

PCCS



Police Complaints Commissioner
for Scotland

Request for complaint handling review of a complaint about

Tayside Police

**under the provisions of
the Police, Public Order and Criminal Justice (Scotland) Act 2006**

October 2009

Case reference: PCCS/0910/00395/PF-TP

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Introduction

The role of the Police Complaints Commissioner for Scotland was established by the Police, Public Order and Criminal Justice (Scotland) Act 2006 (“the Act”) to consider and review the way police bodies handle complaints from the public. The Commissioner provides a free and independent service, reviewing the handling of complaints fairly, looking at both sides of what has happened and looking at the facts.

The Commissioner aims to review complaints in an independent, open and fair manner. In line with this aim the Commissioner will publish the reports of his complaint handling reviews, whilst bearing in mind individuals’ rights to confidentiality. The following report therefore details the Commissioner’s consideration, but does not include individual names of complainers, police officers or others affected by the events detailed therein.

1. Request for review

The complainer has asked the Commissioner to review the handling of his complaints about Tayside Police relating to an incident on 27 November 2007. The complaints are as follows:

- (1) the complainer was unlawfully arrested and detained;
- (2) the police used excessive force in arresting him and, in particular, applied handcuffs in such a way as to cause him physical injury to his wrists;
- (3) while in police custody inadequate consideration was given to his welfare and there was a failure to advise him of his legal rights and the process he faced;
- (4) on an occasion subsequent to his arrest police officers visited the complainer's home unannounced; and
- (5) that CCTV evidence which the complainer has viewed does not show that he lashed out with arms and legs, as was alleged by the officers who arrested him.

2. Power to conduct a complaint handling review

Section 35 of the Act provides the Commissioner with the authority to examine the manner in which an appropriate authority has handled a complaint about a police officer, member of police staff or the service provided by a relevant authority.

In order to carry out such a complaint handling review the Commissioner's office requests the complaint case papers from the police body in question. The Commissioner examines the facts of the case, looking at information provided by both the complainer and the police body. The Commissioner considers whether the information available does, or does not, support the complaint, and whether or not the police body has responded to the complaint in a reasonable manner. The Commissioner also considers whether the police body communicated with the complainer in a reasonable manner, including whether the police body handled the complaint within a reasonable timescale. The Commissioner then comes to a view on whether the conclusions drawn by the police body in handling the complaint were reasonable in all the circumstances.

Once the Commissioner has reached his conclusions he prepares a report which details his findings. This is then forwarded to the relevant authority in accordance with section 35(3) of the Act. The complainer will be advised of the conclusions of this review and of what action, if any, the Commissioner proposes to take in consequence of those conclusions. Where the complaint is in respect of an act or omission by an individual police officer, that person will also be informed of the conclusions of this review.

2.1 Relevant complaint

Section 34 of the Act provides that the Commissioner may review the handling of a complaint where the complaint is “a relevant complaint”, defined as

(1) ... a complaint which is given or sent ... to the appropriate authority in relation to the complaint.

(2) “complaint” means a written statement expressing dissatisfaction about an act or omission...

(3) But “complaint” does not include

(a) any statement made by a person serving with, or who has served with, the police, about the terms and conditions of that person's service with the police; or

(b) a statement which consists of or includes an allegation of an act or omission which constitutes a crime.

The complainer has supplied a written statement expressing dissatisfaction about an act or omission by a police body. The complaint is therefore a relevant complaint.

2.2 Relevant complainer

The Act further provides that the Commissioner may review the handling of a complaint where the complainer falls within one of the following categories (section 34(6)):

(a) a member of the public who claims to be the person in relation to whom the act or omission took place;

(b) a member of the public not falling within paragraph (a) who claims to have been adversely affected by the act or omission;

(c) a member of the public who claims to have witnessed the act or omission;

(d) a person acting on behalf of a person falling within any of paragraphs (a) to (c)

The complainer is a member of the public who claims to have been adversely affected by an act or omission by the police. The complainer is therefore a relevant complainer under the terms of section 34(6)(a).

3. Background

The complainer's account

The following details are taken from the complainer's statement of 25 February 2007 which he gave in connection with his complaints about Tayside Police.

The complainer describes himself in his statement as politically active. On 27 November 2007, he noticed that there was a comedy show being held at a particular building on a university campus (it appears that the show was attended in the main by Muslims). The complainer thought it would be an appropriate place to distribute political leaflets.

The building in question is reached by stairs which lead to a concourse, to the rear of which are the entrance doors. The complainer was standing on the concourse at the time of the incident.

According to his statement, the complainer was approached by a university janitor, Mr A, who told him, "You're not doing that here". In reply to this, the complainer informed Mr A that he intended to continue handing out leaflets. A short time later another janitor, Mr B, approached him and said that he would have to move as he was on private property and could not hand out leaflets there. The complainer again refused to do so and suggested to Mr B that he might wish to get in touch with the police to check their view as to the legality of what he was doing.

The complainer states that a short time later he was approached by two police officers, Constables C and D, one of whom told him to move. The complainer states that he then asked the officers to provide him with a "legal reason" as to why he could not remain there. He claims that at one point the female officer (Constable C) asked him if he had a street trader's licence, to which he replied that he did not need one. The complainer states that at this point he and the officers were raising their voices. At one stage, Constable D said to the complainer that there was no law of trespass in Scotland, to which the complainer agreed.

According to the complainer, Constable C eventually seemed to decide that he was "getting moved" and told him he was under arrest. The complainer alleges that the officers then grabbed him and swung him round. He was then placed on the ground while the officers put handcuffs on his wrists, which were placed behind his back. The complainer states that as the officers were putting him down on the ground, he told them that their actions were unnecessary. He continued to protest regarding the use of the handcuffs which he claims were placed at an angle, causing his wrists to bleed. The complainer was then taken to a police van and continued to shout to onlookers about the officers' treatment of him. He was then transported to police headquarters.

