SIR CHRISTOPHER PITCHFORD

THE UNDERCOVER POLICING INQUIRY

SKELETON ARGUMENT ON BEHALF OF VARIOUS NON-POLICE, NON-STATE CORE PARTICIPANTS

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1. These submissions are filed, on behalf of Deighton Pierce Glynn and Public Interest Lawyers, who are recognised legal representatives of a number of non-police, non-state core participants (hereinafter 'NPNSCPs'), in response to the Chairman's 'minded to' note of 3rd March 2016. It addresses the issue of the treatment of non-police, non-state core participants and witnesses in the Inquiry, with particular reference to undertakings and compellability. It is intended to be read in conjunction with and complementary to the Skeleton Argument On Undertakings On Behalf Of The Non-Police, Non-State Core Participants, dated 13th April 2016.

2. As regards undertakings, the position set out below is that an undertaking should be sought to 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. There are two options in this regard. The first – and the most effective option, we contend is an undertaking to provide prosecutorial immunity to the NPNSCPs. In the alternative, we seek a slightly modified version of the the 'wider undertaking' set out in the NPNSCP submissions of 13th April.

3. On compellability, it is hereby contended that the NPNSCPs should be given an option not to answer particular questions and/or not to give evidence if there is a

risk of criminalisation, and, more generally, to prevent disproportionate interference with their rights under Article 8 of the European Convention on Human Rights.

4. The first section contains our submissions as to the principles applicable to the Chairman's decisions in relation to undertakings (I). The second section addresses the specific measures hereby sought (II). A third and final section relates to the relationship between, and prioritisation of, the various measures sought (III).

I. LEGAL FRAMEWORK

5. It is plain from section 17 of the Inquiries Act 2005 that the Chairman possesses a broad power to act in the interests of fairness, and to achieve the purposes of the inquiry. Although the 2005 Act contains no explicit, specific power to grant undertakings, previous inquiries put beyond doubt that the Chairman has the power to make a request for undertakings from the Attorney General. It is also apparent from previous inquiries that the Chairman may allow witnesses an option not to answer certain types of questions.

6. The Act imposes no conditions in relation to the exercise of such powers nor any limit on the scope of the measures employed. The question is whether, and with what parameters, these powers should be exercised in the present context. It is submitted that there are a number of overarching public law principles that condition the choices made within the range of possibilities arising from section 17 and the Chairman's inherent jurisdiction. They include

- Common law fairness and due process principles, including but not limited to the privilege against self-incrimination;
- The purpose of the Inquiry (and in public law terms, the preclusion from taking into account irrelevant considerations);
- Obligations under the Human Rights Act 1998;
- The principle of legal certainty;

7. We appreciate, of course, that there is no utility in simply duplicating submissions. However, in order to properly contextualise and support the requests made herein, it will be necessary to re-visit a limited amount of the terrain addressed in the NPNSCP submissions of 13th April 2016, and the Chairman's 'minded to' note of 3rd March 2016.

8. The Chairman (in the note of 3rd March 2016) noted that the purpose of the inquiry, as stated in the terms of reference is "to investigate the conduct and management of undercover police operations". Rightly absent from the terms of reference – in terms of its *purpose* – is investigation of the activities of the activists, even though hearing evidence about such activities will be essential. There is a distinction of principle, which is of absolutely paramount importance, between: (i) the subject matter of the inquiry's purpose, and (ii) the subject matter of the facts/evidence that must be considered in order to achieve that purpose.

9. The Chairman has observed that "it is not the business of the Inquiry to make findings about criminal liability", but that the actions of both police and activists, that the investigation is likely to embrace, will include "the possible commission of criminal offences in purported furtherance of a cause".

> *It will embrace the personal conduct of police officers towards those with whom they were associating while acting undercover. Among the possible offences committed by police officers may be misconduct in public office.*

10. Much if not all of the difference between these submissions and the Chairman's preliminary position can be traced to the need to distinguish between "possible offences" by police officers and "possible offences" by activists. The Inquiry's treatment of "possible offences" in each of these categories must, it is submitted, reflect the above-mentioned distinction between (i) purpose, and (ii) the evidence needed to achieve it. Whilst the investigation of "possible offences" by police officers (albeit without determining any question of criminal liability) is core to the *purpose* of the inquiry, consideration of the facts of "possible offences" by activists

arises as collateral – through the obtaining of evidence needed to pursue the inquiry's purpose. The only viable principled position is that where necessary to investigate the former, the possibility of prosecution of the latter must be sacrificed. Furthermore, it necessarily means that it is inherent in the purpose of the Inquiry that the NPNSCPs be considered and treated as *victims*.

11. This is no more than an extrapolation of the purpose of the inquiry, and it makes clear that the NPNSCPs' status as victims is inherent in the Inquiry's purpose. This, in turn, necessarily conditions the approach that must be taken to their evidence. The particular measures that, it is submitted, are warranted, are set out below. However, some general points should be made at the outset as to the relevance of victim status.

12. The Ministry of Justice, in its Consultation Paper of January 2012, 'Getting it right for victims and witnesses' acknowledged that victims are to be treated with dignity and respect. The Victims Code, revised on 2015 (a published policy with which there is a public law duty to comply), makes clear the requirement that victims be treated "in a respectful, sensitive, tailored and professional manner without discrimination of any kind". The very purpose of the inquiry is aligned with their status as victims, and therefore the interests of the Inquiry and fairness to the NPNSCPs coincide in demanding that they are treated with respect.

