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**From the General Secretary's Office**

JF/sg

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**JBB CIRCULAR NO: 35 /2008**

Dear Colleagues

**NOTE MAKING POST INCIDENT**

As you may be aware, we have been in discussion with ACPO and IPCC regarding the making of notes post firearm incident.

The suggestion is that contrary to the customary and lawful practice, and contrary to the practice in relation to any other incident in which a police officer or witnesses are involved, police officers should not be allowed to confer prior to making their notes. A new chapter will be written into the firearms manual to reflect this change.

We have strongly challenged ACPO and IPCC on this proposed change as we believe that this not in the interests of officers or the service as a whole.

ACPO has obtained legal advice which supported this proposal. However, in response to this we have obtained our own legal advice from two eminent QCs. We have now circulated this to the interested parties in this debate, inviting them to contact us to discuss the issues.

In view of the fact that the debate may continue in Forces, and in public, I attach a copy of our legal advice to ensure that you are fully up to date with our interpretation of the legal position.

Yours sincerely

John Francis

**JOHN FRANCIS**
**General Secretary**

**IN THE MATTER OF**
**NOTE MAKING AND CONFERRING**
**IN POST CRITICAL INCIDENT INVESTIGATIONS**

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## ADVICE

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1.1 We are asked to advise on proposed alterations to the current ACPO Manual of Guidance on the Police use of Firearms in relation to authorised firearms officers conferring and making their notes together after a critical incident.

1.2 ACPO have taken advice from counsel, John Beggs and Sam Green. Their advice of 20 February 2008 ("the ACPO Advice") has been provided to us. In that advice they suggest amendments to Chapter 9, particularly 9.54, 9.55 and 9.60 effectively to forbid officers from collaborating in respect of note-making after an incident.

1.3 This would be a substantial departure from normal and conventional police practice. The justification, in the course of an extremely lengthy advice, seems to be:-

(i) that there is a risk of a breach of Article 2 obligations in a post-incident investigation if these measures are not taken, and

(ii) the very fact that officers do confer leads automatically to suspicion that they have dishonestly adapted their accounts in order to give inaccurate evidence.

1.4 It is our opinion that the approach is misconceived:-

(i) There is no real risk of the conventional practice breaching Article 2; and

(ii) Nothing could be more "natural or proper" when two or more officers have been present at an incident than that they should afterwards confer as to what each had seen.

1.5 It is not proposed in this advice to go through, line by line, the ACPO advice: we propose to set out our position on the above matters, in law, and comment briefly on the consequences of the proposed amendments.

1.6 We do however make the following comment on the ACPO advice: if the purpose of these amendments is to make matters *"look better for the police service from a public relations perspective"*[1] , then we respectfully suggest that the approach is likely (with justification) to be seen to be misconceived. Police officers who accept the onerous duty of firearms use in dangerous conditions deserve better from the Police governing body.

1.7 We will look at the position in law on officers conferring, deal with ACPO's Article 2 position and then examine the consequences of any proposed change in the present position.

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[1] From paragraph 25 of the Advice.

## 2. Witnesses conferring

2.1 There is nothing wrong with witnesses conferring. To do so after an incident is natural. Not to do so is, in fact, "unnatural" or to use a term in ACPO's advice "artificial". What is, obviously, 'wrong' is where the tribunal of fact is not made aware that there has been such collaboration.

2.2 Collaboration does not automatically give rise to collusion. The former means *"To work together with somebody to produce or achieve something"*, the latter means *"To work together secretly or illegally in order to trick other people"*[2]

2.3 The distinction is obvious; and, as the ACPO Advice acknowledges, it has long been conventionally permissible for officers to collaborate in the preparation of their accounts after an incident as long as, when they give evidence, they volunteer the fact of such collaboration having taken place. Judicial observations on the issue may well have been strictly *obiter*, as the ACPO Advice observes; but the judiciary has had ample opportunity to condemn the convention, had it seen fit to do so: it has not.

2.4 R. v. Bass[3] sets out the matter with some clarity as long ago as 1953:-

> "This court has observed that police officers nearly always deny that they have collaborated in the making of notes, **and we cannot help wondering why they are the only class of society who do not collaborate in such a matter**. It seems to us that nothing could be more natural or proper when two persons have been present at an interview with a third person than that they should afterwards make sure that they have a correct version of what was said. Collaboration would appear to be a better explanation of almost identical notes than the possession of a superhuman memory."

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2 The Oxford Advanced Learner's Dictionary 7th Edition (2005)

3 [1953] 2 WLR 825 at 829, the offence was "shop breaking" not shoplifting (para.49 of ACPO's advice).

The emphasised passage propounds an unexceptionable general proposition. It is still the law that there is nothing inherently "wrong" in police officers conferring.

2.5 *Bass* is still good law: see R. v. Skinner[4]:-

> "It has certainly been permissible, since Lord Goddard's time, for officers to confer together in the making up of their notebooks immediately after the events or interviews in which they have both been participating, as an aid to memory."

