IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

SKELETON ARGUMENT ON UNDERTAKINGS

ON BEHALF OF

THE NON-POLICE, NON-STATE CORE PARTICIPANTS

The following abbreviations are used in this skeleton argument:

NPSCP = Non-police, non-state core participant; i.e. core participants who are not police officers, former police officers, state officials or employees.

NPSW = non-police, non-state witness; i.e. witnesses in the Inquiry who are not police officers, former police officers, state officials or employees. This includes NPSCPs (who are also witnesses in the Inquiry) and also non-police, non-state witnesses who do not have CP status.

NPSI = non-police, non-state individuals. This includes NPSCPs and NPSWs and also anyone else who is not a police officer, former police officer, state official or employee, but who may have relevant evidence to give, or otherwise be relevant to the Inquiry (e.g. this might include individuals who were spied upon, but who are currently unaware of this, or who are aware, but are as yet undecided as to whether to come forward)

Introduction

1. The NPSCPs' position in respect of undertakings remains as set out in their position paper dated 19 February 2016. The present submissions develop those arguments in support of the remaining live issue following the Chairman's "minded to" note dated 3 March 2016, namely: whether a wider undertaking should be granted in the terms set out at [13] of the NPSCP's position paper, which would ensure that evidence given to the Inquiry (including documents and information provided as well as oral and written evidence) could not be used in criminal proceedings or investigations against anyone other than police officers and state officials or employees.

2. The Chairman in his note of 3 March 2016 has indicated that he is "minded to" invite the Attorney General to consider providing a "blanket" undertaking that is co-extensive with the privilege against self-incrimination [PSI] to all who give evidence to the Inquiry as set out at [8] of the Chairman's note. Given that there appears to be general agreement between the CPs and the

Inquiry in relation to this issue, these submissions do not address it further. In the event that it is necessary, the NPSCP submissions in support of such an undertaking are set out [4]-[7] of their position paper of 19 February 2016.

3. In considering the merits of the wider undertaking sought by the NPSCPs, it is important to recognise the very particular context of this Inquiry. It is an investigation into very serious misconduct on the part of undercover police and institutional failures going to the heart of democratic freedoms and civil society. The behaviour of political activists and social justice campaigners is not and should not be its focus. Given the history of miscarriages of justice caused by the involvement of UCOs, and the very serious abuses that have been uncovered, the NPSCPs consider it to be wrong in principle that their participation in the Inquiry as victims of these abuses could lead to prosecution of other victims. They do not consider that the perpetrators of the misconduct under examination, that is the UCOs, should benefit from the same protection.

4. The NPSCPs' position in respect of the wider undertaking sought is founded on the following observations:
    a. the position in respect of police / state witnesses is not the same as that of those who were spied upon and those associated with them;
    b. the undertaking to be obtained must reflect this distinction:
        i. the purpose of the Inquiry is to inquire into and report on undercover police conduct, not on the conduct of those spied upon[1];
        ii. it arises because of serious public concern about police interference with the democratic process; with freedom of political belief and expression; the politicisation of policing; unjustified attempts to criminalise peaceful protest; gross

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

violations of privacy rights; deception of the criminal courts and the Stephen Lawrence Inquiry; engaging in sexual relationships, including fathering children, while undercover; gathering evidence upon campaigns for police accountability including following deaths in custody; disclosing personal information to blacklisting organisations and other private companies; utilising the identities of deceased children; breaching of legal professional privilege;

iii. those spied upon participate as the victims of these wrongs;

iv. they participate in the public interest generally, but also in furtherance of their Article 8 right to discover the truth about undercover policing operations concerning their own lives;

c. the Inquiry must adopt an approach that does not exacerbate the wrongs about which they testify and which addresses their concerns that by participating they may expose friends and co-activists to a risk of criminalisation;

d. by contrast, the conduct of police / state witnesses is the subject matter of the Inquiry. In the event that evidence of criminal offences having been committed by police officers, state officials or employees is discovered, there is a strong public interest in those responsible being held to account.

