COUNSEL TO THE INQUIRY'S NOTE ON UNDERTAKINGS

Introduction

1. This note examines and seeks to explain the legal context in which a decision falls to be made by the Chairman of the Inquiry as to whether he should request an undertaking from the Attorney General that evidence given by witnesses during the course of the Undercover Policing Inquiry will not be used against them in criminal proceedings. In doing so it explores recent practice in other public inquiries, the majority of which have requested and been given a written undertaking from the Attorney General. The note explores the possible form of undertaking which might be sought from the Attorney General, through past examples. It also considers other persons who might potentially be approached for an undertaking, especially in relation to the use to which evidence produced to the Inquiry by a person might be put against that person in disciplinary proceedings.

2. The note will consider the following questions:

   (i) What is an undertaking and why might undertakings be necessary?

   (ii) What is the scope of the privilege against self-incrimination?

   (iii) What is the process for obtaining an undertaking?

   (iv) What undertakings have been sought and granted in recent public inquiries and why?

   (v) What is the relevance of the Witnesses (Public Inquiries) Protection Act 1892?

   (vi) From whom, other than the Attorney General, might an undertaking be sought?

   (vii) What are the relevant considerations in relation to the Undercover Policing Inquiry?

(i) What is an Undertaking and why might undertakings be necessary?

3. In order to fulfil his terms of reference, the Chairman of the Inquiry will need to obtain evidence from a large number of persons and will no doubt wish to hear or read the evidence of a variety of witnesses. It will obviously assist the Inquiry fully to establish the true facts if all relevant documents are produced to the Inquiry and if all witnesses give full and frank evidence. One potential obstacle to obtaining all of the documents necessary for the Inquiry to discharge its function and obtaining answers from witnesses on all relevant matters is the privilege against self-incrimination. Absent an undertaking from the Attorney General, it may lawfully be relied upon, in appropriate circumstances, to refuse to produce a relevant document or to refuse to answer a relevant question. An undertaking from the Attorney General not to use evidence given to an inquiry against the person who has provided it in criminal proceedings is a mechanism by which this obstacle can be removed. As already noted in paragraph 1 above, such undertakings are very common in public inquiries although their precise terms have varied as is discussed further below. It is important to recognise that such undertakings protect only against self-incrimination and do not prevent a subsequent prosecution of a person which relies upon evidence produced or given to an inquiry by any other person. They should not be confused with absolute immunity from prosecution.

4. A second but very different potential obstacle to establishing the truth is the fact that, without more, documents produced by a witness or evidence given by a witness may subsequently be used against that person by his or her employer, or in the case of a police officer, his or her force in disciplinary proceedings. The reason that this is a very different obstacle is that the privilege against self-incrimination does not extend to disciplinary proceedings: a person cannot lawfully object to producing a document or answering a question simply because the answer might tend to expose him or her to disciplinary action by an employer or police force. There are enforcement powers and sanctions to ensure that such documents are produced or such questions are answered: see ss.35 & 36 of the Inquiries Act 2005 ("the Act") which concern offences and enforcement; see also s.1 of the Perjury Act 1911 in relation to evidence given on oath. The concern for consideration here is whether witnesses may be less open and forthcoming than might otherwise be the case. This risk falls to be weighed against the need for police forces and employers to maintain discipline and

hold to account those who are guilty of misconduct. Some inquiries have sought and received undertakings from employers or other disciplinary authorities where it has been judged appropriate in the particular circumstances. Such undertakings are less common and where they have been sought and obtained, often couched in narrow terms: see the undertakings of this nature granted in the Baha Mousa, Al-Sweady and Rosemary Nelson inquiries which are considered further in section (iv) of this note.

5. It is possible to conceive of other potential protections from criminal or disciplinary proceedings which might encourage witnesses to be forthcoming. For example, the granting of an absolute immunity to the person providing evidence, or promises that B's evidence will not be used against A in circumstances where a closing of ranks is a risk. However, such wide protections could have very serious implications for the administration of justice or, as the case may be, discipline and accountability within an organisation. There are no recent precedents for the granting of immunity.

The Inquiry's powers of compulsion and the privilege against self-incrimination

6. Although evidence can be, and often is, provided to a public inquiry voluntarily, ultimately there are powers of compulsion. Pursuant to Section 21(1) Inquiries Act 2005 ("the Act"), the Chairman can require, by notice, a person to attend at a specified time and place to give evidence; to produce any documents in his custody or under his control that relate to a matter in question at the inquiry; or to produce any other thing under his control for inspection, examination or testing by or on behalf of the inquiry panel.

7. Pursuant to Section 21(2) of the Act the Chairman may also require a person, within such period as appears to the inquiry panel to be reasonable, to provide evidence to the inquiry panel in the form of a written statement; to provide any documents in his custody or thing under his control that relate to a matter in question at the inquiry; or to produce any other thing in his custody or under his control for inspection, examination or testing by or on behalf of the inquiry panel. Failure, without reasonable excuse, to comply with such a requirement is an offence punishable by up to 51 weeks' imprisonment pursuant to section 35 of the Act.

8. However, there are limits to the above powers of compulsion. Of particular relevance to the current issue is section 22(1) of the Act. Section 22(1) of the Act provides that a person may not be required under s. 21 to give, produce or provide any evidence or document if he could not be required to do so if the inquiry proceedings were civil proceedings in the relevant part of the United Kingdom or if the requirement would be incompatible with a Community obligation.

9. It is via this statutory mechanism that it is clear that a person who is the subject of a s.21 notice may rely upon the privilege against self-incrimination. This is because the giving of evidence in civil proceedings is governed by the Civil Evidence Act 1968 which provides a rule against self-incrimination in civil legal proceedings in the UK at section 14:

> *(1) The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty—*
>
> *(a) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; and*
>
> *(b) shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the spouse or civil partner of that person to proceedings for any such criminal offence or for the recovery of any such penalty.*
>
> *(2) In so far as any existing enactment conferring (in whatever words) powers of inspection or investigation confers on a person (in whatever words) any right otherwise than in criminal proceedings to refuse to answer any question or give any evidence tending to incriminate that person, subsection (1) above shall apply to that right as it applies to the right described in that subsection; and every such existing enactment shall be construed accordingly.*
>
> *(3) In so far as any existing enactment provides (in whatever words) that in any proceedings other than criminal proceedings a person shall not be excused from answering any question or giving any evidence on the ground that to do so may incriminate that person, that enactment shall be construed as providing also that in such*

proceedings a person shall not be excused from answering any question or giving any evidence on the ground that to do so may incriminate the husband or wife of that person.