Subsequent cases have left the position untouched but provided important guidance on cases where witnesses have been shown to have been involved in important discussions outside Court (e.g. R. v. Shaw[5] ) and identifying the distinction between witness familiarisation (permissible) and witness training (forbidden): R. v. Momodou and Limani[6]

2.6 The ACPO advice places much weight on the case of R. v. Rowe[7] between paragraphs 56-65: we urge caution! There, the Appellant's counsel clearly went to the Court of Appeal in 1985 with his freshly published article and sought to persuade the Court to pronounce on the matter. In rejecting all the Appellant's arguments the Court declined that invitation and merely referred to the article as conveniently setting out counsel's arguments. We have searched for any further reference in the authorities and been unable to find any case since 1985 where the article was considered, let alone approved. It provides no authoritive legal basis for any suggestion that the convention/law is not as previously stated.

2.6 See also R v. HM Coroner for North London *ex parte* Sharman[8] where the Court expressly declined to adopt the submissions of the Family that there was anything sinister in the officers collaborating over their

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4 [1994] 99 Cr.App.R. 212 at 216.
5 [2002] EWCA Crim 3004.
6 [2005] 2 Cr.App.R.85
7 [1986] 83 Cr.App.R. 100
8 [2005] EWHC 857 (Admin)

post incident accounts. [9]

2.7 That that should be the position accords with common sense. The ACPO proposals amount to introducing a bar on post incident discussion for police officers which is outside the conventional and legally-approved (even if *obiter*) position and distinct from the position in normal policing. Such a bar would be truly "artificial" and unsupported by any authority.

2.8 The consequences of such a change on the administration of justice by police officers may be far reaching:-

1. In the context of authorised firearms officers dealing with a shooting incident it will inevitably put those officers in a different position from other police officers (dealing with 'ordinary' crime) and amount to an implicit caution that their conduct will not only be under review but possibly be criminal, for otherwise why are they forbidden the normal practice of discussing with their colleagues what happened?
2. If introduced in the form of an authoritive instruction it will inevitably lead to a call for the practice to be brought in all cases. After all where officers are attesting to matters that affect the liberty of the individual the argument inevitably will be that the rules should be the same. This is anticipated by the authors of ACPO's advice, see paragraphs 144 and particularly 190.

2.8 We will deal with the consequences of ACPO's proposed change under the heading "A Firearms Officer's position". However the consequences of such a change if applied to Police Officers generally would have far reaching consequences to the proper exercise of law enforcement.

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[9] Interesting that while the criticism of the officers by the family was that their evidence was identical, the independent witnesses (who all exculpated the officers) were criticised because of disparity in their accounts (se para.s 20-21).

## 3. ACPO's Article 2 position

3.1 It is our opinion that there is no real risk of ACPO breaching its Article 2 obligations in a post incident investigation by 'condoning' collaborative note-making which is approved by domestic law.

3.2 The ACPO advice at paragraph 189 seeks to say there is an arguable breach. We do not agree and set out why below. We do however feel it appropriate to mention that, in our collective experience of fatal shooting incidents, no such argument has ever been advanced, notwithstanding representation at the highest level of "human rights" interests. That is not to say that such an argument will never be advanced; but, if it is, we are confident that it can be resisted.

3.3 The position in law is clearly seen by applying the steps taken as a matter of law in fatal shooting incidents and asking the question; is the State complying with its Article 2 obligations? These obligations are conveniently set out in paragraph 122 of the ACPO Advice. Anyone involved in fatal shooting incidents in the UK will know that the investigation of such incidents is of the utmost rigour and required to be compliant in every respect with the demands of Article 2.

3.4 The quotations from paragraph 113 of the report of Nachova v. Bulgaria[10] at paragraph 136-137 of ACPO's Advice provide no support for the proposition that there is some non-compliance by ACPO in its current position. The *Nachova* case involved an incident where there had been no proper investigation: see paragraphs 114-119 of that authority. That was a case where unarmed men were shot, one in the back and there had been no proper investigation. Pronouncements by the Court in that case applied to that factual matrix. This appears to be implicitly accepted by the authors of the Advice at paragraphs 138-139.

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[10] 42 EHRR 933(43) ECHR

3.5 We have considered the case of *Ramsahai v the Netherlands*[11] to see whether it provides any support for the suggestion that ACPO may be violating Article 2. In that case the ECtHR (Grand Chamber) (disagreeing with the Third Section Chamber) held (at paragraph 332) that the adequacy of the investigation into a fatal shooting had been undermined by certain shortcomings such as to amount to a violation of article 2, namely:-

(i) failure to test the hands of the officers for gunshot residue

(ii failure to stage a reconstruction of the incident,

(iii) there was no examination of the weapons or ammunition and

(iv) No adequate pictorial record of the trauma caused to the victim's body by the fatal bullet.

(v) In addition, the officers had not been kept separated after the incident and had not been questioned until nearly three days later (at para. 330)

The Court found a further violation of Art. 2 in respect of a lack of 'sufficient' independence in the police investigation: para. 341.