13. Furthermore, the Victims' Code provides for "enhanced entitlements" for those who "have been targeted repeatedly as a direct victim of crime over a period of time, particularly if you have been deliberately targeted or you are a victim of a sustained campaign of harassment or stalking" (para. 1.9). It is submitted that because of the nature of undercover operations, many of those who will give evidence to the Inquiry would qualify for this enhanced approach within the criminal justice system.

14. The victim-specific measures available in the criminal justice system reflect the broader point that fairness does *not* mean identical treatment. To the contrary.

fairness requires that everyone is accorded equal respect and provided with equal opportunities. This is reflected, for example, in the nature of indirect discrimination under the Equality Act 2010, which arises where a practice or procedure applied equally to all can have a detrimental and unfair effect on only some. This is clearly the case for many of the NPNSCPs.

15. It is readily apparent that some of the NPNSCPs and witnesses have suffered extremely serious effects as a consequence of the police operations that the Inquiry will address. As noted below, there are strong arguments that some have suffered sexual abuse. It can be said with confidence even before the Inquiry begins that some have suffered serious psychiatric harm. There will, of course, be a very broad range of levels of victimhood among them. In those circumstances, the question arises as to where the *status quo* should lie in these proceedings: i.e., how to define the starting presumption in relation to how a particular person should be treated.

16. The question is whether the approach should be precautionary or conservative. The precautionary approach would be to presumptively treat all non-police, non-state core participants and witnesses as victims (with the possibility that CPs could make applications for reductions in the level of protection afforded to a particular person and/or the Chairman to address the issue *proprio motu*). The conservative approach would be to presumptively view each person as meriting a low level of protection, with the possibility that applications could be made *ad hoc* for a greater level of protection. It is submitted that the precautionary approach is appropriate. Two points are made in this regard.

17. First, the threshold for being considered a victim is low, particularly where the intrusion is in the form of secret surveillance and other intelligence gathering. In *Klass v. Germany* (1978) 2 EHRR 214 the ECtHR held that "[a]n individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him".

18. Second, it is not value-neutral to adopt an *ad hoc* approach. The victims' rights framework emphasises the need for victims to feel a level of agency and control in the court process, and sets itself against treatment that can feel uncertain or arbitrary. The seriousness of the impact upon a victim of a lack of clarity, in advance, as to whether they will be forced to recount deeply personal facts in open court, and in the glare of the media, should not be underestimated. It is likely, we suggest, that this Inquiry may hear from some very vulnerable individuals, some of whom have suffered serious harm. It is submitted that a failure to take the precautionary approach supported here may *itself* breach the requirements of article 8 – even where an extensive level of protection is ultimately provided to a particular victim.

19. Third, to the extent that others might seek to argue for the *ad hoc* conservative approach on the basis of the need for flexibility and response to circumstances, this same benefit is offered by the precautionary approach. The only difference is the starting point, and it is the starting point, we contend, that demonstrates to the victims most clearly the Inquiry's attitude towards them.

II. SPECIFIC MEASURES

A. Option to decline

20. It has been suggested that the purpose of providing an undertaking is to require the witness to give all relevant evidence without recourse to the privilege ('Minded to' note, para. 11) – i.e., without invoking an option to decline to answer a question where this may tend to self-incriminate. However, it is submitted that, in this inquiry, there are good reasons to allow a witness the option to decline to answer a particular question, even where an undertaking is in place. Plainly, this mechanism would not justify the provision of untrue or misleading evidence.

21. Submissions in support of an option to decline, even where an undertaking is in place, are made on the basis of

    i. The Chairman's obligations under the Human Rights Act 1998;

ii. The purpose of the inquiry;

iii. PSI and the avoidance of incriminating others;

22. After setting out our submissions as to the rationale for maintaining an option to decline to answer, we will address the question of whether section 21(4) would be adequate to achieve the same goals (iv).

i. The Chairman's obligations under the Human Rights Act 1998

23. It is our position that, in this inquiry, undertakings alone are insufficient to fulfil the rationale for PSI, and that even on the basis of PSI alone, the option to decline is required. This submission is set out below (see *infra*, section A.iii).

24. However, the Chairman's legal obligations are certainly not limited to PSI. Section 6(1) of the Human Rights Act 1998 provides that "[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right", and section 6(3) makes clear that "public authority" includes a court or tribunal, and any person certain of whose functions are functions of a public nature. Plainly the Chairman is bound by section 6(1).

25. Even if – contrary to the submission below on PSI – undertakings can, in this inquiry, sufficiently prevent prosecutions, as well as the threat thereof, it is submitted that an option for a witness to not to answer a given question remains necessary as a function of the Chairman's obligations under section 6(1) and articles 8 of the ECHR.

26. A court is a public forum, and this is an inquiry that will garner enormous media coverage and public attention. Any reference to or description of a person or a person's behaviour as 'criminal', or 'unlawful', interferes with their article 8 interests. This is so whether or not it is thereby determined that such labels are legally accurate – even an allegation of commission of crime which has not been shared with third parties triggers the application of article 8: *Cemalettin Canli v. Turkey* (Application no. 22427/04).

