

UNDERCOVER POLICING INQUIRY

PRELIMINARY HEARING ON UNDERTAKINGS

I N D E X

Opening remarks1

Submissions by COUNSEL TO THE INQUIRY5

Submissions on behalf of the non-state, non police8
core participants by MR BAILIN

Submissions on behalf of the Metropolitan Police37
Service by MR HALL

Submissions on behalf of Mr Duwayne Brooks OBE, Ms38
Hannah Sell, Ms Lois Austin, and Youth Against Racism
in Europe by MR CLARK

Submissions on behalf of the separately represented.....52
police officers by MR BRANDON

Submissions on behalf of the Attorney General and 54
the Crown Prosecution Service by MR LITTLE

Submissions in reply on behalf of the non-state,59
non police core participants by MR BAILIN

Submissions in reply by COUNSEL TO THE INQUIRY64

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Wednesday 27 April 2016

(10.30 am)

Opening remarks

THE CHAIR: Good morning everyone.

I need, I am afraid, to refer you again to the rules that apply to this hearing. Cameras and recording equipment are not allowed. There must be no recording of the proceedings except by the Inquiry itself.

1 A transcript of today's proceedings will be prepared and
2 placed on the Inquiry's website.

3 Will you please make sure that mobile phones are
4 switched off or on silent. Telephone calls from this
5 room are not allowed except during any breaks in the
6 hearing.

7 Finally, text and Twitter are allowed, but you will
8 remember that no statement made in this hearing can be
9 transmitted from here until at least 60 seconds has
10 elapsed since the statement was made. This one minute's
11 delay is to enable anyone who wants to object to
12 a transmission from here to somewhere else can make it
13 before it is too late.

14 Can I remind you what today's hearing is about? It
15 concerns undertakings which I am being invited to seek
16 from the Attorney General. The reason for that, I will
17 explain in summary, is this: the Inquiry obviously wants
18 to receive the best evidence it can from witnesses who
19 are frank and truthful. If a witness is asked
20 a question whose answer may implicate them in a criminal
21 offence, they are entitled to decline to answer it.

22 The Inquiry itself has no power to give undertakings
23 or indeed immunity in respect of prosecutions for
24 criminal offences, but it's not unusual in an Inquiry
25 for the Crown, through the Attorney General, to give an

1 undertaking where it serves the public interest in
2 encouraging frankness in the evidence given to the
3 Inquiry.

4 I have received written submissions which I have had
5 the opportunity to read and no one disputes that
6 I should invite the Attorney General to consider giving
7 an undertaking whose effect will be to ensure that
8 nothing said by a witness to the Inquiry can be used in
9 future in connection with a criminal prosecution of that
10 witness.

11 That will enable the witness to give evidence to the
12 Inquiry confident that nothing they say will later be
13 used against them.

14 However, the non-state non-police core participants
15 wish to argue that a wider undertaking should be sought
16 whose effect would be to ensure that nothing said by
17 a witness in the Inquiry would be used in future in
18 connection with a criminal prosecution of any person who
19 neither is nor was at the time a police officer.

20 So that, at the moment, is the issue that arises for
21 consideration today. I will ask Mr Barr to tell me
22 whether I am right about that.

23 MR BARR: Sir, yes. Before I do that, may I introduce who
24 is here as much as anything else for the transcript.

25 To my immediate left is Mr Bailin, leading

1 Ms Brander, for most of the represented civilian core
2 participants. To my immediate right is Ms Wilkinson,
3 with me. To her right is Mr Hall for the Metropolitan
4 Police service, leading Ms Le Fevre.

5 To my extreme right is Mr Brandon who appears on
6 behalf of certain police officers not represented by the
7 Metropolitan Police Service. On the second row to my
8 extreme left is Mr Little by the lectern, and his
9 instructing solicitor. Behind me, a little to my left,
10 is Mr Clark who appears on behalf of other civilian
11 represented core participants.

12 Immediately behind me is Mr O'Connor for the
13 National Crime Agency. Almost to the extreme right of
14 the second row is Ms Barton on behalf of the National
15 Police Chiefs' Council. On the third row, a little to
16 my left, is Mr Griffin acting for the Home Office.
17 They, as I understand it, are the advocates who are here
18 today.

19 Mr Clark, as you will know, is here to make an
20 application for permission to make submissions raising
21 issues which were not presented in time.

22 THE CHAIR: Shall we first of all discuss with Mr Clark how
23 he wants to proceed?

24 Mr Clark, I have read the written submission that
25 was received by the Inquiry yesterday afternoon. I was

1 going to suggest to you that it may assist both you and
2 me before you make your application to hear from
3 Mr Bailin.

4 MR CLARK: I would be more than happy with that course,
5 my Lord, thank you.

6 THE CHAIR: You don't have anywhere to go immediately after
7 you have made the application?

8 MR CLARK: No, I don't, thank you, Sir.

9 THE CHAIR: Well if you don't mind, I will call on you
10 later.

11 MR CLARK: So be it.

12 THE CHAIR: Thank you.

13 Submissions by COUNSEL TO THE INQUIRY

14 MR BARR: Sir, as to the position of counsel to the Inquiry,
15 we published a note late on Monday in order to give
16 people advance warning of what it is that we were going
17 to say in response to the skeleton arguments which have
18 been submitted to you. That note has been posted on the
19 Inquiry's website. In those circumstances I propose to
20 be very brief and simply to summarise the main points.