(4) Where any existing enactment (however worded) that—

(a) confers powers of inspection or investigation; or

(b) provides as mentioned in subsection (3) above,

further provides (in whatever words) that any answer or evidence given by a person shall not be admissible in evidence against that person in any proceedings or class of proceedings (however described, and whether criminal or not), that enactment shall be construed as providing also that any answer or evidence given by that person shall not be admissible in evidence against the husband or wife of that person in the proceedings or class of proceedings in question.

(5) In this section "existing enactment" means any enactment passed before this Act; and the references to giving evidence are references to giving evidence in any manner, whether by furnishing information, making discovery, producing documents or otherwise.

(Emphasis added)

10. This means that within public inquiries there is a provision against self-incrimination which plainly creates a tension when set against the need for any public inquiry to uncover all relevant evidence.

11. If no undertaking were sought and granted, a witness could be required to attend the inquiry and give evidence but he or she could legitimately refuse to answer relevant questions, for example as to his past behaviour, on the basis that his answers could incriminate him and might be used as evidence against him in a future prosecution. This may mean important relevant witnesses would not give highly relevant evidence before the inquiry.

12. In practice, in past inquiries, the way in which this tension has been resolved is by requesting from the Attorney General an undertaking prohibiting the use of evidence provided to the inquiry in future criminal proceedings. The aim of such an undertaking is to allow witnesses to give evidence freely, knowing they are not at risk of subsequent prosecution on

the basis of it and to ensure that inquiries are not delayed or obstructed by witnesses invoking the privilege against self-incrimination.

13. Use of an undertaking in this way means that a witness remains compellable to give evidence to the Inquiry: a witness would not be able to refuse to give evidence on the basis that his account may incriminate him. Not only might enforcement action follow but a witness might also be the subject of an adverse inference. As Lord Saville stated during the course of the Bloody Sunday Inquiry:

> *"In our view, if such an undertaking were provided, persons giving evidence to the Inquiry in any form could not refuse to answer or to produce documents on the basis of the privilege, for there would be no risk of self-incrimination: see, for example, R v Boyes (1861) 1 B & S 311 and Re Genese (1885) M.B.R. 223. As we said in July, it also seems to us that in such circumstances, the Inquiry could properly draw inferences from a failure to answer questions or to produce documents, unless of course there were other good grounds (apart from the privilege against self-incrimination) to justify that failure."*

(ii) What is the scope of the privilege against self-incrimination?

14. To assess what sort of undertaking might be required to avoid the Inquiry being deprived of evidence through the exercise of the privilege against self-incrimination it is necessary to consider the extent to which a witness might be able to invoke that privilege.

15. It has been recognised in several previous inquiries that self-incrimination includes not only evidence which directly incriminates a witness but also evidence which might show knowledge of information on which the prosecution might wish to rely in establishing guilt (e.g. on a charge of murder which a witness denies, admissions that the witness had regular access to the poison used to kill), evidence which the prosecution might wish to rely upon in deciding whether to prosecute or not (e.g. that the witness has acted outside his authority on many previous occasions falling short of criminal or disciplinary conduct but showing a pattern of poor behaviour), and evidence which may later be deployed in criminal proceedings to contradict or cast doubt on other statements made by the witness in an effort to undermine his credibility (e.g. an account of the events of the day of a protest which later might transpire to be inconsistent

with a version advanced before a jury at the witness' trial for public order offences or blackmail).

16. Much authority has been cited in past inquiries for the breadth of the scope of self-incrimination.

17. In *Rank Film Distributors v Video Information Centre* [1982] AC 380, Lord Wilberforce described the privilege as a "basic liberty of the subject". The Court was considering the use to which information gained by compliance with an Anton Pillar Order (which is a court order compelling a defendant to allow a plaintiff access to his premises to obtain evidence) could be put. He rejected submissions that an undertaking not to use the information obtained in any subsequent criminal proceedings was sufficient. He reasoned:

    "...whatever direct use may or may not be made of information given, or material disclosed, under the compulsory process of the court, it must not be overlooked that quite apart from that, its provision or disclosure may set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character. In the present case, this cannot be discounted as unlikely: it is not only a possible but probably the intended result. The party from whom the disclosure is asked is entitled, on established law, to be protected from these consequences." (Emphasis added).

18. In *Sociedade Nacionale de Combustiveis de Angola UEE v Lundqvist* [1991] 2 QB 310, Lord Justice Beldam held that Parliament's choice of the 'would tend to expose...to proceedings for an offence' in s. 14 Civil Evidence Act 1968 rather than referring merely to conviction was significant:

    "...in my judgment, it is sufficient to support a claim to privilege against a self-incrimination that the answers sought might lead to a line of inquiry which would or might form a significant step in the chain of evidence required for a prosecution." (Emphasis added).

19. In *Den Norske Bank ASA v Anonatas* [1999] QB 271, Lord Justice Waller summarised the principles governing what is meant by the privilege against self-incrimination as follows:

"Thus, it is not simply the risk of prosecution. A witness is entitled to claim the privilege in relation to any piece of information or evidence on which the prosecution might wish to rely in establishing guilt. And, as it seems to me, it also applies to any piece of information or evidence on which the prosecution would wish to rely in making its decision whether to prosecute or not." (Emphasis added).

20. He also cited with approval, the judgment of Kirby P in the Australian case *Accident Insurance Mutual Ltd v McFadden* 31 NSWLR 402, in which Kirby P said:

"…I can only say, the strong inclination of my mind is to protect the party against answering any question, not only that has a direct tendency to incriminate him, but that forms one step towards it…."

21. In *Saunders v United Kingdom* [1997] BCC 872, the European Court of Human Rights explained the role that privilege against self-incrimination played in the concept of the right to a fair trial embodied by Article 6. It was a case where Mr. Saunders had been compelled to answer questions posed by the Department of Trade and Industry. The Court held that the privilege extended beyond directly incriminating evidence:

"70….However, the Government have emphasised, before the Court, that nothing said by the applicant in the course of the interviews was self-incriminating and that he had merely given exculpatory answers or answers which, if true, would serve to confirm his defence. In their submission only statements which are self-incriminating could fall within the privilege against self-incrimination.