The complainer states that at one point Constable C said that she would take off the handcuffs if he behaved himself. The complainer told her, however, that if she did not trust him she should just leave them on. When the handcuffs were removed later at the charge bar, the complainer noticed cuts to and blood on his wrists, but he did not say anything about this.

The complainer was then taken to a cell within the police station. In his statement he states that he “expected more checking from the custody staff as [he] felt that they did not look after [his] welfare very well.”

The complainer questioned the legality of his arrest as well as the need for the officers to have seized him in the way they did. He stated that if his arrest was unlawful then his detention was also.

Constable C’s account

Constable C provided a statement to the police dated 31 December 2007 in response to the complaints. According to the statement, on the evening in question she received a call from Tayside Police’s control room regarding a male who was handing out leaflets on university property, acting in an aggressive manner to staff and refusing to leave. She and Constable D immediately attended the incident and spoke to the janitor, Mr B. According to Constable C’s statement, Mr B informed her of the circumstances and told her that the complainer was acting in an “aggressive manner”. Mr B also apparently informed Constable C that the complainer had shouted at him about, among other things, there being no trespass law in Scotland.

Constable C said that the complainer had an “aggressive demeanour” as she and Constable D approached him. According to Constable C, the complainer ignored her request for his name, stated that he had every right to be where he was and asked what legal right the officers had to ask him to move. Constable C then raised her voice in order to get the complainer’s attention and to stop him from shouting. However, as this led only to the complainer raising his voice further, she desisted. She and Constable D attempted to tell the complainer that the university staff were happy for him to stand at the bottom of the stairs leading to the entrance to the building, but the complainer refused to move.

Constable C then asked the complainer to move to the side so that the matter could be discussed rationally. The complainer then began shouting again and so Constable C placed her hand on his right arm and tried to usher him to the side. According to Constable C, the complainer then “braced up, threw his hands in the air and became more aggressive”. She tried to bring the complainer’s arms down in fear that he would lash out. The complainer then began lashing out with his arms and struggling with her and Constable D. Constables C and D then attempted to place the complainer in handcuffs but he continued to struggle. They eventually restrained him on the ground, his wrists cuffed to the rear. The complainer then appeared to calm down a little and was taken to a nearby police van in which Constable E was waiting. The complainer was placed in the rear cage of the van while Constables C and D returned to the scene to note statements. Both constables returned to the van a short time later and were told by Constable E that the complainer had provided his details.

Constable D's account

In his statement of 28 December 2007, Constable D states that he overheard the call from the control room to Constable C regarding a male handing out leaflets on university property and "refusing to leave". He and Constable C attended the incident and asked the complainer to leave, as he was occupying private property. The complainer refused to do so, stating that he had the right to sell his magazines wherever he wanted and that the police had no power to move him. The complainer went on to say that there was no law of trespass in Scotland, to which Constable D agreed. However, Constable D reiterated to the complainer that he was on private property and that the staff of the university had the right to ask him to leave. Constable D advised the complainer that the staff had become alarmed at his behaviour.

Constable D explained in his statement that after several failed attempts to persuade the complainer to move on, Constable C "took [the complainer] by the elbow and attempted to lead him off of the private property towards the public street." The complainer then reacted by jerking himself free and taking an aggressive stance. Constable C then informed the complainer that if he remained aggressive he would be arrested. Constable C again began trying to lead the complainer to the street but he refused to leave and became even more aggressive. Constable C thereafter advised the complainer that he was under arrest for breach of the peace.

Constable D thereafter gave a description of the officers' struggle with the complainer which led to him being handcuffed and taken from the scene.

Mr A's account

Shortly after the complainer was taken away, Constable D returned to the scene and obtained a statement from Mr A.

In the statement Mr A said that he told the complainer that he could not "sell his magazine" outside the building as this was private property. He asked the complainer to move to the nearby street, in response to which the complainer said, "This is a free country, I can go where I want." As the complainer was refusing to move, he contacted Mr B. A short time later, Mr B called him and asked for the telephone number of the police.

On 6 February 2008, Mr A provided a further statement as part of the investigation into the complainer's complaints. In this statement, Mr A said that he had been on duty at the university when he noticed the complainer selling the Socialist Worker newspaper. As this was contrary to university policy, Mr A asked the complainer to leave. The complainer declined and told Mr A that he could sell the newspaper anywhere he liked.

Mr A then called Mr B who also spoke to the complainer. While Mr B was doing this, Mr A went downstairs to the CCTV room and moved the camera into a position from which he could watch the area. From what he could see, Mr B was still with the complainer when the two police officers arrived. Mr A saw the officers speaking to the complainer for a minute or so. He then saw the officers move towards the

complainer, the complainer moving back and then all three falling to the ground. While on the ground the complainer was struggling violently. The officers eventually placed him in handcuffs and took him to a nearby van.

From what he could see, Mr A did not believe that the officers had done anything wrong.

Mr B's account

Mr B was interviewed at the scene shortly after the complainer's arrest. He confirmed that he had earlier been contacted by Mr A regarding the complainer selling the Socialist Worker and refusing to move on. Mr B said that it was contrary to university policy to sell anything on its property without permission.

Mr B spoke to the complainer and told him that he was not allowed to be on the campus. The complainer replied that there was no law of trespass in Scotland and refused to leave unless the police were called. According to Mr B, the complainer began shouting about there being no law of trespass in Scotland.

Mr B saw Constables C and D approach the complainer, whom he thought had a confrontational manner and was not prepared to listen to reason. The officers asked him to move to the side but he was not prepared to listen to them. The officers asked the complainer to listen but he refused to do so and asked them what right they had to ask him to leave. He then "braced up" and lifted his arms in a confrontational manner. He continued to shout at the police and was then arrested. He continued to fight and struggle and would not calm down. He was then put to the ground and restrained but he continued to struggle. He asked onlookers to film the scene with his camera, before being brought to his feet and led away.

