

Consultation on draft IPCC statutory guidance to the police service

Reasons for the consultation

The IPCC is reviewing its statutory guidance to the police service on the handling of complaints in light of the decision of the Court of Appeal in *Chief Constable of West Yorkshire v Independent Police Complaints Commission* [2014] EWCA Civ 1367.

This judgment is clear that where investigators reach case to answer findings for misconduct or gross misconduct, they cannot uphold the complaint if this would determine, or would give the appearance of determining, any of the issues that would be for the subsequent misconduct panel to determine. This means that investigators cannot reach 'determinative' findings that a police officer has misconducted him or herself or acted unlawfully (either civil or criminal) and if to uphold a complaint has this effect, then the investigator cannot uphold the complaint (they are restricted to reaching a case to answer finding on misconduct).

The draft amendments we are now consulting on are intended to reflect this judgment and to make clear what conclusions investigators are able to reach in different types of case.

Consultation period

This document was produced to support a public consultation on draft amendments to IPCC statutory guidance to the police service on the handling of complaints. There is a pressing need to revise the statutory guidance as it is now contrary to case law. The amendments to the statutory guidance must be approved by the Home Secretary and therefore we are consulting for a shorter period of time than usual to allow this to happen before purdah begins. The consultation begins on **19 December 2014** and will run for six weeks until **5pm on 30 January 2015**.

About the consultation

These draft amendments affect three sections of the guidance:

- Section 9: Investigations
- Section 11: Concluding the investigation
- Section 13: Appeals

The paragraphs which have been amended and about which we are seeking feedback are highlighted in the consultation document.

How to respond

You can respond:

- by email: statutory.guidance@ipcc.gsi.gov.uk
- by post: Statutory Guidance Consultation, PO Box 473, Sale, M33 0BW

Alternative formats

Please email statutory.guidance@ipcc.gsi.gov.uk if you require a copy of the consultation document in another format, e.g. large print or hard copy.

How your responses will be used

Comments, opinions and feedback on this document will help finalise the IPCC's draft statutory guidance for the police service.

Confidentiality and disclaimer

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the Freedom of Information Act 2000 (FOIA) and the Data Protection Act 1998 (DPA).

If you want the information you provide to be confidential, please be aware that under the FOIA there is a statutory Code of Practice with which public authorities must comply. This deals with, among other matters, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot guarantee that confidentiality will be maintained in all circumstances.

An automatic confidentiality disclaimer generated by your IT system will not be regarded as binding.

Please make sure that if you wish your name to be kept confidential, this is clearly marked in your response.

The IPCC will process your personal data in accordance with the DPA – in the majority of circumstances this means that your personal data will not be disclosed to third parties.

Consultation on the IPCC's draft amendments to statutory guidance to the police service on the handling of complaints

Consultation response form

This response form invites you to consider the draft amendments to the guidance and provide us with any general comments. Please include paragraph numbers in your response where appropriate.

Please return your completed response form to statutory.guidance@ipcc.gsi.gov.uk.

Date	3 February 2015
Name	Police Lawyers Action Group
Organisation	Police Lawyers Action Group
Contact details	Michael Oswald, Bhatt Murphy Solicitors m.oswald@bhattmurphy.co.uk 0207 729 1115

Is this a personal response or on behalf of an organisation?

Personal

Organisation

Do you wish your response and name to be kept confidential?

No

If 'yes', please indicate why:

1.

Section 9

We have amended the guidance on severity assessments between paragraph 9.35 and 9.42.

Is the guidance clear about how a severity assessment should be made?

Yes

Partially

No

Please provide us with a reason for your answer and any suggestions for improvements we should make:

2.

Section 11

The guidance sets out in section 11 what conclusions can be reached in relation to cases which are subject to special requirements, conduct investigations and service delivery complaints.

Is it clear from the amended guidance when a complaint should or should not be upheld?

