

Report of a Complaint Handling Review in relation to Lothian and Borders Police

under section 35(1) of the Police Public Order
and Criminal Justice (Scotland) Act 2006

Summary and Key Findings

The applicants' complaints arose from a comment made by a police officer following the stopping of their vehicle in relation to an alleged driving offence.

Of the two complaints considered, the Commissioner found that both were not handled in a reasonable manner. The Commissioner made a single recommendation.

The Commissioner's role

Section 35 of the Police Public Order and Criminal Justice (Scotland) Act ("the Act") gives the Commissioner the power to examine the manner in which a policing body has dealt with a "relevant" complaint, as defined in the Act.

The Commissioner is independent of the police service and performs his functions in a fair and impartial manner. Before considering a complaint, the Commissioner's office obtains all papers held by the policing body against which the complaint has been made. These papers are considered alongside information provided by the applicant. The Commissioner then assesses whether the policing body's handling of the complaint was reasonable in all the circumstances. The Commissioner will look at the entire handling process, from the initial investigation by the policing body to the final response issued to the applicant. Among the factors which the Commissioner takes into account are the following:

- whether the policing body's response to the complaint is supported by all material information available;
- whether in dealing with the complaint the policing body has adhered to all relevant policies, procedures and legal provisions;
- where the complaint has resulted in the policing body identifying measures necessary to improve its service, whether these measures are adequate and have been implemented;
- whether the policing body's response to the complaint is adequately reasoned; and
- whether the policing body has communicated with the applicant in a reasonable manner.

Background

In the early hours of 14 February 2010 the applicants, Mr A and Mr B - a couple in a same sex relationship - were in their car driving home. Mr B was driving the car. At approximately 4.05 am the applicants' car was stopped by Sergeant C, who was acting on an anonymous call that the driver of a car fitting the same description was believed to be under the influence of alcohol or drugs.

The incident report records that, on stopping the applicants' car, it was noticed that Mr B was smelling strongly of alcohol. Sergeant C asked him to remain within the vehicle and thereafter requested the attendance of other officers.

Mr B gave the following account of what occurred:

"[Mr A] was in the front passenger seat ... Sergeant [C] came to the driver's side and I opened the door. He asked me to remain seated in the car and went to check it out. He came back to my side. He crouched down to the open car door and asked for my details. He then smirked and said 'Is that your wife', meaning [Mr A].

*I said 'Are you [taking] the f***** piss?' I was angry and felt discriminated against. He said 'I'm sorry, I shouldn't have said that'. I said 'You've picked on the wrong person'. I told him to get stuffed till the other officers arrived."*

Mr A stated the following:

“The Sergeant asked [Mr B] for his details and then he said ‘Is that you wife?’ [Mr B] was astonished by this. Sergeant [C] apologised saying ‘Sorry, I shouldn’t have said that’.

Other officers (Constables [D and E]) arrived and [Mr B] was taken away. The Sergeant waited behind and then apologised again to me. It was along the lines something like ‘I’m sorry for what I said earlier. I shouldn’t have said it’. I went along with it and said ‘Okay’.

Sergeant C provided the following account:

“I had at this time only briefly viewed the front seat passenger ... Having obtained the driver’s details I then turned my attention to the passenger. This person was sitting at the dark side of the vehicle and was looking out the front windscreen at an angle away from my direction. The passenger was of slight frame and appeared to be very well groomed. I said to the driver ‘Is this your partner? Wife?’ His reply was ‘Are you taking the piss? Does he look like a bird?’ or something similar. I replied that I wasn’t, that it was dark and that my comment was a standard form of approach that I usually made. I then immediately apologised for my mistake. The driver’s response was ‘whatever’. I then obtained the front seat passenger’s details.”

Mr B subsequently provided a positive breath sample to Constable D, in the presence of Constable E. He was then arrested and conveyed to a police station where he refused to provide the required further breath samples. Mr B was thereafter cautioned and charged under section 7(6) of the Road Traffic Act 1988. He was released on an undertaking to appear at court in this connection.

