

DRAFT IPCC GUIDELINES: INVESTIGATING ALLEGATIONS OF DISCRIMINATORY BEHAVIOUR

RESPONSE TO CONSULTATION BY THE POLICE ACTION LAWYERS' GROUP AND THE DISCRIMINATION LAW ASSOCIATION

The Police Action Lawyers' Group (PALG) and the Discrimination Law Association (DLA) appreciate an extension of time in order to respond to the IPCC consultation on draft guidelines for the investigation of allegations of discriminatory behaviour. As organisations with overlapping and shared concerns regarding acts of discrimination by the police the following is a joint response to this consultation by our two organisations.

Background

The PALG is an organisation comprised of lawyers who represent complainants against the police throughout England and Wales. PALG members are concerned first and foremost with the principle objective of the complainants they represent: to ensure that the police are held accountable for their conduct through all available avenues, including the police complaints system, as well as private law and public law actions.

The DLA is a national organisation that seeks to secure improvements in discrimination law and practice in the UK, Europe and at an international level. It achieves this by, among other things, the promotion and dissemination of advice and information, arranging seminars, conferences and training, making representations to government and bodies concerned with legal practice and the administration of justice, The DLA has a wide membership, currently some 350 members including practising lawyers, legal or advice workers, academic lawyers and other persons substantially engaged or interested in discrimination law as well as solicitors' firms, barristers' chambers and other organisations engaged or interested in discrimination law. The membership comprises, in the main, persons concerned with discrimination law from a complainant perspective. .

Some general comments

The draft guidance makes clear that the IPCC fully recognises discrimination as an aspect of police conduct about which members of the public are likely to complain. We therefore welcome the decision by the IPCC to seek to ensure high standards and best practice in the response by police forces and the IPCC to allegations or discriminatory conduct. The specific statutory duties of the police service and the IPCC under the Race Relations Act 1976 (RRA), Disability Discrimination Act 1995 (DDA) and Sex Discrimination Act 1975 (SDA) to eliminate unlawful discrimination and to promote equality on grounds of race, disability and sex makes it all the more important that discrimination complaints are handled appropriately. The PALG and the DLA are concerned about much of the content of the draft guidance. We are concerned about serious inaccuracies in sections 3, 4 and 5, which appear to be

intended to summarise current anti-discrimination legislation relevant to the conduct of the police.

We have, however, more fundamental concerns about the ways in which the information on discrimination law and discriminatory conduct referred to in these draft guidelines should be 'packaged' – when, how and to whom it should be provided.

We identify two distinct functions which, in our view, need to be addressed separately:

1. All investigators should be trained. The training should address issues of discrimination law and practice as well as issues of how to carry out an investigation. Training manuals should include relevant aspects of the law and guidance.
2. A guidance document for those investigating police complaints, to be effective, should contain clear step-by-step guidance on what steps are necessary to carry out an effective investigation. It should not be a discourse on the law.

The law in the field of discrimination is frequently changing both as a result of decisions of the appellate courts and new legislation. Since 2003 there have been major amendments to the RRA, DDA and SDA and new legislation outlawing discrimination on grounds of religion or belief, sexual orientation and age. Further amendments to the SDA to comply with EU law are now overdue.

We do not disagree that police officers and members and staff of the IPCC should have a good understanding of the scope of anti-discrimination legislation and the grounds protected by such legislation. We recommend that this should be contained in an annex to the training manual to which we refer above, so that new and amending legislation or important interpretations by the courts could be easily incorporated.

Further, given the frequency with which discrimination or harassment or unfair treatment in some form occurs within conduct referred to in police complaints, or subsequently uncovered in the investigation process, we query the benefits to all relevant parties of separate guidance for investigation of alleged discriminatory conduct. We recommend that the relevant contents of such guidance should be consolidated and form an integral part of general guidance for the investigation of all complaints investigated under Part 2 and Schedule 3 of the Police Reform Act 2002.

The need for accurate information on discrimination law

For the avoidance of doubt, we restate that our comments below on the law should be read in the above context, namely that discourse on the law should be within a training manual and not a guidance document.