21 We have asked how might the issue of third party
22 incrimination arise in this Inquiry. It is perhaps
23 instructive to start with where it won't arise. It will
24 not arise in relation to groups whose members have acted
25 lawfully. It is likely to be academic if the offence is

1 an offence which is summary only, because of the six
2 months' time limit for laying an information.

3 Thirdly an issue would only arise if the issue of
4 third party criminality was relevant to the Inquiry's
5 work.

6 If there was any attempt to abuse the Inquiry's
7 processes for collateral purposes, it would be
8 prevented, firstly because only relevant questions could
9 be asked and secondly because you, Sir, have very strong
10 powers under Rule 10 of the Inquiry Rules 2006 to control
11 questioning.

12 So how might the issue arise?

13 We consider that it might arise when the Inquiry was
14 considering the justification for undercover policing
15 operations, both at the inception of such operations and
16 perhaps more pertinently during the course of ongoing
17 undercover operations. It might arise in relation to
18 offences committed by undercover police officers,
19 together with others. It could conceivably arise in the
20 event of a retrial following a successful appeal based
21 on a miscarriage of justice involving an undercover
22 police officer.

23 Finally, by way of example, it might arise in
24 relation to serious crimes which were overlooked in
25 order to ensure that the cover of an undercover police

1 officer was not compromised.

2 Sir, we do not rule out that the issue might arise.
3 But would an undertaking in the extended form contended
4 for assist? It might do. Although whether it would
5 really loosen an otherwise tied tongue is unclear. But
6 there are other ways of ensuring that the Inquiry gets
7 to the truth in relation to any relevant criminal
8 activity perpetrated by civilians.

9 If a witness refuses to answer a question about this
10 or gives an evasive answer, you, Sir, may draw
11 inferences. Ultimately you have powers of compulsion.
12 I am talking here about compulsion in relation to
13 a question about relevant criminal activity by
14 a civilian. I am emphatically not talking here about
15 the compulsion of vulnerable witnesses.

16 What would the consequences on the administration of
17 justice be though if an extended undertaking was sought
18 and granted? Here we suggest is the nub of the problem.
19 What is sought is a sweeping undertaking that would
20 cover all offences, no matter how serious, whatever the
21 circumstances. It would apply to all civilian
22 witnesses, no matter who they were. In this regard it
23 must be remembered just how wide the Inquiry's terms of
24 reference are. They are not confined to the undercover
25 policing of political protest. If you accede to the

1 submission, Sir, you would be inviting the
2 Attorney General to take a step which might deprive the
3 victim of a very serious crime of justice. At this
4 early stage of the Inquiry you simply do not know what
5 the impact of a blanket extended undertaking might be.
6 Moreover, you are not in a position properly to inform
7 yourself on that question.

8 An extended undertaking such as the one sought would
9 be unprecedented as far as we have been able to
10 ascertain. We remain of the view that consideration
11 should be left open on a case-by-case basis in the event
12 that exceptional circumstances arise.

13 Unless I can assist you further, Sir, those are my
14 submissions.

15 THE CHAIR: Thank you very much.

16 Right, Mr Bailin.

17 Submissions on behalf of Non-state, non-police core
18 participants by MR BAILIN

19 MR BAILIN: Sir, I will not be as succinct but I will endeavour
20 to be.

21 THE CHAIR: I understand that.

22 MR BAILIN: Sir, obviously I only propose to address you on
23 the need for the extended undertaking. You are
24 currently minded to request an undertaking, co-extensive
25 with the privilege against self-incrimination,

1 and there is no objection to that course from anyone
2 and the only live issue is whether you should go
3 further.

4 THE CHAIR: So that there is no misunderstanding between us,
5 can I ask you whether you have examined the terms of the
6 undertaking set out in my "Minded to" letter?

7 MR BAILIN: Yes, I have, Sir.

8 THE CHAIR: Are those the terms of an undertaking that would
9 be acceptable to those whom you represent?

10 MR BAILIN: No, Sir. We request that the undertaking goes
11 further.

12 THE CHAIR: Could you tell me, before we go any further,
13 what additional words you would require to make that, at
14 paragraph 8 of the "Minded to" letter, acceptable to
15 you?

16 MR BAILIN: Sir, the way we have done it is rather than
17 amend, as it were, your draft, we had set out the
18 proposed terms of our undertaking in our position paper,
19 which is, I think, tab 7 of your bundle, paragraph 13.

20 THE CHAIR: Which is the bit that tells me the point of
21 departure?

22 MR BAILIN: The point of departure is on page 6 in the
23 middle paragraph.

24 Obviously evidence is defined above. So if I can
25 summarise it as follows, Sir, the extending undertaking

1 that we seek, in short, as Mr Barr and yourself, Sir,
2 correctly summarised, would protect non-police persons
3 from criminal consequences of being incriminated by
4 anyone -- not just a police witness -- in the Inquiry.
5 That's the effect in summary.

6 THE CHAIR: I am so sorry. I do understand that. We are
7 not looking at the same page.

8 I am going to hear from you submissions as to
9 whether there should be an extended undertaking. But as
10 far as it goes, and is related only to, and co-extensive
11 with, the privilege against self-incrimination, are the
12 terms of the undertaking you see at paragraph 8 of the
13 "Minded to" letter adequate for that purpose?

