

## **JBB Circular No.62/2005**

17 November 2005

To: The Chairman and Secretary  
All Branch Boards

Dear Colleagues

### **SUBSTANCE MISUSE AND ALCOHOL TESTING**

The Police (Amendment) Regulations 2005 came into force on 7 November and introduced new Regulation 19A, which authorises:

- Substance misuse testing members; and
- Alcohol testing of members,

**but, only** in specified circumstances.

#### Substance misuse

From 7 November 2005 a member may be required to give a sample of saliva or urine to be tested for evidence of controlled drugs (that is amphetamines (including ecstasy), cannabis, cocaine, opiates (e.g. morphine and heroine) and benzodiazepines).

A member can only be required to undertake such testing if:-

- The Chief Officer (or delegate) has reasonable cause to suspect that the member has used a controlled drug  
(that is, one of the drugs listed above); or
- The member is on a period of probation under Regulation 12 (for the avoidance of doubt this does not extend  
to any period of probation on promotion); or
- The member has been identified by the Chief Officer (or delegate) as being vulnerable because of a specific responsibility for dealing with drugs; or
- The member is of a description specified in a determination of the Secretary of State.

Where a member is required to provide a sample of saliva or urine then this should be undertaken only in accordance with the procedures determined by the Secretary of State which are that:

- Testing be carried out without advanced notice;
- On site testing using portable testing kits may be used to screen out members of Police Forces and candidates for appointment (this applies to those members applying for transfers between forces) at an early stage of procedures (though any test to be relied upon in criminal or disciplinary proceedings must be conducted through laboratory analysis);
- Collection of samples and initial on site screening may be undertaken by an independent agency or by suitably trained police staff;

- There be a secure chain of custody (through collection, analysis and medical review) as set out in protocols issued by the Secretary of State which need to be complied with;
- Importantly, split samples need to be used to go forward to laboratory analysis such that a member of a Police Force will have the right to have one sample tested independently, to challenge the result of a test on the other sample.

Insofar as the groups of members affected are concerned we are advised that:

1. Reasonable cause

The Chief Officer (or delegate) can be called to account as to the grounds on which they consider they have reasonable cause to suspect that a member has used a controlled drug. If the member is required to provide a sample on this basis and refuses, then there is the material risk of disciplinary action being taken.

After a test has been conducted and the member is able to demonstrate that the Chief Officer (or delegate) had no reasonable cause then this could give rise to disciplinary action against the officer requiring the test to be undertaken, a complaint for breach of the Data Protection Act 1998 and, in theory, a claim for compensation (though this is unlikely to be anything other than nominal).

2. On probation

Whereas the Chief Officer is not required to give a reason for testing a member on a period of probation, we are advised that the use of these powers should be proportionate (such that if there were to be oppressive testing of a particular probationer, this may be capable of challenge as an inappropriate exercise of discretion under Regulation 19A).

As under each of the grounds for testing, Joint Branch Boards may wish to consider securing that the Force monitors the use of the powers by reference to the gender, race, sexual orientation and faith of the members tested.

3. Vulnerable officers

It is for the Chief Officer to identify those within the Force who may be vulnerable because of a specific responsibility for dealing with drugs. As the protocols states:

*“In the nature of their duties, many police officers, and particular those working under cover, will have close associations with criminals. Those whose duties bring them into contact with drug dealers are particularly vulnerable to malicious allegations that they are themselves drug users. A liability for such officers to be tested enables it to be demonstrated that they remain “clean”: In some Forces it is possible to define the post concerned - for example Drug Squad Officers and Test Purchase Officers However, not all Forces have single function crime squads, so it is necessary to define vulnerable posts on a Force by Force basis”.*

There may well be scope for Joint Branch Boards to discuss this matter with the Chief Officer so that, at the least, there is consultation regarding the identification of those posts/members who may be vulnerable because of a specific responsibility for dealing with drugs.