5. Further, the NPSCPs wish to make clear at the outset that their request for a wider undertaking should in no way be taken to suggest that there is widespread criminality amongst their friends and fellow campaigners. There is not. They point to Mark Ellison QC's finding in his report into potential miscarriages of justice arising out of undercover activity: "*Although the types of criminality infiltrated by the SDS evolved over the years, the majority was low level and therefore retention of investigation records beyond 7 years was unlikely*."[2]

The role of the NPSCPs and the particular challenge faced by this Inquiry

[2] Review of Possible Miscarriages of Justice, July 2015, p.32.

6. By its very subject matter and remit, much of the activity of significance to this Inquiry (i) occurred in private and (ii) may concern contentious allegations of criminality, including allegations by those spied upon of criminal or other serious misconduct on the part the undercover officer(s). As the Herne and Ellison reports show, official documentation of the relevant undercover activity is poor and much has been destroyed. Clearly the best means of getting at the truth is by hearing and assessing the evidence of those involved. The evidence of the NPSCPs is therefore vital to getting to the truth of the central issues.

7. The Inquiry would be wholly ineffectual and one-sided were it only to receive evidence from police and state witnesses. It would be unable to assess the effect of such operations on the individuals affected by them. But it would also be unable to test the veracity and proportionality of justifications advanced and assess the true extent of criminal activity and other misconduct perpetrated by officers and others in connection with undercover activities, including, but not limited to, in the context of miscarriages of justice. Without such an assessment, it would be impossible for the Inquiry to determine the extent to which misconduct was known about and sanctioned at higher levels within the police, government departments or the CPS. These are the key areas of justified public concern on which this Inquiry is founded.

8. The particular challenge faced by the Inquiry is that there are currently acute disincentives to full and frank participation which non-police, non-state individuals [NPSIs] face.

9. First, participation in the Inquiry by NPSIs exposes to close scrutiny the very conduct that the police have sought to spy upon. It requires NPSIs to provide details of their personal beliefs and private lives, in some cases of the most intimate nature, in circumstances where they should have been entitled to the protection of that information, but are now forced to make it public in

order that the police version of events can be held to account. That, for many, is a profoundly difficult choice.

10. Second, NPSIs currently have no guarantee that their participation will in fact lead to any disclosure being made to them of material going to the truth of what actually happened to them. This is the consequence of the MPS position in relation to restriction orders. It is the position that the DIL and AKJ claimants found themselves in in their civil litigation, where they were required to provide extensive detail about their private lives and, even though they have been given a public apology, have still been told nothing about the truth of what happened: if they were targeted and if so, why, or whether they were "collateral damage" in the targeting of others; whether their treatment was known about and authorised and if so by whom and at what level. It highlights the very clear asymmetry between the NPSCPs as compared to the police / state CPs in terms of the level of information and resources available to them. The police have spent years collecting information about all aspects of the NPSCPs' lives, activities and beliefs. The NPSCPs by contrast have almost no information about what was done to them or why. Many NPSCPs have already indicated that it would be impossible for them to participate without meaningful disclosure.

11. Third, and most importantly in the present context, most, if not all, the NPCPs are intensely loyal to their fellow activists and campaigners and would be as reluctant, if not more so, to incriminate others (perhaps unwittingly) as they would be to incriminate themselves. In this regard an undertaking that is limited to being co-extensive with PSI goes only a small way towards removing this strong disincentive to participate. Indeed the co-extensive undertaking may in fact heighten the risk of prosecution of NPSIs, because it facilitates the giving of evidence by police officers that they have previously been, or would otherwise be, reluctant to give, because it necessarily involves implicating themselves in criminal conduct. Moreover, from the NPSIs' perspective the police are likely to have a direct interest in pursuing

prosecutions against those who were spied upon in order to back-justify their undercover operations.