Mr B provided a further statement on 29 January 2008 as part of the investigation into the complaints. The statement is similar in terms to the one he gave at the time of the incident. According to Mr B, as soon as he asked the complainer to remove himself from university grounds, the complainer became very defensive and told him there were no trespass laws in Scotland. When Mr B said he had no option but to call the police, the complainer insisted that he do so as he wanted to know what right they had to remove him.

Mr B felt that the complainer's actions were causing a "nuisance". He also felt that if other political groups, such as the British National Party, were allowed to hand out its leaflets there would be a security risk.

A short time later, two police officers arrived and Mr B explained to them what had happened and that the complainer was refusing to leave the premises. The officers took the complainer to one side and began speaking to him but Mr B could not hear what was being said. However, at one point the complainer began raising his voice and pointing repeatedly at Mr B. The officers then appeared to usher the complainer off the campus, at which point he quickly stepped backwards and began to struggle with the officers. Mr B then heard the officers say "Right you're getting arrested", to which the complainer replied "What for?". In response to this, Constable C said

“breach of the peace”. A struggle thereafter occurred between the officers and the complainer was finally overpowered and handcuffed.

Mr B said that he had not heard the officers shout or raise their voices at the complainer, nor had he heard them being rude to him or calling him names. He did not believe that the officers had done anything wrong.

Further developments

The complainer’s case was referred to the Procurator Fiscal who decided that no proceedings should be taken against him. The complainer thereafter wrote to the Procurator Fiscal enquiring as to why no proceedings were being taken. In his response of 15 February 2008, the Procurator Fiscal advised the complainer that:

“Following careful consideration of the police report, it was concluded that the conduct which led to your arrest did not amount to a crime under Scottish law.”

4. Internal handling

Events prior to the complaint

It appears that having been notified of a planned demonstration by a pressure group, prompted by the arrest of the complainer, it was decided by Tayside Police that officers should visit the complainer at his home address. In terms of a memorandum from Superintendent F to the Professional Standards Department dated 7 December 2007, this decision was taken because it was clear at that stage that the complainer wished to make a complaint.

In an email dated 6 December 2007 to Superintendent F, Inspector G stated that he and Sergeant H had visited the complainer’s address that evening. The complainer was on the telephone at the time but after he had finished the call he spoke to the officers on the common landing. Inspector G explained his reasons for attending and asked the complainer if he would be willing to speak to him in an attempt to resolve the matter, or to provide a statement if he wished. According to the email, the complainer refused to do so as he had spoken to his solicitor that day and did not want a meeting to take place at his home address. He stated that he intended to write a formal letter of complaint that or the following day which he would send to Tayside Police. Inspector G explained to the complainer that taking a statement from him would mean that Tayside Police could deal with the complaint from that point, but the complainer did not change his mind. He told Inspector G that he wished to come to Tayside Police headquarters with his solicitor at a pre-arranged time and would provide a formal statement at that time.

According to the email, Inspector G asked the complainer if he intended to go ahead with the demonstration, and the complainer confirmed that he did. Inspector G informed the complainer of the obligations upon demonstrators to comply with certain legal requirements, and that the failure to do so could result in prosecution. The complainer said that he was aware of what was required.

The initial complaints

On 14 December 2007, Tayside Police received a letter from an MSP enclosing a statement the complainer had prepared himself detailing complaints 1, 2 and 3 (see page 4 above).

In this statement, the complainer described the circumstances of his arrest and stated that he had been shocked by “the disproportion of force” used by the officers in effecting this. The complainer alleged that the officers’ actions were “wrong, disproportionate and illegal”. He also made reference to injuries to his wrists which he claimed had been sustained by the way in which the handcuffs were applied. He implied that his arresting officers had assaulted him. In respect of the time he spent in the police cell, the complainer said that no effort was made to check on his welfare, and that no medical advice, food or drink had been offered. He also complained that no explanation had been given to him as to when he would be released or as to the legal process. In addition, he complained that no-one had informed him whether his solicitor and another individual he named had been contacted.

The statement and accompanying letter was received by the Professional Standards Department on 18 December 2007. On 19 December 2007, a Complaint About Police Staff (CAP) form was completed which recorded the complaints as follows:

“That he was unlawfully arrested and that in doing so excessive force was used by the officers and that his legal position and rights were not fully explained to him.”

Inspector G’s Preliminary Report

Inspector G wrote to the complainer on 24 January 2008 to advise that he had been appointed as the preliminary investigating officer. Following enquiries, Inspector G prepared a preliminary report dated 7 February 2008 in which he listed the complaints as follows:

“(1) Unlawful and unnecessary arrest with regards to [the complainer’s] conduct and action at the locus.

(2) Alleged excessive force used during the course of the arrest whereby complainant sustained and injury to his wrists by Constables D and C.

(3) Failure to be provided his legal rights... having been arrested and given sufficient information so that he understood the procedures being followed.

(4) Failure to provide a reasonable level of care in respect of his welfare whilst in custody.”

After setting out the circumstances giving rise to the complaint and the enquiries he had undertaken, Inspector G made a number of observations, including the following.