"71. The Court does not accept the Government's premise on this point since some of the applicant's answers were in fact of an incriminating nature in the sense that they contained admissions to knowledge of information which tended to incriminate him…. In any event, bearing in mind the concept of fairness in Article 6…, the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature -such as exculpatory remarks or mere information on questions of fact - may later be deployed in criminal proceedings in support of the

> *prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility. Where the credibility of an accused must be assessed by a jury the use of such testimony may be especially harmful. It follows that what is of the essence in this context is the use to which evidence obtained under compulsion is made in the course of the criminal trial."*

(Emphasis added)

22. Turning to the question as to when the privilege applies, the common law privilege against self-incrimination applies equally whether a witness has already been charged with an offence or is yet to be charged with an offence.

23. The position in relation to Article 6 of the European Convention on Human Rights is that the implicit privilege against self-incrimination commences when a person is "charged" within the special meaning given to that word by the European Court of Human Rights. This established position was recently confirmed by the Supreme Court in *Beghal v Director of Public Prosecutions* [2015] 3 WLR 344, at paragraph 68 by Lord Hughes JSC in the following terms:

> *" Article 6 of the Convention does not contain an explicit privilege against self-incrimination, but it is well established that such is implicit in it. The trigger for the privilege is, however, that a person is "charged" with a criminal offence, in the special sense in which that word is used in the jurisprudence of the Strasbourg court, that is to say that his position has been substantially affected by an allegation against him and he has become, in effect, a suspect: see Lord Hope of Craighead DPSC's summary of the rule in Ambrose v Harris [2011] 1 WLR 2435*, paras. 62-63. *If a person is charged in this sense, then the effect of article 6 will be to confer the privilege against self-incrimination and any abrogation by statute of the common law privilege will accordingly be ineffective; moreover the use in a subsequent criminal trial will be an infringement of the right to a fair trial. See for example Saunders v United Kingdom 23 EHRR 313 where section 434(5) of the Companies Act 1985 had abrogated the privilege. In that case the answers given under compulsion to DTI inspectors were adduced in a criminal prosecution of the subject and it was that which constituted the breach of article 6. The*

> *court made it clear at para 67 that the asking of the questions, at a stage when the defendant (as he later became) had not been charged and the purpose of the questioning was an administrative investigation quite different from a criminal one, did not amount to a breach of article 6."*

24. What is the position where a witness to the Inquiry has already been convicted? The threshold for engagement of the common law privilege against self-incrimination is where answering a question, or yielding up a document or object would carry a real of appreciable risk of its use in the prosecution of that person or his spouse: see *Beghal v Director of Public Prosecutions* at paragraph 60, per Lord Hughes JSC who stated:

> *"The privilege against self-incrimination is firmly established judge-made law dating from the sixteenth century abolition of the Star Chamber: see Holdsworth's History of English Law, 3rd ed (1944), vol 9, p 200 and Bishopsgate Investment Management Ltd v Maxwell [1993] Ch 1, 17. <u>It entitles any person to refuse to answer questions or to yield up documents or objects if to do so would carry a real or appreciable risk of its use in the prosecution of that person or his spouse</u>: In re Westinghouse Electric Corpn Uranium Contract Litigation MDL Docket No 235 (Nos 1 and 2) [1978] AC 547 and Rank Film Distributors Ltd v Video Information Centre [1982] AC 380. <u>If such level of risk exists , the individual should be allowed "great latitude" in judging for himself the effect of any particular question</u>:* R v Boyes (1861) 1 B & S 311, 330, cited with approval in the Westinghouse case."
>
> (Emphasis added).

25. Applying this test to the present context, if there is a real or appreciable risk of the evidence being used against that person (or spouse) in appellate proceedings then, absent an undertaking, the privilege may be relied upon. Such circumstances could arise even where a witness has already been convicted. For example, if there is scope for appeal proceedings where the safety of that conviction will be examined by the Court of Appeal then there is potential for the use of evidence given to the Inquiry as fresh evidence before the Court of Appeal or as evidence in any retrial ordered. Alternatively, if there is scope for an appeal from a conviction in the Magistrates' Court to the Crown Court by way of rehearing then evidence given to Inquiry could be deployed by the prosecution. If there was an appreciable risk of either of these scenarios eventuating and evidence

sought by the Inquiry being used against its provider then the provider of the evidence could elect to rely upon the privilege against self-incrimination in the absence of an undertaking.

(iii) What is the process for obtaining an undertaking?

26. It should be noted that the Inquiries Act 2005 specifically did not give an inquiry chairman a power in relation to the future use in criminal proceedings of evidence given during an inquiry. Rather the route that has developed in practice is to seek an undertaking from the Attorney General. The process is clear. It is for the panel of the public inquiry to decide whether it should seek an undertaking at all but it is the Attorney General's decision as to whether, and in what form, any undertaking should be given. This process has the virtue of requiring consideration both by the Inquiry which is best place to understand its evidential needs and the Attorney General, in consultation with the Director of Public Prosecutions, who is well placed to assess the overarching criminal justice aspects of the issue. The process is essentially the same in relation to undertakings sought from other persons. It is for the Inquiry to decide whether to seek an undertaking and, if an undertaking is sought, for the person concerned to decide whether or not to provide an undertaking. In making his decision, the Attorney General will consider all relevant matters.

(iv) What undertakings have been sought and granted in recent public inquiries and why?

27. Analysis of examples of statutory public inquiries over the last twenty years indicates that although undertakings have been sought in the majority of cases it has not always been considered necessary. Where undertakings have been sought and granted there is an apparent shift from the tendency to seek narrow undertakings, aimed at assuring witnesses that there will not be any direct use in criminal proceedings of any evidence they give to the Inquiry, to a more recent tendency to seek broader undertakings to give assurance against the derivative use of a witness' evidence. The broadest of these derivative use undertakings are at least equal in scope to the privilege against self-incrimination and therefore leave no need, or basis, for reliance upon privilege at the inquiry concerned. We are not aware of any recent public inquiry in which a complete immunity from prosecution has been granted. It is also notable that all recent examples of undertakings given to public inquiries permit the use of evidence provided

by a person to the inquiry for the purposes of any proceedings for offences relating to the evidence given to the Inquiry itself, for example perjury or an offence contrary to s.35 of the Act.

