In the Undercover Policing Inquiry

SUBMISSIONS ON UNDERTAKINGS
DATED 13 JANUARY 2016

Introduction

1. The Metropolitan Police Service ('MPS') makes the following observations in response to Counsel to the Inquiry's Note on Undertakings dated 8 January 2016 ('the Note').

2. Part 1 concerns observations on the law. Unless stated below, the MPS agrees with the analysis in the Note.

3. Part 2 contains observations on the balance of interest. No concluded view on disciplinary proceedings is expressed as the Commissioner wishes to keep an open mind until receipt of any invitation from the Chairman.

Part 1: observations on the law

Criminal

4. The terms of any undertaking that may be given by the Attorney General should be clear as to their effect, and all affected individuals (including the police as investigators of potential offences) should know where they stand.

5. On the need to be careful about avoiding ambiguity in any undertaking, see *B v Chief Constable of Northern Ireland* [2015] EWHC 3691 (Admin). In that case an issue arose as to the effect of an undertaking given by the Attorney General in the Saville Inquiry (see §31) on the subsequent investigation of soldiers by the PSNI. In the event the issue did not need to be resolved (see §67), but from the direct knowledge of counsel involved (JHQC) the issue was whether officers of PSNI who had read the Saville report could play any part

in the investigation without a breach of the part of the undertaking that prevented use of evidence "*...for the purpose of investigating...*". Whether evidence is "*used"* for the purpose of an investigation may not always be clear. It is suggested that the sort of express provision contained in the Azelle Rodney undertaking (Note, §68) ("*It is further undertaken that…*") is preferable.

Disciplinary

6. In *R. (on the application of Friend) v Greater Manchester Police Authority* [2009] EWHC 3152 (Admin), Divisional Court, Elias LJ observed albeit *obiter* that the Chief Constable could not properly give an assurance that he would not bring disciplinary proceedings (at §43). Because, as the Court itself noted, no argument was heard on this issue it is difficult to know what prompted this observation. No issue arose in that case as to undertakings before public inquiries.

7. The duties of the MPS and other police forces (and indeed other bodies with disciplinary functions as described in the Note at §83) with relation to disciplinary matters are statutory and the Commissioner does not have an entirely free hand as to whether to investigate or bring disciplinary proceedings. The principal regulations are the Police (Conduct) Regulations 2012, SI. 2632/2012. For example, regulation 19 provides that following receipt of an investigator's report, the appropriate authority shall, as soon as practicable, determine whether the officer concerned has a case to answer in respect of misconduct or gross misconduct or whether there is no case to answer; and that where the appropriate authority determines that there is a case to answer in respect of gross misconduct, it shall, subject to considerations concerning any criminal proceedings, refer the case to a misconduct hearing. Any undertaking given by the Commissioner would have to be consistent with his statutory duties.

8. The matter is complicated by the potential role of the IPCC in relation to allegations of misconduct. The IPCC has power not only to direct an

investigation but to direct the bringing of disciplinary proceedings. Part 3 of Schedule 3 to the Police Reform Act 2002 (as amended) describes the complicated process where the IPCC is involved. Paragraph 27 is entitled "Duties with respect to disciplinary proceedings etc". Subparagraph (4) empowers the IPCC to direct the appropriate authority to take action. This clearly includes directing the appropriate authority to bring disciplinary proceedings since subparagraph (7) provides that "*Where disciplinary or other proceedings have been brought in accordance with a recommendation or direction under this paragraph, it shall be the duty of the authority to ensure that they are proceeded with to a proper conclusion*" (emphasis added).

9. Any undertaking that a chief officer of police or other appropriate police authority (for example, the Mayor's Office for Policing and Crime in certain cases) could give would have to be consistent with, or at the very least subject to, their obligations under the 2002 Act. The Inquiry may consider that:

    a. The effect of any undertaking given by a chief officer of police or appropriate police authority must be clear;
    b. If the Chairman is to seek an undertaking, the terms of the suggested undertaking should be consistent with the chief officer's or authority's statutory duties;
    c. It would be helpful to invite submissions from the IPCC in light of their powers; and
    d. If an undertaking is to be sought from a chief officer of police or appropriate police authority it may be appropriate for the Chairman to consider inviting an undertaking from the IPCC at the same time.

Part 2: the balance of interests

Criminal

10. The MPS agrees that there will be a need to resolve certain issues of fact which may touch on criminal conduct on the part of identified individuals (whether members of the public, or police officers).