- In terms of the information provided by Mr A and Mr B, it was clear that the university did not allow anyone to distribute political material on its premises without prior consent.
- Constables C and D were justified in arresting the complainer for breach of the peace due to his conduct.
- The actions of Constables C and D appeared proportionate and justified. The complainer was obstructive and argumentative during the incident. By his own admission, and as shown by the CCTV footage, he “actively attempted to resist the police officers when trying to arrest him and gain control.”
- From the information available, the officers used only such force as was necessary to subdue the complainer, and the complainer’s own actions contributed to the injury to his wrists. According to Inspector G “[it] can be argued that had [the complainer] been compliant and not intentionally resisted, then it is likely the injuries would not have been sustained.”
- The complainer’s account of his actions outside the university and his processing at police headquarters did not withstand scrutiny when compared with the accounts given by independent witnesses, the arresting officers, the support staff as well as the CCTV footage.
- The CCTV footage and the accounts given by the officers showed that recognised holds and techniques were used to overpower and restrain the complainer and that the handcuffs were locked as per procedure.
- Mr B stated that the officers were calm throughout the incident and were not rude to the complainer.
- The complainer was provided with sufficient information as to why he was being arrested and the offences with which he was being charged.
- The complainer was informed correctly, using pre-worded instructions, about the obtaining of bodily samples.
- Constable D was wrong to agree with the complainer that there was no law of trespass in Scotland, although this had no direct bearing on the outcome of the incident. Inspector G recommended that Constable D be provided with suitable advice on the law of trespass in Scotland.

Inspector G also commented in his report on the legislative provisions relating to trespass in Scotland. This appears to have been based on advice obtained from Tayside Police’s legal department. The report contains the following passages:

“The position in Scotland is that it is a perpetual myth that there are no trespass laws in Scotland. Even before the recent Criminal Justice and Public order Act 1994, trespass has been a delict (civil wrong) which is remediable by the remedies of interdict and damages. However, the Land Reform (Scotland) Act

2003 amends the Trespass (Scotland) Act 1865 and establishes a statutory right of access...

Section 3 [of the 2003 Act] makes it an offence for any person to lodge in any premises, or occupy or encamp on any land, being private property, without the consent of the owner or legal occupier. Admittedly, this section envisages a degree of permanency which will not be present in every situation of trespass...

The [2003] Act establishes statutory rights of non-motorised access... to most areas of land and inland water for passage, recreation, education and commercial activities...

Most noticeably and pertinent to this case certain conditions apply over which access rights are not exercisable: various categories of land are outwith access rights. Privacy concerns are addressed by excluding the curtilage of buildings from access rights...

Inspector G pointed out, however, that the officers in the present case did not arrest the complainer under the trespass laws but for breach of the peace, due to his causing annoyance to others and “failing to desist.”

The involvement of the Professional Standards Department

On 12 February 2008 Superintendent F referred the complaint and associated paperwork to the Professional Standards Department. According to Superintendent F's memo of that date, this was done because the complaint contained an allegation of assault/ excessive force against the arresting officers.

On 13 February 2008 the complainer emailed the Professional Standards Department asking that the formal complaints process begin in relation to the officers who arrested him.

On 18 February 2008 Superintendent J wrote to the complainer explaining that allegations of criminal conduct against police officers are referred to the Area Procurator Fiscal who is responsible for directing enquiries. Superintendent J advised the complainer that the decision had been taken to carry out an investigation in his case and that the Deputy Chief Constable had appointed Inspector K to undertake this. Superintendent J asked the complainer to contact Inspector K in order that a meeting could be arranged.

Inspector K thereafter obtained a statement from the complainer on 25 February 2008 (the contents of which are summarised at pages 6-7 above). Inspector K also took statements from a number of other witnesses.

On 14 March 2008, the complainer wrote to Inspector K listing a number of points which he wished to be considered during the course of her investigation. The complainer reiterated his complaints about the legality of his arrest and detention (complaint 1), the force used to effect his arrest (complaint 2), and the allegedly inadequate consideration given to his welfare while in custody (complaint 3). However, he also raised issues as to the “legality of unannounced visits to [his

home] by police officers” and the “legality of statements made by these officers that [he] would be liable for public order offences” (complaint 4).

The complainer stated in his letter that he wished a written response to the points he had raised; public recognition of the officers’ “illegal and dangerous behaviour”; a public apology; a public commitment to “human rights education and training for the police force”; and compensation.

Inspector K’s Report to the Deputy Chief Constable

Following the completion of her enquiries, Inspector K prepared a report to the Deputy Chief Constable dated 9 April 2008. The report focussed on what Tayside Police considered to be criminal allegations arising from the complaints, namely assault and abduction by the officers concerned. The assault allegation consisted of the officers having used excessive force in effecting the complainer’s arrest; the abduction allegation concerned the complainer’s removal from the scene of the incident and his subsequent detention at police headquarters.

After narrating the contents of the various statements taken in connection with the complaint, Inspector K goes on to make several observations. She confirms that advice had been obtained from Tayside Police’s solicitor to the effect that the complainer had no rights under the Land Reform (Scotland) Act 2003. According to the report, this was because access rights created by that Act are “not exercisable on land where there is a building or on land which forms curtilage of a building which it is not a house.” The solicitor also apparently advised that although the university impliedly gave a right of public access to people accessing the building or crossing over to get elsewhere, that right could be withdrawn if the university believed it was being abused. According to Inspector K’s report, the solicitor was therefore of the view that it was “permissible to request [the complainer] to remove himself from the private property of [the university] as his activities were incompatible with university policy.”

In Inspector K’s view, there appeared to be some disagreement between:

“...[the complainer’s] perception of the opinion of the Procurator Fiscal Service and the force solicitor in the rights [the complainer] had to distribute his leaflets [on the campus]. The Procurator Fiscal view being that he was not committing a crime but the force solicitor is of the opinion that he may have been.”

Inspector K considered that the complainer’s assertion that he had a right to be present on the campus was untrue, as the 2003 Act had amended the Trespass (Scotland) Act 1865. Inspector K then repeats much of what Inspector G said in his report as to the law of trespass (see page 12-13 above). According to Inspector K the two janitors, Mr and Mr B, had felt it inappropriate that the complainer distribute his leaflets given the university’s non-affiliation with political organisations. In light of this, Inspector K believed that Constables C and D had acted in good faith when they assumed that the complainer was breaking the law by handing out leaflets on private property. Inspector K also believed that because the complainer had put up a struggle with the officers “when asked to leave”, reasonable force had been used to apprehend him.