The Complaints

Based on the contents of the application form, and the information obtained from Lothian and Borders Police, the Commissioner has identified the following complaints:

- (1) that Sergeant C deliberately acted in an offensive and homophobic manner; and
- (2) that Sergeant C made assumptions regarding the relationship of the occupants of the vehicle.

The Commissioner’s Review

This section sets out the Commissioner’s views on the manner in which the complaints were handled by Lothian and Borders Police.

Complaint 1: Offensive behaviour

In his letter to Lothian and Borders Police dated 18 July 2010, Mr B stated the following:

“As you can imagine I was disgusted with the sergeant’s remark. Being gay I get enough prejudice [sic] treatment and as a sergeant or any police officer you would think that they could not show any prejudice towards anyone ...

I understand that the sergeant is claiming that the passenger side of the car was dark and he could not see – however, the passenger side was where the street lights were and with the car door being open the inside car light was on, so I fail to see how he could not have seen that my passenger was male.”

Mr A stated that he felt Sergeant C's comment was "potentially a form of harassment of [his] sexual orientation." According to both applicants, Sergeant C's question was intended to offend.

Internal Handling

As noted above, Sergeant C denied in his statement that he had intended to offend the applicants by his comment and said that he had apologised for having simply made an error.

Constables D and E had not been present when the exchange took place but both gave statements in which they commented on Mr B's demeanour towards Sergeant C in light of what had taken place. Specifically, Constable D stated:

*"I spoke with [Sergeant C] who apprised me of events and he requested that I speak with the driver [Mr B]. [Mr B] alighted from the vehicle and I observed him to be in an agitated state. He was speaking in a raised voice, swearing frequently and I recall him saying to me – or words similar – 'I'll speak to you but [not] to him because he's f***** ignorant'. This being directed at [Sergeant C]. I asked [Mr B] to calm down and while speaking to him I could detect a smell of alcohol on his breath."*

Constable E stated:

"At the time [of my arrival] [Mr B] had alighted from the vehicle and was standing with Constable [D] and Sergeant [C]. I could not make out what he said initially, however I could see [Mr B] was acting in a very animated fashion, pacing up and down the street and waving his arms. Soon after [Mr B] stated that he did not want to talk to Sergeant [C] and would only speak to Constable [D] and myself. Sergeant [C] apologised towards the accused and took a backwards step; at this time I did not know what the apology was for."

In his report, Inspector G noted Sergeant C's description of Mr A as being "well groomed" and of slight build and his account that this had contributed to his initial assumption that Mr A was in fact female. Inspector G, who interviewed both applicants, described Mr A in his report as "of slight build, [with] soft facial features and has long hair to one side." Inspector G considered that given Sergeant C saw Mr A at a sideways angle and in dim lighting he could "easily" have mistaken Mr A as a female. Inspector G concluded that the comment made by Sergeant C "was not made with any discriminatory intention." He added:

"The fact that Sergeant [C] immediately apologised and then did so a second time to [Mr A] demonstrates that there was no intent to offend ...

Sergeant [C] was and is genuine in being apologetic for his remark and fully realises that he should have employed more gender-neutral language or exercised greater caution to confirm the passenger's gender before making his enquiry. Both the investigating officer and Divisional Superintendent have discussed the matter with Sergeant [C] and are satisfied that the advice given will ensure he will not make a similar error in the future."

In his response to the complaint dated 8 November 2010, the Deputy Chief Constable stated the following:

"The officer subject to this allegation admits that he made the offending remark whilst talking to [Mr B] and referring to [Mr A]. The officer states that due to it being dark and not having a full view, he believed [Mr A] to be female. This mistake, according to the officer, was genuine and when you challenged him he immediately apologised.

In addition following the arrest of [Mr B] the officer again apologised to you for the mistake.