11. However the MPS observes that:
    a. It may not be possible for a variety of reasons to address every issue of fact that individuals may wish the Chairman to resolve. It may be that given the width of the Terms of Reference the Chairman will want to exercise considerable powers of selection as to which individual issues are considered during the course of the inquiry.
    b. Even where focus on individual incidents is required, the focus of the Inquiry cannot be a hunt for criminal wrongdoing: see the observations of Simon Brown LJ set out at §33 of the Note.

12. The MPS agrees that to maximise the effectiveness of the inquiry individuals giving information to the Inquiry should not be deterred from providing their fullest and most open account because of fears of prosecution.

13. However, ultimately, it is for the Chairman to judge what is most likely to work on the particular facts. What is necessary in one inquiry may not be necessary in another: what may deter witnesses in one inquiry may not deter in another. Many of the activities of police witnesses in this case will already be known to the MPS and may well have resulted in investigation and interview: in these circumstances the prospect of being deterred from giving evidence to the Inquiry may be remote. It cannot however be excluded that a police witness might be deterred by fear of prosecution.

14. Furthermore, as recognised in the Note (at §86), it is likely that the Chairman will have to consider the conduct of members of the public when evaluating the appropriateness of infiltration of particular groups. Individuals may claim that their activities, and those with whom they associated, were entirely lawful and those claims may need to be tested.

15. In these circumstances, the MPS does not disagree with seeking an undertaking from the Attorney General that is at least as extensive as the privilege against self-incrimination. Even if it is not possible to foresee which witness may assert the privilege, it is better to remove the need.

16. It is also observed that Chairman may wish to press individuals not only about their own criminality but about the criminality of others, and for the inquiry to be effective those questions will need to answered candidly. This may be particularly relevant where evidence is given about the infiltration of a group and evidence is heard from a limited number of members of that group. The undertaking described above will not deal with the issue of X's evidence being used against Y. Individuals of a group may therefore remain cautious about giving evidence about other members or associates. Nor can it be excluded in principal that police officer witnesses would seek to close ranks.

17. The MPS note there is no precedent for a wider undertaking which would prevent X's evidence being used against Y in criminal proceedings, although that form of undertaking has been given in the context of potential disciplinary proceedings (Rosemary Nelson Inquiry, at Note §§55 and 57). Since it is not obvious at this stage that an expanded criminal undertaking will be needed, it may be that the need for an undertaking of this nature can be kept under review; the Inquiry should not rule out seeking such an undertaking from the Attorney General should the need arise.

18. It is also desirable that any undertaking is clear as to the role if any that any evidence given should play in any miscarriage case. It might be considered anomalous if a person's conviction was referred for consideration as a miscarriage of justice as a result of the work of the Inquiry, but that the individual's own evidence, including any admissions he or she made, could not form part of any appeal proceedings. This argues in favour of applying the undertaking only to matters which have not to date been the subject of criminal proceedings.

Disciplinary

19. In principle, the MPS wishes to retain the ability to bring misconduct proceedings against serving officers if appropriate. Any undertaking should not unreasonably restrict this ability (cf Baha Mousa ruling at §31, per Sir

William Gage). This is particularly so with respect to offences meriting dismissal for gross misconduct. The public interest in disciplinary proceedings being pursued is well-recognised: see for example, *R (Birks) v Commissioner of Police of the Metropolis* [2014] EWHC 3041 (Admin), Lang J., at §48.

20. That includes the ability if appropriate to bring proceedings based on a failure to give an honest account at an earlier time (for example, in an internal investigation), because of the need for police officers to be people of the highest integrity. For that reason the MPS would not be inclined to provide even the more limited undertaking provided in Baha Mousa (Note §63).

21. In addition, the Commissioner cannot make an undertaking that is inconsistent with his statutory duties or which might bring his position into conflict with the IPCC.

Conclusion

Criminal

22. The MPS suggests that the Attorney General should be invited to give an undertaking that is:
    a. coextensive with the privilege against self-incrimination;
    b. clear as to its effect in relation to investigations, and appellate proceedings,

    but not *at this stage* to provide a wider undertaking to deal with the effect of X's evidence against Y.

Disciplinary

23. The Commissioner will consider the submissions of other CPs and in due course any invitation from the Chairman, but in principle wishes to retain the ability to bring disciplinary proceedings in appropriate cases, without limit; and observes that he does not have an entirely free hand because of his statutory duties.

JONATHAN HALL QC

SARAH LE FEVRE

AMY MANNION

ADAM PAYTER

RACHIT BUCH

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