IN THE UNDERCOVER POLICING INQUIRY

SUBMISSIONS ON THE LEGAL PRINCIPLES
APPLICABLE TO APPLICATIONS FOR RESTRICTION ORDERS
ON BEHALF OF
THE NON-POLICE, NON-STATE CORE PARTICIPANTS

INTRODUCTION

1. The central premise of these submissions is that if this Inquiry is to be effective and fulfil its terms of reference, it must be open. Any application for a restriction order must, therefore, be approached (as counsel to the Inquiry ["CTI"] rightly point out[1]) as an exception to the primary position of open justice; it must be fully justified and must place no greater restriction on openness than is strictly necessary. This includes the Inquiry being satisfied that there are not measures, other than restriction orders, which could achieve the purpose for which the restriction order is being sought and which are less destructive of the proper functioning of the Inquiry.

2. Within the context of this overarching submission (developed in Part 1 below), these submissions seek to assist the Inquiry with the matters set out at paragraph 7 of the Chairman's notice to CPs dated 22 February 2016. The legal principles which inform the determination of individual restriction order applications are considered in Part 3 below. However, the NPSCPs contend that there is a logically prior issue that has to be addressed first, before considering the other legal principles. That is the question of the way in which the Inquiry is to approach the stance of "NCND"[2].

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[1] CTI note [26].

[2] The stance whereby all questions concerning undercover operations are met with the response that the position can "neither be confirmed nor denied".

3. NCND has to be addressed first, because if the Inquiry were to adopt the approach advocated by the MPS[3] (supported by the NCA[4], NPCC[5] and the Home Office) the consequence of such an approach, whilst paying lip service to a balancing of public interests in respect of each restriction order application, would in fact, as the MPS accept, result in an almost entirely secret Inquiry:

> "*The measures for which the MPS will contend are those which, with no more restriction on public access than can be justified: (i) Ensure that* _no_ *material is disclosed by the MPS or the Inquiry…that confirms any matter that could lead to the identification of a UCO; (ii) Ensure that* _no_ *material is disclosed that puts others at risk of harm; (iii) Ensure that* _no_ *material is disclosed that could damage the public interest…The above will apply save where UCOs have been officially confirmed, or where there is an illegitimate method that is not and never will be used.*" [MPS submissions at [VI.1]; see also, MPS submissions at [I.2(iv)] & [VII.15]].

4. The MPS make clear at VI.1 of their submissions that "*anonymity is not the sole restriction for which the MPS will be applying*". It is possible to go further than that and to deduce at the outset what form of restriction they will be applying for. It is clear, for example, that, in order to protect a UCO's identity, the MPS will contend that anonymity is unlikely to be sufficient. In most cases, UCOs spent a considerable amount of time with those on whom they spied. Their voices are therefore likely to be recognisable to them and, in any event, they would be readily identifiable from the evidence they give about their activities. Therefore, in order to ensure that nothing is disclosed which could lead to a UCO's identification, it would be necessary to impose closed hearings, at the very least, in respect of all evidence which a UCO gives, but very probably also in respect of large amounts of evidence which indirectly relates to their undercover activities. Added to this are restrictions in respect of all methods, even those that are illegitimate, if they are used or might be used in the future. The upshot would be an Inquiry where key evidence in relation to the most crucial events, the true

[3] Metropolitan Police Service.
[4] National Crime Agency.
[5] National Police Chiefs' Council.

nature of which the Inquiry must comprehend in order to fulfil its terms of reference, would be heard in secret.

5. The NPSCPs contend such secrecy would render the Inquiry unable to function, because without openness the Inquiry cannot be thorough or effective. Unless it is thorough and effective it cannot fulfil its terms of reference and allay public concern.

6. Since this would be the consequence of the position for which the SCPs contend, it is essential that the correct approach to NCND in the particular legal and factual context of this Inquiry should properly be analysed at the outset and the Chairman should make a ruling as to the approach the Inquiry will take. The NCA, in their submissions, appear to acknowledge this: "*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*." [NCA submissions at [31]]

7. For the avoidance of doubt and for the reasons developed in Part 2 below, the NPSCPs contend that NCND (that is a consistent wall of silence) has no part to play in this Inquiry. The NPSCPs submit that when NCND is properly understood, with reference to its constituent parts, and properly considered in the particular context of this Inquiry, the interests underpinning it can be addressed without resort to the almost total secrecy for which the SCPs contend.

8. The structure of these submissions is therefore as follows:

PART 1: WHY THIS INQUIRY MUST BE OPEN

PART 2: THE APPROACH TO BE ADOPTED BY THE INQUIRY TO NCND

2.1 The NCND stance and its component interests

2.2 The alternative to NCND in the context of this Inquiry

PART 3: THE LEGAL PRINCIPLES APPLICABLE TO INDIVIDUAL RESTRICTION ORDER APPLICATIONS

PART 1: WHY THIS INQUIRY MUST BE OPEN

9. It is important to be clear about the context of this Inquiry. It is not an inquiry into the use of undercover policing in the context of serious and organised crime, although much of the police submissions and evidence erroneously adopt that focus. The context is covert policing of individuals and groups, not based on suspicion of criminality, but because of their political views and/or involvement in justice campaigns. This context goes to the heart of our democracy and the free exercise by its citizens of their fundamental civil and political rights.

10. The serious public concern, which led to the establishment of the Inquiry includes, but is not limited to, concern about police interference with the democratic process by spying on individuals, including serving Labour MPs and even Ministers, political, environmental and social justice organisations (including those campaigning for accountability following deaths in police custody and racially motivated murders) and trade unions when there was absolutely no legitimate basis for doing so or where doing so was wholly disproportionate; deception of the criminal courts leading to miscarriages of justice; surveillance of Duwayne Brooks, the Lawrence family and those close to them; material non-disclosure to the Stephen Lawrence Inquiry; engaging in sexual relationships, including fathering children, while undercover; disclosing personal information to blacklisting organisations; utilising the identities of deceased children; breaching of legal professional privilege.

11. The Home Secretary, in announcing the Inquiry's terms of reference, described the undercover policing practices unearthed by Mark Ellison in his review as "appalling"[6] and "profoundly disturbing"[7].

12. The public interest in openness and public scrutiny in this context is beyond dispute:

> *"… the rule of law and the democratic requirement that governments be held to account mean that the case for disclosure will always be very strong in cases involving alleged misconduct on the part of the state*" [Lord Clarke JSC, *Al Rawi & others v The Security Service & others* [2012] AC 531 at [102]]

13. Openness is not only vital as a facet of the rule of law, but also at a more practical level: this Inquiry simply cannot function without open consideration of the evidence. The police / state bodies ["SCPs"] are wholly wrong in their submission that the "core" public interest in the Inquiry conducting a thorough investigation requires the police evidence to be heard in secret. To the contrary, the Inquiry can only conduct a thorough Inquiry if the police evidence is made public. The reasons for this are developed in Part 3 at [58]-[66] below, but are set out in headline form here.

14. If the Inquiry hears much of the evidence from the police in secret, it has no effective means of testing that evidence: it will be entirely dependent on self-disclosure by the police in secret. This is in the context of the mass destruction of, and serious and sustained failures to disclose, relevant material on the part of the MPS uncovered by the Ellison review[8] and in the miscarriages of justice cases[9]. The Ellison review found the MPS conduct in the context of the Stephen Lawrence Inquiry to be of such magnitude that

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[6] https://www.gov.uk/government/news/home-secretary-announces-terms-of-reference-for-undercover-policing-inquiry.

[7] www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140306/debtext/140306-0002.htm

[8] The Stephen Lawrence Independent Review, Summary of Findings pp.11, 13, 15, 16, 17, 31.

[9] "*…elementary principles which underpin the fairness of our trial processes were ignored*." Judge LCJ, *R v Barkshire* [2011] EWCA Crim 1885 at [1];

"*public disorder of a far more serious kind than anything envisaged by the original undercover deployment could well have resulted*."[10]

15. It cannot sensibly be suggested in light of this history that an inquiry that is dependent on self-disclosure by the police in secret could be thorough, or effective, or command the confidence of the public. It is fanciful to expect that officers will unilaterally volunteer all misconduct in the process of giving evidence in secret. The Inquiry can only, therefore, assess the extent and effect of undercover police operations by hearing from those affected as well as from the police themselves. But those who have been affected will not know that this is the case if disclosure is not made. Even those who suspect enough to come forward cannot give meaningful evidence unless they know what actually took place.