14 MR BAILIN: Yes, Sir, I believe they are. Because they
15 encompass -- I don't think we have an issue with those
16 terms, save that they do not extend beyond the
17 privilege.

18 THE CHAIR: That's all I was checking with you.

19 MR BAILIN: Yes.

20 No, in terms of, as it were, the drafting of that
21 undertaking, we don't take issue with that, because it
22 encapsulates within it, for example, that evidence
23 includes evidence given by -- evidence includes for
24 example the provision of documents, oral and written
25 testimony.

1 THE CHAIR: Yes.

2 MR BAILIN: So we don't have an issue with that wording save
3 it doesn't go far enough.

4 THE CHAIR: Now we are going to consider a different issue,
5 which is, if I can call it this, the X against Y
6 undertaking.

7 MR BAILIN: Yes, cross-incrimination.

8 THE CHAIR: It is an undertaking, if given, given in favour
9 of the witness who is giving the evidence that might
10 implicate someone else.

11 MR BAILIN: Yes.

12 THE CHAIR: The difference between that and an immunity is
13 that an immunity is granted to the person against whom
14 the evidence is given.

15 MR BAILIN: Sir, that is certainly one way of looking at it.
16 We make absolutely clear, my first point, Sir, is that
17 it is not an immunity.

18 It is not an immunity, because although if requested
19 and granted it protects non-police persons from the
20 criminal consequences of being incriminated by anyone,
21 it's not an immunity because, firstly, if there is
22 pre-existing evidence, independent of the evidence given
23 to the Inquiry relating to a crime, then the undertaking
24 does not immunise that against prosecution. That
25 pre-existing evidence is not immunised by virtue of the

1 undertaking. That is the first point which militates
2 against the submission that potential victims would be
3 deprived of justice.

4 Firstly, no, because it's not an immunity,
5 pre-existing evidence. Secondly, because a witness who
6 is covered by the undertaking, whether X or Y -- whether
7 it is the person giving the evidence or the person who
8 is incriminated by that evidence -- if the X in that
9 scenario, if the incriminating witness wants to repeat
10 their evidence outside the Inquiry, and give a statement
11 to the police or the authorities, they are free to do so
12 and that material can be used to prosecute. It is not
13 an immunity.

14 Sir, our starting position -- and I hope I don't
15 overstate the position -- is as follows. To avoid
16 getting myself in a tangle, Sir, I will use the
17 shorthand "my group" if I may, to collectively refer to
18 non-police non-state core participants as well as
19 non-police non-state witnesses and non-police non-state
20 individuals. We have defined those terms, Sir, and
21 I will refer to those as "my group" if I may.

22 My group's position, Sir, in this Inquiry is
23 inherently and qualitatively different from the police
24 and state witnesses. Of course in the public Inquiry it
25 hardly needs saying but all participants are entitled to

1 be treated fairly. We accept that of course. But it
2 would be wrong, we submit, to deny the fundamental
3 distinction that exists between my group and others.

4 Other public inquiries have recognised that one
5 needs to acknowledge difference between groups whilst
6 treating them equally fairly in order that the inquiry
7 can effectively discharge its core duty of getting to
8 the truth, of maximising frankness and openness in a way
9 one hopes that goes beyond what would be achieved within
10 the confines of criminal or civil litigation. The truth-
11 finding exercise.

12 So we have given an example. We accept, of course, it is
13 very different in context, the [Independent Inquiry
14 into Child Sexual Abuse], whilst being conspicuously even-handed
15 to all parties, has nevertheless recognised a fundamental
16 distinction between groups. It has taken the decision not to
17 compel, use its powers of statutory compulsion to compel
18 witnesses to give evidence. So there you have -- it's
19 an example and we certainly don't draw a direct
20 parallel, an example of a public inquiry --

21 THE CHAIR: Is this an indication that that Inquiry is
22 willing to receive evidence in writing that will not
23 necessarily be given orally? Or is this a blanket
24 indication saying that no one need say anything to the
25 Inquiry about sexual abuse or the like?

1 MR BAILIN: The indication that has been given, as we
2 understand it, is that no victim will be compelled to
3 give evidence in any form that they don't wish. They
4 have privilege against self-incrimination protection.
5 They also have other protections - for example, whistle
6 blowers have protection against Official Secrets Act
7 powers being used against them, but in addition to that
8 it has been indicated because of the fundamental
9 distinction between the groups that victims, although
10 they could and although powers of compulsion are equally
11 available in respect of all parties, won't be used in
12 respect of that group. And that's a recognition -- we
13 don't put it any higher than this -- that a public
14 inquiry may need to stand back, look at the different
15 groups and acknowledge a distinction whilst still
16 treating all parties fairly.

17 The reason we say that is so important here is
18 because, as you are fully aware, Sir, the primary
19 purpose of this Inquiry is, by its title, to inquire
20 into undercover police conduct. And the examination of
21 the conduct of members of my group is ancillary to that
22 purpose. Yes, it is within the terms of reference but
23 it is not the primary focus nor should it become so.
24 Without being glib, this is not the 'social justice and
25 political activists criminal behaviour inquiry', and it

1 shouldn't become that, Sir.

2 And the Metropolitan Police Service in their skeleton at
3 paragraph 4 put it fairly. They say the Inquiry is not
4 concerned with identifying criminal wrongdoing on the
5 part of members of the public, whether political
6 activists or social justice campaigners or other, but
7 rather with considering past, present and future conduct
8 of police operations.