In this brief response we do not propose to review sections 3, 4 and 5 line by line, although to ensure accuracy we strongly advise that such review is carried out. We recommend that, as a minimum, any person involved in any stage in the investigation of a police complaint that could include an allegation of discriminatory conduct should have access to the following basic information, clearly and accurately presented:

- Discrimination is unlawful on grounds of race, sex, disability, sexual orientation and religion or belief in the provision of or access to goods, facilities or services and in the carrying out of all public functions of the police service and the IPCC; this last goes beyond providing a “service” and applies to all law enforcement functions and the exercise of police powers;
- Discrimination on grounds of age currently applies only in relation to employment and vocational training, but in its recent Green Paper with proposals for future equality legislation the government has indicated that it is considering extending age discrimination law to provide equivalent protection;
- The police service – Chief Officers of Police and police authorities -- and the IPCC are subject to duties under the Race Relations Act 1976 (RRA), the Disability Discrimination Act 1995 (DDA) and the Sex Discrimination Act 1975 (SDA), requiring them in carrying out their various functions to have due regard to the need to eliminate unlawful discrimination and to promote equality of opportunity. The RRA duty includes promoting good relations between members of different racial groups, and the DDA duty includes other matters intended to achieve full and effective participation of disabled people in public life;
- Under the Human Rights Act 1998 (HRA), giving effect to the European Convention on Human Rights (ECHR), there must be no discrimination on any ground in the enjoyment of other ECHR rights, including rights to life and to liberty and freedom of the person and freedom from torture and inhuman and degrading treatment. The HRA makes it unlawful for any public body to act in ways that are incompatible with the ECHR.

PALG and DLA comments on the sections of the draft guidelines

We set out below some general and some specific comments on the sections of the draft guidelines.. Our view that discourse on the law should be in a training manual sets our comments in context.

Section 1- Introduction

This section in part reflects our view that vigorous and fair investigation of all complaints, including, but not limited to, complaints of discriminatory conduct is essential to build trust and confidence in the police.

To allow police conduct which is, or which appears to be biased to go unchecked clearly affects adversely the relationship of the police service with communities.

The suggestion in this and other sections that parallels should be drawn with allegations of discrimination in the workplace and adjudication of such allegations by the employment tribunal is not helpful. While it is correct that the vast majority of discrimination claims that have been considered by the courts and tribunals are in the field of employment, conduct giving rise to complaints of discrimination by service users under the statutory police complaints procedure would, if litigated, be heard in the county court, to which no reference is made in the draft guidelines. As the procedure in the employment tribunal (and the county court) is adversarial, dependent on the parties to identify and produce relevant evidence to support or discredit the discrimination claim, lessons from the employment tribunal are unlikely to be helpful those who are mandated to carry out an independent investigative procedure in response to complaints by members of the public.

Section 2 - Proposed Standards of Professional Behaviour

So far as we can ascertain, the Standards of Professional Behaviour have not yet been laid before Parliament, but have now been finalised. It is not clear why only three of the standards have been included in these guidelines, since in our view the standards relating to personal responsibility and accountability, honesty and integrity, refraining from carrying out unlawful orders, non-abuse of authority and treating members of the public with respect and courtesy would also be relevant to the investigation of alleged discriminatory conduct.

The respective roles of managers and of individual officers in relation to the statutory equality duties could be clearer. It should also be clearer how failure by a supervisor to promote equality and eliminate discrimination will be taken into account where an officer s/he supervises is alleged to have committed an act of unlawful discrimination.

Section 3 - The legal framework

As indicated above, the PALG and DLA are concerned that any summary of discrimination law must be accurate and up-to-date. Unfortunately, the current law is complex, as well as frequently changing. It is for this reason that we recommend that fuller, more accurate summaries of the following in their current, amended versions should be set out in an annex to a training manual:

- Race Relations Act 1976
- Sex Discrimination Act 1975
- Disability Discrimination Act 1995
- Equality Act 2006, Part 2
- Equality Act 2006 (Sexual Orientation) Regulations 2007

The information provided should be directly relevant to police conduct that could be subject to a complaint by or on behalf of a member of the public and investigation of such complaints. Since the Standards of Professional Behaviour refer to both unlawful and unfair discrimination, thereby going beyond the grounds protected under the above legislation, it should not be necessary to discuss in much detail the particular exceptions that exist for particular grounds. Within the annex there should be accurate explanations of direct discrimination (when discrimination can rarely be justified) indirect discrimination, harassment and victimisation as defined in the legislation. It should be clear that it is also unlawful to aid or abet or to instruct or induce someone to discriminate unlawfully. When and how the duty to make reasonable adjustments under Part 3 of the DDA applies in a policing context should be explained. Focus should be on the application of these measures to the areas of activity which are likely to be relevant to complaints regarding police conduct by or on behalf of members of the public, which includes