16. Nor can the Inquiry adequately or fairly assess the purported justification for or efficacy of undercover policing operations, as it must do to fulfil its terms of reference, if assertions are made by officers in justification of their actions in secret, because there is no opportunity for such evidence to be tested or refuted by those whose actions are said to form the basis of the justification. Even where convictions have resulted, these may not be safe by virtue of police misconduct.

17. This is why the contention of the SCPs that the Inquiry can be thorough and effective, even if the evidence is heard in secret, so long as its conclusions are made public, is wholly misconceived. Even if, which is not accepted, open conclusions based on primarily secret evidence were capable of allaying public concern in the context of state misconduct of this nature, the Inquiry will simply not be able to draw valid conclusions without hearing evidence from those affected by undercover policing. And those affected cannot give meaningful (or indeed, in the cases of the many who do not know that they were spied upon, any) evidence if they remain in the dark about what in fact took place.

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[10] Ibid. p.32.

18. In short, both the efficacy and credibility of this Inquiry depend on it being open.

Restriction orders must be a measure of last resort

19. Given the inextricable link between the openness of the Inquiry and its ability to pursue its terms of reference and assuage public concern, restriction orders in respect of police evidence must be a measure of last resort. That is (i) they must be founded on a very careful scrutiny of the evidence that is said to justify them and (ii) the Inquiry should satisfy itself that the interests that restriction orders are said to be necessary to protect cannot be protected by other means. In particular, the NPSCPs contend that the Chairman should first satisfy himself that those interests cannot adequately be protected by measures available to the police themselves.

20. First, the NPSCPs wish to put it on record that they do not accept that any officers are likely to be at risk of harm from disclosure of their identities as a result of their infiltration of the political, environmental and social justice movements in which the NPSCPs were involved. Certainly in respect of the UCOs who have been publicly named to date, none has come to any harm or demonstrated any perceived need to hide. Further, the NPSCPs are deeply concerned that some of the SCPs appear to suggest that officers will face risk of harm from the NPSCPs themselves or other members of the groups of which they were members. They find this hugely insulting and wholly unjustified.

21. If it is the case that any of the officers who infiltrated the organisations to which the NPSCPs belonged also infiltrated organisations whose members might pose a serious threat, then it may be that the police can demonstrate that disclosure of their identity might place them at risk. However, it is submitted that in such circumstances, the primary obligation for ensuring the safety of the officer and of any other affected individual must fall on the police themselves.

22. This is for two reasons: first, the Commissioner owes a duty of care to his officers, and former officers, both in tort and in accordance with their Convention rights. This duty arises irrespective of this Inquiry and it is understood that the Commissioner produces regular risk assessments and, where necessary, will put in place protective measures in respect of an officer assessed as being at risk.

23. Second, if, which is not accepted (save in exceptional circumstances), there is a need for protective measures in respect of an officer falling within the scope of this Inquiry, then such measures are likely to need to be put in place by the Commissioner in any event. This is because, ultimately, it is likely that the identities of those UCOs involved in the infiltration of political and social justice groups will become public at some point even if they are not disclosed by the Inquiry. This is likely to occur, for example, through the work of organisations such as the Undercover Research Group. If that is right, then a restriction order in fact affords little or only temporary protection in any event and does not avoid the need for the Commissioner to put in place his own protective measures. In other words, the loss of openness and its consequent impact on the thoroughness and credibility of the Inquiry that a restriction order entails in fact achieves little in the way of protection.

24. These factors are highly relevant to the Inquiry's assessment when balancing the public interests for and against a restriction order in accordance with the principles set out in Part 3 below. Because, where, as set out above, the credibility of the Inquiry and its ability to pursue its terms of reference depend on openness, a restriction order should not be made unless the Inquiry is satisfied that the steps available to the Commissioner in the discharge of his protective duties are incapable of meeting the risk.

25. For these reasons of both principle and practicality, even where the Inquiry is satisfied on the evidence that disclosure of a UCO's identity exposes him or her to a real risk of harm (and the NPSCPs submit that such instances will be rare given the nature of the organisations with which this Inquiry is principally concerned), regard must first be had to the protective duty of the Commissioner and the measures available to him to safeguard against such risk and only if the Chairman is satisfied that such measures would be inadequate should a restriction order be granted.

PART 2: THE APPROACH TO BE ADOPTED BY THE INQUIRY TO NCND

2.1 The NCND stance and its component interests

26. As set out at [3] & [4] above, if the SCP submissions in relation to NCND were to be accepted, the effect on this Inquiry would be total, or near total, secrecy and its ability to fulfil its terms of reference and to assuage public concern would be destroyed. The correct approach to NCND in the context of this Inquiry must therefore be addressed at the outset.

NCND is a stance adopted by state agencies involved in intelligence gathering

27. It is important to keep in mind that NCND is first and foremost a stance adopted by the security and intelligence services whose officials are deployed in intelligence gathering operations. It is neither a rule of law nor a legal principle, as CTI set out at [94] of their note. Its effect is to put up a wall of silence in response to any information about undercover activities by its operatives. A consistent application, save in exceptional circumstances, lies at its heart.

28. The submissions in this Part address why NCND (as in a consistent wall of silence) has no part to play in this Inquiry.

29. However, first, the NPSCPs wish to put on record that they do not accept that NCND is consistently or genuinely applied by the MPS. This is borne out by the experience of some NPSCPs in their past dealings with the MPS and is supported by submissions on behalf of Peter Francis, dated 7 March 2016, at [14][11]. The NPSCPs contend that NCND has rather been seized on by the MPS as a means through which, under the cloak of law enforcement, misconduct by undercover officers has, at worst, been encouraged and, at least, been allowed to go unchecked, resulting in a lack of accountability in either event.

30. In light of this, the NPSCPs contend that the misuse of NCND should itself be a matter to be examined by the Inquiry and it is likely that the Chairman will need to make recommendations in relation to it at the conclusion of the Inquiry. For this additional reason it should not be deferred to in the manner contended for by the SCPs and should play no part in the Inquiry's processes.

31. In any event and irrespective of MPS abuse of NCND, there is no need for this Inquiry to adopt the approach advocated for by the SCPs, because, for the reasons developed below, the public interests that the NCND stance is said to protect can be given their proper weight in the context of this Inquiry without having to resort to secrecy, save where absolutely necessary.

The state agencies cannot apply an NCND stance to the Inquiry itself but are inviting the Inquiry to mirror it.

32. Neither the MPS nor any other relevant state body can apply a stance of NCND in respect of the Inquiry itself. On the contrary the SCPs all accept a duty to make full and frank disclosure to the Inquiry team. The significance

[11] See, also, for example, the very extensive disclosures made by the MPS to the BBC in the context of the True Spies documentary.

of the NCND stance arises rather in the way in which the SCPs are seeking to persuade the Inquiry to mirror its effect.

33. The CTI consider that the point at which the Chair should assess the weight to be attached to NCND is when he carries out the balancing exercise under s. 19 in respect of each application for a restriction order. However, central to the value to be attached to an NCND stance is its consistent application. This is for the reasons identified in *Scappaticci*. It is the centrality of the need for a consistent application which leads the MPS to make plain that they seek nothing less than secrecy across the board in respect of all evidence concerning their undercover operations, save where there has already been official confirmation of a UCO's identity.

34. The NPSCPs contend that the weight to be attached to the consistent application of NCND cannot meaningfully be examined as part of a s. 19 exercise addressing whether a restriction order should be imposed in the individual case. This can only properly be done as an overarching exercise that assesses and evaluates in the context of the Inquiry as a whole, the respective impacts of:-

    a. a consistent application of secrecy upon the ability of the Inquiry to function and
    b. a presumption of openness upon the component interests underpinning NCND.

