

THE UNDERCOVER POLICING INQUIRY

SUBMISSIONS ON BEHALF OF THE NPCC ON THE ISSUE OF UNDERTAKINGS

1. These submissions are filed on behalf of the National Police Chiefs' Council (NPCC) in response to Counsel to the Inquiry's Note on Undertakings dated 8th January 2016 (CTI's Note).
2. The submissions are principally directed at the issues which directly concern police forces and policing.

THE LEGAL FRAMEWORK

3. The NPCC does not take issue with the historical and legal analysis set out in CTI's note.
4. It is submitted that any undertaking must be clear and unambiguous as to its scope, terms and effect. In particular, to be effective it must effectively protect the privilege against self-incrimination
5. There are two key issues which concern the police with regard to undertakings of the type under consideration. The police have two potential roles which may be affected by undertakings. The first is as appropriate authority in respect of misconduct proceedings as identified by CTI. A second and arguably more important role is as investigators in respect of both criminal and misconduct allegations. It is submitted that any undertaking must therefore cover not only the extent to which a court or disciplinary tribunal may be able to directly rely upon the evidence given in the course of the Inquiry but also the extent to which the police may use such evidence (if at all) in the course of an investigation, eg. using it to identify lines

of inquiry. The investigative role is an issue of real significance to the police service and therefore to the Inquiry and witnesses.

6. The issue of the applicability of the undertaking to the investigative role also applies to the activities of the Independent Police Complaints Commission (IPCC) in carrying out their statutory duties.
7. It is submitted that, in light of the investigative role of the police (and IPCC), set out above it is necessary to include in any undertaking provision as set out in the undertaking given in the Azelle Rodney Inquiry (CTI note para. 68) namely,

“...no reliance will be placed on evidence which is obtained during an investigation as a result of the provision by that person of evidence to the Inquiry. This undertaking does not preclude the use of information and/or evidence identified independently of the evidence provided by that person to the Inquiry.”

It is submitted that such an undertaking is wholly consistent with the privilege against self-incrimination and provides the witness with the appropriate degree of protection which the privilege intended to afford.

CRIMINAL UNDERTAKING

8. It is submitted that, in order to protect the privilege against self-incrimination and to thereby endeavour to ensure that a witness gives a full and frank account of events to the Inquiry, the AG should be invited to give an undertaking.
9. It is submitted that the form of the undertaking sought should be as extensive as that given in the Azelle Rodney Inquiry.

DISCIPLINARY

10. This section of the submissions deals with disciplinary issues concerning police officers and civilian staff only. The NPCC makes no submissions with regard to other persons or organisations from whom undertakings might properly be sought.

The legal framework

11. The police misconduct regime is a statutory regime (the regime) which gives rise to a multitude of rights and obligations. It covers police officers and civilian staff. The regime covers both complaints by members of the public and conduct matters which, in very broad summary, means any potential breach of the Standards of Professional Behaviour. The principle pieces of legislation are:

- The Police Reform Act 2002, in particular Sch. 3
- The Police Reform and Social Responsibility Act 2011
- The Police (Conduct) Regulations 2012, SI 2632/2012
- The Police (Complaints and Misconduct) Regulations 2012, SI 1204/2012

When a complaint or conduct matter is identified certain duties are placed upon the appropriate authority (AA) or the IPCC. The table set out in CTI's Note at paragraph 83 identifies the relevant appropriate authorities under the regime.

12. Where the allegation is a complaint, recordable conduct matter or involves death or serious injury Part 3 of Sch 3 of the PRA 2002 applies and the applicable Regulations are The Police (Complaints and Misconduct) Regulations 2012. Various duties arise under the Act and the Regulations. The basic structure is set out below.
- a) Subject to very limited exceptions, the AA is under a duty to record the allegation. Under para. 3 Sch 3 PRA 2002 a complainant has a right of appeal against a failure to record a complaint and the IPCC may direct that the matter is recorded.