9 It is also right, Sir, of course, that you recognise
10 the context in which this Inquiry was set up. It was
11 set up, of course, because of concern that the police
12 have overstepped the mark in a number of very serious
13 respects. You don't need me to rehearse them, but they
14 include the criminalising of peaceful protests, the
15 deception of criminal courts and the entering into
16 sexual relationships with those whom they spied on.

17 Those in my group, Sir, of course they encompass
18 a wide range of persons and participants, but they, in
19 broad terms, participate in this Inquiry as victims of
20 those wrongs.

21 That is not to prejudge the Inquiry, but it is
22 a recognition of its foundation and premise. It is, we
23 would submit, a proper acceptance of the context in
24 which the Inquiry operates. But, Sir, if the Inquiry
25 process causes my group further distress or anxiety then

1 there is the very real possibility -- I don't say it of
2 course in any veiled threat -- but there is the very
3 real possibility that those in my group won't wish to
4 take part in it or take part in it fully or take part in
5 it fully and frankly. We submit, Sir, that if that
6 position arose that would be, without overstating the
7 position, little short of catastrophic for the Inquiry.

8 If that happened the Inquiry would unavoidably
9 become one-sided. It would be very difficult, Sir, for
10 the Inquiry to make objective assessments of what
11 happened, to look at the justification for what
12 happened. That would obviously have a consequential
13 impact on accountability and lesson learning. But the
14 problem, Sir, is that as currently calibrated, there are
15 serious disincentives and serious obstacles for my group
16 to participate fully and frankly.

17 Sir, we ask you, candidly, for these purposes to, as
18 it were, put yourself in their shoes and consider it
19 from their perspective for a moment.

20 Firstly, of course, they have to make the difficult
21 decision, many of them, about whether to talk about the
22 most private aspects of their lives in a public forum,
23 in a public inquiry. Obviously the invasion about which
24 they complain about being opened up in public, to gain,
25 hopefully, accountability and understanding, already

1 presents a difficult choice. But the difficulty they
2 then have is that compounding that delicate situation is
3 the core problem that we are faced with, Sir.

4 All of my group -- but especially the political
5 activists, but all of my group -- are intensely loyal to
6 one another. It may be, and it has been said by others,
7 well, others may be loyal to one another too. Police
8 officers may be loyal to one another too in certain
9 groups. Well, we don't necessarily dispute that, but
10 they at this stage have not asked for any extended
11 undertaking, so the focus we submit is properly the
12 loyalty of my group. And my group's loyalty to one
13 another means that they are extremely reluctant and
14 unwilling to do anything which could result in or
15 increase the risk of or contribute in any way to the
16 prosecution of their friends or co-activists, whether
17 that is deliberately or inadvertently.

18 Now the fact that I seek that undertaking, Sir, is
19 not some tacit acceptance that within my group there is
20 wide-spread criminality. You will be aware, Sir -- and
21 it has been referred to for example in the Metropolitan
22 Police Service skeleton -- that there are some very serious
23 crimes under fresh investigation, and it's not the case
24 that for the purposes of our argument we have presumed
25 that only police officers have committed offences or

1 that all police officers have committed offences.

2 That's not the premise of where we start from.

3 Our premise is a concern that those within my group
4 may have committed conduct which is considered by the
5 authorities to be criminal and that's why they seek
6 a wider undertaking.

7 Mr Barr in his supplementary note accepts fairly and
8 summarised to you that at the moment it is unclear how
9 much cross-incrimination and how much examination of
10 criminality of my group may arise during the Inquiry.

11 He suggests, for example, that it may be less of
12 a problem -- I will come to summary only offences and so
13 forth in a moment if I may. But one of the reasons he
14 suggests it may not be such a problem as we paint is
15 that it will only arise if the civilian who gives
16 incriminating evidence would become a prosecution
17 witness in a trial of his or her friend rather than
18 a co-defendant. So one of the points he makes in his
19 skeleton argument is that typically hearsay evidence
20 between co-defendants is inadmissible against one
21 another.

22 It is a valid point, Sir. The difficulty of course
23 is that a person, a witness in the Inquiry -- or worse
24 still a person considering whether to come forward to
25 the Inquiry -- won't know in advance what status they

1 might have in any criminal prosecution. And it's not
2 going to be of much comfort to say, well, don't worry if
3 you incriminate others, I know there is not this wider
4 undertaking but you are likely to be a co-defendant so
5 anything you say will not be used against you. That is
6 of little or no comfort, Sir.

7 So the current protection which you are minded to
8 give -- welcome of course -- does not address or grapple
9 with the loyalty or cross-incrimination. If it remained
10 as it was, we submit it is likely to have an inhibiting
11 effect on the giving of evidence and the coming forward
12 of those who wish to give evidence.

13 Sir, it may even be worse than that, we submit,
14 because of the asymmetry. It is not just the loyalty
15 within my group, but because of the asymmetry between my
16 group and the police. That asymmetry could actually
17 operate as a potential to skew the position because if
18 undercover officers are protected or liberated now by
19 the "Minded to" undertaking, they are free to speak
20 about criminality without fear of consequences for
21 themselves. They are ostensibly unlikely to be loyal to
22 those in my group.