- provision of or access to goods, facilities or services
- . carrying out functions of a public nature,

The annex should also give a clear explanation of the equality duties under the RRA, DDA and SDA that apply to all chief officers of police and all police authorities as well as to the IPCC. These duties, require due regard to be given to the need to eliminate unlawful discrimination (and harassment) and to promote equality of opportunity (with additional obligations under the DDA) in the carrying out of all police functions and all functions of the IPCC. The duty applies collectively and does not create new civil wrongs, that is non-compliance with the duty is not in itself “unlawful discrimination”, but the force or authority or the IPCC could be challenged by an application for judicial review if it failed to meet the duty when developing or implementing policies or practices. Reference in the annex could also be made to specific duties requiring consultation, equality impact assessment and monitoring the impact of policies and practices.

Article 14 and other relevant articles of the ECHR should be included in an annex. It should be clear that the prohibition of discrimination under Article 14 applies to all grounds/statuses and is not limited to the six grounds currently protected under anti-discrimination legislation in Great Britain. Information on s.6 of the HRA, which makes it unlawful for a public body to act in ways that are incompatible with the ECHR should also be set out in the annex.

Section 4 – Burden and standard of proof

This section should give a clear indication as to the standard of proof that is to apply in the investigation of all police complaints; we understand that the current standard is the civil standard – *on the balance of probabilities*. The draft guidelines state that within this there should be some flexibility, with a higher standard of proof required where the allegation or potential consequences are more severe. We do not

recommend that any different standard should apply to the investigation or to disciplinary proceedings where the complaint includes an allegation of discriminatory conduct.

The guidelines must also make clear where the burden of proof lies in the investigation of police complaints and whether a different approach is to be adopted in relation to allegations of discriminatory conduct. This section includes an extract from Home Office guidance on deciding matters of fact in a misconduct hearing/tribunal, which states plainly that “ the burden of proof lies with the presenting officer”. If, in relation to the initial investigation of allegations of discrimination the Home Office and the IPCC are proposing to adopt the “shift of the burden of proof” that is now required for most discrimination cases in the employment tribunal and the county court, then this fact and how it would work in practice needs to be far more clearly explained than in the draft guidance.

We endorse the approach that moves the burden from the complainant to the subject of the complaint once there is sufficient evidence to make discrimination one possible explanation for the conduct in question. We can appreciate, however, that this approach could require procedural changes in the investigation process, especially, for example, where a complaint includes an allegation of discrimination together with other allegations.

It should be noted that the EC Directives which have required shift of the burden of proof in discrimination claims before the employment tribunal and country court, do not impose the same requirement where there procedure is an investigative one. *“Member States need not apply paragraph 1 [requiring shift of the burden of proof] to proceedings in which it is for the court or competent body to investigate the facts of the case”*¹

Section 5 – Different forms of discrimination

The purpose of this section appears to be to use examples to assist police officers and IPCC officers and members to understand ways in which unlawful or unfair discrimination might occur within a policing context. As lawyers we are concerned that where there is reference to matters covered by anti-discrimination legislation the law must be accurately stated or interpreted. In some instances it is unclear whether the text is meant to be referring to statutory provisions. One example arises in the first paragraph, where the text in italics uses some of the terminology that occurs in the statutory definition of harassment in RRA, SDA and DDA but in a way that slightly misquotes that definition:

“unwanted conduct which has the purpose or effect of violating ...other person’s dignity ,or (our emphasis) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

¹ Art.8 EC Directive 2000/43/EC and Art. 10 EC Directive 2000/78/EC

A major error in this section is the statement that “only race, gender and sexual orientation apply to public services.” As we have stated above, there is legislation prohibiting discrimination on all of the protected grounds other than age in relation to the provision of goods, facilities and services and to the carrying out of all public functions. Thus it will be unlawful to discriminate on grounds of race, sex, disability, sexual orientation or religion or belief in all aspects of police activity. The fact that the police must also not discriminate “unfairly” should bring discriminatory conduct based on age within the scope of prohibited action.

We recommend that the examples within this section should be reviewed, so that whatever point they are meant to highlight emerges clearly from the facts stated. We would also recommend that the examples should be based on situations that are familiar rather than those that will appear exceptional. The aim should be to alert the police and those involved in the investigation of complaints to types of conduct that may give rise to complaints by members of the public that the police officers concerned, unduly steeped in police culture, may not have regarded as discriminatory.

