

Undertakings 'Minded to' note to core participants

1. On the subject of Undertakings I have received a Note from counsel to the Inquiry and written submissions/position statements on behalf of the Metropolitan Police Service, the National Police Chiefs' Council, the National Crime Agency, the Home Office, Mark Kennedy, Peter Francis, the 'N' police officer core participants, and the non-police/non-state co-operating core participants. The purpose of this Note is to inform core participants of my preliminary views and to invite responses as to whether it is necessary to hold an oral hearing and, if so, on what issues. I shall not summarise all the positions taken and the responses received, but I shall provide my reasons for the preliminary views that I hold.
2. There is a community of view that I should seek from the Attorney General a general undertaking for application to every person who provides evidence to the Inquiry in the form of oral evidence, any written statement made in preparation for giving oral or written evidence to the Inquiry, and by the production of any document or information to the Inquiry. It is largely agreed that the undertaking sought should be co-extensive with the privilege against self-incrimination in a civil trial, although it is submitted on behalf of Mr Francis that the undertaking sought should be "slightly wider" than the privilege against self-incrimination. Whether the undertaking sought is slightly wider than the privilege seems to me to depend upon how the privilege is defined. For present purposes I shall adopt the definition at paragraph 6 below. I believe that all represented core participants are content with such a formulation.
3. Secondly, the non-police/non-state core participants seek a further undertaking to the effect that none of them should be at risk that evidence given in the Inquiry by others will be relied upon in support of a prosecution against them or for the purpose of deciding whether to bring a prosecution against them; or that evidence gathered in consequence of another witness' evidence to the inquiry will be used against them in a criminal prosecution.
4. Thirdly, it is submitted on behalf of Mr Francis that an undertaking should be sought from the "relevant police disciplinary bodies" that evidence given to the Inquiry will not be used to institute or support disciplinary proceedings against any police officer.
5. I shall address each of these submissions in turn.

Privilege against self-incrimination

6. Section 22(1) of The Inquiries Act 2005 applies the privilege against self-incrimination in a civil trial to the proceedings of an Inquiry. The privilege as it applies to a civil trial is derived partly from common law and partly from section 14 of the Civil Evidence Act 1968. The scope of the privilege is discussed by counsel to the Inquiry in their note of 8 January 2016 at paragraphs 14 – 25. I understand that discussion to be uncontroversial. I conclude that the scope of the privilege is as follows. A witness may decline to supply evidence in any of the forms listed in paragraph 2 above if:
 - i. it would incriminate or tend to incriminate the witness or a spouse or civil partner in the commission of a criminal offence;
 - ii. it may lead to incrimination or may lead to the discovery of evidence of an incriminating character;
 - iii. it or evidence which is derived from it may be relied upon to decide whether a prosecution should take place.
7. The terms of reference for the Inquiry require it to investigate the conduct and management of undercover police operations. While it is not the business of the Inquiry to make findings about criminal liability (section 2 of The Inquiries Act 2005) that investigation is likely to embrace, among other things, the actions of political, social, environmental and animal activists, and undercover police officers acting with and reporting on them, including the possible commission of criminal offences in purported furtherance of a cause. It will embrace the personal conduct of police officers towards those with whom they were associating while acting undercover. Among the possible offences committed by police officers may be misconduct in public office. It is tolerably clear to me that many occasions will arise in the course of the Inquiry when a witness would be entitled to decline to answer questions, make a statement or provide a document or information by relying on section 22(1) of The Inquiries Act 2005. Successful reliance on the privilege against self incrimination would inhibit the pursuit of the Inquiry's objective.
8. I am minded to follow the example of the chairmen of other inquiries in recent years and invite the Attorney General, respectfully, to consider providing a 'blanket' undertaking applying to any putative witness in the Inquiry that would be co-extensive with the privilege against self-incrimination as I have identified it in paragraph 2 above. Such an undertaking would be in terms such as the following:

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“It is undertaken that in respect of any person who provides evidence to the Inquiry 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, thing or information produced by that person to the Inquiry, will be used against him or her (or a spouse or civil partner) in any criminal proceedings (whether present or future or on appeal from a conviction) or when 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 or procured any other person to do so or 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 not to use in criminal proceedings against that person (or a spouse or civil partner) any evidence which is itself the product of an investigation commenced as a result of the provision by that person of any evidence, document, thing or information to the Inquiry.

For the avoidance of doubt, this undertaking does not preclude the use of information and/or evidence identified independently of the evidence provided by that person to the Inquiry.”