12. The NPSCPs therefore invite the Chairman to reconsider his provisional assessment that "*there are other means by which a witness' fears may be allayed*", for example by not requiring the names of others to be given[3]. The problems with such an approach can be illustrated with a hypothetical example: a witness gives evidence to the Inquiry about a meeting she attended at which a group of five activists discussed a protest at an arms company. One of those present, whom the witness now (rightly) believes was an undercover officer, made a concerted effort to persuade the others that the protest should break into the company offices and disrupt activity there. Some of the other activists present appeared to be persuaded and agreed to the plan. This is prima facie a conspiracy to commit criminal offences. The undercover officer reported the meeting to his handler, including the names of those present, but he did not mention that the plan extended beyond a protest at the company offices or his role in seeking to persuade the others to criminal activity.

13. In this situation the police will be well aware of the identities of those present at the meeting. The material new evidence from the witness to the Inquiry is the nature of what was discussed and the role of the UCO in that. Even if the witness were not required to name those who were at the meeting with her, she might still be exposing them to risk of prosecution, because the police already know who was present.

14. This is plainly the type of misconduct on the part of a UCO that the Inquiry is tasked with investigating. It is also an example of the type of case where there is likely to be important evidence that can only come from those who were directly involved. However, unless a wider undertaking of the type sought is obtained a witness in this type of situation would, if they are to be

[3] "Minded to" note at [12].

completely truthful, be compelled to incriminate their fellow activists. If that evidence is not forthcoming, and there is a general reticence on their part the Inquiry will be seriously frustrated in its core purpose.

15. It is a stark choice for the Inquiry to have to make, but if scenarios such as this are likely to arise – and the NPSCPs contend that they plainly are, across a broad spectrum of factual contexts – the Inquiry will have to assess whether the public interest in it being able to pursue its terms of reference and investigate serious criminal activity and misconduct on the part of undercover officers (and their superiors) justifies the wider undertaking.

16. The NPSCPs submit that such an undertaking is both necessary and justified for the reasons developed below.

The purpose of the Inquiry

17. It is vital to keep well in mind the purpose of the Inquiry and the reasons for its establishment, because they inform the weight to be given to the competing public interests.

18. The purpose of the Inquiry is to investigate undercover policing in the light of public concern about serious police misconduct and miscarriages of justice. The Inquiry is not an evidence gathering exercise for the prosecution of social justice activists and political campaigners and it would be wholly counterproductive to the purpose of the Inquiry were it to become so. Whatever the public interest in the latter, there is an enhanced public interest in holding police and state officials to account for abuses of their public powers, particularly if the present concerns about the political nature of undercover targeting, going to the heart of democratic freedoms, are found to be justified. This is the very reason why the Inquiry has been established.

19. However, if the evidence gathering process of the Inquiry exposes activists and political campaigners to the risk of criminal proceedings, which it will do in the absence of a wider undertaking, this will inevitably have a deterrent

effect on participation and inhibit the Inquiry's ability to fulfill its purpose of investigating serious state misconduct.

20. The primary consideration of the Chairman must be the fulfillment of his terms of reference. Section 17 of the Inquiries Act 2005 affords him broad powers to adopt such procedure and conduct as he may direct in order to do so, subject to a duty to act with fairness, in compliance with the provisions of the Act, and with regard to the need to avoid unnecessary cost.

21. The power to invite the Attorney General to consider providing a wider undertaking, as proposed by the NPSCPs, is plainly within the scope of the Chairman's powers. The lack of any statutory immunity powers within the 2005 Act itself, strongly suggests that Parliament intended that each Inquiry would need to approach the question of undertakings on an individualised basis, tailoring the request to the particular needs of each Inquiry. If, therefore, the Chairman accepts that there is a credible basis for believing that there are likely to be witnesses who have material evidence to give but who will be deterred from doing so out of concern that they might thereby expose friends or co-activists to criminal proceedings, then the Chairman's primary consideration must be whether there are steps available to him to remove that impediment to the fulfillment of his terms of reference.