35. The NPSCPs submit that the Inquiry must proceed on a presumption of openness and reject any role for the consistent application of NCND for two reasons:-

    a. As set out above, an approach which gives weight to the need for a consistent application of secrecy is antithetical to the Inquiry's ability to fulfil its terms of reference.
    b. It is possible, in the context of this Inquiry and for the reasons set out below, for all of the component interests the consistent

application of NCND is said to protect to be taken into account and protected by other means which do not undermine the Inquiry's ability to fulfil its terms of reference.

The component elements of NCND

36. First, it is important to be clear that there is no public interest in the NCND response in and of itself, it is solely its role as a means of protecting a number of primary interests that gives it value. Therefore, when reference is made to "*the public interest in the NCND policy*" [Bean J in *DIL v CPM* 2014 EWHC 2184 (QB) at [39], or NCND is described as a "*form of subset*" of public interest immunity [Maurice Kay LJ in *SSHD v Mohamed* [2014] EWCA Civ 559 at [20]], such comments are to be read as meaning that NCND is shorthand for the subset of public interests it protects, rather than that there is separate public interest in the NCND stance itself.

37. This is important, because, it makes clear that NCND only has value to the extent that it is necessary for the protection of its component interests. If, as the NPSCPs contend, those interests can be afforded adequate protection by other means in the context of this Inquiry, or are differently affected by disclosure in view of that context, then the value attached to "NCND" in other contexts is irrelevant.

38. The component interests that the NCND stance seeks to protect, as identified by the SCPs, fall into two categories:
    a. individual interests, in particular, those set out in the MPS Summary of Harm (open version) Tab 2 at I and IIa (prevention of harm to individuals arising from disclosure; protection of covert techniques and methodology);
    b. wider interests, in particular those set out in the MPS Summary of Harm (open version) Tab 2 at II(b) & (e)[12] (maintaining confidence of the wider CHIS community that identities will be protected and

[12] It is noted that Tab 2 does not contain any II(d). It is not clear to the NPSCPs whether this is because it has been entirely redacted, or whether it has been missed out in error.

guarding against the impact of loss of such confidence on recruitment / retention of CHIS) and that set out at [32] of the NCA submissions, namely maintaining the co-operation of international partner agencies.

39. The wider interest in maintaining confidence that identities and methods will be protected is said to give rise to a public interest in consistently maintaining an NCND response even where it would not otherwise be justified on the basis of the protection of the individual interests in play[13]. Consistency is also relevant to the "standardised" NCND response for the reasons explained in *Scappaticci* at [15]. However, both the interest in consistency and the value of the standardised response itself are entirely parasitic on the extent to which they are necessary for the protection of the primary interests. If those primary interests can be protected by other means that are less destructive of the Inquiry's ability to function, then such other means should be adopted.

40. The NPSCPs submit that:
    a. all of the individual interests that consistency and the standardised response serve to protect will be weighed in the balance in their own right, in accordance with the principles discussed in Part 3 below;
    b. the wider interests in maintaining the confidence of the CHIS community and foreign agencies will not be undermined by disclosures made in the very particular context of this inquiry for the reasons set out at [42]-[44] below; and
    c. the interest in preserving the utility of the standardised (NCND) response can be protected by far less restrictive means in the context of this Inquiry.

41. The balancing of the individual interests is discussed in Part 3 below and is not repeated here. The following sections address the impact of disclosure

[13] MPS submissions [1.2(iii)], [VII.15].

on the wider interests in the particular context of this Inquiry and preservation of the standardised response.

The effect of disclosures made by the Inquiry on the wider interests of maintaining confidence in the confidentiality of CHIS

42. The MPS' submissions on this issue are founded on the premise that all UCOs and their families have been promised lifelong confidentiality. The NPSCPs do not accept that premise, for the reasons set out below, and note that the MPS acknowledge that it will be required to provide evidence of any assurances given to UCOs as to confidentiality. It is significant that Peter Francis, in his submissions dated 7 March 2016, states that he was not promised lifelong confidentiality.

43. **If**, which is not accepted, the MPS is able to make good its general contention that all UCOs and their families were promised lifelong confidentiality, it then contends that any disclosure of a UCO's identity is not only potentially damaging to that UCO, but undermines the confidence of the CHIS community in general in the MPS's ability to protect the identity of CHIS and thereby serves to deter potential recruits. It submits that the Inquiry should recognise the institutional competence of the police in making such an assessment. The NCA make a parallel argument in relation to the willingness of foreign agencies to co-operate in future if disclosures are made.

44. The NPSCPs make a number of submissions in response:

    a. The MPS themselves can and do depart from a consistent NCND response: see, for example, the MPS Commissioner in relation to Jim Boyling and the very extensive departures made in relation to the True Spies documentary. No evidence has been adduced as to any adverse effect on the confidence of the CHIS community, on recruitment, or co-operation from foreign agencies in the light of those disclosures. See also the submissions on behalf of Peter Francis,

dated 7 March 2016, at [14] to the effect that he was unaware of the concept of NCND during the course of his employment with the MPS;

b. It is well established that courts will, if the balance of public interest is in favour of disclosure, order such disclosure to be made. As such, neither past nor future CHIS should ever be given an expectation of secrecy forever come what may;

c. The MPS and the NCA submissions fail to take account of the very exceptional circumstances of this Inquiry, arising out the very significant level of public concern. The exceptionality of the circumstances of this Inquiry is made clear in Annex A to the submissions on behalf of the Home Office. At [6] of that document, the Home Secretary's responsibilities for police wrongdoing are set out. These arise where "*alleged police wrongdoing is on a national scale, or such as to undermine public confidence in the police service as a whole*". In such circumstances, the Secretary of State "*will, where appropriate, take action to ensure that the effectiveness of the whole police system is not undermined, for example through regulation or legislation or, less commonly, by announcing a public inquiry*." This makes clear that the course taken by the Secretary of State in instigating this Inquiry is wholly exceptional and is necessary because the police wrongdoing, not alleged, but revealed, by judicial proceedings, and the train of inquiries and reports into the activities of the SDS and NPOIU, is such as to undermine public confidence in the police service as a whole. Current and potential CHIS must be presumed to be rational and, as such, it must be readily apparent to them that disclosures made in the context of such an Inquiry set no precedent outside the wholly exceptional parameters of the Inquiry. The MPS submission that "*the detailed circumstances in which a decision that confidentiality should be forfeited in a particular individual's case would be soon forgotten*."[14] is simply untenable in light of the striking circumstances of this Inquiry;

[14] MPS submissions at [V.38(ii)].

d. Nor will disclosure undermine the MPS position, because if disclosure is made, it will be the result of an order of the Inquiry Chairman, not as a result of any MPS decision. Outside of the particular circumstances of this Inquiry, the MPS will, subject to any recommendations the Inquiry might make, remain free to adopt an NCND approach in respect of all other matters;

e. In all of these circumstances, there is no rational basis for any present or future CHIS to consider that disclosures made in the exceptional context of this Inquiry make the protection of the identities of CHIS in the future any less secure. The only basis for such a conclusion would be if another inquiry into abuses in undercover policing operations were to become necessary. But there is no reason to think that that would be likely given the clean-up operation that will have to follow this Inquiry;

f. Indeed, the NPSCPs submit that potential recruits themselves have a strong interest in the effectiveness and thoroughness of this Inquiry, so as to ensure that an effective clean-up is achieved.

g. With respect to institutional competence and the degree of deference the Inquiry should show to the police assertion that any disclosures made would have a detrimental effect on the confidence of current and future CHIS, it is submitted that no deference should be shown. The position in relation to institutional competence and national security is different. The SCPs have failed to address the very particular context of this Inquiry and have not provided any evidence in support of the bald assertion of detrimental effect.

45. It is submitted that the same arguments apply in respect of foreign agencies. It is the serious misconduct on the part of MPS officers, as revealed by *DIL v CPM, AKJ v CPM, R v Barkshire*, *R v Bard,* the Ellison report, that is likely to affect the confidence of other agencies, not an open and effective Inquiry into such wrongdoing.

