IN THE UNDERCOVER POLICING INQUIRY

SUBMISSIONS ON LEGAL TESTS APPLICABLE TO APPLICATIONS FOR RESTRICTION ORDERS SERVED ON BEHALF OF THE NATIONAL CRIME AGENCY

Introductory

1. These submissions are served on behalf of the National Crime Agency ('the NCA') pursuant to the Chairman's directions dated 27 January 2016. The submissions respond to Counsel to the Inquiry's Note dated 29 January 2016, which addresses the legal tests applicable to applications for restriction orders under section 19 of the Inquiries Act 2005 ('the 2005 Act').

2. The NCA is a non-ministerial government department that was formed in October 2013 under the Crime and Courts Act 2013. The NCA leads the UK's fight to cut and prevent serious and organised crime, strengthens UK borders, fights fraud and cyber crime, protects children and young people from sexual abuse and exploitation and responds to a broad range of national threats and risks. The NCA works in partnership with police forces throughout the UK and the security and intelligence agencies, as well as private industry, local and national government and other public sector stakeholders. Much of the NCA's work has an international reach and the NCA works closely with foreign law enforcement partners. The NCA conducts undercover operations, as have its predecessor national organisations the Serious and Organised Crime Agency ("SOCA") and the National Crime Squad ("NCS"). The NCA regards undercover work as an essential means of fulfilling its statutory functions. The NCA is a senior stakeholder within the various national undercover oversight strategic and working groups.

3. These proceedings are still at an early stage and the NCA has not yet applied for any restriction orders. It is expected, however, that it will become

necessary for the NCA to make such applications in due course. Such applications are likely to fall into three categories:

a. Depending on which (if any) NCA witnesses the Chairman calls to give oral evidence at public hearings, the NCA may apply for restriction orders permitting such witnesses to give evidence anonymously and/or with screening. The purpose of such orders would be to protect the identity of the witnesses in question.
b. It is likely that orders will be sought to the effect that (subject to gisting etc) sensitive passages of documentary evidence made available to the Inquiry by the NCA are considered by the Inquiry without being disclosed either to the public or generally to core participants.
c. In parallel, orders are likely to be sought to the effect that, if oral evidence is to be called in relation to such matters, this takes place at hearings from which both the public and other core participants are excluded.

4. The latter two procedures, involving the exclusion of parties to the proceedings from the evidence taking process, amount to 'closed material procedures' ('CMPs') as that term has been used in other related contexts.

5. It has been made clear that the purpose of this stage of the proceedings is to explore the legal principles that will apply to the making of restriction orders. That is the level at which these submissions are pitched.

6. If and when the NCA makes any applications for restriction orders, it will of course be necessary to serve further evidence. It is also possible that in due course the facts of particular applications may generate further issues of principle that have not been raised previously, and the NCA reserves its position in this regard.

7. The Metropolitan Police Service ('the MPS') has served detailed submissions responding to CTI's Note. The NCA has seen those submissions and supports them. The submissions below do not attempt to cover all of the matters

addressed in CTI's note and in the MPS submissions. Rather, they focus on a number of points that the NCA wishes to emphasize, together with some matters that touch on the NCA's institutional expertise.

The statutory context

8. The statutory context of the 2005 Act is clearly an important starting point for considering the legal principles relevant to the making of restriction orders – see CTI's Note at paragraph 3 and also Part II generally.

9. The NCA agrees with CTI that the reference to *"public concern"* at section 1 of the 2005 Act amounts to encouragement within the statutory scheme for openness in proceedings under the 2005 Act. That provision is clearly relevant to the approach that should be taken to applications under section 19. Although similar (and more particular) provisions regarding openness appear at section 18 of the 2005 Act, they are not of relevance to the present issue (i.e., the correct approach to section 19 applications) since the provisions of section 18 are expressly made *"subject to any restrictions imposed by a notice or order under section 19"*.

10. There is a further element of the statutory scheme that is of considerable relevance for present purposes, and which has not been explored in any detail in CTI's Note. That is the existence of section 19 itself. The NCA makes the following three points in this regard.