22. For the reasons above, measures short of a wider undertaking will not suffice in this particular Inquiry. Although an individual who is identified as likely to have relevant evidence to give can be compelled under section 21 of the 2005 Act to give it and will commit an offence under section 35 if he or she fails to comply, it is plain from other public inquiries that powers of compulsion, even when coupled with an undertaking co-extensive with PSI, are an imperfect tool for securing full and frank evidence. See, for example, the remarks of the Chairman of the Baha Mousa Inquiry at Vol 1, p.48 [2.4] of the Inquiry report: '…*I had hoped that it would be possible to breach the "more or less obvious closing of ranks" referred to by the Judge Advocate… at the Court Martial. This closing of ranks has often been referred to in the press as*

"the wall of silence". To some extent this was successful and the evidence of some soldiers went a great deal further than hitherto. However, I have concluded that a number, not all, continued to hide behind oft repeated phrases such as "I can't remember" or "I did not see anything untoward. This was, to say the least, regrettable and cannot be excused or justified.' The context of soldiers closing ranks in that inquiry is obvious wholly different to the concerns identified above that might make an NPSI reticent to give evidence here, but Sir William Gage's comments do illustrate the difficulties that arise for an Inquiry where witnesses are reluctant to give evidence, whatever the reason for that.

23. For these reasons, a wider undertaking is necessary if the Inquiry is to maximize its ability to obtain evidence that is likely to be material to its terms of reference, but which otherwise might be withheld from it.

24. In the following sections, the NPSCPs address the factors raised in the Chairman's "minded to" note as militating against a request to the Attorney General for a wider undertaking.

The absence of precedent

25. The NPSCPs accept that no wider undertaking of the kind they seek has apparently been given in any previous Inquiry. However, steps taken, or not, in other inquiries do not set any precedent by which the Chairman is bound. The powers conferred by section 17 of the 2005 Act are amply wide to allow for a request of this nature to be made to the Attorney General and further, the factual context of each inquiry is different. The 2005 Act itself contains no power to grant undertakings nor any conditions attached to seeking them nor any limit on the scope of the undertakings that may be sought. There is no 'standard undertaking'. The factual context of each Inquiry and its own unique needs dictate the steps that will be necessary and appropriate for each inquiry to take. The particular need for a wider undertaking in the present Inquiry arises out of its particular context – i.e. an investigation into misconduct by police officers purporting to justify their actions by reference

to alleged criminal activity on the part of their targets. In circumstances where evidence from those targets is essential to getting at the truth, it is difficult to see how the necessary issues could be addressed without ventilating matters going to the alleged criminality. This presents a very obvious obstacle to the Inquiry's ability to obtain material evidence and, as set out above, the risk of *self*-incrimination addresses only one aspect of this. This is an acute difficulty that arises out of the particular context of this Inquiry. In other words, it is undeniable that it is a highly unusual feature of this Inquiry that some of the *victims* are at risk of prosecution if they co-operate fully with the Inquiry.

26. The individualised nature of undertakings can be illustrated by the variation in approach in recent inquiries. In the Litvinenko Inquiry, for example, no undertakings at all were sought: that was presumably because the prime suspects had elected not to take part and were not compellable (being out of the jurisdiction and un-extraditable). In the Iraq Inquiry, however, the undertakings extended to disciplinary proceedings and not just criminal proceedings. The fact that the wider undertaking sought here has not been given in other inquiries is not, therefore, a reason for not seeking one in the context of this Inquiry. Without it, the ability to fulfill the Inquiry's terms of reference is materially hindered.