Thus we would expect that an example of sexual harassment or less favourable treatment of a woman as victim or suspect might be more useful than the example chosen relating to a transgender suspect.

We do not find the first example relating to religion or belief to be credible or a good example of religious discrimination. The second example under religion or belief appears to conflate religion and ethnicity.

It is helpful to emphasise that age discrimination applies to young persons as well as older persons, and we would have expected a more useful example to cover police action against one or more young people based on their age.

Several of the examples appear to confuse discrimination, ie less favourable treatment, with failure to take positive measures to accommodate needs based on religion or belief or age. Examples of both may be useful, but there needs to be clarity as to what the example is illustrating; the example relating to disability is a clear example of alleged discrimination.

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

In our view, most of the useful guidance contained in this section should apply to all police complaints not just those of discrimination in order to ensure that the investigation process itself is, and appears to be, fair and unbiased.

For example, the importance of treating complainants with respect and dignity as set out on page 12, recognising particular needs and avoiding offensive words or action based on negative stereotypes, should form part of every investigation regardless of the conduct that is the subject of the complaint. It would be helpful if within this there was reference to complainants with mental health problems.

In relation to the definition of 'hate crime' (pages 12-13) and its reliance on motivation, it is important to be clear about the issues being addressed. Case law under the anti-discrimination legislation has established that motive or intention is irrelevant, the issue being simply whether there has been less favourable treatment on one of the protected grounds.

While there is some reference to the need for suitable training, we emphasise the importance of any officer who is expected to have any responsibility in receiving, allocating, investigating, recording or resolving police complaints having training on discrimination - how to recognise direct and indirect discrimination, harassment and victimisation, how such conduct can affect its victims, especially when meted out by persons in positions of authority, how discriminatory attitudes can be changed, how institutional patterns of discrimination can be altered.

We would have found it helpful for the statement on page 17 regarding the "aims of the investigation" to have been included at the beginning of these guidelines .

It is not clear why it is not standard practice always to give complainants a copy of the terms of reference for the investigation of their complaint, we suggest it should be.

Turning to the parts of this section that relate specifically to discrimination complaints, we welcome the recognition (page 19) that investigation of an allegation of discriminatory conduct may expose systematic discrimination within all or part of a police force; this was the thrust of the findings of the Stephen Lawrence Inquiry and remains a major concern of the PALG and DLA. This section is not very clear, however, as to how the investigation should proceed, and what outcomes might follow if the problem is confirmed as institutional.

We note with concern a tone of disbelief on page 20 of the draft guidance in relation to complaints of discrimination. As the stated objective is to search for the truth, we accept that this must require testing of the complainant's evidence. This should be the same for all complaints and not any more rigorous for those alleging discriminatory conduct.

The guidelines recognise that in drawing up the investigation plan the investigating officer may need evidence beyond that which is presented by the complainant, witnesses and the officers. This reflects the experience in discrimination litigation, that evidence of discrimination is rarely available to the victim and unlikely to be voluntarily disclosed by the alleged discriminator. There are two lines of evidence that should be investigated as a matter of course. As suggested on page 19, it will be important to uncover any previous history of (alleged) discrimination by the officer.

In addition comparable incidents to that which is the subject of the complaint, and involving the same police officers, should as a matter of course be investigated. This is often crucial to a discrimination complaint investigation. The purpose is to establish whether the officers treated the complainant similarly or differently to others of a different race/gender etc in similar situations.

As in section 4, it is never explicitly stated that to find the “truth” in relation to an allegation of discrimination the investigation procedure will adopt the ‘shift of the burden of proof’ that applies in discrimination cases in the county court and employment tribunal. If this is the approach that is to be taken, then, as we recommend above, it must be clearly stated to all parties from the outset, especially to the officer(s) whose conduct is at issue. As well as setting out the statutory requirements in an annex to this guidance, it may be useful to state in plain language how this will apply in the context of a complaint investigation.

We are not persuaded that the “Dx3+E” formula is an accurate transposition of the statutory rule on shift of the burden of proof in adversarial proceedings, which is:

Where, on the hearing of the claim, the claimant proves facts from which the court could ...conclude in the absence of an adequate explanation that the respondent (a) has committed such an act of discrimination or harassment against the claimant ...

the court shall uphold the claim unless the respondent proves that he did not commit ...that act.²

It is not clear from the guidance what strength of evidence is expected for the investigating officer to be satisfied that “the 3Ds are in place”. It is not clear how evidence regarding previous conduct of the officer would fit within the 3Ds. The above statutory provision merely requires the court to have sufficient facts for discrimination to be one possible explanation for the conduct in question.