27. Moreover, virtually any statement in the public sphere about a person's actions as "reproachable or even unlawful behaviour" including in the form of a public judgment or in the form of media reporting on legal proceedings – triggers article 8: *Pfeifer v. Austria*, no. 12556/03, (2007). In that case, the ECtHR held that "there can be no doubt that these allegations, brought against an individual who was not a public figure or a politician, fell within the scope of the second applicant's "private life" within the meaning of Article 8 of the Convention".

28. The giving of an undertaking does nothing to prevent the close examination of allegations of criminal behaviour in public. Indeed, as noted above, the Chairman's account of the rationale of an undertaking is to *ensure* it. In such circumstances, it is submitted that NPNSCP witnesses must be allowed the option to refuse to answer a question where the information given would fall within the scope of privilege. Answers to questions which might create an appearance of criminality give rise to a very weighty argument under article 8. An appearance of criminality impacts upon a person's reputation in a particularly damaging way. Friendships and family relationships could be affected. Employment prospects are very likely to be very seriously affected. The interests protected by article 8 are not protected merely by the absence of threat of prosecution.

29. There is nothing in the article 8 framework to reproduce the distinction between self-incrimination and incrimination of others that arises from common law/statutory PSI. Having the victims of police wrongdoing give evidence under compulsion, where they fear that their words might appear to incriminate themselves or others – it is submitted, would be an unnecessary, disproportionate and perverse intrusion upon their article 8 rights.

30. Even more importantly, most of the victims do not have evidence to give about crimes. As pointed out in the NPNSCP submissions of 13th April, the request for a wider undertaking should in no way be taken to suggest that there is widespread criminality amongst campaigners. In his report into potential miscarriages of justice arising out of undercover activity, Mark Ellison QC found that "[a]lthough

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." To design the process as if there were widespread criminality would reflect a fundamentally inappropriate attitude to the victims. It follows that measures designed to prevent incrimination will be of neither relevance nor utility to the majority of victims, all of whom merit protection under the legal framework outlined above.

31. Undercover policing will have intruded upon the personal lives of many, and the evidence about that, quite apart from criminality, may damage reputations, employment, and family lives, among other things. The types of harm range from the psychiatric trauma of a victim of abuse to loss of income of a construction worker who has lost his job. Some of the NPNSCPs have already lost their jobs as a result of the intrusions upon their privacy. It must also be borne in mind that the giving of evidence under compulsion may have the effect of re-traumatising a victim.

32. It is likely that the Inquiry will include the giving of testimony by victims of very serious trauma. To give one example, the following is a summary of the treatment suffered by Duwayne Brooks:

- In April 1993 Duwayne Brooks and Stephen Lawrence were black teenagers having a regular evening out, and Mr. Brooks was 18 years of age. They were attacked by a racist gang who murdered Mr. Brooks' friend and left him with chronic PTSD.

- By 1998 Mr. Brooks had given nine statements to the police, attended three identity parades, attended meetings with the police on numerous occasions and attended numerous court hearings. He has been required to make myriad further statements since then.

- Mr. Brooks was compelled to give evidence at the first trial of the suspects in 1996, and as a result of PTSD suffered the appalling experience of being

unable to do so coherently in a voir dire, which led to the prosecution being abandoned, and propagated a devastating feeling of guilt. This is an illustration of the potential impact of compulsion upon the quality of evidence given.

- He was compelled to give evidence at the second trial in 2011. The scope of his evidence was very much reduced. He gave that evidence within hours of the death of his own father.

- At the Stephen Lawrence Inquiry in 1998 he was not compelled to give evidence as the Inquiry recognised his psychiatric difficulties. Instead he gave a very considered written statement which was invaluable to the inquiry. It was one of only three statements that were appended to the final McPherson Report. Within that statement there were some areas – such as the attack itself, that he simply said he didn't want to talk about and he did not.

- In about 2011 he was given an unconfirmed report that as long ago as May 2000, his meetings with his solicitor and the then Assistant Commissioner of Police were covertly recorded by the Assistant Commissioner himself. Ellison reported in 2014 that he had been spied upon until about 2006.

- The revelation was and remains traumatic. Just as conviction of the suspects suggested that Mr. Brooks could begin to put the attack behind him and redirect his life, he was confronted with the information that his privacy had been invaded so many years ago. This information which brought back the the horror of the attack and its aftermath.

- It was being a victim of this crime that triggered Mr. Brooks being subjected to undercover policing.

- It is because he is public-spirited and because he wants to know why being the victim of a murderous racist attack should cause him to be spied upon that he agreed to participate in this Inquiry and become a CP.

- Mr. Brooks is now 41 years old. He has suffered the consequences of being a victim of crime for the majority of his life.

33. It is absolutely essential, both in terms of fair treatment, and in terms of the public perception of the Inquiry, that Mr. Brooks is treated with respect and dignity. Given the importance of his evidence, it is submitted that all practicable measures should be undertaken to ensure that he provides information to or gives evidence to the Inquiry *and that he does so at no further cost to himself.* Logic, as well as humanity, dictate that the two are connected. Moreover, it is apparent from past experience that his contribution to the giving of evidence was increased when it was not compelled. It is not merely compassion, nor sensible strategy for the Inquiry but also Mr. Brooks' rights and rights to privacy and confidentiality that demand that he is afforded the option not to answer certain questions. Put simply, there is absolutely no good argument for subjecting him to further compulsion.