11. *First*, the powers under section 19 are extremely wide. Those powers include a power to conduct closed material proceedings – that is, for an inquiry to receive / hear substantive evidence relating to its terms of reference in the absence of some or even all of the core participants. It is notable that Parliament chose to grant the power to conduct CMPs at 2005 Act inquiries. There is no such power at inquests, which in other respects are closely analogous to inquiries.[1] Recent decisions of the Supreme Court have

[1] CTI draw the analogy between inquiries and inquests at paragraph 70 of their Note. For the unavailability of CMPs at inquests see *Secretary of State for the Home Department v Assistant Deputy Coroner for Inner West London* [2011] 1 WLR 2564, DC

emphasized the exceptionality of CMPs, and have held that they are only permissible where sanctioned by statute.[2] The 2005 Act is one of the handful of statutes that authorise this procedure.

12. *Second*, section 19 is an integral part of the statutory scheme. Parliament must be taken to have intended that the power to make restriction orders, including conducting CMPs, would be used in appropriate cases. Moreover, and importantly for these purposes, Parliament intended that these powers would be used notwithstanding that the effect of doing so would be to derogate from the openness of the proceedings.

13. *Third*, the value of the section 19 power is not difficult to identify. Whereas the role of a court hearing adversarial litigation is limited to determining disputed issues that the parties before it have raised, an inquiry has a far wider inquisitorial role. The primary purpose of an inquiry is to conduct its own detailed and thorough investigation into the issues raised by its terms of reference. Where evidence that is relevant to those issues is of such sensitivity that it cannot be disclosed to core participants, then an insistence on conducting open proceedings would require that evidence to be excluded. Whilst that is, of course, precisely how the public interest immunity system operates in inquests and 'ordinary' civil proceedings, the power to conduct CMPs under section 19 of the 2005 Act recognizes the particular importance in the inquiry context of conducting the most thorough investigation possible, even if that means doing so in the absence of some or all of the core participants.

14. The NCA therefore submits that there are two relevant themes to be drawn from the statutory context. Those themes are, first, the promotion of openness and, second, the availability of an exceptional but valuable power to conduct CMPs where necessary in order to ensure the thoroughness of the investigation.

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2 *Al Rawi & others v The Security Service & others* [2012] AC 531; *Bank Mellat v Her Majesty's Treasury (No.1)* [2014] 1 AC 700

15. At paragraph 19 of their Note, CTI refer to the desirability of *"an open and thorough inquiry"*. The NCA agrees that an inquiry should aim to be both open and thorough. In some cases, it will be possible to conduct an inquiry that is at once entirely open and entirely thorough. In other cases, however, the sensitivity of relevant evidence will make this impossible.

16. In proceedings where PII principles apply, a tension between openness and thoroughness is resolved in favour of openness, by sensitive material being excluded from consideration. By making provision for CMPs under section 19, Parliament clearly intended that this tension would be resolved in a different way in inquiries held under the 2005 Act – sensitive evidence can remain in evidence albeit that the openness principle is compromised.

17. The implication in the final sentence of paragraph 19 of CTI's Note is that making a restriction order represents a departure from the norm, and even that such orders run contrary to the public interest considerations that underpin the 2005 Act. The NCA respectfully disagrees with that analysis. The core public interest that is engaged is the public interest in the inquiry conducting a thorough investigation. It is clear from the statutory scheme that the starting point should be one of openness. But it is equally clear that Parliament recognized that some inquiries would need to depart from this principle where thoroughness required them to consider sensitive evidence that could not be heard publically.

18. Put shortly, the NCA submits that the granting of restriction orders where the need for them is made out – including restriction orders establishing a CMP - represents not a departure from, but rather a vindication of the statutory scheme of the 2005 Act and the public interest considerations that underlie it.

19. One final point to be emphasized is that it does not follow from the fact that an inquiry has received closed evidence (whether documentary or oral) that its conclusions on that evidence must themselves necessarily remain secret. On the contrary, an inquiry must necessarily draw its conclusions on the basis of all the evidence that it has heard – both open and closed. And whilst some

detailed findings made on the basis of closed evidence may not be published, the inquiry's high level open conclusions will inevitably by informed by the closed evidence that it has heard. The Litvinenko Inquiry provides a recent example of precisely this process.