- b) The AA must refer the complaint or conduct matter to the IPCC in the circumstances defined (paras 4(1), 13 and 14C Sch 3 PRA 2002).
 - c) Where a complaint or conduct matter is referred the IPCC is under a duty to determine whether it is necessary for the matter to be investigated – paras 5, 14 and 14D Sch 3 PRA 2002 – this appears to be a broad discretion.
 - d) Reg 11 deals with rights of appeal under para 7(8) - appeal against a decision to handle a complaint otherwise than in accordance with the Schedule or take no action in relation to it and under para 8A(1) appeal against the outcome of any complaint subject to local resolution or handled otherwise than in accordance with the Schedule.
 - e) There are only limited circumstances in which the provisions of Sch. 3 may be lawfully disapplied see Reg. 5 Police (Complaints and Misconduct) Regulations 2012 – on a case by case basis Reg 5(2)(a) might arguably arise in relation to conduct which comes to light in the course of the Inquiry.
 - f) If the matter is to be investigated then the investigator in consultation with the AA must make a severity assessment ie an assessment as to whether the conduct if proved would amount to misconduct or gross misconduct see para 19B Sch 3 PRA 2002 and Reg 16
13. Where the conduct does not fall within paragraph 11 above The Police (Conduct) Regulations 2012 apply. The regime is slightly less complex than that under the Police (Complaints and Misconduct) Regulations 2012 but still requires the AA to take certain prescribed steps. Regulation 12 is important because it not only prescribes the steps to be taken but it also provides the options once the necessary determinations have been made.

Assessment of conduct

12.—(1) Subject to paragraph (6) the appropriate authority shall assess whether the conduct

which is the subject matter of the allegation, if proved, would amount to misconduct or gross misconduct or neither.

(2) Where the appropriate authority assesses that the conduct, if proved, would amount to neither misconduct nor gross misconduct, it may—

- (a) take no action;
- (b) take management action against the officer concerned; or
- (c) refer the matter to be dealt with under the Performance Regulations.

(3) Where the appropriate authority assesses that the conduct, if proved, would amount to misconduct, it shall determine whether or not it is necessary for the matter to be investigated and—

(a) if so, the matter shall be investigated and the appropriate authority shall further determine whether, if the matter were to be referred to misconduct proceedings, those would be likely to be a misconduct meeting or a misconduct hearing;

(b) if not, the appropriate authority may—

- (i) take no action; or
- (ii) take management action against the officer concerned.

(4) Where the appropriate authority determines that the conduct, if proved, would amount to gross misconduct, the matter shall be investigated.

(5) At any time before the start of misconduct proceedings, the appropriate authority may revise its assessment of the conduct under paragraph (1) if it considers it appropriate to do so.

(6) Where the appropriate authority decides under this regulation to take no action, take management action or to refer the matter to be dealt with under the Performance Regulations, it shall so notify the officer concerned in writing as soon as practicable.

There are further provisions which relate to events after the appointment of the investigator but which are of less relevance to the issue of undertakings.

14 It does not appear to have been fully argued, but there is a significant legal question mark over whether an AA or the IPCC could in fact give an undertaking of the type which would be necessary in this Inquiry. In so far as there is recent dicta on the issue Elias LJ observed (obiter) in **R (on the application of Friend) v Greater Manchester Police Authority [2009] Admin EWHC 3152** that a Chief Constable could not properly give an assurance that he would not bring disciplinary proceedings. There is some authority in respect of the Police Discipline Regulations 1985 to the effect that even where the Regulations contain the word "shall", they are directory not mandatory see **R v Chief Constable of Merseyside ex.p.Calveley [1986] QB 424 at 431** and **R v Chief Constable of Merseyside ex. p. Merrill**

[1989] 1 WLR 1077 at 1085. However, in the current regime both the primary legislation and the Regulations make specific reference to the existence of duties it and prescribe outcomes therefore it does appear that any general undertaking would be inconsistent with the legislation.

- 15 It is therefore submitted that it would be inappropriate and arguably unlawful, for Chief Constables to give disciplinary undertakings at this stage. The matter should be kept under review by the Inquiry. The NPCC is anxious to cooperate with the Inquiry to ensure that there is no impediment to all witnesses giving a full and frank account of events to the Inquiry however for the reasons set out above it is unable to recommend that Chief Constables give a blanket undertaking at this stage of the Inquiry.

Dated this 25th day of January 2016

FIONA BARTON QC