23 They may feel the need to back-justify their actions
24 to show that in some sense they spied on "the right
25 persons". So you have a situation where they are

1 likely -- or may be likely -- to be more willing to
2 incriminate those within my group, whereas my group is
3 extremely unlikely to wish to incriminate one another.
4 That creates a very potentially distorting effect: one
5 group, by virtue of the operation of this limited
6 undertaking, willing or prepared or has a greater
7 incentive to point the finger at another group; another
8 group, as it were, having an incentive to be reticent
9 with its evidence, close ranks, or whatever phrase one
10 wants to characterise it.

11 We have considered very carefully, Sir, the
12 suggestions both by counsel to the Inquiry and by you in
13 your "Minded to" note, Sir, as to whether some lesser
14 measure would operate to remove the inhibition. Because
15 we accept, of course, that it is a significant step to
16 take.

17 Can I address those in turn if I may? Firstly,
18 anonymity. Why couldn't a witness from my group, who is
19 afraid or does not wish to incriminate another within
20 his or her group simply anonymise the others who he or
21 she is talking about when giving evidence?

22 Well that is possible, obviously. Firstly it would
23 need your permission. Secondly, we would need, we
24 submit, to know how that would work. Would you be
25 giving blanket permission for anyone within my group not

1 to name others? If you were not prepared to do that,
2 would it operate on a case-by-case basis?

3 If so, the witness would undoubtedly wish to know
4 before they began their evidence -- and possibly before
5 they came forward -- am I going to have to name others
6 or not? It's critical to my decision. So we submit
7 there would be potentially real difficulties about
8 anonymity.

9 The other difficulty is even if one could work round
10 those practical difficulties, anonymised evidence can
11 still be used to fill an evidential gap. So if the
12 police for the sake of argument know who is present at
13 some key event but don't know what role those who were
14 present played -- and we have evidence about that --
15 then anonymising that fills the gap. It is not the
16 identities which are unknown, it is what happened is
17 unknown. And describing what happened, even with
18 ciphers, fills the evidential gap.

19 It may be worse than that, because a witness may
20 say, "well, I don't believe that anything I have to say,
21 even if anonymised, would contribute to the prosecution
22 of somebody else, but I don't know the full picture.
23 I could be giving innocuous details which are critical
24 in a prosecution. I don't know. I'm not prepared to
25 take that risk or I don't want to."

1 Sir, we recognise that that scenario, as it were,
2 may be thought of perhaps as somewhat hypothetical. We
3 recognise that. There are examples referred to -- and
4 of course I choose my words carefully -- but the
5 Metropolitan Police Service, for example, refer in their
6 skeleton at paragraph 10 to the reinvestigation in the
7 Debenhams matter.

8 Sir, that reinvestigation we invite you to consider
9 is in fact supportive of the need for a wider
10 undertaking. There you have a live criminal
11 investigation about potentially serious conduct. The
12 police may know -- and here I am speaking hypothetically
13 to be absolutely clear -- who was present at important
14 times but don't know exactly what was happening. The
15 anonymity solution if it applied to that example would
16 not be adequate.

17 A witness who was loyal to others would be extremely
18 reluctant to describe what anyone else did for fear that
19 if it was known who was present the jigsaw could be
20 completed.

21 Of course others may leap up and say, well, that's
22 preventing justice. That's obstructing justice. That's
23 stifling a prosecution. Sir, it's not, because it's not
24 an immunity. If there is pre-existing evidence and if
25 a witness is prepared to repeat their evidence outside,

1 then it doesn't prevent prosecution or stifling, but it
2 does remove the obstacle to you finding out the maximum
3 amount of detail in relation to that sort of matter.
4 And that sort of matter with respect, Sir, we would
5 submit is just the sort of matter you would want to hear
6 all about, subject of course to not prejudicing any
7 investigation. But that's just the sort of matter you
8 will be looking at in detail and will want witnesses to
9 be able and feel comfortable being as full and frank
10 with you as possible.

11 If it is felt that our position is still too
12 hypothetical -- of course stage 2 could be, as it were,
13 if you were against us at this level of generality, it
14 is possible not to close the issue off completely, and
15 of course if you were against us we would certainly
16 encourage you not to do that, but to revisit the matter
17 on a case-by-case basis.

18 The difficulty we foresee with that, and the reason
19 we ask you to grant and consider very seriously the
20 wider undertaking, is that a case-by-case basis, it is
21 very difficult to see how it would actually operate.

22 The witness is told there is no wider undertaking:
23 you are protected against incrimination from anything
24 you say in the Inquiry, but anything you say about
25 others could be used in their prosecution; however, you

1 are entitled to apply to the Chair for the wider
2 undertaking to apply in your case and you can set out
3 the justifications for it.

4 Well, firstly there are the mechanics of that. The
5 justification for it, the submission supporting that
6 renewed application, would have to be fully immunised.
7 They would be real instructions revealing the content of
8 what the other persons had done. There would have to be
9 a cast iron guarantee that those submissions could not
10 be used in any prosecution. You would have to set that
11 up.

12 That's not necessarily impossible. There are some
13 examples of where that can be done. You may be aware,
14 Sir, in relation to cooperating witnesses for example
15 under the [Serious Organised Crime and Police Act 2005].
16 I don't know if you have come across that scenario, Sir.
17 So where a suspect wanted to speak with the authorities
18 and cooperate with them, they can have negotiations with
19 the authorities, those negotiations are fully immunised,
20 nothing can be done with them, if the negotiations break
21 down the person can walk away. So it is possible to set
22 up a situation like that for a case-by-case wider
23 undertaking.