The alternative to NCND in the context of this Inquiry

46. First, it is important to stress that disclosures made in the context of this Inquiry do not undermine the standardised response in any other context. So, for example, if the situation that arose in *Scappaticci* were to arise again following this Inquiry, the ability of the relevant police force or agency to provide an NCND response if they chose to do so would not be affected. The fact that disclosures were made of other officers' identities in the course of this Inquiry would say nothing about whether Mr Scappaticci 2 was or was not a UCO.

47. Within the context of the Inquiry, it is acknowledged that if a restriction order is exceptionally to be made (taking into account all of the matters set out in these submissions at Parts 1 and 3) then there has to be a mechanism whereby such an order can be given effect. I.e. it cannot be that the information the restriction order is imposed to protect can in fact be inferred from the Inquiry's response. However, such a consequence can be avoided in the context of the Inquiry without the complete destruction of openness that follows from adopting NCND. This can be illustrated by reference to the examples set out in the MPS Tab 6 at [9].

48. On the MPS "NCND approach" to the scenarios there set out[15], the only way to avoid inferences being drawn in respect of one question in light of the answer given to another is total non-disclosure – see Tab 6 [14] & [20]. However, a more open route is available to the Inquiry. This is because the Inquiry will, through the restriction order application process, make a prior determination (subject to review as evidence is heard – see further below at [50]-[52]) of all of the matters where the balance of public interest favours disclosure. It can, therefore, disclose that A was a CHIS, without thereby revealing anything about B. This works as follows:

[15] I.e. where A is a former UCO in respect of whom there is no risk of harm; B is a former UCO in respect of whom there is a risk; and C and D are not UCOs at all, but are wrongly suspected of being so.

49. **If**, the Chairman, having carefully scrutinised the evidence of the consequences of disclosure, and having considered all of the competing public interests and the protective steps available to the Commissioner to mitigate the risks, were to conclude that a restriction order should be granted in respect of B, then he simply discloses nothing about B. In respect of C and D no disclosure is made, because they are not UCOs, so, unless there is a particular reason why the Inquiry should confirm that they are not UCOs, there is nothing to disclose. From the NPSCPs' and the public's point of view, they will receive information about A, but will hear nothing about B, C or D. Those who have suspicions about B, C or D will not know whether the lack of disclosure means that they are in fact UCOs, but a restriction order has been granted prohibiting disclosure, or whether it is because they are not in fact UCOs. Everyone else will not even know of B, C or D's existence. The restriction order in respect of B is therefore effective, notwithstanding the disclosure made in respect of A.

50. But what if an NPSCP, during the evidential phase, were to ask a question of a witness seeking to ascertain whether B (or C or D) was a UCO? The answer lies in the Chairman's powers to determine the scope of relevant evidence and questioning in ways that are not available to a judge in adversarial proceedings, where the issues are determined by the way the parties put their cases. Thus, the Inquiry can (and consistently with its rulings on restriction orders, should) cater for this situation by ruling that there shall be no questions during open evidence seeking to elicit whether any individual is a CHIS or which concern the deployment of tactics and strategies which the Inquiry has not itself ruled can be addressed in public.

51. The above course is premised on the SCPs complying with the duty, that they themselves have acknowledged, to make full disclosure to the Inquiry of all operations and material relevant to the Inquiry's terms of reference and the Chairman then considering that material at the outset and making disclosure, or, where strictly justified and as a measure of last resort,

making a restriction order. However, as set out at [14]-[16] above, in view of the destruction of police records that has already occurred and the history of serious and material non-disclosure, the Inquiry must also be able to cater for situations arising after the initial disclosure phase which raise the need for further disclosure and / or inquiries. In short, the Inquiry's rulings on the ambit of disclosure cannot be a once and for all determination. It must, therefore, establish a mechanism whereby questions which arise during the course of the Inquiry can be addressed without undermining any restriction order that has been made or which might be made in respect of newly emerging material. Such questions might arise, for example, as a result of members of the public coming forward with additional information or concerns, or as a result of gaps becoming apparent in the police evidence.

52. Again, by virtue of the Chairman's powers to control the scope of the evidence and questioning within the Inquiry, such situations can be catered for without resort to an NCND blanket response. For example, if a member of a family justice group were to come forward during the evidential phase and raise a concern with the Inquiry that she had been the target of an undercover operation, but that nothing had been disclosed about her or her group following the initial disclosure phase. The Inquiry would be able to investigate those concerns (initially without making anything public) on the basis of the material already made available to it by the police, or by requesting further information if necessary. If that process raised the need for an application for a restriction order, the same could be considered on the basis considered in Parts 1 and 3 of these submissions. At the end of that process, the Inquiry would then either make disclosure and hear open evidence, or if (exceptionally) a restriction order was justified, the individual would be informed that no disclosure is to be made in his/her case. The same response could also be given if no disclosure was to be made because the individual concerned was not in fact the target of any undercover operation. In this way, the effect of any restriction order made is preserved, but without requiring the Inquiry to adopt an NCND stance

that would result in the withholding of material even where the balance of public interest otherwise favours disclosure.

53. Further, because this Inquiry is a unique event, there is no risk that its rulings in relation to disclosure will set a precedent or undermine the ability of a future court to provide a standardised response where necessary on the balance of public interest.

54. For all of these reasons, the component public interests that the NCND stance is said to protect can be given their proper weight by the Inquiry without the need for it to mirror the effect of NCND.

55. The Chairman is respectfully invited to give a preliminary ruling indicating that, given the need for openness in order for the Inquiry to fulfil its terms of reference, together with the ability of the Inquiry to protect all the interests which a consistent application of NCND serves to protect:

    a. It will not mirror NCND by imposing restriction orders in respect of all UCOs whose identities have not yet been officially confirmed;

    b. On the contrary, the Inquiry will approach each application for a restriction order by weighing only those public interests for and against disclosure that affect the particular case in question. The public interest in maintaining a consistent application of NCND is not one of those.

PART 3: THE LEGAL PRINCIPLES APPLICABLE TO INDIVIDUAL RESTRICTION ORDER APPLICATIONS

56. The NPSCPs agree with much of the analysis of the statutory scheme and the relevant legal principles that inform its application as set out in CTI's note. This response is limited to any points of difference either with the contents of the CTI's note or the response of the SCPs. It begins with an analysis of the key public interests that fall to be considered under s. 19. It proceeds on the assumption that the implications of the SCPs' position on

NCND has already been addressed and that the Chair has concluded he will not mirror NCND by imposing blanket restriction orders.

RELEVANT PUBLIC INTEREST FACTORS CALLING FOR AND AGAINST OPENNESS

57. This section seeks to identify the key public interests that the Chair will be required to weigh in the balance when assessing in the individual case whether to make a restriction order. They will apply in varying combinations depending upon the circumstances of the particular case. The NPSCPs note the Chairman's direction that he does not wish, at this stage, to receive submissions, save at the level of generality, as to the **weight** to be given to the competing public interests to be considered when determining applications for restriction orders. It is, however, important to be clear at the outset how central some of these interests are. The NPSCPs will make further detailed submissions as to the weight to be attached to the competing public interests at the appropriate time.

The public interest in the Chairman being able to pursue his terms of reference as widely and deeply as he considers necessary.

58. As the Inquiry Note recognises, the Court of Appeal in *R (Associated Newspapers Limited) v Leveson* [2012] EWHC 57 Admin at [56] emphasised that this is of "*the utmost importance*." Its importance is highlighted in section 19(3)(b) which expressly refers among all possible public interests to this one alone. Thus the Chair is permitted to specify only such restrictions as he considers to be "*conducive to the inquiry fulfilling its terms of reference, or in the public interest*".

