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THE DEPUTY NATIONAL SECRETARY'S OFFICE

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BB CIRCULAR – 005-2021

To: All Branch Board Chairs & Secretaries

Cc: CAPLOs and Branch Council Admin

Dear Colleague

The Independent Office of Police Conduct (IOPC) power to compel officers to attend for interview as a witness, the segregation of police witnesses & the duty to cooperate

I am writing to update guidance to officers on their rights as witnesses in any death or serious injury investigation.

This guidance is based on recently received legal advice and replaces JBB circulars 026/2013, 07/2013, 008/2010 and 007/2014. The advice in these circulars was based on Authorised and Professional Practice (APP) that has been superseded and is also out of date by reason of not covering the duty to cooperate which was added into the Duties and Responsibilities Standard of Professional Behaviour as set out in schedule 2 of the Police (Conduct) Regulations 2020.

Police Friends and officers should also refer to the following documents, which are mentioned elsewhere in this circular:

- Latest College of Policing [APP on armed policing](#);
 - Latest College of Policing [APP on Death or Serious Injury](#) (this was also circulated via BB circular 005/2020);
 - [IOPC guidance on police complaints system](#);
 - [IOPC guidance for police witnesses in investigations](#);
 - [Home Office Guidance on professional standards, performance and integrity in policing](#) (HOG); and
 - Schedule 2 of the Police (Conduct) Regulations 2020
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- **Conferring and separation**

On conferring the College of Policing APP now states that:

“Officers and staff should not confer before making their accounts (whether initial or subsequent detailed accounts). It is important that KPWs [Key Police Witnesses] individually record their honestly held belief of the circumstances at the time force was used. Therefore, there is no need for them to confer with others about what was in their mind at the time of the incident and when force was used.”

On separation and segregation, legal advice suggests that there is no absolute rule that this must happen, it will depend, but it is quite wrong to say it should not happen. The APP states that the Post Incident Manager's role includes:

“• Consider the need to separate KPWs and record associated decisions or arrangements . . .”

Furthermore, the Armed Policing APP also provides:

“Separating KPWs

As soon as a firearms has been discharged by police, or it is known that a DSI following police contact has occurred, the TFC should consider and decide whether KPWs should be separated to prevent them from conferring; where practicable, this should be done in consultation with the PIM. The PIM or responsible chief officer will review and may override any decision to separate KPWs, or may decide to separate them at a later stage, as appropriate.

Officers/staff need not be separated as a matter of routine. The decision on whether or not to separate KPWs should be based on the consideration of three separate questions in turn . . .”

Similar wording is used in the DSI APP.

• **Officers writing their own statement**

APP now includes the following guidance on the manner in which statements should be obtained:

“Statements

The IIA may wish to have detailed statements from witnesses. These statements may be taken by the IIA or be provided by the witnesses themselves. Individual witnesses, subject to the legal advice they receive, will decide how the statements are obtained or provided. Where officers/staff decide to provide their own statements, these should be submitted to the IIA within seven days of the incident (except in exceptional circumstances)

. . . and . . .

Police witnesses may be accompanied during the interview (e.g. by a legal adviser, staff association, federation or trade union representative) and cannot be compelled to answer questions. How a KPW provides their detailed account will be subject to the legal advice they receive, but it will ultimately be for the KPW to decide.”

It should be noted that all of the above does not engage with the question of ‘duty to cooperate’. The remainder of this circular sets out the legal advice that has been received on the new duty to cooperate.

• **Power to compel an officer to an interview**

Schedule 3 to the Police Reform Act 2002 makes provision for the IOPC to compel an officer to attend for an interview when being treated as a witness in a death or serious injury investigation. It is important that Police Friends and officers understand that this is not a power to compel officers to answer questions. It remains each officer's right to decide whether to respond by answering questions in interview or by preparing a written statement.

However, since February 2020, a duty to cooperate now forms part of the Standards of Professional Behaviour set out in the Police (Conduct) Regulations where there was none before. Therefore, the advice set out in JBB circulars 026/2013, 07/2013, 008/2010 and 007/2014 has been reviewed.

Legal advice suggests that while it remains the case that the wording of APP and other statutory guidance such as that set out in the HOG and IOPC guidance remains persuasive, and an officer cannot be forced to answer questions, the possible adverse consequence of declining to answer questions and instead agreeing to provide a witness statement is a breach of the duty to cooperate.

For this reason, in any DSI, PFEW would strongly advise officers to seek advice from their branch board before attending an interview and, where appropriate, attend with a legal adviser.

- **Duty to cooperate**

The duty to cooperate was incorporated into the Duties and Responsibilities Standard of the Standards of Professional Behaviour set out at schedule 2 of the Police (Conduct) Regulations 2020. This states:

‘Police officers have a responsibility to give appropriate cooperation during investigations, inquiries and formal proceedings, participating openly and professionally in line with the expectations of a police officer when identified as a witness.’