The application of PII principles to restriction orders

20. In terms of outcome, the section 19 process is completely different to the conventional PII process. As described above, the consequence of a restriction order is that the sensitive material remains as evidence in the proceedings, whereas the result of a court upholding a claim for PII is that the material is excluded. It was for this reason that in his judgment in *Al Rawi* Lord Dyson described a CMP as *"the very antithesis of…PII"*.

21. That said, there are, of course, strong analogies to be drawn between the two processes.

22. One point of similarity is the need for the decision-maker to balance competing public interest considerations in determining whether or not to make a restriction order / uphold a PII claim. But the strength of and interplay between those considerations will be different in the inquiry context as compared to the PII context.

23. To take one example, in the PII context, the fact that (*ex hypothesi*) relevant evidence will be excluded from substantive consideration if the PII claim is upheld is a factor that tends to raise the threshold for the granting of the claim. The position is different in a CMP in that the material in question remains part of the evidence – albeit closed evidence - in the proceedings. That is a factor which, it is submitted, makes the threshold for granting a restriction order under section 19 lower than the threshold for upholding a conventional claim for PII.

24. An issue as to which there is no distinction between the approach under PII and the approach under section 19 is the way in which the court / inquiry

should treat 'expert' evidence relating to the harm that would be caused by the open disclosure of the sensitive material.

25. The caselaw on this issue was reviewed at some length by the Divisional Court in judicial review proceedings arising from what was then still the Litvinenko Inquest (i.e., before the public inquiry was established) – see *Foreign Secretary v Assistant Deputy Coroner for Inner North London* [2013] EWHC 3724 (Admin), at paragraphs 29-36.

26. In summary, the Divisional Court concluded that, for reasons of institutional responsibility and competence, the court determining a PII claim should normally accept evidence provided by a Minister in support of the PII claim as to the harm that would be caused by disclosure. Goldring LJ quoted an extensive passage from the judgment of Lord Neuberger in the *Binyam Mohammed* case,[3] which ended with Lord Neuberger endorsing a passage from the speech of Lord Reid in the earlier case of *Conway v Rimmer*:

> "... it is salutary to bear in mind what Lord Reid said in the Conway case ... namely "cases would be very rare in which it could be proper [for a court] to question the view of the responsible minister that it would be contrary to the public interest to make public the contents of a particular document." Especially, I would add, when it comes to issues such as national security."

27. This principle is of direct application in the inquiry context. An inquiry is no better placed than a court to go behind assessments made by ministers or government officials or senior law enforcement officers as to the harm that would be caused by the publication of sensitive information. In the absence of any obvious flaws in the evidence regarding such matters, it must be accepted.

28. Nor, for the avoidance of doubt, can this principle be ring-fenced as applying only to national security cases. It is clear from the above quotation that Lord Neuberger regarded it as a principle of general application, albeit that it applied *"especially"* where national security considerations were raised.

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3 *R (Binyam Mohammed) v Secretary of State for Foreign and Commonwealth Affairs* [2011] QB 21

The NCND policy

29. The NCA endorses the description of the NCND policy contained in the witness statement of Paddy McGuinness. It also supports the detailed submissions that have been made on this issue by the MPS. Those matters will not be repeated here, but the NCA does wish to put on record (a) the value that it places on this policy in the conduct of its own undercover operations; and (b) the damage that it considers would be done both to present and future operations were the NCND policy to be undermined by this inquiry.