The absence of any legal right not to incriminate others

27. The Chairman, at [11] of his "minded to" note is, of course, correct that there is no privilege against the incrimination of others, in contrast to the position in relation to self-incrimination. However, the fundamental rationale behind an undertaking to preclude reliance on PSI and one to remove concerns about incriminating others is the same: maximization of the Inquiry's ability to obtain relevant evidence. It is right that the former removes an obstacle on which the witness is legally entitled to rely and the latter one on which he is not, but the reality is that the inhibiting effect of either obstacle on the Inquiry's ability to get to the truth may be significant and the steps available

to address this are not limited to situations where witnesses have a legal right not to give evidence.

28. In each of the Rosemary Nelson, Hutton and Iraq inquiries, for example, undertakings were sought in respect of disciplinary proceedings arising out of evidence given to those inquiries[4]. This was because it was recognised, in the contexts of those inquiries, that fear of such proceedings was likely to inhibit the giving of relevant evidence and the public interest in those inquiries being able to pursue their terms of reference outweighed that in favour of disciplinary proceedings. This was notwithstanding that there is no privilege against exposing oneself to disciplinary proceedings and, further, the undertakings given in the Nelson and Hutton inquiries extended beyond self-exposure and included protection from exposure of others as well[5].

29. These examples show that an inquiry is not limited to addressing obstacles that arise as a matter of strict legal rights to remain silent, but may also take into account obstacles that arise as a matter of practical reality and seek undertakings designed to remove them.

30. This proposition is not disputed by any of the CPs. The MPS, in their original submissions on undertakings, acknowledge that the seeking of a wider criminal undertaking is both a step available to the Inquiry and one which should not be ruled out: "*Individuals of a group may… remain cautious about giving evidence about other members or associates*"[6]; "*the Inquiry should not rule out seeking such an undertaking from the Attorney General should the need arise*."[7]

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[4] See counsel to this Inquiry's note on undertakings, dated 8 January 2016 at [55], [57], [75] and [76].

[5] Ibid. [55], [57] and [75].

[6] MPS submissions on undertakings, 13 January 2016, [16].

[7] Ibid. [17].

31. Similarly, the Secretary of State for the Home Department in her submissions on undertakings in response to the submissions made by the other CPs does not seek to argue against it being open to the Chairman to seek such an undertaking. Nor does she suggest that such a course would be against the public interest, rather she submits that "*It is a matter for the Inquiry whether any undertaking sought should extend further than the privilege against incrimination in order to encourage openness*."[8]

32. It is submitted, therefore, that the critical questions for the Inquiry are the extent to which an obstacle to it obtaining material evidence will inhibit the pursuit of its terms of reference and the steps that are lawfully available to it to remove that obstacle, not whether the obstacle arises as a strict matter of legal right or as a matter of practical reality.

The due administration of justice

33. The NPSCPs have given careful consideration to whether it would be possible to seek to tailor the scope of the wider undertaking to a limited class of offences or for it to have something other than blanket effect. However, after detailed consideration, and in the absence of disclosure, they have concluded that would not be appropriate for the following reasons:
    a. There is no class of offences which ensures that the undertaking is limited to situations of the greatest relevance to the Inquiry, or to offences below a particular level of seriousness.
    b. Equally, it is not possible to exclude "trivial" or "controversial" offences from the scope of the undertaking on the basis that the CPS will apply the public interest test and so may decide that such offences will not be prosecuted in any event. The purpose of the undertaking is to remove an obstacle to the giving of full and frank evidence due to fears, on the part of NPSWs, that they will expose friends and co-activists to prosecution. Reliance on the *possibility* that prosecution would be precluded by application of the public interest test is likely to be too uncertain to allay

[8] Undertaking submissions in response on behalf of SSHD, 16 February 2016, [3].

such fears, particularly because many NPSCPs have grave concerns about the independence of the CPS in this context, given the unprecedented number of miscarriages of justice that are likely to emerge from this Inquiry and the role of the CPS in them;

c. Further, for many NPSCPs, the fear of incriminating others does not arise out of concern about a particular identifiable offence or offences, but rather because they simply do not know whether apparently innocuous aspects of their evidence might place others at risk, particularly in light of the criminalisation of conduct in the context of protest, that would otherwise not be criminal. The chilling effect of such concerns is general rather than specific and it means that NPSCPs are not in a position to be able to suggest to the Chairman ways in which they could moderate their evidence to avoid the risk of inadvertent incrimination of others;

d. Many NPSCPs are also concerned that the police and the CPS have a direct interest in securing convictions of NPSIs in order to bolster their claimed justification for undercover operations. This heightens their fear that even apparently innocuous evidence may be seized upon to further criminal investigations or prosecutions of others.

