

# 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 applicant's complaints arise from the detention of himself and his wife in respect of a breach of the peace.

The Commissioner considered a total of 16 (one of the complaints comprises two separate allegations), 13 of which were found to have been dealt with in a reasonable manner, and 3 of which were not. The Commissioner made two recommendations in this connection.

## 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

At the time of the incident referred to in this report the applicant and his wife, Mrs A, were involved in an acrimonious relationship with their next door neighbours Mr B and Mrs C.

On 25 September 2008 an incident occurred between the two families which resulted in Mr B telephoning the police. An attempt was made by the police to contact the applicant at home later that evening but this was unsuccessful as he and his family were out on a social occasion. At around 9.15 pm, Sergeant D attended at the applicant's home along with a number of other officers. On receiving no answer at the front door, officers entered the applicant's rear garden through an unsecured gate.

The applicant, Mrs A and their four children, Child E (aged 14 at the time), Child F (aged 13), Child G (aged 10) and Child H (aged 6) had all returned home from their outing and were present when the officers re-attended. It appears that at least one of the children (Child G) was climbing on temporary scaffolding erected to the rear of the applicant's home. Sergeant D detained the applicant under section 14 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") for an alleged breach of the peace arising from the incident reported earlier by Mr B. The applicant was taken to a local police office by Constables J and K.

Following the applicant's detention, Mrs A asked the remaining police officers into her home. At her request, the officers showed their warrant cards and Mrs A noted their details. Constable L then detained Mrs A under section 14 of the 1995 Act, also for an alleged breach of the peace arising from the incident. As Mrs A wished to take the children with her to the local police office, it was arranged that the two elder children would go separately with Constables M and N, while the younger children would travel with Mrs A in Sergeant D and Constable L's vehicle.

On arrival at the police office, the children were taken to a waiting room near the front entrance of the building. Police officers and a civilian staff member, Ms T, looked in on the children periodically and spoke with them; however, the children were not under constant supervision. On a number of occasions, the children went outside into the street which to some extent was covered by CCTV cameras.

At around 2 am on 26 September 2008, following further enquiries by the police, the applicant was arrested, and cautioned and charged with an alleged breach of the peace. He was also cautioned and charged with an offence under section 12(1) of the Children and Young Persons (Scotland) Act 1937 ("the 1937 Act"). This charge alleged that, whilst under the influence of alcohol, the applicant had allowed two of his children to climb on high scaffolding. The applicant was released from police custody at around 5.35 am.

At around 2.10 am on 26 September 2008, Mrs A was herself arrested, and cautioned and charged with an alleged breach of the peace. Mrs A was also cautioned and charged under section 12(1) of the 1937 Act. Mrs A was released from police custody at 2.55 am.

The applicant and Mrs A were thereafter reported to the Procurator Fiscal. In November 2009 both were convicted of breach of the peace.

## The Complaints

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

That on the evening of 25 September 2008 and in the early hours of 26 September 2008:

- (1) the number of police officers who attended at the applicant's home was not proportionate;
- (2) police officers entered the applicant's rear garden without authority;
- (3) excessive force was used when detaining the applicant;
- (4) the applicant and Mrs A were not advised that they were being detained or the reasons for this;
- (5) a record of police officers' names was removed from the applicant's home;
- (6) Mrs A was prevented from holding her daughters' hands;
- (7) the applicant's youngest daughter was transported in a police vehicle without a booster seat;
- (8) the applicant's children were left unsupervised at the local police office;
- (9) the applicant's children were questioned without an appropriate adult present;
- (10) the applicant's daughter was not appropriately dealt with after she vomited;
- (11) the applicant's children were asked inappropriate questions in relation to:
  - (a) a teacher and (b) the purchase of alcohol;
- (12) mocking comments were made about Mrs A's situation;

- (13) the applicant was not afforded the opportunity to make a statement;
- (14) the applicant and Mrs A were charged with an offence contrary to the Children and Young Persons (Scotland) Act 1937 and a report was submitted to social workers on the basis of false information; and
- (15) the applicant was held in police custody for longer than necessary.

## 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: Number of attending officers

In his letter of complaint to the Deputy Chief Constable dated 30 March 2009, the applicant claimed that ten police officers had attended at his home on 25 September 2008. He described this as an over-reaction to the incident in question.

#### *Internal Handling*

Inspector P was appointed to make enquiries into the applicant's complaints.

On 5 May 2009, the applicant and Mrs A met with Inspector P and Sergeant Q to discuss the complaints. According to the discussion, as many of the issues raised by the complaints were sub judice at the time, the applicant requested that no further action be taken until the conclusion of the criminal proceedings against himself and his wife. However, on 10 August 2009 the applicant contacted Inspector P by email advising that he now wished to proceed with his complaints, despite the ongoing criminal proceedings. The applicant requested that the necessary arrangements were made to take statements from himself and his family.

During the course of enquiries into the complaints, statements were noted from the applicant, Mrs A, Child E, Child F and Child G, Mr B and Mrs C. Operational statements were obtained from Sergeant D and Constables J, K, L, M and N. Statements were also obtained from Constable S and a civilian member of staff, Ms T, who were on duty at the local police office at the time.

On 6 January 2010 Inspector P completed a report detailing her findings in respect of the complaints. With regard to complaint 1, Inspector P observed:

- “10.2 In his initial letter of 30 March 2009, the complainer numbered the officers in attendance at his home at 10. He describes this as an over-reaction and found it oppressive in itself.*
- 10.3 Although [Child E] numbers the officers at 10, [Child F] at about 10 and [Child G] at 9 or 10, an interpretation of the STORM system [the system used by the police to record incidents] has confirmed that a total of six officers attended at the locus, a number confirmed also by [Mrs A].*
- 10.4 [Sergeant D] states he arranged for three officers to accompany him initially to the locus as he knew that two persons were to be detained and that four children were likely to be present, with a further two officers to be available in the area.”*

Inspector P reached the following conclusion:

“11.4 The reporting officer concludes that the number of personnel deployed to deal with the incident was not excessive and, despite the opinion held by the complainer, cannot be considered oppressive.”

On 20 July 2010 the Deputy Chief Constable wrote to the applicant in response to his complaints. In respect of complaint 1, he stated:

*“In fact, a total of six officers attended at your home that night. A supervisory officer arranged for this number to attend in order to facilitate the detention of two adults, their transportation to [local] police station in separate vehicles and the carrying out of further inquiries into the criminal complaint made by your neighbours, Mr [B] and Mrs [C], whilst at the same time ensuring the safety of you, your family and the officers themselves.*

*I regret any alarm or distress caused, in particular to your children, by the actions of the officers concerned but I am satisfied that their number was proportionate to the circumstances and that this, in itself, cannot be considered oppressive. Accordingly, I find this allegation unsubstantiated.”*

### Consideration

In the Commissioner’s view, Inspector P’s comment that Mrs A supported the police position in respect of this complaint represents a misinterpretation of Mrs A’s statement. Mrs A states that two male officers took the applicant away, leaving “about another four” officers in the rear garden; however, she goes on to state that there were six officers present in the kitchen following the applicant’s detention. The account provided is somewhat inconsistent but would suggest that Mrs A believed there to be a total of eight officers in attendance. As noted above, however, this misinterpretation did not find its way into the Deputy Chief Constable’s response.

The STORM incident log referred to by Inspector P in her report records that Sergeant D and Constable L were the officers dealing with the incident along with “Team 2 [local police office]”. The log records that Constables J and K were also called to attend at the locus.