Stephen Lawrence Inquiry – decision by Sir William MacPherson - March 1998

28. The terms of reference of the inquiry were *"To inquire into the matters arising from the death of Stephen Lawrence on 22 April 1993 to date, in order particularly to identify the lessons to be learned for the investigation and prosecution of racially motivated crimes."* The inquiry was commissioned after the CPS discontinued the prosecution of two defendants for murder, and after a private prosecution resulted in the acquittal of three further accused.

29. At the subsequent inquest into the death of Stephen Lawrence, all five of those who had faced prosecution declined to give evidence and relied on the privilege against self-incrimination.

30. The Attorney General authorised the Stephen Lawrence inquiry:

> *"to undertake in respect of any person who provides evidence to the Inquiry that no evidence he or she may give before the Inquiry, whether orally or by written statement, nor any written statement made preparatory to giving evidence nor any document produced by that person to the Inquiry will be used in evidence against him or her in any criminal proceedings, except in proceedings where he or she is charged with having given false evidence in the course of this Inquiry or with having conspired with or procured others to do so".*

31. Since the undertakings made it impossible to rely on the privilege against self-incrimination, in the sense that their answers could not be used against them in any criminal proceedings which might later be brought against them, all five of the suspects gave evidence on oath in the inquiry on pain of prosecution should they not have attended or should they have failed to answer questions.

32. In a subsequent prosecution, two of those who had given evidence were convicted of Stephen Lawrence's murder (as a result of fresh scientific evidence).

33. The effect of the undertaking in The Stephen Lawrence Inquiry was not to render all questions which would otherwise have been covered by the privilege against self-incrimination permissible. The five suspects (as they then were) successfully objected to questions being asked which went essentially to their guilt or innocence: *R v The Chairman of the Stephen Lawrence Inquiry, ex p A'Court and Others*, The Times, 25 July 1998. Although there was reference during the course of these judicial review proceedings to the undertakings and the fact that they did not constitute an absolute immunity, the reason for prohibiting the questions was the scope of the inquiry. That inquiry, in the words of its Chairman *"was not about finding the killers of Stephen Lawrence, it is about how the subsequent investigation and prosecution was conducted"*. Lord Justice Simon Brown concluded that an inquiry *"could never be the proper forum for the conduct of a murder trial"*. But he was also careful to recognise that: "*...there may well be some overlap between questions going to the Applicants' guilt or innocence and issues properly for the Inquiry's consideration: balances will have to be struck".*

The Bloody Sunday Inquiry – decision by Lord Saville – 27th November 1998

34. This was an inquiry into an incident on 30 January 1972, where during a disturbance in Londonderry, Northern Ireland following a civil rights march, shots were fired by the British Army. Thirteen people were killed and a similar number wounded.

35. The Bloody Sunday Inquiry recognised that there were families of the deceased and wounded who believed that criminal prosecutions should take place for those responsible:

> *"…we are well aware that some at least of the families of those who died and those who were wounded believe that the casualties resulted from criminal behaviour and that those responsible should not escape justice but should be prosecuted. However, the responsibility for deciding whether or not there are grounds for prosecutions and whether or not there should be prosecutions does not lie with us.*
>
> *"In these circumstances our primary duty must be to use all legitimate and proper means to try and get to the truth. It is in this context that we considered whether the existence of the privilege against self-incrimination, which is among the privileges and immunities given to*

witnesses by Section 1(3) of the Tribunals of Inquiry (Evidence) Act 1921, was likely to hinder us in our task and if so, whether there were any legitimate and proper means we could employ to remove or reduce that hindrance……

"…In the context of the present Inquiry, where allegations of very serious criminal conduct are being made and pursued against soldiers and where indeed those making those allegations have, as we have pointed out, expressed their determination that those they believe have committed crimes should be prosecuted, it seemed to us that there was a real prospect that witnesses who can reasonably be expected to be in a position to assist the Tribunal in its search for the truth, would choose to exercise their human right not to incriminate themselves, and would thereby (given the width of the immunity) deprive the Inquiry of much valuable information in that search."

36. The Bloody Sunday Inquiry balanced strong competing interests but nevertheless sought a wide undertaking from the Attorney General. It was granted in the following terms:

"An undertaking in respect of any person who provides evidence to the Inquiry that no evidence he or she may give before the Inquiry relating to the events of Sunday 30 January 1972, whether orally or by written statement, nor any written statement made preparatory to giving evidence, nor any document produced by that person to the Inquiry, will be used to the prejudice of that person in any criminal proceedings or for the purpose of investigating or deciding whether to bring such proceedings except proceedings where he or she is charged with having given false evidence in the course of this Inquiry or with having conspired with, aided, abetted, counsel procured [sic], suborned or incited any other person to do so."

37. The Attorney General at the time, The Rt Hon John Morris QC MP, announced publicly the reasons for granting Lord Saville's request in these broad terms in part because "*many years have now passed since the incident and evidence sufficient to justify the institution of criminal proceedings has not emerged. Subject to what may happen in the course of the Inquiry, there does not seem any significant likelihood that further evidence would now emerge and the grant of an undertaking cannot be regarded as in any way diminishing the existing prospects for satisfactory*

investigation and prosecution of any criminal offences which may have been committed on Bloody Sunday. As to the Inquiry, its effectiveness is, for the reasons you have explained, likely to be enhanced rather than diminished by the grant of the undertaking which should, in any event, encourage witnesses to testify rather than deter them. I have therefore concluded that the public interest on balance requires me to adopt that course."

38. It seems therefore that the Attorney General was influenced by the age of the criminal activities being inquired into in Bloody Sunday and by the fact that there did not appear to be a significant likelihood of further evidence emerging to create the prospect of a prosecution.

39. A particular issue which was considered in the Bloody Sunday Inquiry was whether a "blanket" undertaking should be sought or whether individual witnesses should be required to apply to the Tribunal individually. It was suggested that an alternative to seeking a 'blanket' undertaking from the Attorney General would be only to seek an assurance if and when requested by a witness, and then only if that witness provided full reasons for that request, including an outline of the nature and content of the evidence to be given and an explanation as to why that evidence could not be given without the assurance. It was suggested that the Tribunal should only seek an assurance if: (a) they were satisfied there was a proper reason for doing so which outweighed the public interest in pursuing a prosecution: and (b) if the parties represented at the Inquiry were given an opportunity to make submissions to the Tribunal on the desirability of seeking an assurance in the particular case.

40. The Inquiry Panel ruled against this suggestion for the following reasons:

"In the first place, as we have observed above, witnesses in general have no cause to seek such an assurance, protected as they are without it by the wide ambit of the privilege against self-incrimination.