Evidence of another witness

9. The non-police/non-state core participants who are represented in the Inquiry seek a much wider undertaking to protect them not only from the consequences of their own admissions but also from the incriminating evidence of other witnesses. They draw a distinction between the positions of police officers past or present and those among whom police officers moved when acting undercover. It is the conduct of police officers and their management that comprise the principal subject matter of the Inquiry. The non-police/non-state core participants argue that they have been drawn into the Inquiry because their privacy has been invaded. If wrongdoing by the police is exposed then, subject to the privilege against self-incrimination, those police officers should be accountable to the criminal law. In contrast, the conduct of non-police/non-state core participants will be examined not because the public interest requires its exposure but as a collateral effect of investigating the justification for undercover operations and the conduct of undercover police officers. It is submitted that there is no public interest to be served by requiring non-police witnesses to act to the detriment of their associates. On the contrary, the public interest requires that witnesses should be permitted to assist the Inquiry without the inhibiting knowledge that, in so doing, they might incriminate others.

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10. There is some logical force behind this submission. X may give evidence to the Inquiry that implicates him and Y in the commission of a criminal offence. Without an extended undertaking X's evidence could not be used against him but could be used in a prosecution against Y. This knowledge may tend to have an inhibiting effect on the evidence of X to the Inquiry.
11. However, no such extended undertaking has been given on any previous occasion. It seems to me that there is a good reason for this. The privilege against self-incrimination is an ancient common law protection. The purpose of providing an undertaking is to require the witness to give all relevant evidence without recourse to the privilege. There is, however, no privilege against incrimination of others. Accordingly, there is not the same public interest in a wider protection of people mentioned in the Inquiry.
12. It seems to me that an undertaking in the blanket terms requested would tend to undermine the due administration of justice. It would fail to distinguish between extremely serious and comparatively trivial offences. Furthermore, there are other means by which a witness' fears may be allayed; for example, it may not be necessary to the fulfilment of the Inquiry's purpose to require an individual to be named. In the case of trivial offences or controversial accusations there is available to the prosecuting authorities a public interest test. I am not minded to seek the extended undertaking requested. If special circumstances arise during the Inquiry I can, with further help, consider the position on its merits.

Disciplinary proceedings

13. Mr Francis is the only core participant who submits that a request for an undertaking should be directed at relevant police disciplinary bodies. No-one has suggested that it would at this stage be appropriate to seek an undertaking from any other employer.
14. Only police officers who are serving at the time that disciplinary proceedings commence are at risk of a disciplinary finding and penalty.
15. Disciplinary proceedings against a police officer may be *directed* by the Independent Police Complaints Commission pursuant to paragraph 27, Part 3, Schedule 3 to the Police Reform Act 2002.
16. The Metropolitan Police Service wishes to preserve its ability to bring misconduct proceedings against serving officers in appropriate circumstances and cautions against the inquiry seeking an undertaking that might cut across a statutory direction given by the Independent Police Complaints Commission.

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17. The 'N' police core participants expressly do not seek an undertaking from any police authority. Neither Mr Kennedy nor Mr Francis are personally at risk of disciplinary proceedings because they both left the police service several years ago.
18. Mr Francis' interest is in ensuring so far as possible that police witnesses make full and frank disclosure to the Inquiry. He does not expand upon the need to seek an undertaking from police disciplinary bodies, nor the terms in which such an undertaking might be sought. The information available to me at this stage does not appear to support the view that an undertaking is required to remove any inhibition against telling the truth.
19. In my preliminary view no need for any blanket undertaking to police officers as to disciplinary proceedings has been established. Should circumstances arise in which I am required to reconsider this conclusion or to address an individual case I would be minded to seek further assistance.

Next steps

20. The Inquiry has informed the Attorney General's Office that by 4 pm on 4 March 2016 it will provide a summary report upon the position statements of the core participants to enable the Attorney General to indicate whether he wishes at this stage to make written representations to the Inquiry and/or to be represented at any oral hearing on the issue of Undertakings.
21. The Inquiry will provide a copy of this Note to the Attorney General's Office as part of its summary report.
22. The core participants are invited to notify the Inquiry by 4 pm on Wednesday, 9 March 2016 whether they wish to be heard orally upon any and, if so, which issues arising on the subject of Undertakings.
23. The Inquiry will notify the core participants by 4 pm on Friday, 11 March whether an oral hearing on the subject of Undertakings will be required.

3 March 2016

Sir Christopher Pitchford
Chairman, Undercover Policing Inquiry