Inspector K goes on to say that it was understandable why the complainer was aggrieved as he felt the officers had no right to remove him from the area. She adds that the legality of the police procedures from his arrest onwards were therefore under scrutiny.

Under the heading "Learning Points", Inspector K commented that it might have benefited the officers if they had sought advice before proceeding to apprehend the complainer. She pointed out that Constable C was alleged to have said that the complainer required a street trader's licence; while Constable D had agreed with the complainer that he was not trespassing on university property but could not tell him why he was being moved. In Inspector K's view it was therefore "clear that the officers were unsure of the powers open to them in respect of the incident..."

Inspector K concluded her report by requesting that it be sent to the Area Procurator Fiscal. She added that after a decision had been made by the Area Procurator Fiscal, there were no misconduct issues for Constables C and D.

Subsequent developments

On 30 April 2008, the Area Procurator Fiscal wrote to the Deputy Chief Constable advising that he intended to take no proceedings against Constables C and D.

On 2 May 2008 Superintendent P sent separate memos to Constables C and D advising them that no criminal or misconduct proceedings were to be taken against them. Superintendent P added, however, that "any additional learning points identified during the course of this enquiry will be forwarded to your Divisional Commander to be addressed directly."

On the same date, an email was sent from Ms Q of the Professional Standards Department to Inspector K reiterating that a learning point had been identified regarding Constable C and D's lack of awareness of the powers available to them in relation to the incident. Ms Q asked Inspector K to prepare a memo to the Staff Development Unit covering the points raised and return this to her.

Also on 2 May 2008, the Deputy Chief Constable produced a note in the following terms:

"I'm not sure that I agree that we have acted properly in this case and would like clarification of the following points.

What powers were the officers exercising when they took hold of [the complainer]?

Under the circumstances described, were they entitled to do so?"

There is nothing within the police file to indicate the content of any discussions arising from this note.

On 10 May 2008 Superintendent P sent an internal memo to the Staff Development Unit summarising the complaint of unlawful arrest. Superintendent P noted that the circumstances of the complaint were similar to that of the case of Cardle v Murray, decided by the High Court of Justiciary in 1992. According to the memo, this case was highlighted in a Tayside Police bulletin dated 16 May 2008 (it is not clear from the papers how on 10 May Superintendent P was aware of the contents of a bulletin dated 16 May). Superintendent P stated that officers should take this case into consideration when dealing with incidents. He added that the matter had been identified as a training issue and should be brought to the attention of all officers.

The Deputy Chief Constable's final response

On 19 May 2008 the Deputy Chief Constable wrote to the complainer responding to his complaint about the alleged unlawful arrest.

The Deputy Chief Constable noted that the complainer was correct in stating that there were no trespass laws in Scotland by virtue of the Trespass (Scotland) Act 1865. However, the Deputy Chief Constable explained that this Act had been replaced by the Land Reform (Scotland) Act 2003 which created a statutory right of non-motorised access for certain purposes. This general right of access was, however, subject to several exemptions. The following passages are taken from the letter:

"The most pertinent exemption which applies to your case is that one of the areas where access rights are not exercisable is on land where there is a building or land which forms curtilage of a building which is not a house. Although the University is impliedly giving rights of public access to people accessing the building or crossing over to get elsewhere that implied right could be withdrawn under certain circumstances.

The University policy states they do not affiliate themselves with any political organisations or groups therefore the janitors did have a rights to ask you to move away from the property. Again when the police attended they were within their rights to ask you to move although they had no right to place hands on you which resulted in you being charged with a breach of the peace and I concur that their actions on this occasion were unjustified. That is the reason why the District Procurator fiscal stated in his letter to you that the conduct which led to your arrest did not amount to a crime under Scottish Law.

The Deputy Chief Constable explained that the circumstances of the complainer's case had highlighted a training issue within Tayside Police which would be addressed by the Staff Development Unit. He added that he had passed on the circumstances of the incident to Tayside Police's insurers for their consideration. However, there was, he said, insufficient evidence to substantiate any misconduct on the part of the officers concerned.

The letter concluded with the following passage:

“It is always disappointing when a member of the public does not receive the high standards of service expected from our officers. This has clearly been the case on this occasion and for that I offer you my sincere apologies.”

5. The PCCS’s review

The complainer initially contacted the Commissioner’s office by email on 11 June 2008. He was then asked to complete an application form which was received, together with other relevant information, on 25 June 2008. However, the form was not signed and the complainer was therefore asked to sign and return it. A signed copy was received on 9 July 2008.

On 9 July 2008 the Commissioner’s office asked Tayside Police to provide its case papers. These were received by the Commissioner’s office on 19 July 2008.

The complainer wrote on 11 February 2009 to confirm whether the Commissioner’s office held the CCTV footage of his arrest. On 18 February 2009 the complainer was informed by email that Tayside Police had forwarded to the Commissioner’s office the case papers and CCTV footage of his arrest.

However, on viewing the CCTV footage supplied by Tayside Police it became apparent that this consisted only of footage from one camera (camera 8), when it was known that another camera (camera 9) had also recorded the incident. On 11 June 2009 a request was made to Tayside Police for the footage obtained by camera 9. On 19 June, Tayside Police advised that the footage they had obtained from the university consisted of footage taken only by camera 8. According to Tayside Police, instead of copying the footage from cameras 8 and 9, university staff had inadvertently copied the footage from camera 8 twice. Tayside Police advised that at the time of his initial enquiries Inspector G viewed the footage from camera 9 but formed the opinion that it contained nothing of evidential value, as there were apparently a number of onlookers standing between the camera and the incident itself. Accordingly Inspector G did not copy the footage from camera 9. Tayside Police advised that during her subsequent enquiries Inspector K had approached the university to view the footage taken by camera 9 but was advised that due to the passage of time this was no longer available.

The Commissioner’s office thereafter contacted the complainer to establish whether he had the footage obtained by camera 9 as it was known that he had requested this under the freedom of information legislation. The Commissioner’s office received this footage from the complainer on 31 August 2009.