34. The question arises as to the link between particular examples such as that of Mr. Brooks and the approach to take to all NPNSCPs. In this regard, it is recalled, that what is being requested here relates to the presumptive approach to be applied to each victim. There is nothing to prevent applications for, or *proprio motu,* consideration of, variation of the approach in relation to particular individuals. The Inquiry must, however, presume that the NPNSCPs are victims – and not criminals.

35. One of the key differences between seeking to uphold either PSI or a bar on incriminating anyone other than state actors through an undertaking and doing so through an option to decline is who decides when it applies. Quite simply, there is no reason not to afford the victims of police intrusion the agency in the process of the inquiry that comes with a narrow option to decline to answer certain specific questions.

36. Once there is an option to decline to answer on the basis of possible incrimination, it becomes counterproductive to provide for such an option *only* on that basis

(because of the appearance of criminality given if that is the only reason that a witness can decline to answer). Notwithstanding that, we contend that a broader option to decline answering questions that are heavily intrusive upon interests protected by article 8 is warranted in any event.

37. In the opening statement in the Goddard (Child Sex Abuse) Inquiry, the Chairwoman noted that 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. There are, of course differences between the subject matter of that Inquiry and this one. However, having considered those differences, it is submitted that Hon. Dame Goddard's approach *is* an important comparator in several ways.

38. In both cases there is asymmetry between victims and perpetrators and the possibility that victims would be vulnerable.

39. There is also a strong possibility that this Inquiry will hear evidence about sexual abuse, and will hear from the victims thereof. The evidence may show that some of the NPNSCPs are arguably victims of a sexual offence, in that the consent they gave to sex was vitiated by a material deception (the law on this point having been clarified in a number of cases including, for example, *Justine McNally v R* [2013] EWCA Crim 1051). But regardless of whether the test for rape/sexual assault is met, the evidence will include details of an intimate, sexually intrusive form of spying by the police which has caused significant psychological damage. The circumstances in which the victims of such abuse would give evidence will have to be carefully considered. However, what is being requested at present is the presumption that NPNSCPs will be able to decline to answer questions, in order to reassure them that they will have a measure of control and agency in the process of the Inquiry.

40. Finally, the Opening Statement contains a broader enunciation of principle which, it is submitted, is not restricted to the factual context of the Goddard Inquiry in its relevance. It states, in relevant part (emphasis added):

> *While it would obviously be of assistance to the Inquiry to hear as much direct oral evidence from victims and survivors as possible, they must never be made to carry the weight of proving anything. The focus of attention must remain firmly on scrutinising the institutions concerned [...]*

ii. The purpose of the inquiry

41. It might be suggested that, militating against the granting of an option to decline to answer a question that triggers article 8 would produce a barrier to the achievement of the Inquiry's purpose. However, such an argument is premised upon the incorrect notion that the interests of the NPNSCPs are not aligned with the purpose of the Inquiry. To the contrary, they participate as conduits for the public interest. The Chairman has expressed a concern that measures preventing one witness' evidence from being used against another in a potential prosecution would tend to undermine the due administration of justice. This is addressed in detail below.

42. It should also be noted that the fact of compulsion may operate to diminish the quality of the evidence given, particularly where this is the evidence of a victim. It is submitted that affording the NPNSCPs agency in the process of the Inquiry, and especially in their assistance of it through the giving of evidence, is key to the achievement of the Inquiry's aims.

43. Given the victims' desire to understand what happened to them, as well as the broader need to afford them respect, there can be no real basis for a presumption that they would seek to misuse the option hereby sought. To the contrary, it affords them the comfort of knowing that they will not be *forced* to recount, in public, facts which may be both extremely private in nature, and/or which trigger a concern as

to the criminalisation of others. It would be entirely wrong to presume, we contend, that the NPNSCPs will only assist the Inquiry if coerced.

44. Whilst seeking to effect justice to the serious intrusions suffered by some of the NPNSCPs through the *substance* of the Inquiry's work, it would be perverse and irrational if the *procedure* of the Inquiry were itself unnecessarily intrusive.

45. The interests of the inquiry and fairness to the NPNSCPs coincide in demanding that our clients are treated with respect. Compelling them to give statements or evidence, potentially at the risk of prosecution of their friends and associates, is unreasonable.

iii. PSI & the avoidance of incriminating others

46. Simply because an undertaking is justified by PSI, that does not mean that it fulfils perfectly the function of PSI in maximising the quality of evidence by removing a witness' concerns. It is submitted, in this regard, that there are several unavoidable ambiguities in relation to any undertaking based on PSI (such as the draft undertaking set out in the Chairman's note of 3rd March 2016 (at para. 8)).

47. The lack of clarity as to the meaning of "evidence" upon which the proposed undertaking would preclude reliance in any future prosecution. The police could seek to distinguish this from intelligence that they use in relation to a future prosecution. Similarly there is an ambiguity in relation to "evidence" in the proposed undertaking and other material that arises from a line of inquiry that the police would never have had if not for having heard testimony in this inquiry. A third, related ambiguity, is in the meaning of "use" in relation to the question of whether evidence provided in the inquiry is used in any criminal proceedings or when deciding whether to bring such proceedings. The police even allude to this very issue in their submissions of 13th January (at para. 5).