Yes

Partially

No

Please provide us with a reason for your answer and any suggestions for improvements we should make:

It is clear from the draft guidance when a complaint should or should not be upheld. However, the amendments to Section 11 also concern the guidance as to making findings on whether there is a 'case to answer', and the draft guidance in that regard is not at all clear. We assume that this consultation question is intended to seek feedback on all of the proposed changes to Section 11 and not just those that concern when a complaint should be upheld. However, if that is incorrect, please treat what follows as a response to the request for 'General Comments' below.

While some parts of the draft guidance on making findings on whether

there is a case to answer are clear, they are contradicted by other parts of the guidance, which appear to describe the role of the investigator in a way that is at odds with the judgment in the West Yorkshire case.

The test that the investigator should apply to determine whether there is a case to answer for misconduct/gross misconduct is correctly explained in 11.30 of the draft Guidance, as follows:

*Finding that there is a 'case to answer' means that the investigator is of the opinion that there is sufficient evidence that a reasonable misconduct hearing or meeting **could** find, on the balance of probabilities, gross misconduct or misconduct. [Bold emphasis in original]*

So, the process the Investigator must undertake is to assess the evidence and ask herself in light of that assessment whether a reasonable misconduct tribunal (meeting or hearing) could, on the balance of probabilities, find the misconduct/gross misconduct proven. If that question is answered in the affirmative, then the investigator should make a finding that there is a case to answer for misconduct/gross misconduct.

The test is also correctly explained at paragraph 13.101 of the draft Guidance, in the context of appeals, as follows:

*Finding that there is a case to answer means that the person dealing with the appeal is of the opinion that there is sufficient evidence that a reasonable misconduct hearing or meeting **could** find on the balance of probabilities, gross misconduct or misconduct. [Bold emphasis in original]*

That this is the correct approach is clear from the West Yorkshire judgment, for example at paragraph 56 where the Court explains that the investigator's task is to focus 'on whether an evaluation of the evidence justified the conclusion that there was a case to answer in respect of it in other proceedings.'

However, paragraphs 11.28 and 11.33 of the draft Guidance suggest a contrary approach to the role of the investigator when considering whether there should be a finding of 'case to answer'.

Paragraph 11.28 reads:

In an investigation of a complaint subject to special requirements or a recordable conduct matter, investigators will need to collate and analyse evidence in relation to each allegation and reach findings on the balance of probabilities in relation to each allegation. This will assist investigators in making the 'case to answer' assessment for misconduct / gross misconduct.

Paragraph 11.33 reads:

If, in an investigation of a complaint subject to special requirements or a recordable conduct matter, an investigator finds sufficient evidence that one or more of the allegations are made out on the balance of probabilities, then the investigator must consider whether a reasonable misconduct hearing or meeting could find misconduct or gross misconduct in relation to the relevant officer's conduct. If so, then the investigator should reach a case to answer finding for misconduct or gross misconduct. If not, then the investigator should reach a no case to answer finding. [Underlined emphasis added]

The underlined excerpts from the above paragraphs suggest that the investigator should determine whether the allegations are 'made out on the balance of probabilities'. That is the wrong approach: it is the approach that was found to be unlawful by the Court of Appeal in the West Yorkshire case. That is clear from paragraph 56 of the judgment of the Court of Appeal, the relevant part of which reads as follows:

The investigators' technique in their report was to decide in paragraphs 91 to 103 that the assertion of misconduct on the part of the officer was established on the law and the facts and, in paragraph 104, that there was therefore a case for him to answer. That approach betrays a misunderstanding by the investigators of the nature of their task. They should, in paragraphs 91 to 103 have been focusing not on whether in their opinion the misconduct was proved, but only on whether an evaluation of the evidence justified the conclusion that there was a case to answer in respect of it in other proceedings.