6. Consideration

Complaint 1: Alleged unlawful arrest and detention

In his application, the complainer summarises the circumstances which led to his arrest and explains that he had attempted to pursue this through Tayside Police's internal complaints system. He then states that he remains unhappy with the "last correspondence from them" by which he presumably is referring to the final response to his complaint by the Deputy Chief Constable dated 19 May 2008. However, the complainer does not state in his application *why* he is unhappy with that response. The complainer's dissatisfaction was perhaps all the more difficult to understand when one considered the terms of the Deputy Chief Constable's letter, which appeared to vindicate the complainer's position.

However, the complainer's continuing dissatisfaction has allowed the Commissioner to consider in detail Tayside Police's handling of the complaint. The Commissioner's review has considered not only the final response to that complaint, and the reports prepared by Inspectors G and K, but also the measures Tayside Police has taken to avoid a similar situation occurring in future.

The circumstances of the arrest

In addressing Complaint 1 it is important first to consider the accounts given by several of the witnesses to the incident as these are crucial to any assessment of whether the arrest was unlawful. The inconsistencies in the various accounts make such an assessment difficult.

According to the personal statement he submitted to Tayside Police, the complainer claims that he spoke "firmly" to Mr A and Mr B when approached by them. However, he makes no mention of acting in such a way as might have caused Mr A and Mr B to become alarmed or fearful. Similarly, he states that he spoke to the officers "firmly" but there is nothing in his account to suggest that prior to Constable C laying her hand on him his behaviour justified an arrest for breach of the peace. Indeed, he claims that during the initial exchanges it was Constable C who was shouting in an aggressive manner. According to the complainer, Constable C then shouted aggressively that he was under arrest, and rushed at his chest. In terms of the complainer's account, it appears that it was at this point that the physical struggle took place.

There is likewise nothing in the complainer's statement of 25 February 2008 to indicate that he acted aggressively towards Mr A and Mr B, or in such a way that might have caused them fear or alarm. The complainer states that when the officers arrived, one of them, possibly Constable C, said "You move". He then states that a "verbal battle" took place between, on the one hand, himself and, on the other, the officers and Mr A and Mr B who he claimed were also present. The complainer mentions that "voices were being raised slightly by all of us." He claims that eventually Constable C told him he was under arrest, following which the officers grabbed him.

Constable C claimed that the message she received from the control room related to a male who was handing out leaflets, acting in an “aggressive manner” to staff and refusing to leave. She also said that the complainant had an aggressive demeanour when she and Constable D approached him. She accepted that she raised her voice but claimed that this was partly in an attempt to stop the complainant from shouting. This implies that the complainant was shouting well before she laid her hand on him. Constable C then asked the complainant to move to the side but when he began shouting again she placed her hand on his right arm and tried to usher him to the side. According to Constable C, it was at this point that the complainant threw his arms up and became more aggressive.

However, Constable C’s account is only partly supported by that of Constable D. Constable D makes reference to overhearing the call received by Constable C from the control room but states only that it related to a male handing out leaflets and “refusing to leave”. Unlike Constable C, Constable D does not mention that the call referred to the complainant as acting aggressively. However, Constable D does say he told the complainant that the university staff had the right to ask him to leave and that they had become “alarmed” at his behaviour. Importantly, though, Constable D makes no reference to the complainant shouting or acting aggressively when he and Constable C first engaged with him. Instead, he states that after several attempts to persuade the complainant to leave the area, Constable C took the accused by the elbow and attempted to lead him off the property. It is only at this stage that Constable D makes reference to the complainant reacting in an aggressive manner. Constable C then advised the complainant that if he continued to behave aggressively he would be arrested. According to Constable D, Constable C then tried again to lead the complainant to the street. The complainant refused to leave and was told by the Constable C that he was under arrest, following which both officers took hold of his elbows.

It should be noted that in his statement Constable E supports Constable C in her recollection of the control room referring to an “aggressive male” on the university grounds. Like Constable D, Constable E claims to have overheard the call from the control room.

Constable C and E’s accounts are supported by the statement given by Mr B shortly after the incident. In that statement, Mr B refers to the complainant as having shouted at him before the officers arrived, and also at the officers before they arrested him. On the other hand, in his later statement the most Mr B says of the complainant’s actions is that they were causing a “nuisance”, although he repeats that the complainant was raising his voice and shouting at a point before Constable C took hold of his arm. Mr B adds that the physical struggle appears not to have taken place until after the officers tried to usher the complainant off the campus. This is supported by the footage taken by CCTV camera 8 which shows the struggle occurring only after Constable C reached towards the complainant as if about to usher him away.

Mr A makes no reference in either of his statements to the complainant acting in such a way as to give rise to a breach of the peace.

The issue is whether the alleged breach of the peace occurred before Constable C laid hands on the complainer, or as a result of her doing so. The former scenario is supported by Constables C and E and Mr B. The latter scenario finds support in the complainer's account and to some extent those given by Constable D and Mr A.

Tayside Police's Handling of the Complaint

The reports by Inspectors G and K

It is clear from the file that the Deputy Chief Constable's involvement changed the course of Tayside Police's handling of Complaint 1. Whereas the reports produced by Inspectors G and K suggested that the arrest was justified, the Deputy Chief Constable questioned the powers under which the arresting officers had acted. In the Commissioner's view, the Deputy Chief Constable was correct to challenge the approaches taken by both Inspectors. In particular, it is difficult to understand why Inspector G, having considered the evidence, did not entertain even a possibility that the arrest might not have been lawful. His conclusion that the arrest was justified does not reflect the differences between the accounts given by Constables C, D and E and the other witnesses to the incident, as set out above. For example, Inspector G does not say precisely when the alleged breach is supposed to have taken place and, in particular, whether it occurred before or after the officers laid hands on the complainer. This is clearly important as if the alleged offence occurred only after hands were laid on the complainer, then it would be necessary to assess whether the officers' actions in doing so were lawful. If they were not, then the complainer's reaction would in all likelihood be excused provided it was not excessive.