59. The terms of reference specifically require the investigation to include '*whether and to what purpose, extent and effect undercover police operations have targeted political and social justice campaigners*' including through '*the undercover operations of the Special Demonstration Squad and the National Public Order Intelligence Unit*'. As already noted above, the Inquiry was established because of the serious public concern arising from evidence

that officers from these two units had engaged in long term spying on individuals involved in political and social justice campaigns. It is not simply that there is evidence of abuse. It is a matter of established fact, clear from the various official investigations and the police's own admissions, that officers operating undercover in the SDS and NPOIU have:-

a. Engaged in wholly unjustified interference with the democratic freedoms of civil society by spying on political and social justice campaigns with no apparent legitimate purpose with respect to the investigation and prevention of crime and/or disproportionately;
b. Subjected serving Labour M.Ps to surveillance with no legitimate purpose, fundamentally undermining the democratic process contrary to the spirit if not the letter of the Wilson doctrine;
c. Infiltrated the Stephen Lawrence campaign and other social justice campaigns against police racial discrimination;
d. Deceived the Stephen Lawrence Inquiry about their activities;
e. Gathered intelligence on legal and political campaigns concerning police accountability and deaths in police custody/at the hands of police officers;
f. Gathered information on people's political activities in order to create illegal employment blacklists;
g. Engaged in long term intimate sexual relationships with women while undercover including fathering children;
h. Failed to disclose their undercover role in the course of prosecutions thereby misleading the courts and causing serious miscarriages of justice;
i. Used the identities of dead babies as cover names.

60. These 'appalling'[16] practices obviously affect the population as a whole. They fundamentally erode trust in the ability of the police to use this highly intrusive covert technique within the strict confines of the law. Without the trust of the public it goes without saying that the technique can have no

[16] The word used by the Home Secretary in announcing the Inquiry. See footnote 5 above.

democratic legitimacy. If there is to be any prospect of its future use commanding public confidence and legitimacy, the public must be put in a position where it can have the necessary confidence that it will operate in a way that is strictly justified, proportionate and free from abuse. The Inquiry must be able to make recommendations that will achieve this if its terms of reference are to be fulfilled.

61. As set out in Part 1 above, and developed in more detail below, it simply cannot do that if it does not hear evidence from those affected, but many of those affected will not be aware that this is the case unless evidence as to what has gone on is made public. Even those who currently have a degree of information will not be able to give meaningful evidence without disclosure as to what was actually going on.

The public interest in the Inquiry obtaining all relevant evidence

62. This is ancillary to and essential for the realisation of the public interest in the Inquiry being able to fulfil its terms of reference. In the Leveson inquiry, this pressing need justified the imposition of a restriction order as the only means by which relevant evidence could be secured. In the present case, the opposite applies: relevant evidence can only be secured by openness, it is of the utmost importance that a way be found for such openness to be facilitated, so that the evidence can be considered.

63. Because of the wall of secrecy around undercover policing operations, these appalling abuses only came to light in the first instance through the research of one victim of Mark Kennedy who was able to uncover his true identity. This then led to the discovery of further grave misconduct on his part leading to the quashing of a number of convictions, and through the chains of inquiry that were then set in train, the emergence of all the abuses that are known about to date. But there is no reason to believe that the full extent of any abuse has now been identified. Far from it, as the CTI note recognises at [18], further events of a similar nature may have occurred. It is fanciful to suggest that the officers themselves will self

disclose such abuses. The Ellison review has already uncovered serious and sustained failures to disclose relevant material. The only means by which to be confident of uncovering further evidence is if the names of the officers who operated undercover are disclosed. Only then can those affected acquire the necessary information to recognise that they were victims of abuse and come forward with their evidence. Anything less will inevitably compromise the ability of the inquiry to conduct a deep and thorough investigation and so fulfil its terms of reference.

64. Conducting closed hearings in relation to the evidence of UCOs will also prejudice the Inquiry's efforts to get to the truth because it will lack the means to test the UCO's evidence. Even those who suspect enough to come forward will not be in a position to give meaningful evidence because without knowing what the officer said they will not know that their evidence contradicts his.

65. But there is a more fundamental risk to the effectiveness of the Inquiry if UCOs give evidence in closed hearings and that is that the NPSCPs whose evidence is so central to uncovering the truth refuse to provide evidence. This is addressed below in relation to *the public interest in victims of abuse being able to participate in the Inquiry*.

The public interest in securing public confidence in the outcome of this Inquiry

66. As Mark Kennedy's long term abusive conduct demonstrates, the introduction of a supposedly robust regime under the Regulation of Investigatory Powers Act 2000, has not provided the protections that are required to ensure that undercover policing is conducted lawfully. Public confidence can only be restored (and that of the Secretary of State) before the whole technique falls once again under a blanket of secrecy, if the public can be confident that the Inquiry has been fully able to identify the nature, extent and causes of past abuse. Only then can it make recommendations for reform rationally capable of ensuring a robust framework of regulation in respect of deployment, supervision and

management to ensure that undercover policing in the future fully meets the requirements of legality. It cannot do this unless it is able to uncover the full nature and extent of the abuses that have occurred. Of equal importance is that the public and the victims are not left feeling that there has been a cover up. The legitimacy of future undercover policing and this Inquiry turns, therefore, on setting the highest possible premium on openness.

The public interest in victims of abuse being able to participate in the Inquiry

67. In respect of all those victims whom the Chairman has designated as core participants pursuant to Rule 5 of the Inquiry Rules 2006, he has by that designation recognised that they have a significant interest in an important aspect of the matters to which the Inquiry relates. The effect is to afford them important participatory rights in the process. Those participatory rights bear most directly upon the exercise of the Chairman's statutory and common law duty to act fairly. As has been foreshadowed, restriction orders which impose a closed hearing in respect of matters that directly affect them will have the effect of removing completely their right to participate which flows from their designation under Rule 5. They cease to be participants and become mere witnesses.

68. Each group of victims has suffered a grave infringement of their democratic human rights and/or freedoms. They each have a resulting pressing interest in uncovering the truth about what has happened to them, and doing so in a way that recognises their special status over and above the public at large, including but not limited to:-

    a. The Labour M.Ps and Ministers suffered a gross invasion of their democratic rights as elected Parliamentarians. Undercover surveillance of their activities ran entirely counter to the spirit, if not the letter, of the Wilson doctrine introduced to prevent precisely such unjustified interferences.

b. The victims of miscarriages of justice suffered the serious injustice of a wrongful conviction brought about by violations of their right to a fair trial under Article 6.

c. The victims of intimate sexual relationships with undercover officers have suffered grave violations of the most intimate aspects of their private lives, already clearly acknowledged by the MPS in the apology it has given to them. Despite having achieved this apology, they have still not been provided with any disclosure.

d. The parents of children who have died have similarly suffered an exceptionally painful intrusion into their private lives.

e. The families of those who have died in police custody and at the hands of the police have been notified that the police have gathered intelligence on their activities.

f. Organisations campaigning for police accountability and against police misconduct have been infiltrated by the very organisation whose misconduct they have sought to expose.

g. Political, social and environmental activists have been spied on and attempts made to undermine their legitimate participation in civil society. This has had, and continues to have, a chilling effect on grass roots political participation.

h. The victims of blacklisting suffered long-term unemployment and extreme hardship arising from information illegitimately gathered and distributed to employers about their political association and beliefs; treatment which has been recognised by the British Government[17] as a violation of their fundamental rights under Articles 8 and 11.

69. The right to the truth is emerging as a key interest underpinning the state's duty to investigate serious human rights abuses: see *El Masri v Macedonia* (2013) 57 E.H.R.R. *25* at [191] and *Husayn (Abu Zubaydah) v Poland* (2015) 60 E.H.R.R at [495]. In both cases the applicants had been subjected to

[17] Intervening submissions on behalf of the Secretary of State for Business, Innovation and Skills in *Smith v Carillion* [2015] IRLR 467.

extraordinary rendition following their handover to United States officials. Of the right to truth the Grand Chamber in *El Masri* made the following observations:

> 191 Having regard to the parties' observations, and especially the submissions of the third-party interveners, the Court also wishes to address another aspect of the inadequate character of the investigation in the present case, namely its impact on the right to the truth regarding the relevant circumstances of the case. In this connection it underlines the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened. The issue of "extraordinary rendition" attracted worldwide attention and triggered inquiries by many international and intergovernmental organisations, including the UN human-rights bodies, the Council of Europe and the European Parliament. The latter revealed that some of the states concerned were not interested in seeing the truth come out. The concept of "state secrets" has often been invoked to obstruct the search for the truth. [...]
>
> 192 [...] However, while there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, an adequate response by the authorities in investigating allegations of serious human-rights violations, as in the present case, may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.