Legal advice suggests that where there is disagreement concerning whether an officer is complying with the duty or not (or in a defence to an allegation of breach of duty) it is bound to hinge on what is or is not ‘appropriate’ and why. The phrase ‘in line with expectations of a police officer’ will also form part of the test as to what is sufficient to cooperate.

There is no existing case law on the meaning and extent of the duty to cooperate. It can be taken that it takes an ordinary common sense meaning and it will vary depending on the facts and circumstances of an individual case, which is why PFEW would strongly advise any officer to seek advice from their branch board. The most authoritative sources of information as to what the duty to cooperate means and how far it goes are:

- Home Office guidance
- IOPC guidance on police complaints system
- IOPC guidance for police witnesses in investigations

- **Home Office Guidance**

The HOG deals with the duty to cooperate at paragraphs 2.24 – 2.25. Paragraph 2.24 reads:

‘The duty to cooperate forms part of the Standards of Professional Behaviour under ‘Duties and Responsibilities’. It reinforces the responsibility that a police officer has to cooperate fully where they are a witness in an investigation, inquiry or other formal proceedings. The responsibility is to participate openly and professionally as a witness . . .’

The HOG appears to set a higher standard requiring officers to cooperate ‘fully’ not just ‘appropriate’ cooperation. Legal advice suggests that the HOG does not create an obligation over and above that in the Standard of Professional Behaviour itself to do anything more than what is ‘appropriate’ in the circumstances. Paragraph 1.15 of the HOG confirms that:

‘The guidance does not replace or supersede provisions set out in Regulations or elsewhere in legislation. In the event of a conflict between this guidance and the underlying legislation, the legislation has precedence . . .’

- **Appropriate cooperation**

What is appropriate cooperation will depend on the individual circumstances. The real issue is the risk of an officer incriminating themselves and the consequent risk of becoming a suspect. PFEW remains concerned about the potential misuse of witness status to obtain an account.

Legal advice suggests that the incrimination point is the only issue that has real force and implication in limiting the duty to cooperate. It would not for example be a good reason to limit cooperation because an officer fears placing a colleague in jeopardy of proceedings – not least because there is a positive duty to challenge and report inappropriate behaviour.

The HOG recognises the sanctity of the privilege against self-incrimination – in particular paragraph 2.21 reads:

‘A clear caveat must be placed on the duty that it applies specifically to where the officer’s status is that of witness and does not apply in the same manner where the status of the officer is that of subject to investigation and where a right not to self-incriminate must be upheld.’

The problem remains that there is nothing explicit to prevent an officer pivoting from being treated as a witness to being treated as a suspect.

- **IOPC guidance on police complaints system**

This guidance document states:

“Police witnesses

11.5 Under the Standards of Professional Behaviour, police officers who are witnesses are expected to cooperate with investigations, inquiries and formal proceedings. They must participate openly and professionally in line with the expectations of a police officer when they are identified as a witness. Failure to do so may be treated as a breach of the standards.

11.6 In an independent or directed investigation, a person serving with the police who is a witness may be compelled to attend an interview with investigators if required.”

- **IOPC guidance for police witnesses in investigations**

This bespoke IOPC guidance for police witnesses goes further. It sets out examples of what it envisages failing in the duty to cooperate would be:

“refusing to answer reasonable questions, not submitting a statement within the agreed timescale, or failing to attend an interview without good reason.”

This list is not exhaustive but suggests that non-cooperation sets a higher bar than an officer choosing to complete their own statement.

The IOPC guidance on police witnesses contains parts that point towards officers being free to write their own statements, as well as outlining when they expect officers to submit to questioning in a face to face meeting. The default or starting position is to allow officers to submit their own statements rather than submit to questioning. Under the heading ‘What an officer can expect’ the following guidance is set out:

“• **That submission of a written statement by the officer should be considered before asking them to attend a face-to-face meeting:** it will often be proportionate and reasonable to obtain an account by asking the witness to provide their own account in statement format. The statement should be written by the officer, in their own words.

• **A reasonable amount of time in which to submit a written statement:** a timescale for submission of a written statement should be agreed to allow the officer time to provide the witness account (and seek advice from their staff association and/or legal representative if appropriate) whilst being cognisant of the need for a timely response.”

However, the IOPC guidance also speaks at length to requiring face to face meetings in certain circumstances:

“• **That a requirement to attend a face-to face meeting is explained:** the most important priority for the IOPC is to ensure that all enquiries are conducted efficiently, thoroughly and in a timely manner.

An officer’s witness account may be key in obtaining this evidence and it therefore may be reasonable and proportionate for a first account to be provided in person. This meeting will be audio recorded and copies of discs will be made available to the witness who will have the opportunity to request amendments prior to signing a written account.

Examples of when this may be necessary could include the witness being young in service and needing more support; where the incident is complex and may require additional clarification and exploration; and in cases where the serious and sensitive nature of what took place or the complexities linked to the incident are most likely to require clarification by the witness.”

Under the heading ‘The IOPC expects’, the guidance reads:

“• **That officers will provide an account:** we expect that the officer will provide an account verbally or in writing depending on the most reasonable and proportionate way of ascertaining that information.