The statements provided by Sergeant D and Constables J, K, L, M and N all reflect that six officers attended at the applicant’s home on the evening in question. Constable N stated that on 25 September 2008 she was working within Team 2, along with Constable M. Sergeant D stated:

*“About 2115 hours, same date, Constable [L] and I attended at [locus]. Also in attendance were Constables [M and N]. I also requested that [J and K] attend the area as they had a police vehicle with a cage should it be required. I instructed these officers to remain in their vehicle further up the street unless requested otherwise.”*

In the Commissioner’s view, there is a clear weight of evidence in favour of there having been six officers in attendance. Given that the applicant and Mrs A were to be detained (and conveyed separately to the police office), and that four children were also likely to be present, the Commissioner is satisfied that this was an appropriate number of officers to attend.

In these circumstances, the Commissioner considers that this complaint was dealt with in a reasonable manner.

### Complaint 2: Unauthorised entry

In his statement the applicant complained that a number of police officers proceeded to enter his rear garden without the permission of any member of his family.

### *Internal Handling*

In her report, Inspector P observed:

- “10.6 The officers who attended at [locus] were not in possession of a warrant and no permission was given to any of the officers present to enter the rear garden.
- 10.7 The complainer made it clear to the officers, acknowledged in their statements by [Sergeant D] and [Constables L, M and N], that he immediately wished them to leave his property.
- 10.8 [Sergeant D] and [Constables L, M and N] state that, having gained entry to the rear garden, they became aware of [Child F and Child G] on the scaffolding then at the rear of the house and were each concerned for their safety due to the lack of light and their lack of safety equipment.”

Inspector P concluded:

- “11.7 The reporting officer concluded that [Sergeant D] and [Constables L, M and N] had each lawfully entered the rear garden through an insecure side gate, after it had become apparent there were persons within the premises who were possibly in a position to assist with their enquiry.
- 11.8 Thereafter, the officers were placed in a position where, had they ignored the perceived danger to at least one young girl by her climbing on unlit and unguarded scaffolding, they would have been failing in their duty of care.
- 11.9 [Constables J and K] entered the premises after the lawful detention of [the applicant] had been affected, in their capacity as escorting officers, and therefore their presence was lawful.
- 11.10 As the situation developed at the locus, the officers were duty bound, and authorised by powers granted by Common Law, to remain in the premises despite the complainer’s clear instruction that they leave.
- 11.11 The allegation is unsubstantiated.”

The Deputy Chief Constable issued the following response:

*“I can confirm that the officers were not in possession of a warrant when they entered the rear garden of your home through an insecure gate, an act that does not require a warrant. The officers confirm, also, that when they encountered you, you repeatedly asked them to leave. However, the officers were on your property to make enquiry to detain you and it is my belief that their actions in remaining were both lawful and proportionate.*

*In addition, the officers and your neighbour have described seeing two of your young children on the scaffolding that was then on the rear of your house, in circumstances that gave the officers and Mrs [C] concern for the girls’ safety. Mrs [C] was so concerned that she telephoned the police and another neighbour. Your daughter [Child G] has described how she climbed, in her nightclothes, scared and in the dark, onto the scaffolding.*

*In such circumstances, I am sure you will appreciate that the officers had a duty of care to your daughter, and, despite your asking them to leave your property, were obliged to stay until your daughter’s safety was confirmed. I therefore find this allegation to be unsubstantiated.”*

### Consideration

As described in Inspector P's report, officers were attending at the applicant's home to detain him and Mrs A in connection with an alleged breach of the peace. In order to achieve this, the officers entered the applicant's rear garden through an un-secured gate at the side of the property. In light of this, and given the purpose for which the officers were in attendance, the Commissioner does not consider their actions in entering the applicant's rear garden were unlawful. The officers' apparent concern for Child G's safety was a further factor which justified their continued presence in the garden.

In the Commissioner's view, this complaint has been thoroughly investigated and the applicant provided with a comprehensive and reasonable response. In these circumstances, the Commissioner considers that this complaint was dealt with in a reasonable manner.

### Complaint 3: Excessive force

The applicant complained in his letter of 30 March 2009 that two officers had, without provocation and in front of his children, pulled him through the rear doors of his kitchen (which were open at the time), and placed him in handcuffs behind his back. The applicant stated the following in his statement:

*"One of them asked me if I could come outside to speak to them. I was still on one side of the threshold; they were outside on the other. Both reached over the threshold and pulled me outside; they took one arm each."*

According to his letter, as a result of his being handcuffed the applicant suffered from debilitating symptoms consistent with nerve injury.

### Internal Handling

In her report, Inspector P observed that Mrs A, Child E and Child F corroborated the applicant's version of events. However, Inspector P also noted that according to Sergeant D and Constables L, M and N, at the time of his detention the applicant was either on the patio or on the doorstep of his home. Inspector P concluded:

*"11.13 ... there is no evidence to support the complainer's allegation that [Sergeant D] and [Constable M] pulled the complainer over the threshold of his kitchen windows or used any excessive force in doing so.*

*11.14 The allegation is unsubstantiated."*

The Deputy Chief Constable provided the following response:

*"You also allege that, in order to facilitate your detention, officers used excessive force by pulling you out of your house through a set of open french windows.*

*The officers deny this and state that you were detained when standing on the patio area outside your kitchen. In the absence of any independent evidence to the contrary, I therefore find this allegation to be unsubstantiated."*

### Consideration

As part of the enquiries into this complaint, statements were taken from all those present during the incident (with the exception of Child H whom the applicant did not wish to be interviewed).

The applicant's account of what occurred is supported by Mrs A, Child E and Child F. On the other hand, the officers present at the time (Sergeant D and Constables L, M and N) all maintain that the applicant was outside at the time of his detention. Child G, who was on the scaffolding at the time, refers to the applicant "standing by that door [a reference to the rear door of the house]" and to his being "pulled out" by the officers.

In the Commissioner's view there is insufficient evidence to establish on the balance of probabilities that the applicant was pulled by the officers over the threshold of the rear door. Indeed, there is an equal weight of evidence on both sides. Although Child G refers to the applicant being "pulled out" she also refers to the applicant "standing by" the door as opposed to being inside the house. In any event, all the officers present describe the applicant variously as behaving aggressively, struggling and being uncooperative. In such circumstances, even if it could be established that the applicant was pulled through the doorway, there would still be insufficient evidence to establish that this amounted to excessive force in the circumstances.

Accordingly, the Commissioner does not consider that this complaint is substantiated. The Commissioner therefore considers the Deputy Chief Constable's response to this complaint was reasonable.

#### **Complaint 4: Failure to explain detention**

In his statement, the applicant claims that when he was detained "the officers didn't say anything to me. They didn't tell me why I was under arrest [sic] and why I was being handcuffed." In correspondence with the Commissioner's office dated 4 June 2011, the applicant also complained that the detention process was not explained to him, nor the time this was likely to take. According to the applicant, had this been made clear Mrs A would have made alternative child care arrangements.

#### *Internal Handling*

Inspector P stated the following in her report:

*"10.15 The complainer alleges that when [Sergeant D] and [Constable L] were detaining him and placing him in handcuffs, they failed to explain to him that he was being detained and the reasons for it.*

*10.16 Both officers deny the allegation and [Constables M and N] confirm that the complainer was correctly cautioned and informed of his detention rights."*

Inspector P concluded that there was no evidence to support the applicant's complaint that Sergeant D and Constable L had failed to explain his detention or the reasons for this. The complaint was found to be unsubstantiated.