48. The effect is threefold: first, that no matter how clear an undertaking, there are ways in which evidence given by a witness could play a role in a future prosecution. Second, the possibility of this may impact upon the quality of the

evidence given the by the witness. Third, by refusing to allow a witness to refuse to answer a question based upon his own, sincerely held, fear of incrimination, an undesirable appearance of coercion and unfairness would taint any future involvement between the police and the person concerned. Each of these points apply equally to the question of whether there should be an option to decline to answer questions that might tend to criminalise others, notwithstanding the presence of the wider undertaking.

49. It is submitted, further that an option to decline to answer any question is justified because of the appearance of criminality given if that is the only reason that a witness can decline to answer.

iv. Whether section 21(4) of the Inquiries Act 2005 is adequate

50. It is recognised, of course, that witnesses have a right to object to providing a witness statement or giving evidence under section 21(4) of the Inquiries Act 2005 on the ground that it is unreasonable to require them to do so. It is submitted that the rights of a witness under article 8 of the ECHR may be engaged in an objection advanced under section 21(4).

51. On the one hand, it might be said that by insisting that arguments of the above types (whether on the basis of article 8, or PSI outside of the undertaking, or otherwise) the issue can be decided on the basis of the specific circumstances applicable at the time.

52. It is submitted that in practice, the benefit of this approach would be minimal, and it would be gained at great cost, in terms of legal certainty, the treatment of the victim witnesses, and ultimately, the quality of the evidence that they provide. It is emphasised that, although *some* indication could be advanced on behalf of a potential witness as to the reasons for the section 21(4) objection, this would be substantially limited by need not to render the application moot. With this in mind, it is submitted that little is gained by requiring that the issue be decided ad hoc,

witness by witness. Further, a mechanism in which the burden is placed upon the victim to justify their silence turns the notion of respect upon its head.

53. On the other hand, it is submitted that the benefit of dealing in advance with the issue would be immense in terms of legal certainty. Accepting that NPSCPs will be strongly averse to giving evidence that gives rise to a risk of prosecution of fellow NPSCPs, it is possible that they would run the risk of prosecution under section 35 by refusing to answer a question.

54. A witness could simply decide to take the risk of prosecution for a crime under section 35, but they might decide that that this is too much of a risk, and withdraw from giving any evidence at all.

B. <u>Undertakings</u>

55. It is submitted that undertakings in some form are plainly warranted. There appears to be common ground as to the need for undertakings not to prosecute a witness on the basis of evidence that would fall within the privilege against self-incrimination ('PSI'). These submissions, therefore, address only the need to prevent prosecution of anyone other than police officers and state officials or employees following evidence given to the Inquiry.

56. The Chairman has stated that the purpose of an undertaking is to produce a situation in which witnesses can give all relevant evidence without recourse to privilege. The Chairman has expressed a preliminary view that the wider undertaking should not be sought because there is "no privilege against incrimination of others", privilege being derived partly from common law and partly from section 14 of the Civil Evidence Act 1968, and as discussed by counsel to the Inquiry in their note of 8 January 2016 at paragraphs 14-25.

57. The position advanced in these submissions as to the need for undertakings is not based upon PSI, but rather the following legal rights or requirements:

i. The purpose of the inquiry itself and the concomitant need to maximise the quality of the evidence;

ii. The law applicable to prosecutorial discretion and/or abuse of process, and

iii. Legal certainty.

58. After setting out our submissions in each of these areas, we set out our position as to the specific nature and form of the undertaking (iv). It is submitted that an undertaking to provide prosecutorial immunity is necessary and appropriate. If this is not granted, we submit that a minimal alternative is a slightly modified version of the the 'wider undertaking' set out in the NPNSCP submissions of 13th April.

i. Maximisation of quality of evidence

59. The rationales underpinning the privilege against self-incrimination include maximising the quality of evidence given. It does *not* follow that the is *only* way of maximising the Inquiry's ability to obtain relevant evidence is PSI (whether in the form of an undertaking or in the form of an option not to answer).

60. The questions are whether, in order to maximise the quality of evidence there should be an undertaking to relieve NPNSCP witnesses of concerns that any of the evidence in the inquiry might expose them and others to a risk of prosecution; and why the police and other state actors should not be relieved of this risk.

61. The factors are

a. The purpose of obtaining the evidence;

b. The extent to which the threat of prosecution of another will impact upon the quality of a witness' evidence;

c. What is really lost if the evidence cannot be used to facilitate prosecution of those spied upon;

d. The asymmetry between the position of the police and those spied upon.

62. Each will be considered in turn.

a. The purpose to which the evidence is directed

63. The question is whether it is necessary to deny the possibility of prosecution of anyone other than the police and state actors in order to obtain the best evidence in pursuit of the inquiry's purpose. The principled basis for this is set out above. The specifics of the necessity in the circumstances will now be addressed.

b. Impact of the threat of prosecution of another upon NPNSCP witnesses

64. The consequences of the threat of prosecution in terms of disincentive to participate, and consequently detraction from the inquiry's purpose are well set out in paragraphs 8-11 of the NPNSCP submissions of 13th April, which are wholeheartedly endorsed.

65. Of particular importance among the points made therein is the fact that the NPNSCPs are intensely loyal to their fellow activists and campaigners and would be as reluctant, if not more so, to incriminate others as they would be to incriminate themselves. In many cases the loyalty between activists is a direct corollary of their political position. It is submitted that this loyalty is a function of interests that are protected under article 10 and/or 11 of the ECHR. The suppression of either that loyalty or the evidence to be given to the Inquiry by the activists would exacerbate yet further the incursions made upon their freedom of expression and freedom of association. Further, the treatment that they have received in the context of their pursuit of their political positions has given rise to a distrust of the state, the legitimacy of which is borne out by the very need for this inquiry.