24 But put yourselves, we ask you, in the position of
25 a witness in that scenario. Is the witness

1 realistically going to come forward or going to want to
2 put themselves in that situation, even with the immunity
3 attaching to those submissions?

4 The advice from their lawyers would be you have to
5 write down what it is your evidence is, why you are
6 afraid of incriminating others, why you don't want to
7 incriminate others. The Chair may be with you or
8 against you. Those reasons won't be used in any
9 prosecution. We can't guarantee whether it will be
10 granted. The Chair may take the view -- we don't
11 know -- that he can't decide it at the outset of your
12 evidence; it may only be part way through giving your
13 evidence that the Chair can make a decision on the wider
14 undertaking. That is the Chair's prerogative.

15 A witness in those circumstances, Sir, we submit,
16 would be seriously and justifiably inhibited from giving
17 frank and full evidence in that scenario.

18 THE CHAIR: Mr Bailin, can I put a proposition to you that
19 arises out of the submissions you are making?

20 You emphasised the loyalty between activists, which
21 everyone would understand. Who is to say that even an
22 undertaking in the terms you seek -- the extended
23 undertaking if I can call it that -- would have the
24 effect of prising aside the loyalty so as to persuade a
25 witness to name names? It is an emotional loyalty,

1 apart from a social, political, environmental common
2 mind.

3 MR BAILLIN: Sir, you are right. There is no guarantee but
4 we submit in an inquiry the process must foster
5 encouragement. It's certainly not a guarantee, but it
6 would operate -- it would certainly remove a serious
7 disincentive and it would operate as an encouragement.
8 It would operate as an encouragement because the carrot
9 is two-fold: firstly, no adverse consequences for those
10 whom you are loyal to; secondly, because it doesn't
11 operate as an immunity, if there are others who ought to
12 be accountable as a result of your evidence, they can
13 be, if there is pre-existing evidence or if the evidence
14 can be repeated outside.

15 And obviously those who participate in this Inquiry
16 at the outset do so in the hope that it will provide
17 answers, lesson learning, accountability and so forth.
18 That is what they come to this Inquiry with an open mind
19 about. So it is at best an encouragement, one can't put
20 it higher than that.

21 It is perhaps instructive to consider the [Baha Mousa
22 Public Inquiry] example, because we raised that and Mr Barr
23 engages with it. It was under the heading -- I will
24 deal with it now if I may because it is relevant -- it
25 is under the heading that no one has granted an

1 undertaking or rather no Chair has sought an undertaking
2 from the Attorney General in any public inquiry that we can see
3 in these terms. An undertaking has been requested but
4 no Chair has sought an undertaking in these terms.

5 The sequence in Baha Mousa, of course the context
6 was very different. Those seeking the wider undertaking
7 were the soldiers. They couldn't be described as the
8 victims in that case, fairly. They sought a wider
9 undertaking and you have seen in the skeleton arguments
10 that was rejected.

11 The undertaking was co-extensive with the privilege
12 against self-incrimination along the lines of your
13 "Minded to" note. Then we give the important quote by
14 Sir William Gage at the end of the Inquiry, because that
15 is instructive. Of course it is with the benefit of
16 hindsight. He had hoped that granting merely the
17 undertaking co-extensive with the privilege would have
18 broken "the wall of silence" -- the wall of silence where
19 officers in that case had closed ranks, particularly at
20 the court martial. He had hoped that granting the
21 privilege against self-incrimination undertaking would
22 break through that.

23 He recognised it did to some extent, but nonetheless
24 there was some collective amnesia, for want of a better
25 term.

1 So with the benefit of hindsight, I certainly can't,
2 as it were, impute regret to Sir William, but one gets
3 the impression that with the benefit of hindsight you
4 can see that if a wider undertaking had been given,
5 fuller and franker evidence might have been forthcoming.

6 So we have the benefit of seeing what happened. No
7 wider undertaking. Reticence to give full and frank
8 evidence, and an acceptance of that -- or a recognition
9 of that, to put it neutrally -- at the end of the
10 process.

11 Sir, we do ask you to take that example. Sir, we
12 don't draw a direct parallel between my group and the
13 soldiers there, the situation is different, but it is,
14 as it were, the chronology of what happened there that
15 is relevant. That is why, Sir, we say it would operate,
16 we hope -- we submit -- as an encouragement.

17 It is important that the Inquiry, at least at
18 stage 1, offers a realistic encouragement to full and
19 frank evidence. It may need to go further later on but
20 certainly at this stage.

21 The other suggestion as an alternative to the wider
22 undertaking was [Crown Prosecution Service] discretion.
23 Prosecutorial discretion not to prosecute persons if
24 based on evidence that was given at the Inquiry. Of
25 course the primary difficulty with that is that it

1 offers no certainty. The witness has no idea how the
2 [Crown Prosecution Service] will exercise their
3 discretion.

4 It goes further, because those in my group have
5 misgivings about the independence of the [Crown
6 Prosecution Service] in relation to these sorts of
7 prosecutions. I do not invite you certainly to make
8 a finding about that, but what we do ask you to do, Sir,
9 is take on board the fact that there have been
10 miscarriages of justice, you have a power to refer
11 miscarriages of justice, and so when those in my group
12 have that view, that's not a view that ought to be
13 dismissed out of hand. It is a valid concern.