The Deputy Chief Constable provided the following response:

*"You allege, further, that when officers were detaining you and placing you in handcuffs, they failed to explain to you that you were being detained and the reason for your detention. The officer concerned, and the other officers present, deny this.*

*I am satisfied, in the absence of any independent evidence to the contrary, that you were properly cautioned and informed of your detention rights. Accordingly, I find this allegation to be unsubstantiated."*

## Consideration

Both Sergeant D and Constable L describe in their respective statements the procedure followed in respect of the detention and cautioning of the applicant and Mrs A. Specifically, both confirm that the applicant and Mrs A were detained under section 14 of the 1995 Act for an alleged breach of the peace and were administered cautions. Constables M and N claim to have witnessed the applicant and Mrs A's detention and support the accounts given by Sergeant D and Constable L. In addition, Mrs A makes reference in her statement to being told that she was being "detained under section 14 of some act".

Section 14(6) of the 1995 Act provides the following:

*"At the time when a constable detains a person under subsection (1) above, he shall inform the person of his suspicion, of the general nature of the offence which he suspects has been or is being committed and of the reason for the detention ..."*

In the Commissioner's view, the weight of the evidence indicates that the obligation upon the police under section 14(6) was satisfied. Accordingly the Commissioner considers that this complaint was dealt with in a reasonable manner.

As noted above, the applicant stated in correspondence with the Commissioner's office that had the detention process been explained, Mrs A would have made alternative child care arrangements. Although this was not explicitly raised with Lothian and Borders Police as a complaint, the applicant's letter of 30 March 2009 contains the following passage:

*"As a consequence of [Mrs A] being detained it also meant that all children had to be taken to custody at [local police office] as there was no immediate alternative childcare arrangement available or offered."*

Sergeant D addressed this issue in his statement and his account is supported by Constable L. Sergeant D stated:

*"Having been detained, I advised [Mrs A] that arrangements would need to be made in respect of the children. I advised her that she could arrange for someone to attend at the home to take care of the children or I could arrange for Social Services to perform this role. [Mrs A] was reluctant for either of these options so, in an effort to be accommodating, I offered her that her children could be taken to the police station also and they could be accommodated in a waiting room there. In doing so I did advise her however the facilities available were basic and not ideal for prolonged waiting especially for children. [Mrs A] elected to take her children to [local police office]."*

Mrs A acknowledges in her statement that Sergeant D offered her a range of options regarding childcare but that she elected to take the children to the local police office as she did not expect to be away for a number of hours. As noted above, however, Sergeant D and Constable L state that Mrs A was informed that the facilities at the police office were "basic and not ideal for prolonged waiting especially for children." According to Sergeant D and Constable L, it was in those circumstances that Mrs A opted to have her children conveyed to the police office. The weight of the evidence therefore indicates that Mrs A was, in effect, informed that her detention might be lengthy. Accordingly, even if this complaint had been made to Lothian and Borders Police it is unlikely that it would have been upheld.

## Complaint 5: Removal of record

In his letter of 30 March 2009, the applicant maintains that Mrs A noted the details of six police officers and left this on a kitchen worktop. According to the applicant, when he and Mrs A returned

home the note had gone and they were therefore unable to provide details of the officers who had attended.

### *Internal Handling*

This complaint was recorded under the category of “irregularity in procedure” in the following terms:

*“... in an attempt to conceal the identities of the officers who were present, an officer removed a list of those officers which had been compiled and left within the kitchen by [Mrs A].”*

Inspector P noted the following in her report:

*“11.19 The reporting officer concludes that while it is confirmed that Mrs [A] did make a note of the officers’ identification numbers, there is no evidence to suggest that any of the officers moved or took it.*

*11.20 The allegation is unsubstantiated.”*

The Deputy Chief Constable provided the following response:

*“The officers who entered your home confirm your wife asked them for both further proof of identification and their identification numbers, details of which she noted down on a piece of scrap paper. They each deny that they removed this piece of paper.*

*In the absence of any independent corroboration to support the allegation, I am unable to substantiate it and propose to make no further action.”*

### *Consideration*

In his letter of 30 March 2009 the applicant claimed to have no explanation for the disappearance of the list, and stopped short of alleging that a police officer had removed it. In addition, neither the applicant nor Mrs A makes any reference to this issue in their respective statements.

There is no evidence in the statements obtained by Inspector P that the list was removed by any of the officers who attended the applicant’s home. In these circumstances, the Commissioner considers that the Deputy Chief Constable’s response to this complaint was reasonable.

### **Complaint 6: Prevention of contact**

In both his letter of 30 March 2009 and his statement the applicant complains that Constable L prevented Mrs A from holding Child H’s hand while being taken to the police vehicle. In his statement the applicant also claimed that Mrs A had been stopped from holding Child G’s hand and that Constable L’s actions in this respect were “petty nastiness”.

### *Internal Handling*

Inspector P noted in her report that the applicant had chosen not to permit a statement to be taken from Child H. Inspector P observed the following:

*“10.22 [Mrs A] states that, when she was being escorted from her home to a police vehicle outside, she held her daughter, [Child H]’s, hand and was told by [Constable L] that she could not do so and had her arms taken by two male police officers.*

- 10.23 [Child G] confirms in her statement that one of the officers would not allow her to hold hands with her mother.
- 10.24 [Constable L] denies the allegation. She confirms that, in accordance with standard procedure, she took hold of Mrs [A]'s arm as she led her from the house to the police vehicle. She states further that she thought it necessary to support Mrs [A] due to her having apparently consumed alcohol. She cannot recall any specific request by Mrs [A] to hold her daughter's hand.
- 10.25 [Sergeant D] confirms that [Mrs A] was angered by [Constable L] taking hold of her arm and said this prevented her taking her daughter's arm. He states that [Constable L] told Mrs [A] she could hold her daughter's [hand] but that she would be keeping hold of her arm."

Inspector P found the complaint to be unsubstantiated. She stated the following in this respect:

*"11.22 The reporting officer concludes that as [Constables J and K] had left the locus first, with the complainer, followed by [Constables M and N] with [Child E] and [Child F], only [Sergeant D] and [Constable L] were left with Mrs [A] and her two younger children, despite Mrs [A]'s recollection that two male officers took her elbows.*

11.23 ... [Constable L] was correct to maintain control of a prisoner by taking hold of her arm.

11.24 *There is no independent evidence to support the allegation that, despite this, [Constable L] prevented Mrs [A] from taking her daughter's hand."*

The Deputy Chief Constable provided the following response:

*"The officers present confirm that, in accordance with Force procedure, the officer concerned took hold of Mrs [A]'s arm, but deny this precluded her from taking your daughter's hand or that she actively prevented your wife from doing so.*

*Again, I find it understandable your young daughter might be upset by seeing her parent in such circumstances, and I regret if this has happened. However, in the absence of any independent evidence to the contrary, I cannot determine that the officer acted in any way other than was expected of her and, accordingly, I find the allegation unsubstantiated."*

### Consideration

Inspector P established that Mrs A, Child G and Child H, Sergeant D and Constable L were all present at the material time.

In the Commissioner's view, Constable L's action in taking hold of Mrs A's arm was appropriate in the circumstances. Constable L's actions are consistent with the guidance provided in the Officer Safety Training Students Manual used in the training of all Scottish police officers. In section three of the manual it is recommended that even compliant detainees are kept under the suitable control of an officer.

Based on Constable L's statement, it appears that she adopted what is known as the "come along hold" whereby the officer controls the detainee by holding the arm above the elbow. According to the manual, this form of control is "the minimum level of force which should be used to control a detained or arrested person."

The Commissioner therefore considers as reasonable the Deputy Chief Constable's conclusion that Constable L was acting in the manner expected of her in taking Mrs A's arm on the way to the police vehicle.