34. As to the concern that a wider undertaking would tend to undermine the due administration of justice, the NPSCPs point to the fact that an undertaking, even of the wider nature they seek, is not the same as an immunity from prosecution. An undertaking only prevents evidence **given to the Inquiry** from being used in the context of criminal proceedings (including investigations) it does not preclude the use of material which is available independently of that given to the Inquiry. An undertaking does not, therefore, prevent any prosecution that could, but for the Inquiry, proceed in any event.

Asymmetry as between NPSWs and police / state witnesses

35. It is of note that the asymmetrical nature of the undertaking sought by the NPSCPs is not a factor identified by the Chairman in his "minded to" note as militating against such an undertaking. The NPSCPs contend that this is plainly right given the purpose of the Inquiry as discussed above.

36. The NPSCPs come to the Inquiry as victims of serious intrusion into their private lives as a result of the conduct under scrutiny. This creates a fundamental asymmetry between their position and that of police and state witnesses, which it would be wrong to seek to downplay. It is the misconduct of the latter that is the focus of and reason for the Inquiry. The conduct of the former is relevant only in so far as it sheds light on the conduct of undercover officers or informs an assessment of whether or not undercover operations were justified. Such asymmetry does not, of course, dilute or detract from the Inquiry's duty to treat all participants with equal fairness but it does mean that the particular needs of each group will be necessarily different.

37. By comparison, an asymmetrical approach to the obtaining evidence by a public inquiry was recently adopted by the Goddard Inquiry. In the opening statement in that Inquiry, the Chairwoman announced that, as a matter of policy, she would not use her powers of compulsion under the Inquiries Act 2005 to compel victims or survivors of child sexual abuse to give evidence of their experiences of being abused. Justice Goddard had earlier in her statement made clear that the position was wholly different in respect of the institutions whose actions were called into question. In relation to them, she "*would not hesitate to issue orders under section 21 of the 2005 Act compelling the production of evidence and the attendance of witnesses*."[9]

38. The context of the Goddard Inquiry is undeniably different to the present, but nonetheless, Justice Goddard's approach illustrates that there is no bar to an asymmetric approach being taken to the obtaining of evidence in a public

[9] Ibid. [39].

inquiry and in some circumstances it will positively be justified. The NPSCPs contend that the present Inquiry is one such instance, for all the reasons set out above and in their position paper on undertakings dated 19 February 2016.

Conclusion

39. The NPSCPs submit that there is a real danger that fear of incriminating friends and co-activists will have a chilling effect on the Inquiry's ability to obtain evidence going to the heart of the issues it is tasked with investigating. Although statutory powers of compulsion are available, the experience of other public inquiries suggests that this is unlikely to be the most effective means of obtaining full and frank accounts and would be especially inappropriate in relation to the NPSIs who are victims of invasions of their privacy. The most effective means of enabling NPSIs to give the full and frank evidence that the Inquiry needs to fulfill its terms of reference and meet the purpose for which it was established is an undertaking in the terms set out at [13] of the NPSCPs' 19 February 2016 position paper. The Inquiry is therefore respectfully invited to re-consider its "minded to" note and to request from the Attorney General an undertaking in the terms sought.

40. If, contrary to the above, the Inquiry does not consider such an undertaking is necessary at this stage, the NPSCPs request that the matter is not permanently closed off but kept under review and that they be given liberty to apply to re-visit the issue as appropriate.

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