14 Counsel to the Inquiry, and indeed you, Sir, in your
15 "Minded to" note, point out that there is no legal right
16 not to incriminate others. Of course that contrasts
17 with the position against the privilege against
18 self-incrimination. So the current undertaking aligns
19 with the legal right not to incriminate yourself.
20 Remove the legal obstacle and that's a serious
21 encouragement to give evidence.

22 We accept that analysis, of course, and for what it
23 is worth the privilege against self-incrimination of course is
24 part of [the European Convention on Human Rights] as well. But it
25 doesn't matter what the source of those legal rights is.

1 But what we ask you to consider carefully is that
2 the question of undertakings and encouragement to give
3 full and frank evidence needs to address both practical
4 and legal impediments which may inhibit your question to
5 get at the truth. So it doesn't matter whether the
6 impediment is legal -- your right to remain silent -- or
7 practical -- your loyalty to others -- the question is
8 what will foster maximum openness? What will be likely
9 to get you to the truth?

10 That's why, for example, you have to look at the
11 reality of the situation. The Metropolitan Police Service
12 in their skeleton say the starting point is that all
13 witnesses will give evidence irrespective of their
14 loyalties. That is a valid starting point, but it
15 doesn't, we submit, reflect the reality of the
16 situation.

17 We have a body of persons who indicated through me
18 that they feel inhibited about giving evidence because
19 of loyalty, because of cross-incrimination. So we've
20 moved from the starting point. It is not the case that
21 they will give evidence irrespective of their loyalty.

22 Sir, that, as it were, loyalty scenario is not one
23 of our inventing. The Baha Mousa case is important
24 because although the context is very different, and
25 although the loyalties amongst the soldiers -- we don't

1 draw some direct parallel between that and the loyalty
2 amongst our group -- but that scenario is one which
3 arose in that Inquiry and was a real issue. I will not
4 say it was proven to be correct, but we saw what
5 happened where no wider undertaking was given and
6 Sir William nevertheless saw a reticence to give full
7 and frank evidence amongst that group who were loyal to
8 themselves.

9 So it's not something we have dreamt up, the loyalty
10 scenario inhibiting the giving of full and frank
11 evidence. It has arisen in a very different context.

12 Of course, taking the other side of the equation,
13 you have powers of compulsion. You could in theory
14 exercise your powers of compulsion to break through
15 reticence to give full and frank evidence, to break
16 through any wall of silence. But we would suggest with
17 respect, Sir, that persuasion is generally better than
18 force in an Inquiry, and certainly we would suggest it
19 would be particularly inappropriate to use powers of
20 compulsion against those in my group when, for the
21 reasons I began with, they come to this Inquiry as
22 victims of the wrongs.

23 It is suggested also under that heading that of
24 course adverse inferences can be drawn if a witness
25 chooses to remain silent. So that, as it were, goes

1 short of powers of compulsion: I will not force you to
2 answer, but I will hold it against you or the issue if
3 you don't.

4 Well again, Sir, we would submit -- or if answers
5 are evasive even if they are not totally silent --
6 again, Sir, we would submit that pulls in the wrong
7 direction. That is a stick and not a carrot and for
8 that reason we also submit that those courses would not
9 be appropriate.

10 Under the heading -- I have touched on it, I will
11 just say a little word more on it if I may -- the fact
12 that it has not been given before. One is always
13 tempted to say, well, you are your own man, Sir, and
14 that type of thing, but the reality is it doesn't matter
15 it hasn't been given before. The important point is
16 this, legally: the [Inquiries Act 2005], as you have already
17 observed, grants you no statutory powers of immunity,
18 because Parliament intended that you have complete
19 freedom to seek any undertaking which you wish without
20 any preconditions or statutory conditions which suits
21 the needs of your Inquiry. There is no limit on what
22 you can seek and when you can seek it. That is
23 extremely important and the fact that it's not been
24 granted previously -- it has been sought previously, in
25 Baha Mousa -- has not been granted previously ought not

1 in any way to inhibit you. There is no such thing as
2 a standard undertaking in a public inquiry.

3 I give two examples. In [the Litvinenko Inquiry] for example,
4 we had no undertakings. There the prime suspects were not
5 taking part, were unextraditable and were out of the
6 jurisdiction. Maybe the reasons why no undertakings
7 were sought. Conversely in [the Al Sweady Inquiry], undertakings
8 going beyond the privilege against self-incrimination
9 were granted.

10 And that links back into the point I was making
11 about legal and practical impediments. There is no
12 right not to expose yourself to disciplinary proceedings
13 and yet inquiries helpfully listed by Mr Barr in his
14 position paper or research note, inquiries have on
15 occasion given disciplinary undertakings. So gone
16 further than legal rights.

17 Sir, can I finally address whether it is possible to
18 divide and tailor or limit in some way the wider
19 undertaking?

20 We've obviously given anxious thought to that. We
21 recognise the concern that you and counsel to the
22 Inquiry have about the unlimited effect of the
23 undertaking that we seek.

24 We have already made the very first very important
25 point, however, that it is not an immunity. It doesn't

1 stifle prosecution, it doesn't obstruct justice.