As to whether Mrs A was prevented from holding Child G and/or Child H's hand, the evidence is conflicting. On the one hand, there is the evidence of Mrs A and Child G who provide clear support for the allegation. On the other, according to Sergeant D, Constable L informed Mrs A that she could hold her daughter's hand if she wished but that she (Constable L) would continue to hold her arm. Constable L herself cannot recall Mrs A asking to hold either child's hand, but claims that if such a request had been made she certainly would not have denied this. In the Commissioner's view, this effectively amounts to a denial that she prevented Mrs A from holding the hands of her children.

The evidence is therefore equally weighted on both sides and accordingly the Commissioner considers that the Deputy Chief Constable's conclusion that the complaint was unsubstantiated was reasonable.

### **Complaint 7: Transporting child without booster seat**

The applicant complained in both his letter of 30 March 2009 and in his statement that Mrs A's request to use a booster seat for transporting Child H to the police office was declined by the officers.

#### *Internal Handling*

Sergeant D confirmed in his statement that he had declined Mrs A's request to use a booster seat while transporting Child H to the police office. He stated the following:

*"I decided not to allow this request as it would have given further difficulties [sic] in relation to prisoner and children control ... the child was borderline requirement for a booster seat in terms of height requirement, the child was wearing a standard seatbelt and the police vehicle would not be travelling at excessive speeds."*

Inspector P reached the following conclusions:

*"11.27 Paragraph 1 (e) of Regulation 10 of the Motor Vehicle (Wearing of Seat Belts) Regulations 1993 exempts a small child who is riding in a vehicle being used for the purposes of the police to enable the proper performance of their duty.*

*11.28 [Sergeant D] assessed the circumstances of Mrs [A]'s detention and decided it was not necessary to use a car seat for [Child H], while at the same time ensuring her safety during the journey to [local police office].*

*11.29 The allegation is unsubstantiated."*

The Deputy Chief Constable provided the following response:

*"Although paragraph 1(e) of regulation 10 of the Motor Vehicle (Wearing of Seat Belts) Regulations 1993 exempts a small child who is riding in a police vehicle in such circumstances, from using a car seat, it remains incumbent on officers that they ensure the safety of all passengers, particularly a young one.*

*The supervisory officer who was present at the time assessed the circumstances of Mrs [A]'s detention and decided it was safe for your daughter to use a seat belt, not a car seat, for the*

*duration of the journey to the police station. I am satisfied that this did not compromise your daughter's safety and propose to take no action in relation to this matter."*

### **Consideration**

There is no dispute that the applicant requested a booster seat be used during Child H's transportation to the police office, and that this was declined by Sergeant D. The material issue is therefore whether Sergeant D's decision in this connection was justified.

Section 15(3) of the Road Traffic Act 1998 states the following:

*"Except as provided by regulations, where—*

*...*

*(b) a child of or over [the age of three] but under the age of fourteen years is in the rear of a motor vehicle and any seat belt is fitted in the rear of that vehicle,*

*a person must not without reasonable excuse drive the vehicle on a road unless the child is wearing a seat belt in conformity with regulations."*

Regulation 10 of the Motor Vehicles (Wearing of Seat Belts) Regulations 1993 (as amended) provides the following:

*(1) The prohibitions in section 15(3) ... of the [Road Traffic Act 1988] do not apply in relation to—*

*(e) a small child who is riding in a vehicle being used for the purposes of the police, security or emergency services to enable the proper performance of their duty ...*

Although its terms are perhaps open to more than one interpretation, the Commissioner considers that regulation 10(1)(e) permitted the transportation of Child H to the local police office without a booster seat. In addition, there is evidence that in declining Mrs A's request, Sergeant E assessed the risk associated with transporting Child H using a standard seatbelt.

In these circumstances, the Commissioner considers that this complaint was dealt with in a reasonable manner by Lothian and Borders Police.

### **Complaint 8: Supervision of children**

In both his letter of complaint and statement the applicant complained that his four children were left unsupervised at the local police office for long periods of time and were allowed to leave the station alone despite the late hour. The applicant reiterated these concerns in correspondence with the Commissioner's office dated 4 June 2011.

### **Internal Handling**

As part of her enquiries into this complaint, Inspector P obtained statements from Constable S and a civilian member of staff, Ms T, who were both on duty at the police office at the material time. Inspector P also recovered CCTV footage from the main public vestibule and public entrance of the police office.

Inspector P made the following observations in her report:

- “10.30 [Child E], [Child F] and [Child G] all describe being left unattended within an interview room at [local police office] and leaving the station, unescorted, on a number of occasions.
- 10.31 [Sergeant D] states he instructed [Constables M and N] to ensure that the children were suitably taken care of in the waiting room at the front counter at [local police office]. He states, further, that he visited the room a number of times and found the children supervised.
- 10.32 [Constable L] states that, on arrival at [local police office], [Sergeant D] placed the [applicant's] children in the care of [Constables M and N] and gave these officers instructions regarding their supervision.
- 10.33 [Constable M] confirms he had periodic contact with the [applicant's] children during their time at [local police office] before leaving them to attend to other duties, and denies having personal responsibility for the supervision of them.
- 10.34 Station Assistant [Ms T] cannot recall who asked her to do so, but confirms she was asked to keep an eye on the [applicant's] children while they waited for their parents.
- 10.35 She confirms that, on two occasions, the children asked for, and were given by her, permission to leave the building for fresh air. She was able to monitor them on CCTV both inside and outside the station, as far as her other duties allowed, but concedes she cannot account for all of their movements.”

Based on this evidence Inspector P found that the applicant's children had been left unsupervised during their time at the local police office and that the complaint was therefore substantiated. Inspector P stated:

- “11.31 CCTV coverage of both the foyer area, and of the area directly outside the front door of [local police office], confirms that individually, in the case of [Child E], and as a group, the complainer's children were left unsupervised by a police officer or member of police staff.
- 11.32 [Sergeant D] is clear in his response that he instructed [Constables M and N] to ensure that the [applicant's] children were suitably taken care of in the waiting room at [local police office].
- 11.33 [Constables M and N] both confirm they ... placed the children in the waiting room, where drinks and refreshments were supplied to them. Neither mentions that they had been obliged or instructed by [Sergeant D] to remain with them.
- 11.34 The reporting officer concludes that as a result of either a lack of clarity on the part of [Sergeant D] or misinterpretation by [Constables M and N], the children were left, not only able to misbehave whilst in the station, as happened, but vulnerable to mishap.
- 11.35 The allegation is, therefore, substantiated.”

In his response to the complaint, the Deputy Chief Constable acknowledged the outcome of Inspector P's enquiries and offered an apology, stating:

*“The inquiry officer has confirmed that there were periods of time, late at night, when, regrettably, your children were unsupervised in the police station, and indeed in the street outside.*

*I apologise that the safety of your children was so obviously compromised by this, although, thankfully, they did not come to any harm as a consequence. I have determined that your allegation has been substantiated and the officers concerned will receive corrective advice regarding the matter.”*

### *Consideration*

The applicant's concerns regarding the level of supervision of his children are entirely understandable. In the Commissioner's view, however, the enquiries into this complaint were comprehensive and the conclusions reached, reasonable. The applicant was given details of Inspector P's findings and was also offered an apology for the fact that the safety of his children was compromised.

In these circumstances, the Commissioner considers that this complaint was dealt with in a reasonable manner.

It is, however, clear that as a result of the applicant's complaint disciplinary action was taken against several officers. In the Commissioner's view, the applicant is entitled to be told, in general terms, the nature of this action. The Commissioner therefore recommends that Lothian and Borders Police advises the applicant of the action taken against the officers concerned.

### **Complaint 9: Questioning of children without a responsible adult**

In his letter of 30 March 2009, the applicant complained that his children were interviewed by the police without a responsible adult present. Specifically, he claims that officers obtained details from his children and undertook further enquiries. The applicant names Constable M as one of the officers involved in this.