To similar effect paragraph 52 provides as follows with regard to the role of the Investigator:

[The Investigator has] to investigate the complaint and evaluate the evidence adduced before them in order to decide whether there is such a case to answer; and they have to provide a reasoned report as to the outcome of their investigation. Their investigation and evaluation of the evidence may enable them to conclude, and report, that in fact there is no such case to answer. If, for example, the evidence in this case had demonstrated beyond question that PC Armstrong had been abroad on the afternoon of the alleged incident, so that the complaint against him was obviously misdirected, the investigators would have been entitled to make clear findings on the evidence to that effect and to report that there was no case for him to answer. If, however, their conclusion was that there is a case to answer, then whilst they must explain the evaluation of the evidence that has caused them to come to such a conclusion, they must be careful to stop short of expressing findings on the very questions

that will fall to be answered by the court or tribunal which may later become seised of the matter. It is not difficult to do so. It is the sort of exercise that judges regularly have to perform. [emphasis added]

The proposed Guidance in 11.28 and 11.33 states that investigators should make findings on whether specific allegations are made out. However, as is clear from the Court of Appeal's judgment, such determinations are for the tribunal to make as they are the 'very questions that will fall to be answered by the court or tribunal which may later become seised of the matter.' The Court has made clear that the role of the investigator is simply to evaluate the evidence and determine whether it is sufficient that a reasonable misconduct meeting/hearing could, on the balance of probabilities, find misconduct/gross misconduct proven. They must stop short of making any findings of fact or law, which are properly for the misconduct tribunal.

In short, paragraph 11.30 correctly describes the role of the investigator, whereas 11.28 and 11.33 do not; those paragraphs instruct the investigator to determine questions that are properly the territory of the misconduct tribunal, such that her findings would be vulnerable to challenge (by the officer(s) concerned or the complainant).

In order to avoid guiding investigators toward unlawful decision making, paragraphs 11.28 and 11.33 should be amended. We would suggest the following amendments [excised words struck through and added words underlined]:

Para 11.28

In an investigation of a complaint subject to special requirements or a recordable conduct matter, investigators will need to collate and analyse evidence in relation to each allegation ~~and reach findings on the balance of probabilities in relation to each allegation.~~ This will assist investigators in making the 'case to answer' assessment for misconduct / gross misconduct.

Para 11.30

~~If, in an investigation of a complaint subject to special requirements or a recordable conduct matter, an investigator finds sufficient evidence that one or more of the allegations are made out on the balance of probabilities,~~ then the investigator must evaluate the evidence and consider whether it is sufficient such that a reasonable misconduct hearing or meeting could find misconduct or gross misconduct in relation to the relevant officer's conduct. If so, then the investigator should reach a case to answer finding for misconduct or gross misconduct. If not, then the investigator should reach a no case to answer finding.

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3.	<p>Where an investigation is subject to special requirements, this means that a case to answer decision must be reached. However, there may be allegations within a complaint which concern service delivery and would in no way relate to any subsequent misconduct proceedings.</p> <p>Do you have any suggestions for how these matters should be dealt with?</p> <p>In these circumstances, where there are allegations concerning service delivery that do not relate to the allegations of misconduct, there is nothing to prevent findings to be made in respect of those allegations and for those parts of the complaint to be upheld if appropriate.</p>
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4.	<p>Section 13</p> <p>We have amended the guidance in relation to appeals to assist decision makers to assess the findings of the investigation, including whether a complaint has been upheld or whether it has been found that there is a case to answer.</p> <p>Does the guidance provide sufficient information to assist appeal decision makers?</p> <p>Yes <input checked="" type="checkbox"/> Partially <input type="checkbox"/> No <input type="checkbox"/></p> <p>Please provide us with a reason for your answer and any suggestions for improvements we should make:</p>
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5.	<p>We plan to publish an issue of <i>Focus</i> at the same time we publish the revised statutory guidance. This will cover the conclusions that may be made at the end of an investigation and will include examples of where decisions about a case to answer should be made and where decisions about upholding should be made.</p> <p>Are there any particular points from the amendments to statutory guidance that you think it would be useful for these examples to cover?</p> <p>The process by which an investigator must consider whether there is a case to answer is clearly an area that may give rise to some confusion. The post-West Yorkshire approach will be a significant change for investigators and, as set out in response to section 2, there appears still to be some misunderstanding on the part of the IPCC. We therefore suggest that this may be an area where careful instruction is required.</p>
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General comments

<p>We welcome any other comments you would like to make on the proposed amendments to the guidance.</p>