70. Some of the victims have already written to the Inquiry indicating that they do not intend to participate if the Inquiry proceeds in secret. Indeed, they would be unable meaningfully to do so in the absence of disclosure. NPSCPs cannot be expected to give evidence about often the most personal and sensitive aspects of their private lives in a vacuum. Even attempting to articulate how this might work exposes how ridiculous such a situation would be: would a woman who suspects that her partner was a UCO have to give evidence about every aspect of that relationship without knowing that he was in fact a UCO, or what aspects of his behaviour might therefore be relevant? Would the Inquiry have to hear from every individual who considers they may have been the victim of a miscarriage of justice as a result of SDS / NPOIU infiltration and material non-disclosure and about

every aspect of their case in order that the individual concerned can be sure that, if there is relevant material in respect of his case that has not been disclosed, his evidence will have covered it? Plainly such a scenario would be unworkable and, in the case of many NPSCPs would further exacerbate the harm they have already suffered. If necessary, psychiatric evidence can be provided to the Inquiry of the injury that is being caused to the victims of undercover policing by the continued denial of the truth about what happened to them.

71. For those who have previously suffered bereavement and/or injustice, a discrete form of re-traumatisation arises in circumstances where they have been given reason to believe that they were the subject of some previous attention by the third Operation Herne report but they do not know sufficiently the level and purpose of that activity. For them and wider community campaigns, it is the not knowing as well as knowing only a little that now provides for mistrust and a chilling effect in relation to current and future activism, access to support groups, and participation in legal processes, including inquests and inquiries. This in turn carries the risk of adversely affecting the quality and enjoyment of political campaigning, and family support, in a democratic society, matters which engage Articles 6, 10 and 11 ECHR.

72. In short, the indication that NPSCPs will not participate without disclosure is not stated as a threat. Rather it reflects the desperate need of the victims who have suffered incalculable harm to uncover the truth. They have ceaselessly sought to do so and their efforts have been constantly frustrated by the MPS. The Inquiry provides the only opportunity for the MPS to account to them for the abuse their officers perpetrated under the cover of secrecy and deception.

The public interest in public access and freedom of expression

73. S.18 of the Inquiries Act 2005 enacts the principle of open justice so that the public are free to receive and impart information emanating from the

inquiry. This public interest also finds expression in Article 10 ECHR. While Article 10 does not guarantee a right to be provided with information[18], where information which would otherwise be imparted is subject to restriction, such restriction constitutes an interference with freedom of expression which includes both a freedom to express and receive information: see e.g *In re Guardian News and Media Ltd and others* [2010] 2 AC 697 at [34]; *R (BBC) v Secretary of State for Justice* [2013] 1 WLR 964 at [34][19].

74. Article 10 protects not only the substance of ideas and information but also the form in which they are conveyed: *News Verlags GmbH & Co KG v Austria 31 EHRR 246, 256,* para 39. "*It is not for the court to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists, including as to whether they report the names of persons involved in proceedings*": *In re Guardian News and Media Ltd and others* [2010] 2 AC 697 at [35] and [63-5]; *R (BBC) v Secretary of State for Justice* [2013] 1 WLR 964 at [40 and 43].

75. The value to be attached to freedom of expression varies according to the circumstances and must be measured in specifics: *R v SSHD ex parte Simms and O'Brien* [2000] 2 AC 115 at p. 127. Given the huge public importance of the matters which the Inquiry is addressing, great value attaches to freedom to impart and receive information in relation to it. The media will no doubt play a vital role in relation to this particular public interest in the course of the inquiry.

The public interest in political and community participation

76. As noted above at [71] concern and suspicion about unjustified police infiltration has a chilling effect on political and community participation.

[18] See MPS at [V.20].

[19] The MPS' reliance on the Supreme Court decision in *Kennedy* at V.20, is wrong. This was concerned with whether Article 10 imposes a duty to impart information and any correlative right to receive it, not the interference with freedom of expression that arises when information which would otherwise be imparted, is withheld.

This is relevant to participation by the public at large, but also, for example, in relation to those who have participated in family justice campaigns, it has the effect of inhibiting their access to inquests and other legal processes for fear that it will expose them to covert surveillance and targeting.

The public interest in rectifying miscarriages of justice

77. It is well established that ensuring that a miscarriage of justice does not occur will override the public interest in non-disclosure of an informant:

> "*…if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to shew the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail.*" [*Marks v Beyfus* (1890) 25 QBD 494 at p.498]

78. This principle has been repeatedly endorsed by the courts: see, for example, *R v Agar* (1990) 90 Cr App R 318; *DIL* [26] & [27].

79. It is an express function of this Inquiry to identify any potential miscarriages of justice arising as a result of an undercover policing operation or its non disclosure and to refer the same to the panel of senior members of the Crown Prosecution Service and the police that has been specially established to consider them further. It is also clear from the ruling of HHJ McCreath, dated 18 December 2015, sitting at Southwark Crown Court, when quashing the conviction in the case of R v Jordan as a result of material non-disclosure in respect of the activities of Jim Boyling, that the criminal courts are looking to this Inquiry to identify other potential miscarriages of justice and to fulfil the requirements of open justice.

80. It is equally plain that this cannot be a process that is solely dependent on self-disclosure by the police. Even if all relevant material were to be disclosed to the Inquiry, it is evident from the experience of Operation Herne that it would be impossible for the Inquiry to process it all without

input from the potential victims. Operation Herne has estimated that it would take their investigation 27 years to consider all of the material with which it has been provided. It is therefore essential for the victims to be able to come forward in order that consideration of the material can be correctly focused. However, in order for victims to know to come forward, the cover names of the officers involved must be made public. This is the only practicable means by which the miscarriages of justice that have occurred can now be rectified.

The public interest in protecting victims against further abuse

81. As noted above, some of the abuses perpetrated by the undercover officers took place within the most intimate sphere of the victims' private lives. The MPS has itself acknowledged in the *DIL* and *AKJ* litigation the enormity of the harm that was caused. Some NSPCs do not want to expose themselves to further intrusion but wish to protect their privacy by maintaining anonymity. Anonymity was readily granted to those women who sought it in the High Court litigation. There is an obvious public interest in the Inquiry not compounding the intense harm already done to victims by unnecessarily exposing them to the public gaze.

82. The NPSCPs also raise at this juncture that a considerable amount of information has been collected by the MPS pertaining to the private lives of NPSCPs and other members of the public. The overwhelming majority of such material will be of no relevance to the terms of reference of this Inquiry save in the respect that its collection and retention constitutes a grave invasion of privacy. It is submitted that where private information is disclosed to the Inquiry it should be treated as sensitive personal data and, save where exceptionally it is of relevance to the terms of reference, it should not form any part of the Inquiry process. The Chairman is requested to put in place a mechanism whereby the individual concerned will be informed of the Inquiry's receipt of such material and its provisional

view as to relevance, in order that the individual concerned may make representations and, if necessary, apply for a restriction order.

The public interest in not revealing tactics and methods deployed in the course of undercover policing

83. The MPS submit that this public interest extends to all methods or tactics save those that are illegitimate and are not and never will be used. If the MPS submission were correct then the mere possibility that forming sexual relationships[20] might be deployed as a method of gathering intelligence in the future would mean that the admittedly illegitimate past use of this tactic by undercover officers could not be examined in public. The NPSCPs submit that there is no public interest in protecting a method that at the time of its deployment was illegitimate irrespective of whether it might lawfully be deployed in the future. If a decision is made to deploy it in the future on legally justified grounds then the fact of its deployment at that time can remain confidential through the police's application of NCND and the regulatory framework contained in RIPA. The fact that a technique was examined as an illegitimate method at this Inquiry would likely lead the public to conclude that whatever else undercover operatives are doing they are not using that particular technique. In any event, before the Inquiry can be persuaded that there is any public interest in protecting illegitimate methods, the MPS will have to provide a cogent explanation as to how its examination in the course of the Inquiry could damage its future use.