### *Internal Handling*

Inspector P stated the following in her report:

- “10.37 [Child E] states that [Constable M] asked him for his date of birth and his sister, [Child F], for the family's telephone number.*
- 10.38 [Child F] states that two male officers asked the children for their home telephone number and their dates of birth.*
- 10.39 [Constable N] states she cannot recall the children being asked any questions in relation to the incident for which her [sic] parents had been detained.*
- 10.40 [Constable M] confirms he briefly exchanged conversation with the [applicant's] children, both during the journey to [local police office] and during their stay there. He denies questioning them, as it was not his enquiry.”*

Inspector P concluded that there was no evidence to suggest that the applicant's children had been asked any questions beyond “general chit chat” and requesting brief personal details required for a social work referral. She found the allegation to be unsubstantiated.

The Deputy Chief Constable provided the following response:

*“You allege that officers questioned your children without an appropriate adult being present.*

*Your son, [Child E], and your daughter, [Child F], state that they were asked for their date of birth and for a contact telephone number.*

*The officers concerned deny asking any questions of any of your children that related directly to the incident for which you and your wife had been detained. I am satisfied that the children were asked only for their personal details of their school and that, in the circumstances, it was not necessary for an appropriate adult to be present. Accordingly, I find this allegation unsubstantiated.”*

### *Consideration*

In terms of their statements, none of the applicant’s children claim they were asked questions in relation to the incident which led to the applicant and Mrs A’s detention.

Some of the conversations between the children and officers will be considered in more detail in the context of complaint 11. However, given the nature of the information requested from the children, and the fact that they were not formally interviewed, the Commissioner does not consider that a parent or other appropriate adult required to be present. In the Commissioner’s view, the outcome of Inspector P’s enquiries in this connection were adequately conveyed to the applicant in the letter of response.

For these reasons, the Commissioner considers that this complaint was dealt with in a reasonable manner.

### **Complaint 10: Daughter not dealt with appropriately**

The applicant complained that when Child F was sick in the waiting room of the police office, she was not given appropriate attention. In particular, he stated that she was given paper towels and told to clean up the vomit herself without any care being afforded to her wellbeing.

### *Internal Handling*

According to Inspector P’s report, Child F stated she had been sick whilst in the waiting room, an account which was supported by Child E and Child G. Ms T, the member of civilian staff on duty at the front counter of the local police office, stated that she had been told by one of the children that Child F had been sick. According to her statement, however, Mrs T did not consider that Child F had actually been sick.

Inspector P noted the following:

- “11.41 [Ms T] confirms that she provided [Child F] with paper towels to clear up a small amount of sickness.*
- 11.42 [Child F] confirms in her statement that some damp paper towels were sufficient to clear up the small amount of sickness that she believes was caused by her being upset at the situation.*
- 11.43 There is no evidence to suggest that [Child F] was otherwise ill or needed any medical treatment or that [Ms T] acted oppressively or improperly when dealing with her or failed to attend to any medical needs she may have had.*

11.44 *The reporting officer is of the opinion that under the circumstances it was not inappropriate to [Ms T] to require a child of thirteen years to wipe up a small amount of sickness.*

11.45 *The reporting officer concludes that this allegation is unsubstantiated.”*

Following consideration by Superintendent U and the Deputy Chief Constable, this complaint was found to be substantiated. The Deputy Chief Constable provided the following response:

*“The member of staff concerned confirms that your daughter was slightly sick and that, as [Child F] indicates, she was given some damp paper towels, sufficient to clean up a small amount of liquid that did not, otherwise, warrant that the room be evacuated. She has declared herself satisfied that each of your children appeared physically well, an assumption reinforced to her by the fact they all consumed chocolate bars given to them later by the police officers.*

*[Child F] stated to the investigating officer that hers was a nervous reaction to her circumstances and I very much regret if any of your children was upset by the events of that night, particularly to the extent of being physically sick. I also regret that the children found the member of staff to be unsympathetic to their situation.*

*However, whilst I have determined that the member of staff did not meet the duty of care expected of her and find your allegation substantiated, I am satisfied she did not act maliciously or oppressively. I have instructed that she receive corrective advice regarding her actions.”*

### **Consideration**

In the Commissioner’s view, Lothian and Borders Police reached the correct conclusion in respect of this complaint. Although Ms T did not consider that Child F had actually been sick, the weight of the evidence suggests otherwise. During the applicant and Mrs A’s detention, the officers and staff responsible for the supervision of their children were obliged to provide a reasonable standard of care. By asking Child F to clean up following an apparent bout of sickness, the Commissioner shares the Deputy Chief Constable’s view that this standard was not reached.

By acknowledging this, providing a comprehensive response to the complaint, and giving appropriate advice to Ms T, the Commissioner considers that Lothian and Borders Police dealt with this complaint in a reasonable manner.

### **Complaint 11: Inappropriate questioning**

In his letter of 30 March 2009 the applicant complained that a male officer (who he said had accompanied Constable M) asked his daughter, Child G, inappropriate questions about her teacher, which were beyond her understanding as a ten year old. In particular, he alleged that the officer had asked Child G if one of her teachers was “hot” or whether she was “mutton dressed as lamb”.

The applicant also complained that another officer had asked Child E, “where do you buy your booze from?”. The applicant questioned whether his children would have been spoken to in this manner if a parent or senior officer had been present.

### **Internal Handling**

#### **(a) Questions regarding a teacher**

Constable M stated the following in connection with this complaint:

*"I deny this allegation. This allegation has been turned on its head. I clearly remember [Child G] talking about her schooling, and I remember asking her if she knew a teacher by the name of [Mrs Y], who is a close family friend of mine. [Child G] knew her and responded that she was a nice teacher who she liked. Her elder sister [Child F] went on to mention teachers whom she liked and who she didn't. I remember her using the term 'hot' to describe a particular teacher who was unknown to me. [Child F] was polite and courteous throughout, however, thought it was funny what her elder sister was saying. [Constable N] was present during the conversation."*

Constable N stated:

*"Brief conversation was exchanged with the children in an effort to make them feel at ease and help them take their mind off the incident. I don't recall ... [Constable M] using the term 'hot' to describe a teacher."*

Constable S stated:

*"I do remember [Constable M] briefly entering the room at one stage but I do not recall him talking to any of the children about their school or their teachers."*

Inspector P noted the following in her report:

*"10.45 [Child G], [Child F] and [Child E] state that [Constable M] asked the former if her teacher was 'hot' or if she was 'mutton dressed as lamb'.*

*10.46 [Constable M] denies the allegation. He confirms he chatted with [Child G] about his friend, her teacher. He states it was [Child F] who widened the conversation to include other teachers, one of whom she described as 'hot'.*

*10.47 [Constable N] cannot recall [Constable M] using the term 'hot' to describe any of the children's teachers.*

*10.48 [Constable S] confirms he was present during conversations with the children but cannot recall [Constable M] talking to any of them about their school or teachers."*

In conclusion, Inspector P found the complaint to be unsubstantiated. She stated that there was no independent corroboration to confirm that an officer had used the language alleged or that it amounted to misconduct.