4. Specified descriptions

The descriptions of officers that have been determined by the Secretary of State are those in safety critical posts defined as only comprising:

- Firearms officers authorised to use firearms or directly supervising such officers;
- Drivers authorised by their Chief Officer to use the police exemption under the Road Traffic Regulation Act 1984 and holding a post in which they may be called upon to use that

exemption;

- Members or supervisors of Police Search Advisor Teams;
- Police Divers

Whereas it is anticipated that the identification of members within these groups should be self-explanatory, nevertheless Joint Branch Boards may wish to ensure that those in these posts are made aware of the potential for random tests of saliva and urine (and/see below the potential for alcohol testing of this group also).

#### Advice from Joint Branch Boards

If a member contacts the Joint Branch Board having been required to give a sample then we suggest that:

- You ascertain the basis upon which the test is being required;
- If a test is being required on the basis of there being "reasonable cause to suspect" that the member be informed that if he refuses (and the Chief Officer (or delegate) can then demonstrate reasonable cause) disciplinary action may follow;
- If on another basis, you will need to check that authority subsists under Regulation 19A for the test;
- The member should be advised that, in the case of a sample of saliva/urine, that two samples should be taken and one should be made available to the member for it to be tested independently to challenge the result (if it proves to be positive);
- The member should be informed that the testing is a two stage test in that there will at first be "on site screening" but that, if this is positive, there would then be a full laboratory test which may not be available for between 2 or 3 days. They should be advised that they should seek assurances from those conducting the test that confidentiality will be preserved throughout because (though the Federation pressed for express provisions that matters be conducted confidentially) neither the regulations nor the determination include such requirement.

#### Alcohol testing

Only those in safety critical posts (see above) may be subjected to alcohol testing under Regulation 19A.

The procedure is that testing be carried out without advance notice "and using breath testing equipment capable of taking measurements at the 13 micrograms percentage level".

It is important to emphasise that this limit is significantly less than the test for driving.

As the protocol makes clear:

"There is a presumption that a person is unfit to work in a safety critical area... if they have more than 29 milligrams % in blood (39 milligrams % in urine, 13 in micrograms % in breath). This compares with a limit of 80 milligrams % in blood for driving"

It is important that members in safety critical posts are aware of this and that they should be strongly advised to declare if they suspect that they might have inadvertently exceeded the limit.

When attending for their rostered tour of duty it may be more difficult for them to justify having exceeded the limit. However, there may well be circumstances where due to an unexpected recall to duty or re-allocation of duties (which place them immediately into safety critical position) they may believe they may have inadvertently exceeded the alcohol limit (which, as stated, is much more stringent than that applicable to driving).

The protocol makes clear that "any such declaration (of inadvertent breaking of the limit) should be made before the officer is notified of any requirement to take a test. Such declaration should not result in the officer being penalised, provided there is no pattern of continuing excess".

#### Other matters

Whereas the Police Federation pressed for the regulations/determinations/protocols (as appropriate) to make clear that the handling of the samples and test results were subject to the Data Protection Act 1998 and, further, that testing should be undertaken in confidence, there is no express provision to this effect.

So far as confidentiality is concerned, if you come across examples of tests being undertaken without due respect to the confidentiality of the process then we would be grateful for information to be provided to us about those examples (with a view to us pressing for changes to the provisions and, if appropriate, taking legal advice on breach of any implied duty of confidentiality).

As far as data protection implications are concerned, Joint Branch Boards may wish to press for clarification of the approach to be adopted by Forces of the maintenance of records of the results of the tests on the personnel files of members and the time period for which such tests would be maintained (both positive and negative). They may also wish to press the Chief Officer in terms that a record of the justification for any requirement to undertake a test is maintained.

Further, Joint Branch Boards may wish to press the Chief Officer to secure that there is appropriate monitoring of the use of the powers under Regulation 19A, under each of the 4 categories, by reference to the gender, race, sexual orientation and faith of the members tested.

It is to be anticipated that there will be further queries raised as a result of the implementation of these provisions and, if appropriate, further guidance will be issued in due course.

Yours sincerely



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