- **That the officer will attend meetings in person when reasonable and proportionate to do so.**

This could include instances where:

- A more timely and comprehensive response could be achieved via face-to-face meetings (for example, where the incident is complex and there is a need to ask the witness questions to establish the facts). This can be crucial in gaining the best understanding of what the witness saw, thought and felt at the time and may not always be included in written statements.
- The officer is young in service and would benefit from additional support during the interview.
- There is a need to ask follow up questions and doing this in writing is likely to be protracted.”

The result is that it can be an expectation within the duty to cooperate to attend a face to face meeting to answer questions. Failure to do so could be a breach of the duty to cooperate. It is worth noting that the IOPC Guidance for police witnesses makes clear that there should be plenty of warning before it is escalated to failure to cooperate. For example:

“ . . . if the IOPC investigator feels the officer is not co-operating, they should set out the grounds on which they believe that the officer has not co-operated with the investigation, what the officer needs to do to demonstrate that they are co-operating, and also provide an explanation of what the consequences may be if co-operation is not forthcoming.

. . . during face-to-face discussions, if the witness was felt to be disruptive or un-co-operative our investigations staff would make them aware of this.

. . . if non co-operation continued, consideration would be given to notifying the professional standards department of this after the discussion concluded.”

- **Breach of the duty to cooperate**

The question then arises – would it be a breach of the duty to cooperate to decline to answer questions and instead agree to provide a witness statement?

Legal advice suggests that officers cannot be forced to answer questions, there is no power of compulsion to answer but the possible adverse consequence is a breach of the duty to cooperate. The duty to cooperate in its various descriptions is shown to require what is:

- appropriate;
- reasonable;
- proportionate; and
- in line with the expectations of a police officer when they are identified as a witness.

Despite concerns about the applicability of APP as a complete description of what is required, legal advice suggests that the relevant APP can still inform the last of these considerations and should certainly be used in argument should such an argument arise. In addition, the fact that it is the usual practice of officers to write their own statements when witnesses in cases may be deployed to help defeat a requirement to answer orally face-to-face. An officer should still attend when asked however as not attending is specifically mentioned as non-cooperation. An officer should attend then gather instructions of what is of interest before submitting answers in a timely fashion.

Where there is legal advice against a face to face meeting the cases in which it is considered appropriate, reasonable, or proportionate to ignore that advice should be vanishingly rare. Following advice should be a good answer.

The IOPC has issued guidance that answering questions in person may be required for reasons of timeliness and comprehensiveness. This is the strongest argument against officers leaving face to face meetings to do their own statements.

The answer to whether it could be a breach of the duty to cooperate to decline to answer questions and instead agreeing to provide a witness statement is therefore yes but –

- officers can expect warnings before it even possibly came to that; and
- if it did it is likely a robust defence could be mounted to an allegation of such a breach where the officer does agree to answer all the questions in a timely manner albeit in their own writing rather than directly orally in a face to face meeting.

The only way to avoid being in that jeopardy in the first place (and to defeat the duty to cooperate and request to answer questions in a face to face meeting) is where the right against self-incrimination attaching to a suspect applies.

- **Conclusion**

In conclusion, the duty to cooperate in combination with IOPC guidance for police witnesses could give rise to a situation where it is incumbent upon an officer to answer questions as a witness in a face to face conversation upon pain of an allegation of breach of duty to cooperate.

The strongest ground the IOPC might have is where it is necessary to make the evidence gathering 'timely' and/or 'comprehensive' i.e. it would take too long to come and go with lists of questions, or something may be missed if the advantages of a to and fro conversation are lost. However, if an officer chose not to answer questions as a witness in a face to face conversation but undertook to answer all the questions in a timely fashion in writing, legal advice suggests that it is unlikely that the enforcement tool of duty to cooperate could be wielded effectively.

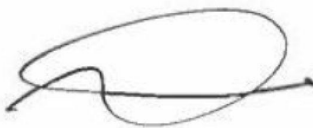
As mentioned previously, where there is a risk of an officer becoming a suspect or incriminating themselves then their argument against face to face oral questioning is very strong.

It cannot be ruled out that offering to comply by way of writing their own statement could result in a successful duty to cooperate allegation. In theory and principle, the duty to cooperate can require face to face question/answering. However, the facts of such a case are difficult to conceive. In addition, if an officer's written statement answered the questions and topics raised in a timely fashion then it is unlikely that such an allegation would succeed on the basis that it could be argued an officer had given appropriate cooperation in a timely fashion and acted in line with the expectations of a police officer when they are identified as a witness.

Therefore, for the reasons above, the advice set out in JBB circulars 026/2013, 07/2013, 008/2010 and 007/2014 is no longer sustainable as there could be a case where the duty to cooperate requires officers to answer questions in a face to face meeting. However, legal advice suggests that in almost every conceivable individual case the approach that officers will write their own statements soon after could properly be taken and that it should be done that way where there is any prospect of self-incrimination or an officer evolving from a witness to a suspect.

If you have any questions about the contents of this circular please email DPA

Yours sincerely



John Partington
Deputy National Secretary