84. To the extent that the MPS is able to identify a rational basis for protecting illegitimate methods on the ground of possible future authorised use, there are obviously a very large number of public interests to be weighed in the balance against the imposition of a restriction order, all pointing to the need to achieve as public an inquiry as possible to restore public confidence. The need to " counter or .. neutralise the obvious alternative

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[20] This is used as an example because the MPS has made clear in its apology to the women in the *DIL* and *AKJ* cases that this was not an authorised tactic.

surmise, namely a sustained "cover up""[21] is particularly important here. Hiding from public view admitted wrongdoing, which could even amount to criminal conduct, could readily be seen as part of a general cover-up.

85. Further, where methods or techniques have already been publicly disclosed, for example by the claimants in the DIL and AKJ litigation, there can be no justification for granting a restriction order in respect of these. The information is already public.

The public interests identified in s. 19(4)

86. Section 19(4) identifies a number of matters to which the Chairman must have regard in determining whether a restriction order is necessary as being conducive to the Inquiry fulfilling its terms of reference or in the public interest. These include two of the public interests on which the SCPs rely as weighing in favour of a restriction order, namely the public interest in avoiding or reducing a risk of harm to undercover police officers, and the public interest in maintaining promises of confidentiality given by the MPS to the undercover officers.

87. *(i) Avoiding the risk of harm*: where the alleged risk of harm is to the life or limb of an undercover police officer, then in the first instance this falls to be considered under s. 19(3)(a) in accordance with the requirements of the Human Rights Act 1998 and the rights conferred under Articles 2 and 3. Consideration is given to this below. Consideration must also, of course, be given to the harm caused to the victims of undercover policing by the continued denial of the truth, as set out at [67]-[72] above. Further, as set out in Part 1 above, the Inquiry must have regard to the means available to the police themselves to protect against the risk of harm

88. Insofar as the Inquiry decides not to impose a restriction order under Articles 2 or 3, then it may again consider the risk to life or limb under s.

[21] Laws LJ in *R (E) v Chairman of the Inquiry into the death of Azelle Rodney* [2012] EWHC 563 (Admin) [26].

19(3)(b). Considerations of fairness, including subjective fears on the part of officers, will also have to be taken into account at this stage. The balancing exercise at this stage will necessarily be made on the prior finding of the Chair that either:-

a. There is no real or immediate risk of Article 2 and 3 ill-treatment should a restriction order not be imposed; or

b. That even if there is such a risk, the particular factors calling for disclosure outweigh that risk, such that measures other than restriction orders will need to be deployed to protect the individuals[22].

89. If the Chairman has made a decision on the basis of a. then the nature and extent of the risk to life or limb he has found to have been established can be taken into account as one of the factors to be weighed in the balance under s. 19(3)(b). However, if the Chairman has based his decision on b. above, then it is submitted that he could not rationally conclude that a restriction order should nonetheless be imposed under s. 19(3)(b) on the basis of such a risk. For these reasons issues related to the risk of harm which officers might face are addressed below when consideration is given to the application of Article 2 in accordance with s. 19(3)(a).

90. *(ii) The public interest in maintaining a promise of confidentiality*: The NPSCPs note that CTI's note requires the MPS to provide evidence of what assurances were given to each officer and in what circumstances. They also endorse the analysis in CTI's note at [90] that any confidence owing to the officers by reason of assurances they were given is simply one of the factors to weigh in the balance. They further submit that insofar as any assurance was unqualified it was improperly given. The MPS well knew or ought to have known that there might be circumstances in which they themselves might consider it necessary to disclose. Moreover, they knew

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[22] See [93] below where submissions are made on the factors the Inquiry can take into account in assessing whether to impose a restriction order where it is satisfied that there is a real and immediate risk to life or limb.

or ought to have known that circumstances might arise where disclosure was beyond their control because the decision would vest in a different body such as a court. A promise of confidentiality, properly qualified to make clear that there could be circumstances in which a disclosure might be made, would contemplate disclosure in circumstances such as this Inquiry, that is, following a careful judicial determination of the compatibility of disclosure with the human rights of the officers and a careful and thorough weighing of the competing public interests. It is submitted that this is the most important factor to take into account when determining what weight to give to the actual assurances that were given. Finally, the Inquiry should consider whether the anonymity which that promise has conferred has been abused by the officer who is still seeking to hide under it. A duty of confidence is a creature of equity and those seeking to benefit from its obligations should have clean hands: *Coco v. A. N. Clark (Engineers) Ltd.* [1969] R.P.C. 41. Even if the assurances are contractual, this equitable principle should still inform the balancing exercise.

SECTION 19(3)(a)

Public interest immunity under s. 19(3)(a).

91. The NPSCPs do not take issue with the principles outlined in the CTI note in relation to public interest immunity. They also agree with [41] that s. 19(3)(b) better reflects the reality of the situation and should be the preferred route to conduct the balancing exercise between the relevant competing public interests calling for and against the imposition of a restriction order. This is important because while section 19(3)(b) requires the Chair to specify such restrictions as are necessary in the public interest taking into account the factors identified in sub-section (4), it also requires him to impose only such restrictions as he considers to be conducive to the inquiry fulfilling its terms of reference. Thus, if a restriction is not conducive to the inquiry fulfilling its terms of reference, this is a very powerful factor indicating that the restriction is not in the

public interest. While this is not in the least surprising given that the whole object of establishing an inquiry is that it fulfil its terms of reference, conducting the assessment under s. 19(3)(b) underscores the very great weight that this factor must be given in the context of a public inquiry.

92. The NPSCPs agree that in all other respects the approach which the courts take in conducting a PII assessment should inform the approach which the Inquiry takes under s. 19(3)(b), save in respect of the approach to NCND, which is addressed in Part 2 above.

HRA, Articles 2 and 3 ECHR

93. Like CTI, the NPSCPs have not found any case law in which the question whether, if Article 2 is engaged, the public interest in the credibility of the inquiry can be taken into account when assessing what protective steps are reasonably required. However, it is submitted that Lord Carswell was correct at [21] of *Re Officer L* (cited at [53] of the CTI note) to consider that such an approach appears correct in principle. The steps that it is reasonable to take to protect life necessarily vary according to the circumstances. One relevant circumstance is the extent to which a pressing countervailing interest would be undermined by taking a particular measure to reduce the threat. The greater that countervailing interest the more reasonable it may become to find alternative ways to do so even if those alternatives are more costly. In assessing what steps it is reasonable to take to protect a real and immediate risk to life, factors such as the credibility of the Inquiry do therefore fall to be taken into account. Thus, as set out in Part 1 above, given the centrality of openness for the effective and credible functioning of this Inquiry, even if (which the NPSCPs submit will arise rarely if at all) the Chairman is satisfied, on the evidence, that there is a real and immediate risk to an officer, the primary means of the state discharging its Article 2 obligations must be by way of protective measures put in place by the police, rather than via the granting of a restriction order. This approach is necessary in order for the Inquiry to function, and also, in some cases, to give effect to the victims' rights to

effective participation under Article 3, given the extent of harm they have suffered as a result of illegitimate undercover policing and continue to suffer by virtue of the ongoing denial of disclosure. Additionally, there is the pragmatic point addressed in Part 1 above that restriction orders are likely to be ineffective in the long run in any event, given the success and determination of political and social justice groups in uncovering the identity of UCOs.

94. **Deference to the MPS**. Turning to the SCPs submission that the Inquiry should adopt the same degree of deference to their assessments of the threats that would flow from disclosure as the courts show to the intelligence service's assessment of threats to national security. Assuming that the position of the SCPs is that such deference is required not only in assessing whether an NCND response should be mirrored by the Inquiry, but also whenever the Inquiry is required to assess whether disclosure will threaten any other public interest or is prohibited by a particular rule of law such as Article 2 or 3 ECHR, the NPSCPs submit that no such deference is justified. Thus in relation to an assessment of the risks under Articles 2 or 3, all participants agree with CTI that these must be based on objective evidence and the threshold is a high one. In none of the cases, including in *Re L* itself, have the courts stated that deference must be given to the assessment of the police. The court is in as good a position as the police to make that assessment. As Nicholson LJ stated in *In re Donaghy's Application* [2002] NICA 25(1) at p. 15 *"[t]hey do not have to be slavishly accepted if the Tribunal considers that they are exaggerated*". The Inquiry's ability to assess the risk depends not how the police characterise it, but on the quality of the evidence the police present in support of the existence of a risk.