The Deputy Chief Constable provided the following response:

*"You allege that an officer asked your daughter, [Child G], questions about her teacher that you found to be entirely inappropriate and improper.*

*The officer concerned denies he used the terms 'hot' and 'mutton dressed as lamb'. He confirms he is a friend of your daughter, [Child G]'s teacher and that their mutual acquaintance was discussed in the course of casual conversation between them. He states, however, it was your other daughter, [Child F], who widened the conversation to include other teachers, one of whom she described as 'hot', to the amusement of [Child G].*

*Other officers who were at times party to the conversations cannot recall specific phrases being used by either party.*

*I regret you consider the tone of the conversation that took place between your children and officer to have become too informal, and thus inappropriate, but I am satisfied there was no misconduct on his part and, therefore, find the allegation to be unsubstantiated.”*

#### (b) Question regarding purchase of alcohol

Child E stated the following in connection with this aspect of the complaint:

*“Then the officer I hadn’t seen before ... asked if I went out with my friends. He then asked where I bought my booze. I don’t think it was a serious question but he didn’t laugh when he said it so I don’t know if he was being serious or not. I said I don’t drink alcohol so I didn’t buy it.”*

Child F stated the following:

*“I remember the same officer asking [Child E] where he bought his booze from. [Child E] replied that he was only fourteen and he didn’t drink.”*

Child G stated:

*“[One of the officers] asked [Child E] where he got his booze from ... sort of joking, sort of not. [Child E] was only 14; he doesn’t drink. He said ‘Oh’. Maybe he didn’t realise how old [Child E] was or just expected him to say where he got his drink from if he did underage drink.”*

Inspector P stated the following in her report:

*“10.50 [Child E], [Child F] and [Child G] state that [Constable S] asked the former where he bought alcohol.*

*10.51 [Constable S] confirms he asked [Child E] where he got his alcohol from but only after the boy had claimed he had been drunk the weekend before.”*

Inspector P concluded that there was no evidence that the question was asked inappropriately or that it amounted to misconduct.

The Deputy Chief Constable provided the following response:

*“You allege, also, that an officer asked your son, [Child E], where he bought his alcohol, a question you found to be similarly improper.*

*The officer in question confirms that in conversation with him, he asked your son this question, but only after [Child E] indicated he had been drunk the previous weekend.*

*I am satisfied that the question was asked, but have no independent evidence to suggest it was asked in circumstances that were inappropriate and, therefore, do not substantiate this allegation.”*

#### *Consideration*

##### (a) Questions regarding a teacher

Both the Deputy Chief Constable and Inspector P identified the officer subject to this complaint as Constable M. However, in terms of complaint itself and the statements of Child E, Child F and Child G, the allegation appears to be levelled at different officer, possibly Constable S.

It is understandable why the Deputy Chief Constable and Inspector P adopted the position they did, since Constable M accepted in his statement having a conversation with Child F and Child G in which he said Child F had used the word “hot” to describe a particular teacher. Nevertheless, although Constables N claims not to recall Constable M making an inappropriate remark, it is not possible to surmise from her statement her position as to whether Constable S made such a remark. Likewise, although Constable S did not recall Constable M talking to the children about their teachers, his statement does not address the allegation that he himself made the inappropriate remarks.

In light of these deficiencies, the Commissioner does not consider that this complaint was dealt with in a reasonable manner. There are three sources of evidence which support this complaint and it is important that the allegation is properly addressed. The Commissioner therefore recommends that Constables M, N and S are asked to provide further statements specifically addressing whether Constable S made comments of the kind alleged by Child E, Child F and Child G. A further response should thereafter be submitted to the applicant, in which the evidence that supports and refutes the complaint is assessed.

#### (b) Question regarding purchase of alcohol

In the Commissioner’s view, there is insufficient evidence to confirm that Constable S acted inappropriately in asking this question. Even taking the Child E, Child F and Child G’s statements in isolation, the question might well have been asked in order to establish whether Child E engaged in underage drinking. Evidence of this would have been relevant to the reference that was made to the social work department. Constable S’s own statement provides a further rationale for his asking the question.

In these circumstances, the Commissioner considers that the conclusion reached by the Deputy Chief Constable was reasonable.

#### **Complaint 12: Mocking comments**

According to the applicant’s statement, Child E reported to him having overheard police officers talking about Mrs A in a mocking manner.

#### *Internal Handling*

Child E stated the following:

*“On one of the occasions I went down the street beside the station ... there was a gap where one of the windows was open and I heard officers having a conversation. I think there was about two or three. I think there was a woman and two men by the sounds of it ... I think they were making fun of my mum ...”*

Inspector P noted the following in her report:

*“11.54 The allegation that an unidentified male officer made mocking remarks about the situation in which [Mrs A] found herself, is based in uncorroborated evidence provided by [Child E].*

*11.55 ... there is no evidence to support the complainer’s assertion that such remarks were made by any officer.*

*11.56 This allegation is unsubstantiated.”*

The Deputy Chief Constable provided the following response:

*“Unfortunately, [Child E] did not see the officer responsible and the investigating officer has been unable to identify him. In the absence of any independent corroboration to support the allegation, I do not find it substantiated.”*

### Consideration

Attempts were made by Lothian and Borders Police to establish the identities of the officer(s) who made the comments alleged by Child E. Constable M denied making any such comments and claimed not to have known it was Mrs A's birthday. Constable L was unable to comment on the allegation as she was not within the police office at the relevant time. Sergeant D also appears to have been engaged in further enquiries at the time. The statements obtained from other officers in the course of the complaints investigation make no reference to such an incident.

Given that Child E was unable to identify the officers concerned, the Commissioner considers that reasonable enquiries have been undertaken in this connection. Based on the available evidence, the Commissioner considers that the Deputy Chief Constable's conclusion is reasonable.

### Complaint 13: No opportunity to give statement

In his letter of 20 March 2009 the applicant complained that neither he nor Mrs A had been interviewed by the police before charges were brought against them. In his statement, the applicant complained that he was not given the opportunity to speak to anybody or make a statement before he was charged.

### Internal Handling

Inspector P stated the following in her report:

*“10.55 The complainer alleges that when [Sergeant D] and [Constable L] were charging him he was not given the opportunity to give a statement.*

*10.56 Both officers deny the allegation. They state that [the applicant] elected to make no reply when he was charged.”*

Inspector P concluded that the complaint was unsubstantiated as there was no evidence to support it.

The Deputy Chief Constable provided the following response:

*“You allege that when officers were charging you, they did not give you the opportunity to make a statement. Both officers deny this is the case and state that when charged and given the opportunity to reply, you elected not to. In the absence of any independent corroboration to support the allegation, I do not find it substantiated.”*

### Consideration

Following the applicant and Mrs A's detention, further enquiries were conducted to determine if there was sufficient evidence to charge them with a criminal offence. A total of five witness statements were taken in this connection, resulting in the applicant and Mrs A being charged with the two offences described earlier in this report.

Although the police detain suspects under section 14 of the 1995 Act in order to allow further enquiries to be undertaken, it is important to make clear that such enquiries will not necessarily involve the suspect being interviewed. There is no obligation upon the police to interview suspects

before charging them: suspects will generally be charged whenever the police consider there to be sufficient evidence to do so. In some cases the evidence will include any incriminating comments made by the suspect at interview, in others it will consist of the results of alternative enquiries.

In the Commissioner's view, the Deputy Chief Constable's response did not address the issue raised by the applicant's complaint. Although it is true that neither the applicant nor Mrs A made any response to caution and charge, the question raised by the complaint was whether the applicant and Mrs A ought to have been given an opportunity to provide their version of events prior to being charged. In the Commissioner's view, although it was open to the applicant and Mrs A to comment following the administering of the caution, this procedure is not designed to allow a suspect to provide a full account of his position.

For the reason given, the Commissioner does not consider that this complaint was dealt with in a reasonable manner. However, as the issue raised by the complaint has been addressed above the Commissioner does not consider it necessary to recommend further action.

#### **Complaint 14: Reliance on false information**

In his statement, the applicant complained that the charge against him under the 1937 Act, as well as a referral to the social work department, were based of falsehoods.