66. Moreover, where there is a fear of causing or assisting the prosecution of another, it is vitally important to note that this can be a much broader impediment to the giving of evidence than a fear concerning risks oneself. Whilst a witness may have a good grasp of his/her own actions and the question of whether they were

criminal in any way, it is submitted that the consequences of provision of evidence in relation to the activities of another person will cause a much greater concern. This is because one knows all of one's own actions, and is therefore in a better position to determine whether a particular – ostensibly innocuous detail – could incriminate. The fear, which could conceivably be without real basis in the criminal law, of incriminating another, unwittingly is a concern in itself *and is much greater in relation to the actions of others.*

67. The Chairman has expressed the provisional view that there are other ways to allay a witness' fear that another person would be prosecuted as a consequence of their testimony (note of 3rd March, para. 12). The example given is that "it *may* not be necessary to the fulfilment of the Inquiry's purpose to require an individual to be named" (emphasise added). There are two elements of uncertainty in this approach: first the fact that the Chairman is right not to guarantee that the Inquiry's purpose would not require the naming of a person; and second, that even if the individual concerned were not named, the detail provided may well give rise to a substantial fear of prosecutorial consequences nonetheless. For these reasons, that such an approach would fail entirely to allay a witness' fears.

68. It is, therefore, necessary to deny the possibility of prosecution of anyone other than the police and state actors in order to obtain the best evidence in pursuit of the inquiry's purpose.

69. Uncovering and examining the "possible offences" of the police is core to the Inquiry's purpose, whereas uncovering and examining the "possible offences" of the activists will inhibit the obtaining of evidence needed to achieve it if there is a threat that this could lead to criminal prosecution. In other words, one consequence of the purpose-means distinction is that, in order to achieve the core aim of the inquiry, there is necessarily a difference in the proper treatment of possible offences of NPNSCPs and those of the police. This inquiry absolutely must not become a proxy for further police investigation of the NPNSCPs.

c. What is lost?

70. It should also be emphasised that what is being traded for an obvious and clear improvement in the quality of the evidence to be provided by the NPNSCPs is the loss of an opportunity to pursue prosecutions in relation to conduct which has not previously led to criminal prosecution, despite the highly intrusive police operations that are the subject of this inquiry.

71. It is emphasised again that there is no basis for a presumption that there is widespread criminality among the NPNSCPs. Further, what is being removed is the *threat* of prosecution, a factor which operates upon the preconceptions of a particular witness as to what is and is not criminal. It is submitted that the fears of a witness in relation to the possibility of prosecution of another may diminish the quality of evidence given in relation to activities which are not, in fact, criminal and which would not, in actuality, lead to prosecution.

72. The Chairman has expressed the preliminary view that an undertaking not to use one witness' evidence against another in a potential prosecution would tend to undermine the due administration of justice. The basis for this view that an undertaking not to prosecute anyone (other than state officials or employees) would not allow for a distinction to be drawn between serious and trivial offences.

73. However, for the reasons already set out, this line of reasoning wrongly implies that by precluding the possibility of prosecutions to be pursued on the basis of information that comes to light in the inquiry, criminal behaviour – whether serious or otherwise – that would otherwise have been subject to prosecution, will be allowed to defy justice.

74. It is again vital to distinguish the purpose of the inquiry from the general public interest in the administration of justice. The interest in investigating and prosecuting alleged crime by *anyone*, including activists is one of the reasons for the activities of the police and the system of courts in general. This inquiry has arisen specifically as a result of *prima facie* concerns as to the way in which some aspects

of that broad activity have been pursued. It is not a permanent part of that system but is, rather, a narrow corrective within the broader state framework for the administration of justice. By precluding the possibility of prosecution of NPNSCPs as a result of anything that happens in this Inquiry, nothing is taken away from the police at all.

75. It would be self-defeating for the inquiry to allow for the possibility of a prosecution in the name of the administration of justice writ large if that would impinge upon that narrow corrective function. It is plain that the threat of prosecution of NPNSCPs will deter them giving evidence, and would therefore seriously undermine the possibility that the inquiry can fulfil its mandate.

76. Its purpose is specifically directed at the activities of the police, and it is submitted that the notion of using the inquiry as a potential basis for prosecutions against NPNSCPs should be abandoned at the outset. Any suspicion of criminal activity on behalf of the NPNSCPs would relate to factual material that is very likely to have already been subject to the consideration of the police.

77. In contrast possible wrongdoing – indeed, "possible offences" – on behalf of the police have never subjected to the scrutiny of an investigation. And moreover, the wrongdoing of state actors is of unique importance, in that it will address serious misconduct on the part of undercover police and institutional failures going to the very heart of democratic freedoms and civil society. The institutional reforms that it will necessarily propagate will condition the level of trust that the public has for the police, and for the administration of criminal justice more generally. Its impact will be serious and long-term.

d. Relevant differences between the position of the police and those spied upon

78. Some of the NPNSCPs have already been the victims of mistreatment and grave miscarriages of justice. All have already been subject to intrusive attention from the criminal justice system. They participate as victims, and carry with them the public

interest in examination of, and accountability for, serious misconduct in public office.