"In the second place, the suggestion is that the witness should in effect provide the very evidence in respect of which the assurance is sought. If the evidence would not tend to incriminate that witness, there would be no point in him asking for the assurance. If the evidence was self-incriminatory, then the witness has the right not to give it.

> *"In the third place, if there was a witness who had self-incriminatory evidence that he wished to give but which he did not want to be used to incriminate him, then the so-called blanket assurance would cover this case, but the suggestion made would involve the witness having to take the risk of incriminating himself in an attempt to get the assurance, since his application might be refused. To our minds that would be tantamount to a breach of the human rights of that individual."*

41. We note, in the context of the present Inquiry and given the number of people who might be expected to be able to provide important evidence to the Inquiry but which might be self-incriminatory in nature, that to approach the undertakings on a 'case by case' basis could cause substantial delay.

Ladbroke Grove Inquiry – decision by Lord Cullen – 2000

42. This was an inquiry into a collision between a Thames Trains commuter train and a First Great Western high speed train at Ladbroke Grove. 31 people died.

43. The Attorney General granted an undertaking applying to any person who provided evidence to the Inquiry, as recorded by Lord Cullen in the final report at paragraph 2.7:

> *"The Attorney-General authorised me to undertake in respect of any person who provided evidence to the Inquiry <u>that no evidence he or she might give before the Inquiry,</u> whether orally or by written statement, <u>nor any written statement</u> made preparatory to giving evidence, <u>nor any document produced by that person to the Inquiry, would be used in evidence against him or her in any criminal proceedings, except in proceedings</u> where he or she was charged with having given false evidence in the course of the Inquiry or having conspired with or procured others to do so. The Attorney-General also stated that the effect of the undertaking was to protect from use in any prosecution the actual documents produced to the Inquiry and that <u>it did not extend to any other manifestation of the documents, whether retained originals or any copies, which the police or other investigators were able to obtain</u>."*
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> (Emphasis added)

44. Network Rail Infrastructure Ltd was later prosecuted by the Crown Prosecution Service for health and safety offences. Although no individual

was ultimately prosecuted, the undertakings did not prevent the CPS and counsel from forming a provisional view that there was a realistic prospect of conviction in a prosecution of certain individuals for offences including manslaughter by gross negligence (although no such prosecution was, in fact, taken forward): see http://www.cps.gov.uk/news/latest_news/166_05/. A successful health and safety prosecution was also mounted against Thames Trains Limited by the Health and Safety Executive.

Robert Hamill Inquiry – decision of Sir Edwin Jowitt – 2004

45. This was an inquiry announced on 16 November 2004 into the death of Robert Hamill who died following an incident in Portadown, County Armagh on 27 April 1997. The terms of reference were to determine whether the Royal Ulster Constabulary had carried out any wrongful act or omission which facilitated his death or attempted so to do.

46. The Attorney General provided an undertaking in the following terms:

> *"An undertaking in respect of any person who provides evidence to the Inquiry that no evidence he or she may give before the Inquiry, whether orally or by written statement, nor any written statement made preparatory to giving evidence, nor any document or information produced by that person to the Inquiry, will be used in evidence against him or her in any criminal proceedings, except in proceedings where he or she is charged with having given false evidence in the course of this Inquiry or having conspired with or procured others to do so."*

47. The sole difference between this undertaking and the undertaking given in the Stephen Lawrence Inquiry is the addition of the words *"or information".*

48. It is to be noted that the scope of this undertaking was limited to self-incrimination and not the incrimination of others. In the later Azelle Rodney Inquiry, counsel to the inquiry, agreeing with submissions to this effect, observed (directions hearing of 4 November 2010, paragraph 28):

> *"...it's not a novelty that an inquiry, which is in place of an inquest, has an undertaking of the sort of nature that one is proposing here, where there is in fact the possibility of a prosecution. In the Robert Hamill Inquiry in Northern Ireland, there was an undertaking, but it did not go as far as this, because it didn't cover the question of whether the DPP would take into account anything said in evidence, in considering a*

prosecution. It was in the more conventional terms. But there, there had been no inquest. That concerned the death of a young man and there was very much the possibility of prosecutions arising out of it; and indeed within a month of finishing the Inquiry hearing, the Inquiry made the interim recommendation that the Director of Public Prosecutions should consider prosecutions, despite the undertaking. So it is not unconventional to have such an undertaking in those circumstances, and neither, I would suggest, does it inhibit the actual getting to the truth; rather the contrary."

Rosemary Nelson Inquiry – decision by Sir Michael Morland – 2005

49. Rosemary Nelson was an Irish human rights solicitor who was assassinated by an Ulster loyalist paramilitary group in 1999. A bomb exploded under her car. Allegations that the British state security forces were involved in her killing led to a public inquiry.

50. Insofar as identifying any person who might be charged with murder is concerned, the assassination of Rosemary Nelson was and remains an unsolved murder.

51. However, a number of assurances were obtained.

52. First, the Attorney General provided, by letter dated 4 July 2005, an assurance in the following terms:

"An undertaking in respect of any person who provides evidence to the Inquiry that no evidence he or she may give before the Inquiry, whether orally or by written statement, nor any written statement made preparatory to giving evidence nor any document produced by that person to the Inquiry will be used in evidence against him or her in any criminal proceedings, except in proceedings where he or she is charged with having given false evidence in the course of this Inquiry or with having conspired with or procured others to do so".

53. (This was, therefore, in identical terms to that previously given in the Stephen Lawrence Inquiry.)

54. Secondly, there was an undertaking in relation to soldiers, provided by the Ministry of Defence by letter dated 27 June 2005, which was in slightly different terms:

"...the MOD undertakes that evidence given to the Inquiry by military personnel will not be used against them in any subsequent proceedings before a Court Martial or summary hearing before a commanding officer or appropriate superior authority, other than proceedings for an offence under section 70 of the Army Act 1955 for which the corresponding civil offence is perjury. But if such evidence given to the Inquiry exposes any offence under military or civilian law or any breach of the Army's Standards and Values, the Army will investigate to discover whether any other evidence, other than that given to the Inquiry, might exist to support some form of disciplinary or administrative action."

55. Thirdly, the Cabinet Secretary provided, by letter dated 22 June 2005, an undertaking in relation to civil servants:

"Subject to the limitations set out below, nothing which any official provides the Inquiry by way of evidence, whether orally or in writing, will be used in subsequent disciplinary proceedings against that official or any other official.

