

IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

POSITION PAPER ON UNDERTAKINGS ON BEHALF OF THE NON-POLICE, NON-STATE CORE PARTICIPANTS

INTRODUCTION

1. This paper is served on behalf of the recognised legal representatives ["RLRs"] of the non-police, non-state core participants ["NPSCPs"] as listed in the schedule hereto. Hereafter references to the NPSCPs should, for the purposes of this paper only, be taken as including only the NPSCPs represented by those RLRs.

2. This paper sets out the common position of the NPSCPs in relation to the undertaking they would ask the Inquiry to seek from the Attorney General in respect of criminal proceedings. This position is founded on the following observations:
 - a. the position in respect of police / state witnesses is not the same as that of non-police / non-state witnesses ["NPSWs"];
 - b. the undertaking to be sought / granted must reflect this distinction because;
 - c. the purpose of the Inquiry is to inquire into and report on undercover police conduct, not on the conduct of NPSWs¹;
 - d. the NPSWs participate as the victims of invasions of privacy;

¹ The conduct of some NPSWs will be examined by the Inquiry "*because it is so closely related to police activity as to be necessary in order to permit a full examination of police conduct*" [counsel to the Inquiry's note on undertakings, 8 January 2016], but it is the police conduct which remains the focus of the Inquiry. Consideration of the conduct of NPSWs is a means of assessing the conduct of officers, not a purpose of the Inquiry itself.

- e. they participate in the public interest generally, but also in furtherance of their Art 8 right to discover the truth about undercover policing operations concerning their own lives;
 - f. the Inquiry must adopt an approach that does not exacerbate the invasions of privacy about which they testify and ensure that NPSWs, in coming forward to assist the Inquiry, are not thereby exposed to criminal sanction;
 - g. by contrast, the conduct of police / state witnesses is the subject matter of the Inquiry. In the event that evidence of criminal offences having been committed by police officers, state officials or employees is discovered, there is a strong public interest in those responsible being held to account.
3. For these reasons, and those developed below, the NPSCPs contend that the undertaking sought must differentiate between the position in respect of police / state witnesses on the one hand and NPSWs on the other.

UNDERTAKING IN RESPECT OF CRIMINAL PROCEEDINGS – POLICE/STATE WITNESSES

4. The NPSCPs agree with the analysis set out in counsel to the Inquiry’s note on undertakings, dated 8 January 2016, that “[a]n 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 [the obstacle to full and frank disclosure arising from the privilege against self-incrimination] may be removed.”²
5. The NPSCPs would endorse such an undertaking being sought from the Attorney General in respect of the police / state witnesses in order that the Inquiry may obtain evidence which might otherwise be

² Counsel to the Inquiry’s note [3].

withheld from it on grounds of the privilege against self-incrimination [“PSI”].

6. However, such an undertaking should be exactly co-extensive with PSI. As counsel for the Inquiry identify, if too narrow a wording is sought then there remains scope for the privilege to be asserted, whilst wording that goes wider than the privilege would not be justified on the basis of the effect of the privilege alone.³
7. Given the clear public interest in police officers and other state actors being held to account in respect of criminal conduct uncovered by the Inquiry, there would need to be powerful factors weighing against that public interest in order to justify curtailing it beyond the parameters of PSI. There is no valid justification for extended curtailment here. The Inquiry has powers under section 21 of the Inquiries Act 2005 to compel witnesses to give evidence. Further, section 35 of the Act makes it a criminal offence intentionally to prevent evidence from being provided to the Inquiry, or intentionally to suppress or conceal relevant documents. This is not, therefore, a situation in which further inducements to testify are either necessary or appropriate.
8. The NPSCPs would therefore support an undertaking being sought from the Attorney General in the terms set out in paragraph 13 below.

UNDERTAKING IN RESPECT OF NON-POLICE/ NON-STATE WITNESSES

9. As set out above, there is a fundamental distinction between the position of police / state witnesses and that of NPSWs. If the Inquiry is to function effectively, it must receive evidence from both. It is

³ Ibid. [87] & [88].

necessary, therefore, that the Inquiry adopts an approach which reflects the fact that:

- a. its focus is on the conduct of undercover police operations and that the conduct of the targets of such operations is relevant only in so far as it informs the Inquiry's assessment of the purpose, effectiveness and legality of the undercover operations;
- b. NPSWs come forward to assist the Inquiry, not only in order to understand what has happened to them, but also in furtherance of the public interest in holding secretive and invasive police practices up to scrutiny. In many cases, the personal cost for NPSWs of giving evidence to the Inquiry will be significant, as it concerns intimate aspects of their private lives, personal relationships and/or political activities and beliefs, in some cases exposing central parts of their lives over many years;
- c. the NPSCPs have already suffered significant intrusion into their private lives by virtue of the police operations under scrutiny by the Inquiry; and
- d. there is a very significant imbalance in what is known to police / state witnesses and what is known to NPSCPs. The former are aware of the most intimate details of the private lives of many NPSCPs, whereas the latter know almost nothing about those who spied on them or the extent to which they were monitored. For some NPSCPs this remains the case despite civil proceedings in which they have had to give detailed evidence about their private lives, but no information or disclosure has been provided by the police.

10. Some of the adverse consequences for NPSWs that may flow from giving evidence to the Inquiry may be addressed by the granting of restriction orders and the NPSCPs will make submissions in respect of this in the process concerning such orders. However, in relation to exposure to criminal sanction, this must be addressed by way of an

undertaking from the Attorney General. Unlike with police/ state witnesses, there are strong policy reasons in favour of a wider undertaking being sought.

11. First, it would be fundamentally unfair, and counterproductive to the obtaining of full evidence, were it to be a *de facto* precondition of an NPSW's participation in the Inquiry that s/he be prepared to incriminate friends, colleagues, fellow activists etc. However, this will be the consequence where the activities of others are intimately linked with the activities of an undercover officer or officers. In these circumstances, it is submitted that fairness requires a broader undertaking be given to all NPSWs.
12. Second, NPSWs may be incriminated as an unintended side-effect of an undertaking in respect of police / state witnesses. This might arise where a police/ state witness gives evidence which s/he would not be prepared to give, but for the undertaking, i.e. because it would have been self-incriminating. It is submitted that evidence given to the Inquiry by a police / state witness that is not available in a criminal prosecution of that person, by virtue of an undertaking, ought not to be relied upon in criminal proceedings against a non-police, non-state individual. The NPSCPs request that such an undertaking be sought.
13. The NPSCPs contend therefore for an undertaking being sought from the Attorney General in the following terms:

This is an undertaking in respect of any person who provides evidence to the Inquiry relating to the matters within its terms of reference. "Evidence" for the purposes of this undertaking includes oral evidence given by that person to the Inquiry, 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, as defined above, given to the Inquiry by a person will be used in evidence against that person or against any other person who was not at the time to which the evidence relates a police officer, state official or employee in any criminal proceedings, or for the purpose of deciding whether to bring such 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 the 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 a person to whom this undertaking applies, no reliance will be placed on evidence which is obtained during an investigation as a result of the provision of evidence to the Inquiry by that person. Further, in any criminal proceedings brought against a person who was and is not a police officer, state official or employee, no reliance will be placed on evidence which is obtained during an investigation as a result of the provision of evidence to the Inquiry which could not, by virtue of this undertaking, be used in criminal proceedings against the person who gave it. This undertaking does not preclude the use of information and/or evidence identified independently of the evidence provided to the Inquiry.

CONCLUSION

14. For the reasons set out above, the NPSCPs would ask the Inquiry to seek an undertaking from the Attorney General in the terms set out at paragraph 13 above.

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