As noted earlier, Inspector K suggested in her report that there was some disagreement between "the complainer's perception of the opinion of the Procurator Fiscal..." and Tayside Police's solicitor on his right to distribute leaflets on the campus. Inspector K stated that the Procurator Fiscal's view was that he was not committing a crime, whereas the solicitor considered that he may have been.

The Commissioner finds it difficult to understand this passage in Inspector K's report. Firstly, the comment by the Procurator Fiscal in his letter to the complainer of 15 February 2008 (to the effect that the conduct which led to his arrest did not amount to a crime under Scots law) must be seen in the context of the charges contained in Inspector K's report (principally breach of the peace). Secondly, there is nothing in the police file to suggest that the advice given by Tayside Police's solicitor was that the complainer may have been committing a criminal offence under the Land Reform (Scotland) Act 2003, as opposed to some civil wrong.

The Deputy Chief Constable's response

Although the question of the lawfulness of the complainer's arrest is difficult to determine on the facts available, the Commissioner considers that the approach taken by the Deputy Chief Constable in his response was reasonable. In the Commissioner's view there are serious doubts as to the lawfulness of the officers' actions in laying hands on the complainer. Although the witness statements do not present a clear picture of the incident, there is evidence for the view that any

aggressive or alarming behaviour by the complainer occurred only after hands were laid on him.

However, in the Commissioner's view the Deputy Chief Constable's response is not sufficiently clear in a number of respects. The complaint submitted to Tayside Police was that the complainer was unlawfully arrested. While the letter implies that the arrest was unlawful, it does not say so explicitly.

In addition, although the law of trespass features highly in this case, the Commissioner is far from sure that the complainer or his arresting officers are any clearer about their rights and powers should a similar incident occurred in future. Although the complainer was not arrested for trespassing on university property, the law in this area may be important in establishing what, if any, powers police officers have when dealing with incidents of this nature. In terms of the advice given by Tayside Police's solicitor, it remains unclear whether the complainer's actions in distributing political literature on a university campus justified the involvement of the police and the use of their powers to remove him. The Deputy Chief Constable does not deal with this issue in his letter, with the result that his reference to the law of trespass appears meaningless in the context of the complaint.

These reservations aside, the Commissioner commends the Deputy Chief Constable for his actions in dealing with Complaint 1.

The Commissioner makes further comment on Tayside Police's response to Complaint 1 when dealing with the complainer's other complaints.

Training and advice

As noted earlier, shortly before the final response was issued to the complainer, Superintendent P sent a memo to the Staff Development Unit advising that the complaint about unlawful arrest had been identified as a training issue and should be brought to the attention of all officers.

There is nothing in the information supplied to the Commissioner's office by Tayside Police to suggest that this has been done. Superintendent P's memo makes reference to a Force Bulletin issued on 16 May 2008 (ie before the present complaint was determined by Tayside Police). The Commissioner's office obtained the relevant extract of this bulletin from Tayside Police's Professional Standards Department. The extract relates to a criminal case in Tayside in which two individuals convicted of breach of the peace for shouting and swearing at police officers had their convictions overturned on appeal. The extract makes clear that all officers must have a clear understanding of their powers and are able to articulate them when required.

The Commissioner's office asked the Professional Standards Department if any further bulletin had been produced following the Deputy Chief Constable's final response to the present complaint. The Department was also asked whether there was any other internal communication to officers advising them of how to approach a similar incident in future. The response received from the Department suggests that there were no bulletins sent following the Deputy Chief Constable's response to

Complaint 1. If that is true, then Tayside Police has not followed up on the Deputy Chief Constable's assurance that it would undertake training as a result of Complaint 1.

It also does not appear that the complainer's arresting officers have been given any advice or additional training on how to approach a similar incident in future. As noted earlier, both Inspector G and Inspector K identify in their reports a need for Constables C and D to be given some form of advice or training on how to approach similar incidents in future. Inspector G recommended that advice be given to Constable D on the law of trespass; Inspector K said in her report that it is "clear that the officers were unsure of the powers open to them in respect of the incident..."

As noted earlier, Superintendent P also sent memos to Constables C and D advising them that any additional learning points identified during the course of the complaint enquiry would be forwarded to their Divisional Commander to be addressed directly.

Despite this, there is nothing in the information supplied by Tayside Police to indicate that the officers received any advice on how to deal with similar incidents in future. Indeed, on 11 August 2009 the Professional Standards Department confirmed to the Commissioner's office that neither officer received any form of advice as a result of the enquiry into the complaint. It was explained to the Commissioner's office that although the officers should not have arrested the complainer, it was felt that they had acted in "good faith".

In the Commissioner's view, the question of whether the officers acted in good faith is not relevant to whether they ought to have received advice and training following the incident. In his response to the complaint, the Deputy Chief Constable expressed the clear view that the officers were not justified in laying hands on the complainer and that their doing so resulted in the conduct for which the complainer was eventually charged; it is equally clear from the officers' statements that they believed they had a proper basis, not only for laying hands on the complainer, but for arresting him. In the absence of advice or training to the officers concerned, the Commissioner fails to see how Tayside Police can expect them to approach a similar incident any differently.

Concluding comments

The issue raised by this complaint has important implications for the complainer's future conduct and others who may find themselves in similar situations. It also has important implications for the complainer's arresting officers and for operational policing in general. The Commissioner understands the pressures upon police officers faced with situations such as the present one, particularly when they have been called by a member of the public. However, the Commissioner also recognises the importance of citizens being fully aware of the circumstances in which their conduct will justifiably attract the use of police powers. The same is true of police officers themselves who must be aware of their powers and the circumstances in which their use is justified.