"This undertaking not to use evidence is subject to three limitations. First, it does not apply to anyone who is charged with having deliberately misled the Inquiry by telling lies or deliberately omitting important information in their evidence.

"Second, it does not apply in relation to an allegation of misconduct which is so serious it would justify summary dismissal for gross misconduct. In disciplinary proceedings for misconduct, such evidence from officials may be used.

"If an official's employing department becomes aware of any possible misconduct by that official only because of evidence given to the Inquiry by any official witness, that Department will not investigate any such possible misconduct or institute disciplinary proceedings in relation to any allegations of such misconduct [...] except where those allegations are of misconduct which is so serious that it would justify summary dismissal for gross misconduct.

"I should nevertheless make clear that disciplinary investigations and proceedings, including in relation to allegations of misconduct falling short of gross misconduct may be instituted and pursued if there is evidence from sources other than the evidence given to the Inquiry by any official witness.

"Finally, nothing in these undertakings is intended to provide immunity against prosecution for any criminal offence."

56. The head of the Northern Ireland Civil Service indicated, by letter dated 14 July 2005, that he would give an undertaking in the same terms in relation to civil servants in Northern Ireland.

57. Finally, the Chief Constable of the Police Service for Northern Ireland indicated, by letter dated 14 July 2005 that, having discussed the matter with the Police Ombudsman for Northern Ireland, they were both able to give a waiver in the following terms:

"Nothing which any serving police officer provides to the Inquiry by way of evidence, whether orally or in writing, will be used in subsequent disciplinary proceedings against that officer or any other serving police officer, except where the allegations are so serious as to merit consideration by a disciplinary board of the punishments 'required to resign' or 'dismissed'".

The Baha Mousa Public Inquiry – decision by The Right Honourable Sir William Gage - 6th January 2009

58. The Baha Mousa Public Inquiry was an inquiry into the death of an Iraqi detainee, Baha Mousa, and the ill-treatment/assault of nine other Iraqi detainees at the hands of British soldiers in Iraq in September 2003.

59. By the time the Inquiry was commissioned, a Court Martial had resulted in the acquittal of 6 soldiers and the guilty plea of a seventh to inhuman treatment contrary to the International Criminal Courts Act 2001.

60. A broad undertaking was obtained from the Attorney General in the following terms:

> *"1. No evidence a person may give before the Inquiry will be used in evidence against that person in any criminal proceedings or for the purpose of deciding whether to bring such proceedings (including any proceedings for an offence against military law, whether by court martial or summary hearing before a commanding officer or appropriate superior authority), save as provided in paragraph 2 herein:*
>
> *"2. Paragraph 1 does not apply to:*
>
> *(i) A prosecution (whether for a civil offence or a military offence) where he or she is charged with having given false evidence in the course of this Inquiry or having conspired with or procured others to do so, or*
>
> *(ii) In proceedings where he or she is charged with any offence under section 35 of the Inquiries Act 2005 or having conspired with or procured others to commit such an offence*
>
> *"3. Where any such evidence is provided to the Inquiry by a person, it is further undertaken that, as against that person, no criminal proceedings shall be brought (or continued) in reliance on evidence which is itself the product of an investigation commenced as a result of the provision by that person of that evidence."*

61. This form of undertaking incorporates amendments made as a result of a ruling dated 6 January 2009, in which the Chairman accepted the submission that the original proposal should be amended to prohibit use of evidence to the prejudice of that person in any criminal proceedings, or for the purpose of investigating or deciding whether to bring such proceedings. The Chairman rejected the need to seek a wider undertaking to prevent any prosecutor from applying to use any evidence given to the inquiry as hearsay under the provision of the Criminal Justice Act 2003 which might enable the evidence to be used not against the witness but against a third party. The basis for such a rejection was that such an approach did not engage directly the privilege against self-incrimination. Importantly, the Chairman recognised (at paragraph 26 of his ruling) that there was a balance to be struck between measures taken to encourage openness and the need to hold people to account:

> *"...All counsel agree that a balance has to be struck between measures taken by the Inquiry to promote an environment which will enable it to discover the truth and the public interest enshrined in Articles 2 and 3 of the European Convention on Human Rights. In regard to the latter the Inquiry must so far as possible not only establish the facts, but do so in such a way that those responsible for what occurred may be held accountable."*

62. Accordingly, the undertaking granted protected a witness from any evidence given to the inquiry being used (a) against him in any criminal proceedings; (b) in deciding whether to bring a prosecution; and (c) to commence further investigation which itself produces evidence relied on in criminal proceedings.

63. The Chairman also sought and obtained very limited undertakings in relation to disciplinary proceedings from the Director of Public Prosecutions, Permanent Under Secretary to the MOD, Commander in Chief of the Navy, Chief of the General Staff, the Air Chief Marshal. Each was worded in the same way, and provided:

> *"If written or oral evidence given to the Inquiry by a witness who is a [current or former member of the relevant body] may tend to indicate that:*
>
> *(1) the same witness previously failed to disclose misconduct by himself or some other person, or*
>
> *(2) the same witness gave false information on a previous occasion in relation to such misconduct,*
>
> *then I undertake that the [relevant body] will not use the evidence of that witness to the Inquiry in any disciplinary proceedings against that witness where the nature of the misconduct alleged is the failure to give a full, proper or truthful account on that previous occasion."*

Al-Sweady Inquiry – decision by Sir Thayne Forbes - 27th July 2010

64. The Al-Sweady Inquiry was an inquiry into the alleged killing and ill-treatment of Iraqi nationals by British soldiers in Iraq during May 2004. Prior to the commission of a public inquiry, there had been an investigation by the Royal Military Police but no criminal proceedings had resulted.

65. In a reasoned decision dated 27 July 2010, Sir Thayne Forbes decided (see paragraph 33) to seek an undertaking from the Attorney General in identical terms to that obtained in the Baha Mousa inquiry. He held (see paragraph 32) that such an undertaking was co-extensive with the privilege against self-incrimination.

66. In addition, an undertaking was sought from the MOD and Heads of the Armed Services to protect a witness from administrative or disciplinary proceedings in respect of previous failures to disclose or previous false information given as to a person's misconduct. Again, these were sought in identical terms to those granted in the Baha Mousa inquiry.