3.6 Detailed examination of that case does not provide support for a general proposition that firearms officers must be immediately separated from their colleagues and not allowed to speak to each other as paragraph 330 might be construed as implying. In *Rhamshai* the incident took place on 19 July 1998, the officers (apparently) made no contemporaneous notes of the incident and were not interviewed until 22 July 1998. Under Netherlands domestic law, although the Officers were presumed not to have acted unlawfully, they were interviewed under caution (paragraph 265).

3.7 That decision is, in our opinion, clearly distinguishable and provides no support for a suggestion that the accepted legal practice in UK domestic law of officers collaborating in their accounts is any breach of

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11 Appln.52391/99; 15 May 2007

Article 2. (There is no indication in the judgment that the Court was referred to any conventional practice as to note-making in the Netherlands, if indeed any such convention exists; and, not surprisingly, there is no reference to the UK conventional practice.) The Grand Chamber were commenting on what was, on any view of the facts, a most unsatisfactory investigation. Further, the suggestion that there should have been some form of segregation or isolation of the officers involved is not one proposed to be adopted by ACPO: it is difficult to see that such segregation could lawfully be ordered.

3.8 If there is no real risk of ACPO being in breach of its Article 2 procedural obligations, then that can be no justification in making the proposed amendments.

## 4. A Firearms Officer's position

4.1 We have little doubt that, should an officer be forbidden from talking to his colleagues about an incident immediately after the incident, it may have the most serious consequences on the position of the officer involved.

4.2 When does the ban start? After the discharge are the Officers entitled to speak to each other? If so when does the prohibition commence?

4.3 An amendment in ACPO Guidance that introduces a ban on firearms officers cannot affect the legality of ordinary police officers conferring in accordance with authority. Therefore the firearms officers are in a special position. Why? The answer can only be that, for them, the presumption of rectitude no longer applies. They are thought to be incapable of honestly conferring without succumbing to collusion. Such officers are 'under suspicion', the presumption of innocence notwithstanding: they are asked, perhaps reasonably, to 'justify' their conduct: was the use of force justifiable in the circumstances; and if so, was the degree of force used (including lethal force) 'reasonable'?

4.4 This is a most material matter when considering whether the Officers could decline to answer questions about the incident.

4.5 This position must be examined in conjunction with the quotation from R. v. Donnelly[12] (para.97) and its reference to "a genuine risk" of prosecution. "Genuine" needs to be contrasted with 'fanciful and artificial' in the same quote. 'Genuine' risk in that context plainly means no more than a 'real', i.e. a non fanciful/artificial risk.

4.6 Contrary to the apparent view in the ACPO advice, we would suggest that any police firearms officer using lethal force is at 'genuine' (i.e. non fanciful or artificial) risk of prosecution, whether because it may be contended that the use of force was not justified by the circumstances or because it is contended that the use of lethal force was unreasonable.

4.7 We have seen numerous recent examples of allegations of criminal wrongdoing by shooters being made[13]. It should not be overlooked that the Stanley officers were arrested for murder. Where there is potential for a finding of unlawful killing by a Coroner's Inquest, there is a 'genuine' prospect of prosecution. If there is no prosecution there will or may be an application for judicial review of the CPS decision not to prosecute.

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12 [1986] NI 54

13 The case referred to in footnote 2 of the ACPO advice was R. v. Hodgson where a Met. Firearms officer faced three trials at the Old Bailey for murder (there was a mistrial and a jury disagreement). He was eventually acquitted on 14 October 1997

4.8 Anecdotally we have noted a tendency of Coronial juries to return unlawful killing verdicts in cases where "innocent"[14] victims have died even where the evidence would not support such a verdict, the Harry Stanley case being one such case. Therefore the risk for firearms officers is very real.

4.8 Adopting the ACPO Advice reference to Den Norske Bank ASA v. Antonatos[15] (para. 88) the 'privilege' is available in respect of 'any pieces of information or evidence on which the prosecution may wish to rely in establishing guilt': a firearms officer could take the view, or be properly advised, that even to admit his presence at the scene let alone to firing the lethal shot(s) could justifiably be withheld in reliance thereon.

4.9 We are aware that authorised firearms officers are invariably high quality, dedicated officers who would be anxious not to do anything to obstruct proper investigation. However, we have little doubt that a changing of the "rules" in the Guidance in such a way as not to reflect the current law can only be construed as a move which overtly places them under suspicion as soon as any serious incident takes place. Whether any officer feels the need to rely on his undoubted right not to incriminate himself will, in each case, be a fact specific decision.

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14 In the sense of not being involved in crime or subject to a tragic mistake..

15 [1998] 3 WLR 711 at p.727

4.10 We query on what basis the proposed change could be said/justified to be a 'lawful' order, non-compliance with which could be pursued as an offence against discipline. The only 'legal' basis proffered in the ACPO Advice is that collaborative note-making might 'arguably' be seen to offend Article 2. That argument, in our opinion, finds no support in authority.

4.11 In the circumstances above, (i) we question whether there is any legal basis for the proposed change; and (ii) even if there was, we draw attention to the practical implications: if collaboration is 'wrong' in a fatal shooting investigation, surely the practice must be prorogued across policing, where Art. 2 does not apply, not simply in respect of fatal shooting incidents.

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