95. The same is true with respect to the disclosure of methods. The Inquiry is in just as good a position as the police to assess whether a particular disclosure is going to give away methods used by undercover officers and so undermine the future utility of the technique. Again, its assessment

depends upon the police providing a clear explanation of how such disclosure is liable to have such an effect. For example, if it is by way of a mosaic effect, the process of joining up the dots must be explained so that the court can assess for itself the likelihood of such an outcome.

96. Finally, on risk of harm, in relation to all those officers who have already had their identities disclosed, whether officially or not, the extent of whatever risk they face from disclosure has already materialised. If protective measures were required, the police will already have put them in place. The imposition of a restriction order seeking to protect their identity will serve no purpose[23].

Articles 8 and 10

97. The NPSCPs note CTI's reference at [73] of their note to the view of Lord Justice Toulson in *R (Associated Newspapers Ltd) v Leveson* that neither Article 8 nor Article 10 add anything to an assessment of fairness. This is so only if in assessing fairness the Inquiry takes into account fairness towards non-participants such as the media. Ordinarily, however, an assessment of fairness is concerned with the impact of procedures upon the parties to a hearing.

98. The NPSCPs disagree with the MPS' submissions at V.17. This suggests a different outcome is possible if an assessment is made whether to impose a restriction order under Article 8 in accordance with s. 19(3)(a) to that which would follow an evaluation of the relative weight to be given to the same factors as a matter of fairness or in accordance with a PII balance under s. 19(3)(b). While there is a difference in the language of sub-sections (3)(a) and (b) of section 19, it is inconceivable that were the Chair to conclude that the Article 8 rights of a witness overrode all other competing interests, he would impose a restriction order under section

[23] See by analogy the observations of Lord Justice Judge in *Savage v Chief Constable of Hampshire* [1997] 1 WLR 1061 at 1067, that once there has been (self) disclosure further secrecy cannot serve to protect the officer.

19(3)(a), but not as a matter of fairness or in the public interest under s. 19(3)(b).

99. Nonetheless, the NPSCPs submit that there is merit in invoking these Convention rights in the evaluation of the competing public interests because where the interests they seek to protect are at stake, their structure, as qualified rights, provides a useful framework for ensuring that all relevant factors are put into the balance and appropriately weighted. The matters that fall to be balanced against each other will vary according to who is seeking a restriction order in reliance on their Article 8 rights.

100. What follows is not intended to be an exhaustive list of the factors likely to be relevant to different applicants.

101. *An undercover officer:* The privacy interests that such an officer might invoke are:

 a. His right to private and family life. He may argue that if his identity is disclosed he and his family are liable to be harassed by the press or by members of the public, the disclosure is likely to impact upon his relationships with others, and/or is liable to lead to psychiatric harm. Objective evidence will be required to support any such argument including as to the likelihood of psychiatric injury: see e.g *X, A Woman Formerly Known as Mary Bell v O'Brien; Carr v Newsgroup Newspapers Ltd* [2005] EWHC 971 (QB). In this regard it will be important to provide the Inquiry with evidence as to how the interests for which protection is sought have been interfered with in the cases of those undercover officers who have already had their identities publicly confirmed, whether officially or not.

 b. The MPS have suggested that some officers might rely upon Article 8 on the basis of a risk that they would find themselves unable to

pursue a particular occupation[24]. It is far from clear that this would fall under Article 8[25], or that circumstances could arise in which it would outweigh the fundamental interest in openness given the relationship between openness and the Inquiry's ability to function, but even if it were capable of doing so, the officer would have to produce cogent evidence as to how disclosure would render him unable to pursue a particular occupation and obviously demonstrate that the occupation in question is one he would have wished to pursue.

c. The promise of confidentiality falls within the scope of Article 8 and has already been addressed above.

102. The factors which fall to be balanced against any interference that the undercover officer can establish, in accordance with sub-paragraph 2 of Article 8 will include: -

a. The vital interest of the Inquiry fulfilling its terms of reference by ensuring that it has available to it all relevant evidence; a process that cannot be achieved without openness.

b. The correlative importance of securing public confidence in the process of the Inquiry.

c. The rights of NPSPCs to participate in the Inquiry in accordance with their designation as core participants under R 5 of the 2006 Rules.

d. The rights of the victims, in accordance with Articles 3, 8 and 10, to receive information and to know the truth.

e. The rights of the victims to participate in political and social justice activities without unlawful interference;

[24] V.11

[25] The authorities which the MPS cite at V.11 do not support this proposition. *Niemetz v Germany* was concerned with the seizure of documents from the applicant's place of work. The Court concluded at [29] that Article 8 extends to the right to develop relationships with the outside world including in one's working life. It does not extend to the right to engage in any specific employment. In the *Leveson* case the Court took into account the possible blight on a journalist's career were his identity disclosed, but not for the purposes of Article 8.

f. The rights of the press and public, in accordance with Article 10, to receive and impart information and know the truth.

103. The NPSCPs submit that it is inconceivable that when these interests are weighed in the balance against an officer's Article 8 interests, those of the officer will prevail.

104. Article 8 is liable to be relied upon by a number of NPSCPs who will wish to protect their identities when giving evidence to the tribunal. For example, some of the women who were deceived into having intimate sexual relationships with undercover officers will seek a restriction order granting them anonymity in order to protect what is obviously one of the most intimate aspects of a person's private lives: see *Bensaid v United Kingdom* (2001) 33 E.H.R.R. 10 at [47]. It appears that the only countervailing interest that falls to be weighed against this under Article 8(2) is that of the press under Article 10 to be free to report their names. The Inquiry will have to identify the relative importance to be attached to each right in the particular circumstances and the extent of the interference that will flow from an interference with it.

CONCLUSION

105. In summary, and for all of the reasons set out above, the NPSCPs make the following overarching submissions:

a. This Inquiry cannot function without openness. Any application for a restriction order must be seen as a departure from this and must be fully justified.

b. If the Inquiry were to hear the police evidence in secret, as the SCPs contend, it would be unable to fulfil its terms of reference and it would do nothing to allay public concern.

c. In view of the history leading to its inception, it would be farcical for the Inquiry to be entirely dependent on self-disclosure by the police in secret.

d. Any fair, thorough and credible assessment of the matters falling within its terms of reference requires the input of those affected by undercover policing, but that cannot be achieved without disclosure.

e. This is both in order to enable victims of undercover policing, who are not currently aware that this is the case, to come forward and also to enable those who have already come forward to participate in a meaningful way.

f. The link between openness and effectiveness in the particular context of this Inquiry is such that restriction orders can only be a measure of last resort in the individual case, where they are justified on very careful scrutiny of the evidence and balancing of the competing public interests <u>and</u> other measures that are less destructive of the efficacy of the Inquiry have been rejected.

g. In making this assessment, consideration must also be given as to whether a restriction order will in fact offer any genuine protection, given the prospects of the information becoming public by other means in any event.

h. Further, in light of the particular context of this Inquiry, an NCND stance has no role to play.

i. There is no rational basis on which to conclude that all disclosures made within the context of this Inquiry will be damaging to the confidence of the wider CHIS community or foreign partner agencies. Indeed confidence may be enhanced by a thorough and open Inquiry that can ensure that similar failings do not reoccur.

j. The powers of the Inquiry to control its own disclosure process and the scope of the public evidence and questioning mean that it is not necessary or appropriate for the Inquiry to weigh in the balance in the context of each restriction order application any interest in the consistent application of an NCND response.

106. Within the context of these overarching submissions, the NPSCPs submit that the legal principles and public interests relevant to the determination of applications for restriction orders are as set out in Part 3 above. Further

submissions will be made as to the weight to be attached to the competing factors at the appropriate time, but it should be made clear that the NPSCPs will submit that all the names of undercover officers must be disclosed, save in the rarest of cases, where nothing less than a real and immediate risk to life arises and the Inquiry is satisfied that the MPS will not in any event have to provide protection against such a risk.

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