It is for these reasons that the apparent absence of any advice or training to Tayside Police officers as a whole following its determination of this complaint is of concern

to the Commissioner. Of even greater concern is to the apparent absence of any advice or training to the officers involved in the incident.

Complaint 2: the use of excessive force by the officers

In the personal statement he submitted to Tayside Police with his complaint, the complainer implies that Constables C and D assaulted him while effecting his arrest. Although Tayside Police initially treated this complaint as one of excessive force, it was later classified by the Professional Standards Department as an alleged assault. Accordingly, it was referred to the Area Procurator Fiscal who decided to take no proceedings against the officers.

In terms of section 34(3)(b) of the Act, the Commissioner's office has no power to deal with complaints about the police which consist of an allegation of an act which constitutes a crime. In the Commissioner's view, however, the purpose of section 34(3)(b) is to preserve the role of the Crown in considering criminal complaints about the police, and to prevent any conflict between its functions and those of the Commissioner. In the present case, the Area Procurator Fiscal decided to take no proceedings against the officers. The complainer's allegation was thereafter considered by Tayside Police as potential misconduct, the Deputy Chief Constable deciding that there was no basis for proceedings against the officers.

Given that the Area Procurator Fiscal considered the allegation, and that it was thereafter treated, in effect, as a non-criminal allegation, the Commissioner considers that he has the power to review the manner in which Tayside Police dealt with this complaint. In the Commissioner's view, any other approach to section 34(3)(b) would mean that Tayside Police's handling of the complaint would not be open to independent scrutiny.

In responding to the complainer, the Deputy Chief Constable concluded that the complainer's arresting officers had "no right to place hands on [him]". Although it is not explicit, the implication of this passage is that the Deputy Chief Constable did not consider that the officers had the power to use any force upon the complainer, let alone the force they in fact used when arresting him. In the Commissioner's view, although it could have been clearer, the Deputy Chief Constable's response was adequate in the circumstances.

The Deputy Chief Constable also informed the complainer that he had considered the behaviour of the officers under the Police (Conduct) (Scotland) Regulations 1996 and had found there to be "insufficient evidence to substantiate any misconduct on the part of the officers." In situations such as these the complainer should be given as much information as is necessary to properly inform him of the reasons why misconduct proceedings are not considered justified. The conveying of such information is clearly essential if complainers are to be fully informed of the outcome of their complaints. In the Commissioner's view, the reasons given by the Deputy Chief Constable were not sufficiently detailed to properly inform the complainer as to why misconduct proceedings were not being pursued. Tayside Police should therefore provide the complainer with additional information so that he is properly informed of the reasons for this decision.

Complaint 3: inadequate consideration of the complainer's welfare

This complaint was contained in the complainer's personal statement which was communicated to Tayside Police at the start of the complaints process. It was noted as a complaint by Inspector G and was addressed by him in some detail in his report. Inspector G also noted as a complaint the complainer's concern that while in custody he was not given sufficient information so that he could understand the procedures being followed. Inspector G also addressed this complaint in his report.

Despite this, there was no reference to these complaints in the Deputy Chief Constable's final response. It is clear from Inspector K's report that she explained to the complainer the procedure for the provision of refreshments to persons in custody and Tayside Police's position on the provision of medical treatment to him. However, in the Commissioner's view the complainer should have been provided with a written response to these complaints.

Complaint 4: unannounced visits by officers to the complainer's home

This complaint was brought to Tayside Police's attention in an email sent by the complainer prior to the submission of Inspector K's report. Again, however, it did not feature in the Deputy Chief Constable's final response. It also does not appear to have been recorded by Tayside Police as a complaint.

Complaint 5: the absence of support in the CCTV footage for the officers' accounts

Although this complaint has been made to the Commissioner, it does not appear to have been made to Tayside Police. As the Commissioner's role is to review the manner in which police bodies deal with complaints it is essential that these are first made to the police body concerned.

If the complainer wishes to pursue this complaint, he should communicate it to Tayside Police. He should also supply Tayside Police with the footage taken by camera 9 which he has in his possession, failing which the Commissioner's office will do so.

7. Conclusion

Complaint 1: alleged unlawful arrest and detention

Given that Tayside Police has accepted that Constables C and D should not have laid hands on the complainer, and that their doing so resulted in the complainer being charged with breach of the peace, the Commissioner does not uphold this complaint.

However, the Commissioner recommends that Tayside Police formulate a precise and lawful approach to dealing with similar situations in future; and that appropriate advice and training is given to the officers concerned in this

incident, as well as all other officers. Such advice and training should be designed to ensure that all officers are aware of their powers in similar situations and to avoid the unjustified exercise of these powers. If, despite the information given to the Commissioner's office by the Professional Standards Department and the contents of the police file, such training is in hand or has been given, the Commissioner asks that evidence of this be passed to his office.

Complaint 2: the use of excessive force by the officers

The Commissioner recommends that Tayside Police provides the complainer with additional information so that he is properly informed of the reasons for the decision not to pursue misconduct proceedings against the officers concerned. The Commissioner wishes to make clear that this recommendation is made with the sole aim of keeping complainers fully informed of the outcome of their complaints. The Commissioner expresses no view on whether misconduct proceedings were justified in the present case.

As the issue raised by this complaint is capable of affecting the police service as a whole, the Commissioner intends to write to the Association of Chief Police Officers in Scotland (ACPOS) to highlight his views and provide guidance.

Complaint 3: inadequate consideration of the complainer's welfare

The Commissioner recommends that Tayside Police now formally responds to this complaint

Complaint 4: unannounced visits by officers to the complainer's home

The Commissioner recommends that Tayside Police records this as a complaint and provides a formal response to the complainer.

Complaint 5: the absence of support in the CCTV footage for the officers' accounts

This complaint has not formed part of the Commissioner's review as it does not appear to have been communicated to Tayside Police.

John McNeill
Police Complaints Commissioner for Scotland
October 2009