##### *Internal Handling*

Inspector P investigated this complaint as two separate allegations: "allegation 15" which concerned the charge under the 1937 Act; and "allegation 16" which concerned the social work referral.

Inspector P made the following observations in her report:

**10.57 Allegation No. 15**

10.58 [Constable L] *denies the allegation.*

10.59 [Sergeant D] *states that there was sufficient evidence to charge both the complainer and Mrs [A].*

10.60 *Both [Constable M] and [Constable N] confirm they saw [Child F] and [Child G], without protective equipment and with only intermittent light, 25 feet up scaffolding at the rear of [locus].*

10.61 [Mrs C] *states that she saw [Child F] and [Child G] on the scaffolding at the rear of the next-door property and was concerned for their safety.*

10.62 [Child G] *confirms that she climbed onto scaffolding.*

10.63 *Neither [the applicant] nor Mrs [A], or any of the [applicant's] children, were interviewed at any time regarding the circumstances in which the police officers found them.*

**10.64 Allegation No. 16**

10.65 [Constable L] *denies this allegation.*

- 10.66 *The reporting officer has examined the social work referral submitted in relation to the incident and is of the opinion that the circumstances described and information contained within the report have indirectly been submitted as evidence during [the applicant and Mrs A's] trial. This was accepted, without adverse comment, by the trial judge as a credible version of events.*
- 10.67 *[Constable L]'s opinion of the behaviour of [the applicant and Mrs A], and the potential effect it may have had on their children, was also mirrored by the comments of the trial judge, and therefore there is nothing in them to suggest that they were in any way malicious."*

Inspector P reached the following conclusions:

**11.61 Allegation No. 15**

- 11.62 *The reporting officer concludes that, as confirmed by the child herself and other members of the [applicant's] family, at least one child climbed up scaffolding at the rear of the family home.*
- 11.63 *She concurs that it might be reasonable to infer from the circumstances that at least one of the children had been endangered by their behaviour.*
- 11.64 *She notes, however, that the Procurator Fiscal in the case chose not to offer any evidence relating to the alleged contravention of Section 12 of the Children and Young Persons (Scotland) Act 1937.*
- 11.65 *For an offence to be complete as defined in Section 12 of the Act, an accused must wilfully expose a child in their care to circumstances likely to cause unnecessary injury to health.*
- 11.66 *The evidence offered to the Procurator Fiscal in this case described the circumstances in which the [applicant's family] were found, but no apparent effort was made to gather or forward any additional evidence, particularly that which highlighted the mens rea or culpability of either the complainer or [Mrs A].*
- 11.67 *This short coming in the quality of the investigation in relation to the alleged contravention of the Children and Young Persons Act was confirmed during the trial when, in giving her evidence, [Constable L] was unsure of her facts.*
- 11.68 *The reporting officer concludes that, although not amounting to neglect, the enquiry carried out fell below the standard required and that both [Constable L] and [Sergeant D], as both her corroborating and supervisory officer, would benefit from corrective advice in this regard.*
- 11.69 *She can, however, find no evidence to support the complainer's allegation that [Constable L] and [Sergeant D] acted on the basis of false information.*
- 11.70 *The allegation is, therefore, unsubstantiated.*
- 11.71 Allegation No. 16**
- 11.72 *The reporting officer concludes there is nothing contained within the Social Work referral which could be considered malicious and which was not vindicated by the deliberations and decision of the trial.*
- 11.73 *The allegation is unsubstantiated."*

The Deputy Chief Constable provided the following response:

*“You allege that, on the basis of false information, officers charged you and Mrs [A] with a contravention of the Children and Young Persons (Scotland) Act 1937.*

*The reporting officer has fully reviewed the circumstances that led to you both being charged with this offence and reported to the Procurator Fiscal. She has identified areas of the original inquiry that did not meet the standard I would expect and the officers concerned will be given corrective advice with regard to this.*

*Nonetheless, I note that following consideration by the Procurator Fiscal, you were summoned to answer the charge although, at your trial, he chose to offer no evidence in relation to it. The decision not to offer evidence is one entirely for the Procurator Fiscal and there are various reasons why he or she may so choose. Such a decision does not, however, reflect on the legality or competency of the original charge.*

*In the circumstances as have been described to me, I am satisfied that the decision to charge you with this specific offence was a valid one, based on an unbiased consideration of the facts available to them. Accordingly, I find this allegation to be unsubstantiated.*

*You allege also that officers submitted a referral report for the attention of [local social work department] that contained malicious falsehoods and was based on false information.*

*... you will be aware that it is incumbent on police officers to bring to the attention of the Social Work Department, those children who may have been placed in either physical or moral danger by their parents' conduct.*

*It is entirely legitimate that such a report should contain elements of opinion on the part of the referring officer, so long as the opinions are based on a reasonable interpretation of the facts as are known to them and are reached without malice or prejudice.*

*I am satisfied that the report submitted on this occasion was based not only on such a reasonable interpretation of the events that night, but also on facts that were subsequently validated by the judicial process. Therefore, I find this allegation to be unsubstantiated.”*

### Consideration

In the Commissioner's view, the first element of this complaint is closely linked to the question of whether there was sufficient credible and reliable evidence to convict the applicant and Mrs A of the alleged offence. Questions as to whether the evidence of a particular witness is credible or reliable are matters for the courts to determine and the Commissioner therefore expresses no view on this issue. It is, however, clear that the evidence presented to the Procurator Fiscal in this connection consisted not only of the evidence of Mrs C but also that of several police officers. In the Commissioner's view, despite the ultimate outcome, the police were justified in reporting this matter to the Procurator Fiscal. The fact that proceedings were initially taken in respect of this charge vindicates the decision to do so.

With regard to the second element of the complaint (the social work referral) the report submitted in this connection contains some minor factual inaccuracies: for example, the scaffolding on which it was alleged the children were climbing is described as being at the front of the property rather than the rear. In the Commissioner's view, however, such errors do not undermine the decision to refer the matter to the social work department, and there is nothing to indicate that the decision to do so was malicious in any way.

In the Commissioner's view, appropriate enquiries were undertaken in respect of this complaint and reasonable conclusions reached as a result. The applicant has also been given sufficient information in the response to the complaint. In these circumstances, the Commissioner considers that this complaint was dealt with in a reasonable manner.

### Complaint 15: Excessive time in custody

The applicant described this complaint as follows in his statement:

*"I wish to complain that it appears to me that I was unnecessarily held in custody after I had been charged. The motive for this is not clear to me other than staff were upset because I had asked to speak to the arresting officer. I was charged at approximately 0200 hours and not released until 0535 hours. I was on my way to have my fingerprints and photographs taken when I asked the turnkey if it was possible to speak to the arresting officer when the man told me I would have to go back in my cell and could be there for the night. He told me that [Constable L] had gone out. In my opinion, had I not asked that, I would have had my fingerprints and photograph taken and been released at the same time as [Mrs A]."*

#### Internal Handling

As part of the enquiries into this complaint, CCTV footage was obtained of the applicant and Mrs A being moved from their respective cells to the fingerprint room. In addition, statements were obtained from two civilian custody officers, Mr V and Mr W.