79. In contrast, the police have rarely been properly investigated, if at all, for serious mistreatment of large numbers of – in many cases – extremely vulnerable individuals.

80. Given the alignment between the NPNSCPs' status as victims and the purpose of the Inquiry, it would be palpably unreasonable and perverse to require them to go through the inquiry under the spectre of a threat of further potential police investigation or public scrutiny of their private lives. 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.

81. The rationale for not affording the same undertaking to the police is, it is submitted, clear from the points already made. In addition, we note that a key aspect of the victims' rights framework operates to provide victims with an opportunity to exert an impact upon the question of whether a prosecution takes place. The ECtHR has held, in this vein, that civil remedies are not an adequate response to serious wrongdoing, thus effectively creating a right of access to criminal remedies: *X v Netherlands* (1986) 8 EHRR 235.

ii. *Abuse of process / grounds of prosecutorial discretion*

82. Aside of the need to provide the wider undertaking on the basis of the need to maximise the quality of evidence, a second legal root for the granting of undertakings is because of a realistic assessment that a prosecution would not be pursued even if a basis for suspicion of criminal activity were to arise. Reasons why a prosecution would not be pursued include the possibilities that

- the CPS would reject a prosecution based on information arising in this inquiry because it is not in the public interest to use evidence from a process directed at examining the activities of the police for this purpose; or

- a court would terminate such a prosecution on the ground that it amounts to an abuse of process for the police to have sought to pursue a criminal charge.

83. It is entirely foreseeable that either the CPS or a trial court would take such positions. For example, there may be concern as to the appearance of the possibility that such a prosecution were pursued in an effort by the state to retrospectively provide some sort of justification or mitigation for wrongs exposed by the present inquiry, or the information that has given rise to it.

84. It is submitted that this would be a very strong argument that pursuit of a criminal charge on the basis of information provided as part of the investigation of police misconduct would amount to an abuse of process (and would not reach trial as a result). The same can be said in relation to the amount of time that will have passed since many of the facts that this inquiry will examine took place.

85. Another basis for a potential abuse argument would arise if the police in any way contributed to the commission of an offence: *R v. Looseley; Attorney-General's Reference (No. 3 of 2000)* [2002] 1 Cr App R 29; *Teixera de Castro v. Portugal* 28 EHRR 101.

86. Even if it were not to amount to abuse of process (a question that would be determined judicially only after the inception of a prosecution), it is submitted that it can rightly be said *now* that the *possibility* of prosecution in such circumstances is contrary to the public interest. This is so for the very reason that it would exert a disincentive from the giving of evidence in this inquiry: it would undermine both (i) the purpose of the inquiry, and (ii) the evidence needed to achieve it.

87. It should be noted that potential abuse of process and/or prosecutions against the public interest are rationales for the granting of undertakings that are not dependent upon PSI. They are, therefore, not undermined by the Chairman's view as to the absence of privilege not to incriminate someone else.

iii. Legal certainty

88. Even if the Chairman were not of the view that it were possible to come to a view that a prosecution in the future based on evidence *would* either be abandoned by the CPS because it is not in the public interest or *would* amount to an abuse of process, it is submitted that the *possibility* of this produces a very significant level of uncertainty as regards the likelihood that a prosecution would, in fact, follow from the giving of evidence that incriminates another person (or gives rise to the prosecution of another in some other way).

89. The possibilities that a prosecution would not go ahead for any of these reasons – and the element of arbitrariness that this introduces – diminish the interest in maintaining the possibility that they would. It is submitted that this militates strongly in favour of providing NPNSCP witnesses with the certainty that their evidence will not give rise to a criminal charge.

iv. Form

90. There are two ways in which the requirements arising from the above might be seen to be implemented. The first, and – we contend – the most effective measure is the granting of prosecutorial immunity. The second is a 'wider undertaking' similar to that set out in the NPNSCP submissions of 13th April, which is *not* equivalent to immunity. Whereas immunity operates *in personam* and would preclude any prosecution for any offence the facts of which are addressed in the inquiry, the wider undertaking operates upon the substance of the evidence and prevents use of *that material* in effecting a prosecution. The key difference between these alternatives – and the reason why prosecutorial immunity is the only truly sufficient measure – is the greater certainty thereby provided. In the absence of any real value to maintaining the possibility of prosecution, there is no reason, we contend, not to provide victims with the greater level of certainty.

a. Immunity

91. The criteria applicable to the question of whether it is appropriate to grant immunity to a witness were set out by the then Attorney General in a written

answer to the House of Commons on 9th November 1981, and are repeated in CPS Guidance.[1] They are as follows:

> *a. Whether, in the interests of justice, it is of more value to have a suspected person as a witness for the Crown rather than as a possible defendant;*
>
> *b. Whether, in the interests of public safety and security, the obtaining of information about the extent and nature of criminal activities is of greater importance than the possible conviction of an individual;*
>
> *c. Whether it is very unlikely that any information could be obtained without an offer of immunity and whether it is also very unlikely that any prosecution could be launched against the person to whom the immunity is offered.*

92. Of course, these criteria are envisaged as being applied in reference to the possibility of a person giving evidence in a criminal trial. They are equally relevant to the present circumstances, however, and it is submitted that application of such considerations militates strongly in favour of granting immunity. For the reasons already outlined, a request for immunity is different from the undertaking requested above (albeit that immunity is a form of undertaking), in that immunity operates *in personam*.