Azelle Rodney Inquiry – decision by Sir Christopher Holland – in 2011

67. The Azelle Rodney Inquiry was an inquiry into the circumstances in which Azelle Rodney was shot dead by an armed officer of the Metropolitan Police on 30 April 2005.

68. The undertaking provided:

> *"This is an undertaking in respect of any person who provides evidence to the Inquiry relating to the matter within its terms of reference. "Evidence" includes oral evidence, any written statement made by that person preparatory to giving evidence to the Inquiry or during the course of his or her testimony to the Inquiry, and any document or information produced to the Inquiry solely by that person.*
>
> *"No evidence a person may give before the Inquiry, nor any evidence as defined above, will be used in evidence against that person in any criminal proceedings, save that this undertaking does not apply to:*
>
> *(a) A prosecution where the person is charged with having given false evidence in the course of this Inquiry or having conspired with or procured others to do so, or*
>
> *(b) Proceedings where the person is charged with any offence under Section 35 of the Inquiries Act 2005 or having conspired with or procured others to commit such an offence.*
>
> *"It is further undertaken that in any criminal proceedings brought against any person who provides evidence, as defined above, to the Inquiry, no*

reliance will be placed on evidence which is obtained during an investigation as a result of the provision by that person of evidence to the Inquiry. This undertaking does not preclude the use of information and/or evidence identified independently of the evidence provided by that person to the Inquiry."

69. Following the inquiry, a police officer, Anthony Long, was tried and acquitted of the murder of Azelle Rodney.

70. There are other examples of inquiries where a different approach has been taken.

71. The Billy Wright Inquiry was an inquiry initially set up in 2004 into the death of Billy Wright who was killed in Maze prison, Northern Ireland on 27 December 1997. Its terms of reference were to determine whether any wrongful act or omission by or within the prison authorities or other state agencies facilitated his death or whether attempts were made so to do. In the Protocol setting out how the Inquiry would approach witnesses, paragraph 7 informs witnesses that the Inquiry does not have the power to grant immunity from prosecution but will consider applications from witnesses or their representatives on an individual basis. In an appropriate case the Inquiry will ask the Attorney General to consider giving an undertaking in respect of immunity. All such applications must set out in full, the reasons for the request. From the rulings and orders published on the Inquiry's website as held by the National Archives, it does not appear that any undertaking was sought or granted. We note that this is not dissimilar from the approach which was expressly rejected by the Bloody Sunday Inquiry. However, Mr Wright's murderers had already been convicted by the time of the inquiry.

72. The Litvinenko Inquiry was converted from the initial inquest on 31st July 2014 to inquire into the circumstances surrounding the death of Alexander Litvinenko, a British citizen, who died from radiation poisoning in London on 23rd November 2006. The inquiry came after the CPS review of the evidence reached the conclusion that there was sufficient evidence to prosecute two Russian men, but also after attempts to secure their extradition from Russia had failed. No rulings or orders on the Inquiry website refer to any undertakings being sought from the Attorney General. The Frequently Asked Questions section of the website poses the question: 'Were any witnesses offered immunity from prosecution?' and then states

the answer: ‘There are no immunities from prosecution relating to the inquiry’s work.’ This approach may be explained by the particular circumstances of this inquiry.

73. Criminal prosecutions of several potential inquiry witnesses for phone hacking and misconduct in a public office were running in tandem with the Leveson Inquiry, which examined the the culture, practices and ethics of the press and, in particular, the relationship of the press with the public, police and politicians.

74. Lord Justice Leveson on 7th November 2011 did not consider it necessary to seek any undertakings regarding the use to which evidence given to the Inquiry could be put for the purposes of Part I of his inquiry (the only part which has taken place). The terms of reference for that Part of the inquiry were at a high level of generality which did not call for evidence of the kind likely to be precluded by reliance on the privilege against self-incrimination.

75. The Hutton Inquiry in 2003 was commissioned to examine the circumstances surrounding the death of Dr. David Kelly on 17th July 2003 who was understood to have been connected to allegations that the dossier advising the government about the presence of weapons of mass destruction in Iraq had been exaggerated. The Attorney General was not asked to provide an undertaking but instead the Cabinet Secretary confirmed in writing that nothing which any Government official provided to the Inquiry by way of evidence, whether orally or in writing, would be used in subsequent disciplinary proceedings against that official or any other official, nor would there be investigation into misconduct which only came to light as a result of evidence during the inquiry, except where it revealed gross misconduct.

76. Similarly, the Iraq Inquiry, which commenced in 2009, sought no undertaking from the Attorney General regarding criminal prosecutions. However, the Government and Services did provide an immunity from disciplinary action to serving officials and military personnel who gave evidence or otherwise assisted the Inquiry, in order to help to reassure witnesses that they could provide frank and honest evidence. The Inquiry’s website records:

"What legal protection did witnesses have to speak freely?

The hearings were not covered by Parliamentary or other privilege. The Committee expected all witnesses to provide truthful, fair and accurate evidence. The Inquiry welcomes the fact that the Government and Services have extended an immunity from disciplinary action to serving officials and military personnel who give evidence or otherwise assist the Inquiry, as this helped reassure witnesses that they could provide frank and honest evidence.

If a witness had felt unable to answer questions due to a genuine fear of self-incrimination of a criminal offence, it would have been open to the Inquiry Committee to consider whether, in order to secure the greatest possible openness and co-operation, it would be appropriate to seek an undertaking from the Law Officers that evidence provided to the Inquiry would not be used in criminal proceedings against them, in accordance with the usual practice in inquiries."

77. Most recently, in 2015, the Child Sex Abuse Inquiry has sought and been granted an undertaking from the Attorney General that no document or evidence provided to the Inquiry will result in, or be used in, any prosecution under the Official Secrets Acts or any prosecution for unlawful possession of the evidence in question. This is aimed at protecting whistle blowers who may hold evidence of historic abuse.

(v) What is the relevance of the Witnesses (Public Inquiries) Protection Act 1892?

78. The Witness (Public Inquiries) Protection Act 1892 provides (insofar as is material) that:

"1. Definition.

In this Act the word "inquiry" shall mean any inquiry held under the authority of any Royal Commission or by any committee of either House of Parliament, or pursuant to any statutory authority, whether the evidence at such inquiry is or is not given on oath, but shall not include any inquiry by any court of Justice.

"2. Persons obstructing or intimidating witnesses guilty of misdemeanor.