30. Two short supplementary points relating to NCND are developed below.

31. First, CTI are of course right to state that each application for a restriction order, including those raising NCND issues, must be considered on their own facts. However, the undoubted need to consider any such application on its individual merits does not alter the fact that many of the issues relating to NCND are of a general nature, and cannot be confined to a particular case. Thus, ordering the disclosure of the name and operational history of a particular undercover officer is likely to raise immediate risks for him and his family, and that risk may be high or low depending on all the circumstances of the particular case. But, as the evidence and submissions served by the MPS demonstrate, the damage potentially caused by that one disclosure may go much wider than that. For example, the disclosure of the details relating to one officer may, as a result of the 'mosaic effect', endanger a series of other individuals with whom that officer worked. The disclosure may also have an incrementally damaging effect on the ability of law enforcement agencies to recruit and retain undercover officers and informants. One of the purposes of the NCND policy is to prevent this type of contagion. Therefore, whilst the Chairman will of course consider each case on its merits, he will also need to reach conclusions about the wider implications of departures from NCND, which he must then apply in individual cases.

32. Second, there is a further class of damage that might result from any undermining of the NCND principle in this inquiry, which would have particular impact on the NCA. As indicated above, the NCA works

extensively with partners in foreign law enforcement agencies. The NCA believes there to be a clear risk that an undermining of the NCND principle in the Inquiry may impact upon the willingness of international partners to permit use of their undercover officers in operations within the United Kingdom, since they will be concerned about the impact upon the safety of the officer and their family and/or the continued operational value of undercover officers whose identity may be compromised. If international partners became less willing (or unwilling) to work with the NCA, this could plainly have serious consequences for the NCA's operational effectiveness. The NCA intends to serve more detailed evidence on this issue once applications for restriction orders have been made.

Confidentiality rings

33. Where the Chairman concludes that information that is the subject of an application under section 19 cannot be disclosed publically, the next question that arises is how broad the restriction order should be. Although the information is not to be made public, should it be disclosed to core participants, or (perhaps) solely to their lawyers? If evidence is to be given at a 'private' hearing, who should be allowed to attend? If a witness is granted anonymity and screening, who should be permitted to see behind the screen?

34. These matters will ultimately be fact-specific. As CTI observe at paragraphs 13 and 14 of their Note, the section 19 power is extremely flexible and it has been used in different inquiries to craft a wide variety of different types of restriction that were appropriate in those individual cases.

35. Two general points are, however, made at this early stage.

36. First, where a witness is giving evidence behind a screen to protect his/her identity, there are good arguments in favour of the lawyers who will be questioning the witness being able to see the witness' face – although, for the reasons given in the *Donaghy* case quoted by CTI at paragraph 118 of their Note, the same does not apply to their clients. Sometimes, however, the witness's face is shielded from the lawyers, either because there are security

concerns justifying this step, or because it is simply not practicable to provide the lawyers but no-one else with the relevant view.

37. Second, and more important, where the Chairman rules that substantive evidence is too sensitive to be heard in public, there are real difficulties in formulating any form of 'middle-ground' procedure whereby some or all of the core participants and/or some or all of their legal representatives are able to be present at the closed hearings on the basis of confidentiality undertakings – an arrangement sometimes described as a 'confidentiality ring'. The large number of core participants involved in these proceedings is likely to accentuate these difficulties. Three of the more serious problems in this regard are:

    a. The invidious position in which the inquiry is placed in being obliged to determine the trustworthiness of those who are participants in the proceedings.
    b. The risk that those admitted to the closed hearings might inadvertently disclose sensitive information.
    c. Legal professional difficulties arising from lawyers being privy to information relating to the proceedings that they are forbidden from communicating to their clients.

38. CTI refer at paragraph 117 of their Note to the *McGartland* case, in which difficulties of this nature were raised.

39. In *AHK & others v SSHD*,[4] Ouseley J (who has great experience of CMPs, having served as President of SIAC and also having conducted many cases with closed hearings in the Administrative Court) was asked to establish a confidentiality ring in a case involving PII material, in part on the authority of observations that had been made in another case by Moses LJ.[5] Ouseley J rejected the application, and in doing so referred to an earlier ruling that he

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4 [2013] EWHC 1426 (Admin)

5 *R (Mohammed) v SSHD* [2012] EWHC 3454 (Admin)

had made in SIAC which drew attention to the practical difficulties inherent in such a scheme. Ouseley J stated:

> "22. There was no reason for Mr Southey to make his submission only after that decision; the point was available for him to take in January 2012. He ought to have raised it earlier, and I can see no justification for his raising it now. He was already aware of the point anyway, or ought to have been. I reminded him of *BB* v *SSHD* SC/39/2005, a SIAC case in which I was Chairman, and in which he represented BB. The Special Advocate, Mr Blake QC, argued in an open hearing in October 2006, that such a process could be adopted to mitigate the effect of the non-disclosure Rules in SIAC. SIAC ruled against such a "ring of confidentiality" in an open judgment, paragraphs 32-34, because a number of practical factors persuaded us that it was not compatible with those Rules, even though it was a practice mistakenly adopted by SIAC in one case at least, *Rehman* v *SSHD* [2001] UKHL 47, [2003] 1 AC 153. Those factors remain pertinent here. As I cannot agree with Moses LJ's view on such a ring, I set out the reasons SIAC gave in that judgment. There is nothing peculiar to the SIAC role in this.
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> 23. First, there was the risk of inadvertent disclosure. This risk had been made manifest, we were told by Mr Tam QC for the SSHD at the SIAC hearing; there had been "repeated open discussion of restricted material by the open advocate", paragraph 31. (I add, in relation to my experience of inadvertent disclosure, that in camera material was referred to in open court, in a criminal case, by leading defence counsel, wholly inadvertently, on two occasions.) SIAC said at paragraph 32:
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> > "First, there is an obvious risk of inadvertent disclosure, by the representative eg in discussions with other representatives or clients, or to others, or in paper management. It is self-evident that the more who have the material, the greater the risk of inadvertent disclosure. The difficulties in managing the separation between open and closed material in terms of questions of witnesses, discussions with advocates in submissions, indeed judgment writing including technical support and publication, would all be greatly increased. All this increases the risk of accidental disclosure. It is easy to see why the experience when these suggestions were tried was an unhappy one. If cross-examination is proceeding on a topic which involves a restricted open document or point, it would have to stop while people left court; the point would be potentially highlighted and inferentially it could be revealed widely. It might give rise to very strong questions from a client to his representative as to why a point had not been pressed, leading to inadvertent disclosure. The answer to a judicial question raised in open submission might make avoidance of reference to such material very difficult, and asking questions in open is already inhibited enough by knowledge of the closed material. The ability to remember which different system applied to which material during a hearing would make for error on all sides. These might be very difficult to correct and could sell the pass for resistance to full disclosure, as we have already seen happen with inadvertent disclosure. If those risks do not matter in

relation to any particular material, that is because it is in reality open."

24. Second, there was the risk, if disclosure took place, that the source would be unknown and suspicion would fall on the innocent.

25. Third, there was the problem of how the Commission, and here the Court, would decide who was safe to be in the "ring". We said [at paragraph 34]:

> "Third, it would involve the Commission being asked to take a view about the willingness and ability of an advocate or representative, barrister or solicitor, to abide by the terms of his undertaking. The Commission does not accept that the mere fact that a representative has a professional qualification suffices to ensure that the undertaking would not be broken, and broken in circumstances which made the breach impossible to detect. Lord Woolf in Roberts pointed out that not all professionals could be trusted. Accordingly, such a process would put the Commission in a wholly invidious position of potentially distinguishing between representatives, or even between representatives from the same firm or chambers, on what might be impression or closed objection, or of having to raise such matters with a representative which could give an impression of bias. It would involve the Commission undertaking some distasteful, inadequate and primitive vetting for integrity and carefulness in substitution for the developed vetting process which special advocates undergo. It is not to be assumed that all open advocates would be acceptable as special advocates by the Attorney General or would pass the vetting process, although some open advocates have done so in other cases. The alternative of simply accepting all lawyers as equally trustworthy rather highlights the weakness of Mr Blake's point. Such an approach could only work if the material were in reality open. The prospect of a penalty is no substitute for not running the risk in the first place."

40. These practical concerns are of clear potential relevance to these proceedings. If necessary, further submissions on this point will be made in due course.

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