93. We recognise entirely the rarity with which immunity is granted. Nonetheless, it is submitted that each of the above three criteria are very clearly fulfilled in relation to the NPNSCPs.

94. As to the benefit of having the evidence of NPNSCPs rather than prosecuting them, and the likelihood of a prosecution against the persons to whom the immunity is offered, consideration must be given to fact that the NPNSCPs have *necessarily*

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[1] CPS Legal Guidance on 'Immunities, Undertakings and Agreements under the Serious Organised Crime and Police Act 2005': http://www.cps.gov.uk/legal/p_to_r/queen_s_evidence_-_immunities_undertakings_and_agreements_under_the_serious_organised_crime_and_police_act_2005/index.html#a04

been subjected to police scrutiny already. In some cases significant criminality was discovered, but as noted above, to the extent that there was criminality among campaigners, the *majority* was low level He went on to note that, as a result retention of investigation records beyond seven years was unlikely.

95. The passage of time since many of the events is, itself, a further factor. As noted above, there is a very substantial possibility that prosecutions arising from this Inquiry would not reach trial because of a finding that they are an abuse of process, or would not even be pursued by the CPS because of the lack of public interest in prosecuting. Given the purpose of the Inquiry as described above, its very existence is a strong indication that it would not be in the public interest to prosecute the NPNSCPs for any criminal activity on their behalf that comes to light in this Inquiry, if that were to occur.

96. All of this renders a successful prosecution, in practical reality, very unlikely. Conversely, the benefit of providing the NPNSCPs with immunity would be of immense benefit in terms of affording them certainty in their understanding of their own position. This would endow the Inquiry with a very substantial benefit in relation to the quality of the evidence that it it will hear.

97. It is hard to imagine another situation in which obtaining information about the extent and nature of possible criminal activities on behalf of the police themselves is so much greater than the pursuit of a prosecution of the source of that information. This Inquiry will address serious misconduct on the part of undercover police and institutional failures going to the very heart of democratic freedoms and civil society. The institutional reforms that it will necessarily propagate will condition the level of trust that the public has for the police, and for the administration of criminal justice more generally. Its impact will be serious and long-term.

b. Alternative submission: wider undertaking

98. In the alternative, we submit that the following slightly modified version of the undertaking set out in the submissions of 13th April contains an important addition:

> *This is an undertaking in respect of any person who provides evidence to the Inquiry relating to the matters within its terms of reference. "Evidence" for the purposes of this undertaking includes oral evidence given by that person to the Inquiry, any written statement made by that person preparatory to giving evidence to the Inquiry or during the course of his or her testimony to the Inquiry, and any document or information produced to the Inquiry solely by that person.*
>
> *No evidence, as defined above, given to the Inquiry by a person will be used in evidence against that person or against any other person who was not at the time to which the evidence relates a police officer, state official or employee in any criminal proceedings, or for the purpose of deciding whether to bring such proceedings, save that this undertaking does not apply to:*
>
> > *A prosecution where the person is charged with having given false evidence in the course of the Inquiry or having conspired with or procured others to do so, or*
> >
> > *Proceedings where the person is charged with any offence under Section 35 of the Inquiries Act 2005 or having conspired with or procured others to commit such an offence.*
>
> *It is further undertaken that in any criminal proceedings brought against a person to whom this undertaking applies, no reliance will be placed on evidence which is obtained during an investigation as a result of the provision of evidence to the Inquiry by that person.*
>
> *Further, in any criminal proceedings brought against a person who was and is not a police officer, state official or employee, no reliance will be placed on evidence which is obtained during an investigation as a result*

of the provision of evidence to the Inquiry which could not, by virtue of this undertaking, be used in criminal proceedings against the person who gave it. This undertaking does not preclude the use of information and/or evidence identified independently of the evidence provided to the Inquiry.

In the event of a prosecution of a person to whom this undertaking applies, or anyone in relation to crimes evidence of which has been given at the Inquiry and in the event that the suspect/defendant argues that the investigation/prosecution is as a result of the evidence and the police deny this the burden of proof lies on the police and the Attorney General would have to be satisfied beyond reasonable doubt that the prosecution was entirely independent of the evidence given.

99. The difference between the undertaking in the submission of 13th April and that which is presently sought is in bold text. It is needed, we submit, in order to alleviate the obvious public concern that would arise, if a prosecution were to ensue, that the police had initiated the prosecution as part of an effort to justify wrongdoing that the Inquiry may expose, or to mitigate the resultant reputational damage. It would be essential to include such a requirement in order to maintain public confidence and trust in the police.

III. RELATIONSHIP BETWEEN MEASURES

100. Whilst there are reasons to seek an option to decline even where an undertaking is in place, the undertaking remains indispensable, even where an option to decline is offered. Three points are emphasised in this regard:

i. It is of profound importance to the confidence and comfort of the NPSCP is that there is a measure in place in advance of a hearing, to provide them with certainty as to the risks that they face.

ii. It will improve the quality of their evidence if they are not under the pressure that would arise from protecting PSI only through the witness' own choices made in the witness box.

iii. Furthermore, it is quite possible that the potentially incriminating character of a particular piece of evidence might become apparent only in view of evidence heard subsequently.

COURTENAY GRIFFITHS QC

PAUL KINGSLEY CLARK

26th April 2016

THE UNDERCOVER POLICING INQUIRY

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