Every person who commits any of the following acts, that is to say, who threatens, or in any way punishes, damnifies, or injures, or attempts to punish, damnify, or injure, any person for having given evidence upon any inquiry, or on account of the evidence which he has given upon any such inquiry, shall, unless such evidence was given in bad faith, be guilty of a misdemeanor, and be liable on conviction thereof to a maximum penalty of one hundred pounds, or to a maximum imprisonment of three months."

79. As can be seen above, section 2 of this Act provides that anyone seeking to punish a witness who gives evidence in good faith to a public inquiry 'for having given evidence upon any inquiry, or on account of the evidence which he has given upon any such inquiry' is guilty of an offence.

80. It should not be construed as providing a sanction against any prosecutor who brings criminal proceedings resulting in penalty against a witness using the witness' own evidence against him. Such a prosecutor would be bringing criminal proceedings for a substantive offence (e.g. for an offence of riot) and merely seeking to use evidence the witness has given to the inquiry in support of that prosecution.

81. The Act is aimed at preventing victimisation. Limited as it is to this aim, we submit that it does of itself render redundant the need for undertakings in public inquiries in appropriate cases.

<u>(vi) From whom, other than the Attorney General, might an undertaking be sought?</u>

82. Given that section 3 of the Prosecution of Offences Act 1985 provides that the functions of the Director of Public Prosecutions will be carried out under the superintendence of the Attorney General, any undertaking in relation to prosecution should be sought from the Attorney General. However, by reference to the Protocol between the Attorney General and the Prosecuting Departments (July 2009) and the recent examples of the letters containing the undertakings given to the Azelle Rodney and Al-Sweady inquiries, it is understood that the Attorney General will consult with the Director of Public Prosecutions.

83. Any undertaking in relation to disciplinary proceedings should be sought from the disciplinary authority. In relation to police forces in England &

Wales (as defined in the Police Act 1996), the Police Reform Act 2002 provides that the ‘appropriate authority’ is responsible for bringing disciplinary proceedings: paragraph 27, Schedule 3, Police Reform Act 2002. For a senior officer (above the rank of Chief Superintendent), that is the police authority for his police area and for a person who is not a senior officer, that is the chief officer: s. 29 Police Reform Act 2002. The table below sets out who the relevant persons are understood to be following the changes enacted by the Police Reform and Social Responsibility Act 2011. Where there is an employer – employee relationship the appropriate person to approach for any undertaking will be the employer. It is not possible at this early stage to attempt an exhaustive list of the employers of witnesses who might be required to produce documents to or provide evidence to the Inquiry and it is suggested that the position will need to be kept under review going forward if undertakings are to be sought from employers. However, it is clear even at this early stage that civil servants are likely to provide evidence to the Inquiry and therefore, if a decision is taken to seek an undertaking in relation to disciplinary proceedings against civil servants, the Cabinet Secretary might be approached.

Senior police officer (i.e. rank above Chief Supt) in the 41 police areas	Police and Crime Commissioner for the relevant police area
Senior police officer (i.e. rank above Chief Supt) in the Metropolitan Police Service	Mayor's Office for Policing and Crime
Senior police officer (i.e. rank above Chief Supt) in the City of London Police	Police Committee of the Court of Common Council (s. 56 City of London Police Act 1839)
Person not a senior officer in the 41 police areas	Chief Constable of the Force for the police area
Person not a senior officer in the Metropolitan Police Service	Commissioner of Police of the Metropolis
Person not a senior officer in the City of London Police	Commissioner of Police for the City of London
Commissioner of Police of the Metropolis	Home Secretary

84. The Independent Police Complaints Commission are responsible for investigating complaints made about the conduct of those 'serving with the police' (defined in s. 12(7) Police Reform Act 2002 as including a member of the police force, an employee of the police authority under the direction and control of the chief officer, thus applying to civilian employees, and a special constable) and can direct that disciplinary proceedings are brought by the appropriate authority: paragraph 27, Schedule 3, Police Reform Act 2002. However, they are not the body responsible for bringing such disciplinary action - it is the individual Police Forces who retain that power at all times until an officer leaves or is permitted to retire from the Force.

(vii) What are the relevant considerations in relation to the Undercover Policing Inquiry?

85. The starting point for consideration whether in this Inquiry any undertaking should be sought at all should, it is suggested, be the terms of reference. Although they are very broad they are such as to require some detailed fact finding of a nature which appears to distinguish this inquiry from Part 1 of the Leveson Inquiry in which the terms of reference were so high level that no undertakings were required.

86. The subject matter to be investigated in order to discharge the terms of reference, and the nature of the events which have thus far come to public attention, also indicate that questioning will need to touch on matters which seem certain to engage the privilege against self-incrimination in the absence of an undertaking. This is likely to apply not only to police witnesses but potentially also to some non-police witnesses (not because their conduct is the focus of the inquiry but because it is so closely related to police activity as to be necessary in order to permit a full examination of police conduct).

87. For consideration by the Chairman is whether in these circumstances an undertaking should be sought which is co-extensive with the privilege against self-incrimination. If so, the question arises as to what wording would be required in order to be co-extensive with the privilege. If too narrow a wording is sought then there remains scope for the privilege to be asserted. This is a disadvantage of a direct rather than a derivative undertaking.

88. Should an undertaking significantly wider than the privilege be sought? A wording wider than the privilege itself would not be justified on the basis of the effect of the privilege alone. An appropriately worded derivative undertaking could fully address any impediment which the privilege against self-incrimination might pose to the discharge of the Inquiry's terms of reference. A significantly wider undertaking could have a significant impact on the administration of justice and would only be indicated in the most exceptional circumstances. The absence of any recent precedents for such undertakings is telling.

89. If any undertaking is to be sought from the Attorney General it should not preclude a prosecution for any offence relating to the evidence given to the Inquiry itself, for example perjury or an offence contrary to s.35 of the Act.

90. Consideration should also be given as to whether undertakings should be sought from disciplinary authorities. Here the potential justification for seeking an undertaking would be to encourage people to be forthcoming. It falls to be balanced against the importance of enforcing discipline. There is a sliding scale of options which ranges from seeking no such undertaking at all through to wide ranging undertakings. In between there is scope for seeking a carefully calibrated undertaking. For example, the very limited undertaking of this kind sought by Sir William Gage in the Baha Mousa Inquiry was designed to encourage a witness who might not have been candid with his disciplinary authority to come clean with that inquiry.

DAVID BARR Q.C.

KATE WILKINSON

VICTORIA AILES

8th January 2016