Further, there is no requirement in the above statutory provision to establish any form of detriment. The guidance does not make clear whether detriment is a necessary part of other types of police complaints.

With regard to the explanation offered by the officer, if the above statutory provision is to be followed, then the officer must prove to the satisfaction of the investigating officer that discrimination played no part whatsoever in the conduct under investigation. The officer may put forward more than one explanation, or a complex explanation; the critical test is whether less favourable treatment on any protected (or any irrelevant ground) occurred. This could be alongside other reasons for the conduct, as suggested in the draft guidance. References to “motive” in the guidelines may be misleading. The investigator should be sufficiently well trained to be able to assess the explanation objectively.

While there is a list of issues (page 20) that should be explored when interviewing the complainant, this section lacks a parallel list that could assist the investigating officer when the officer is interviewed. As the officer’s response is critical where there is an allegation of discrimination, we recommend that there should be

²S. 57ZA (2), Race Relations Act 1976, as amended

guidelines on how to present the allegations and evidence to the officer and how to test the officer's explanation.

Section 7 – Misconduct action

We are concerned that the first paragraph in this section includes a series of generalisation unsupported by any evidence that may inhibit rather than assist effective investigation and response to allegations of discrimination by the police.

In our view, this section fails sufficiently to distinguish the investigation process from any subsequent action relating to alleged misconduct. In particular, there is a need for a clear statement regarding the burden of proof in misconduct hearings involving alleged acts of discriminatory conduct.

We do not disagree with the basic proposal that sanctions should be proportionate and that not all allegations of discrimination which are upheld should be treated as gross misconduct and result in dismissal. We agree that a proportionate approach should be adopted.

A clear policy should be developed to address the situation where an officer has discriminated and has done so in line with force policy or practice. Clearly the complaint should be upheld. The policy should address the issue as to when it is appropriate to uphold the complaint against the officer responsible for the police practice in addition to the officer who carried out the act of the discrimination. The policy should also address the issue as to when and how the fact that the discriminator was acting in line with force policy or practice should affect the nature of the disciplinary action and penalty.

The more significant question is what steps should be taken by the force as a whole in such cases. We recommend that clearer guidance is needed so that chief officers of police cannot avoid taking all steps that are necessary to implement appropriate changes to policies and practices and to assess and regularly monitor their equality impact. Within this context there should be reference to a force's statutory race, disability and gender equality duties as well as to its duties under the HRA.

Section 8 – Implementing these guidelines

The crucial feature within this section, which we strongly endorse, is the need for relevant training. As stated, this will be distinct from "diversity" training, since it should, as we have suggested above, focus on how to recognise direct and indirect discrimination, harassment and victimisation. This is crucial. The training should recognise that this can be a difficult and painstaking process for investigators who are, in the broadest of terms, investigating their own colleagues operating within a culture with which the investigators are very familiar. The training should also focus on the particular steps that are necessary for investigating complaints of discrimination how discriminatory conduct can affect its victims, especially when meted out by persons in positions of authority, how discriminatory attitudes can be changed, how institutional patterns of discrimination can be altered. Further, training for all police officers and police employees should include information on the

police complaints procedures, how complaints are investigated and any different or additional measures that may be implemented in the investigation of allegations of discriminatory conduct.

Section 11 – Summary of guidelines

As appropriately stated, this summary must reflect the guidance in its final form. It must, of course, refer to all grounds of discriminatory conduct and not solely race. We hope that our comments above will be taken into consideration in the final guidance and reflected in the summary.

Appendix 1 – Case summaries

We recommend a review of the decision to include case summaries; what purpose are they intended to serve?

There is now such a huge body of discrimination case law, we question the advisability of selecting only a few cases, as other important points of law may be more easily overlooked or treated as less significant. If the purpose is to assist officers better to understand current anti-discrimination law, then any case which has been overturned or overtaken by statutory amendment, as is true of *King –v- Great Britain-China Centre*, should not be included, as they will mislead rather than assist. We have some concerns regarding the points that have been taken from *Shamoon - v- Chief Constable of the RUC* and *Wong –v- Igen Ltd*. It is possibly unwise to include cases at county court or employment tribunal level, which carry no binding authority.

If any case summaries are included they should be within the training manual annex to which we have referred above, which can more easily be up-dated.

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Police Action Lawyers Group
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