Given the circumstances I consider the comment made by the officer was a genuine mistake without any prejudice or homophobic intent. I have, however, ensured the officer has been made fully aware of your concerns in respect of his behaviour and has received advice from a senior officer. Additionally your concerns have been recorded as a homophobic incident by Lothian and Borders Police.

I regret that on this occasion in your dealings with Lothian and Borders Police you have been treated in a manner that was insensitive and caused offence.”

Consideration

There is no dispute that Sergeant C made the comment in question. The question that requires to be determined is whether it was intended to cause offence to the applicants. On the one hand, Sergeant C claims that his comment resulted from a genuine mistake due to the absence of adequate lighting and his perception of Mr A's appearance (for which Inspector G provides some support in his report). There is also the fact that on two occasions Sergeant C apologised for his remark, which might on one view indicate an absence of intention to offend.

On the other hand, the applicants contend that the lighting was sufficient to enable Sergeant C to identify Mr A as a male and that in these circumstances the comment was clearly intended to offend. The applicants also consider that Sergeant C's apologies are themselves an admission of “discriminatory behaviour”.

In the Commissioner's view, given the available evidence it is not possible to determine on the balance of probability whether Sergeant C's remark was intended to cause offence to the applicants, or was the result of a genuine mistake. It is nevertheless clear that Lothian and Borders Police found the complaint to be substantiated, arranged for advice to be given to Sergeant C in this connection and recorded the incident as homophobic in nature. However, what Lothian and Borders Police failed to do was take the obvious step of providing an official apology to the applicants for the offence that was clearly caused by the remark. Although the Deputy Chief Constable expressed “regret” about the applicants having been treated in an insensitive manner, the Commissioner does not consider this to be adequate in the circumstances.

As Lothian and Borders Police did not take the obvious step of apologising to the applicants, the Commissioner does not consider that this complaint was dealt with in a reasonable manner. The Commissioner recommends that Lothian and Borders Police writes to the applicants apologising for the offence caused by Sergeant C's remark.

Complaint 2: Inappropriate assumptions about applicants

In his email to Lothian and Borders Police dated 23 March 2010, Mr B stated:

“[Sergeant C's comment] made me quite angry as it is quite clear that my partner is male and even if this was not obvious to [Sergeant C] – why be judgemental and assume the nature of the relationship.”

Mr A said the following in his statement:

“I feel that the Sergeant in his comments assuming I was [Mr B]'s wife should not have been assumptions and it is questionable why he did that.

... Inspector [G] has explained that Lothian and Borders Police have a diversity policy however from this incident Sergeant [C]'s behaviour has failed to display the qualities expected from the diversity programme.”

Internal Handling

No specific response was issued by Lothian and Borders Police to this complaint. However, as noted above Inspector G in his report stated that Sergeant C “fully realises that he should have employed more gender-neutral language or exercised greater caution to confirm the passenger’s gender before making his enquiry.”

Consideration

As no response was issued to this complaint, the Commissioner does not consider that it was dealt with in a reasonable manner.

According to Inspector G’s report, Sergeant C has acknowledged the need to employ more gender-neutral language in such circumstances and, as noted above, has been provided with advice in this connection. It is also apparent from the complaints file that, during Inspector G’s enquiries, advice was sought from Lothian and Borders Police’s diversity advisers, who confirmed in November 2010 that they were content with the work done on the complaints.

In these circumstances, the Commissioner considers that, despite no response having been issued, sufficient action has been taken in respect of this complaint. The Commissioner therefore does not consider it necessary to recommend further action in this connection.

Conclusions, Recommendations and Learning

Complaint 1: Offensive behaviour

In the Commissioner’s view, the manner in which this complaint was dealt with by Lothian and Borders Police was not reasonable. The Commissioner recommends that Lothian and Borders Police writes to the applicants apologising for the offence caused by Sergeant C’s remark.

Complaint 2: Inappropriate assumptions about applicants

In the Commissioner’s view, the manner in which this complaint was dealt with by Lothian and Borders Police was not reasonable. However, the Commissioner makes no recommendation in this connection.

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