- Did the officer or member of staff behave unfairly towards the complainant?
- Does the complaint raise questions that require policy or practice to be reviewed?

Outcomes

- Are there any lessons for the police service to learn?
- Investigators and managers should consider whether there is a need for training or supervision.
- Members of panels for misconduct meetings or hearings should receive these guidelines to assist them in reaching a decision on allegations of discrimination.
- The final decision may depend on aggravating and mitigating factors – for example, a lack of training may not serve as mitigation if the individual concerned should have known that the use of certain language was inappropriate.

List of abbreviations

ACAS	Advisory, Conciliation and Arbitration Service
ACPO	Association of Chief Police Officers
CPS	Crown Prosecution Service
CRE	Commission for Racial Equality
Dx3+E	Difference in race, etc, difference in treatment, detriment and no explanation
EHRC	Equality and Human Rights Commission
HMIC	Her Majesty's Inspectorate of Constabulary
HRA	Human Rights Act, 1998
IAG	Independent Advisory Group
IPCC	Independent Police Complaints Commission
PCA	Police Complaints Authority
PDR	Personal Development Record
PEACE	Planning and preparation; Engage and explain; Account; Closure; Evaluation
PSD	Professional Standards Department
NPIA	National Police Improvement Agency
RIPA	Regulation of Investigatory Powers Act, 2000
RRA	Race Relations Act 1976
RRAA	Race Relations Amendment Act, 2000

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