Mr V stated the following:

*"... I can't remember escorting [the applicant] to and from the fingerprint room or any conversation I may have had with him. I can't remember him having any conversation with my colleague [Mr W]."*

*I'm not sure if I know [Constable L] or [Sergeant D] and I can't remember if [the applicant] asked to speak to either of them that night. If he did, I would certainly have passed a message on. It's fairly common for prisoners to ask us to speak to arresting officers or to the custody sergeant."*

*I have looked at [the applicant's] custody record, and that of his wife, and I can see they were not released from custody at the same time. From my experience, there are a number of reasons why a prisoner could be held in custody. It was a weekday, so he could be held for court that day. If he had been drinking, he could be held until he was sober for his own safety. It may be possible that there was a delay because an Inspector has to authorise a release on a special undertaking. It could be, if he asked to speak to the reporting officer and the message was passed, he would have to wait until they were free. On this particular occasion, which I can't remember specifically, I don't know if any of these reasons caused a delay in his release."*

Mr W stated:

*"At 02.18 on 26/09/08 I attended at [the applicant's cell] with [Mr V] to take his fingerprints, photograph and DNA sample. A conversation took place between [the applicant] and myself and [the applicant] was returned to his cell before any samples were taken. I do not remember what the content of the conversation was."*

*[The applicant] subsequently had his fingerprints, photo and DNA taken at 05.50 hours by [Mr V] and [another custody officer] ... I do not remember why he went back to his cell."*

Inspector P noted the following in her report:

- “11.75 CCTV footage confirms that [the applicant] was held in custody for approximately three hours longer than his wife.
- 11.76 The custody record was updated to indicate that [the applicant] was released from custody at 0850 hours and appeared fit and well for court. This is clearly inaccurate as CCTV footage confirms he was apparently released at 0530 hours, as the complainer himself alleges.
- 11.77 CCTV footage confirms that a conversation took place between the complainer and [Mr W] when the former was apparently being taken to the fingerprint room at [local police office]. He was then returned to his cell.
- 11.78 With the evidence available there is no corroboration of the details or nature of the conversation.
- 11.79 Although there is no record to explain the reason for [the applicant] being held in custody longer than his wife, equally there is no evidence to suggest that this was a deliberate or malicious act on the part of [Mr W] or any other member of staff.
- 11.80 The allegation is therefore unsubstantiated.
- 11.81 However, the reporting officer highlights several omissions and inaccuracies in the maintenance of the custody record during the complainer’s time in custody. No record was made of [the applicant]’s release at the apparent time of his release. Thereafter, there have been entries recorded which quite clearly could not have applied to him. These matters, which are a management issue, have been addressed by the reporting officer in the form of a memorandum to the Chief Inspector, Custody sub-division ...”

In January 2010 Superintendent U sent a memorandum to Chief Inspector X at the local police office detailing the shortcomings identified by Inspector P. The Deputy Chief Constable provided the following response to the complaint:

*“Finally, you allege that on 26 September 2008 an officer held you in custody longer than was necessary, following your request to speak to the arresting officer.*

*CCTV footage confirms you being taken from your cell at [local police office] at 0218 hours on 26 September 2008 and speaking for a few moments with the officer concerned, before being returned to the cell until your release after 0533 hours.*

*The officer concerned, and the officer who accompanied him, are unable to recall the specifics of the conversation between you and cannot confirm that you asked to see the arresting officer, although they describe this as a regular, and unremarkable, occurrence.*

*The investigating officer has established that there is no record on the relevant custody reason [sic] of your movement within the custody suite at this time or of any request made by you at that time.*

*Although there is no evidence available to me of malice on the part of an individual officer deliberately doing so, I am satisfied that you were detained in custody for longer than was necessary, resulting from your perfectly reasonable request to speak with an officer who had, unfortunately, already retired from duty.*

*As your detention was still lawful at this time and fell in line with directions given in relation to custody, and given that the reason for you remaining in custody was to facilitate your request, I cannot substantiate this complaint.”*

### *Consideration*

As identified by Inspector P, the applicant's custody record contains entries in relation to observations and the provision of meals timed *after* the applicant's release. It is also recorded that DNA, fingerprints and photographs were taken from the applicant at 5.50 am, around 15 minutes after CCTV shows him leaving the police office. The record also contains an entry wrongly indicating that the applicant was released at 8.50 am for an appearance at court.

In the Commissioner's view, these errors suggest that the applicant's custody record has been updated with details relating to a different prisoner. As noted above, this matter was highlighted to Chief Inspector X as a "management issue". Given the sensitive nature of the information contained within the custody record, such as DNA sample barcodes, the Commissioner's office requested clarification on the action taken by Chief Inspector X in this connection. On 5 August 2011, the Professional Standards Department emailed the Commissioner's office advising that similar inaccuracies had been identified following a fatal accident inquiry. The Professional Standards Department stated:

*“The inaccuracies were due to the absence of IT that allowed for ‘real time recording’ of observations and comments.*

*As a result, best practice at [local police office]'s Custody Suite dictates that staff will record observations in ‘real time’ in their official police notebooks. This practice is being taken up by other Divisions and agreed at Force Executive level; this will be formalised through the Custody Standing Operating Procedures.”*

The applicant's complaint is that he was held in custody unnecessarily following a request to speak to Constable L. Although the applicant is unclear as to the reasons for this, he suggests that it was because he had upset staff by asking to see Constable L. According to the applicant, in response to this request he was advised by a custody officer that he would have to go back to his cell and could be "there for the night".

The custody record sheds no light on why the applicant was kept in custody beyond his being arrested and charged at approximately 2 am on 26 September 2008. The accounts given by Mr V and Mr W also provide no assistance in this connection, although various possibilities are suggested by Mr V.

In the Commissioner's view, it is not possible to establish that the decision to keep the applicant in custody beyond the point at which he was first taken to provide fingerprints etc was malicious in nature: even the applicant acknowledges in his statement that he is unclear as to the reasons for his continued detention. Assuming, however, that the decision to do so was based on the applicant's request to see Constable L, there is no reason why the applicant could not have been released from custody and told that Constable L would see him at a later time. The police office in question has a waiting area and, at the very least, he could have been asked to wait there until such time as Constable L's whereabouts were established.

The Deputy Chief Constable clearly acknowledged in his response that the applicant was held in custody for longer than was necessary and in these circumstances it is difficult to understand why this complaint was not substantiated. The Deputy Chief Constable refers to the applicant's detention as still being lawful. In the Commissioner's view, however, such a finding is undermined by the Deputy Chief Constable's acknowledgement that the applicant was held in custody for longer than was necessary. The Commissioner also does not consider it relevant that the continued detention appears to have arisen from the applicant's request to speak to Constable L.

As noted above, there was nothing to prevent the applicant being released pending further contact with Constable L.

For these reasons, the Commissioner does not consider that this complaint was dealt with in a reasonable manner. The Commissioner recommends that Lothian and Borders Police apologises to the applicant for holding him in custody for longer than was necessary in the circumstances.

## Conclusions, Recommendations and Learning

### Complaints 1-8 , 9-10, 11(b), 12 and 14

In the Commissioner's view, these complaints were dealt with in a reasonable manner by Lothian and Borders Police. However, in respect of complaint 8 the Commissioner recommends that Lothian and Borders Police advises the applicant of the action taken against the officers concerned.

### Complaint 11(a): Inappropriate questions regarding a teacher

In the Commissioner's view, this complaint was not dealt with in a reasonable manner. The Commissioner recommends that Constables M, N and S are asked to provide further statements specifically addressing whether Constable S made comments of the kind alleged by Child E, Child F and Child G. A further response should thereafter be submitted to the applicant, in which the evidence that supports and refutes the complaint is assessed.

### Complaint 13: No opportunity to give statement

In the Commissioner's view, this complaint was not dealt with in a reasonable manner. However, the Commissioner makes no recommendation in this connection.

### Complaint 15: Excessive time in custody

In the Commissioner's view, this complaint was not dealt with in a reasonable manner. The Commissioner recommends that Lothian and Borders Police apologises to the applicant for holding him in custody for longer than was necessary in the circumstances.

**John McNeill**  
**Police Complaints Commissioner for Scotland**

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