2 Of course, it is possible to pick counsel to the
3 Inquiry's annex of likely offences or the catalogue of
4 offences, it is possible to pick those and draw a line
5 somewhere across it. But the truth is, Sir, that
6 loyalty concerns are not offence specific. You might
7 want to consider, Sir, if you were against me what will
8 happen? Because if the undertaking remains co-extensive
9 with the privilege, you will have an odd situation, an
10 artificial situation indeed. Because the only offences
11 which are effectively immunised are time barred summary
12 only offences. Other offences don't have any
13 undertaking at all, but summary only offences don't need
14 an undertaking because they can't be prosecuted anyway.

15 So you would have a position where you hear
16 potentially more about less serious crimes and less
17 about more serious crimes, if we stay as we are in the
18 "Minded to" note. That, we submit, is quite stark.

19 In fact, we submit -- I don't think we need to get
20 into the detail, but the position as regards summary
21 only offences is somewhat muddied for a couple of
22 reasons, which I will just sketch. Firstly, the use of
23 conspiracy, because some agreements to commit certain
24 summary only offences can be prosecuted as a conspiracy
25 even where the summary only offence is out of time,

1 providing the full summary offence has not been
2 committed. So, for example, agreement to commit some
3 summary offence where the full summary offence was not
4 committed can be prosecuted as a conspiracy more than
5 six months later.

6 So conspiracy potentially muddies the summary only
7 waters. In fact there are other issues, for example,
8 criminal damage under £5,000, for example. Although it
9 is summary only it is not necessarily caught by the
10 six-month time limit we have because there have been
11 prosecutions for criminal damage under £5,000 more than
12 six months after the damage. So that is muddled.

13 Finally on the topic of, as it were, dividing or
14 tailoring, the Metropolitan Police Service suggest that the
15 inability to limit the undertaking militates on its
16 grant at all. They don't elaborate much on that. They
17 just say that the fact that it applies to all offences
18 ought to mean it is not granted at all.

19 They do, however, float the idea that of course you
20 would visit wider undertaking on a case-by-case basis.
21 I have already addressed the real practical impediments
22 and chilling effect that that would have, even assuming
23 you could set up a case-by-case undertaking procedure
24 the witness would be extremely unlikely to want to come
25 forward, or certainly begin their evidence, without

1 knowing in advance whether or not any wider undertaking
2 had been granted or was likely to be forthcoming.

3 Finally, Sir, various submissions have been made
4 along the lines of by parity of reasoning why shouldn't
5 the wider undertaking apply to us, for example on behalf
6 of Mr Brandon's clients, I think. He makes the point
7 that force of logic must mean that if you got the wider
8 undertaking we should get it as well, why not? And he
9 sets out his reasons there, Sir.

10 We simply make two points at this stage in relation
11 to that. Firstly we have already set out why we say we
12 ought to be granted or you should seek a wider
13 undertaking in relation to our group. There is an
14 asymmetry between us and others.

15 But secondly, of course, if it were granted and
16 others then sought a wider undertaking, we would then
17 respond to that in due course. At this stage we are the
18 only ones seeking the undertaking and therefore the
19 focus is not whether it ought equally to apply to others
20 or not, but whether those who have applied for it should
21 have it.

22 Sir, unless I can assist at this stage --

23 THE CHAIR: Very helpful, thank you very much.

24 Can I just discover whether the transcribers would
25 like a break?

1 Mr Hall.

2 MR HALL: Sir, I make three very brief points --

3 THE CHAIR: Before we come to you, I need to discuss with
4 Mr Clark whether I'm going to accept any submissions
5 from him, and if so on what terms. I do realise you are
6 under pressure this morning. If at any time you have to
7 go, please don't hang about.

8 MR HALL: Thank you very much.

9 THE CHAIR: We will break, but for a short time. I will
10 come back at quarter to twelve.

11 (11.40 am)

12 (A short break)

13 (11.45 am)

14 Submissions on behalf of the Metropolitan Police Service by
15 MR HALL

16 MR HALL: Sir, my three short points.

17 THE CHAIR: If you would like to do that now, I don't see
18 any reason why you shouldn't, Mr Hall.

19 MR HALL: I am sorry, you want to deal with Mr Clark.

20 THE CHAIR: If you are only going to be five minutes, you
21 carry on.

22 MR HALL: Okay.

23 Sir, firstly we don't propose any alterations to the
24 terms of the draft undertaking in your note.

25 Secondly, the problem with Mr Bailin's submissions

1 is that he's forced to advocate for a general X versus Y
2 undertaking irrespective of the circumstances and
3 irrespective of the nature of the offence.

4 Thirdly, he raises practical issues about how
5 anything less than the X versus Y undertaking might
6 work, but it is too early in the day to reject other
7 alternatives. The Inquiry is at a very early stage in
8 its work.

9 So for those reasons our submission is that the case
10 for a general X versus Y undertaking is not made out.
11 We adopt our submissions and anything else I could say
12 would be repetitious so I don't propose to say anything
13 more.

14 THE CHAIR: Thank you very much.

15 Mr Clark?

16 Submissions on behalf of Mr Duwayne Brooks OBE, Ms Hannah Sell,
17 Ms Lois Austin and Youth Against Racism in Europe by MR

18 CLARK

19 MR CLARK: Thank you, Sir.

20 THE CHAIR: It would help me if I could ask you some
21 questions which go to the issue of whether I should
22 receive your submissions.

23 The Inquiry received just after 3 o'clock yesterday
24 your written submissions with an accompanying email from
25 Ms Maya Lal on behalf of [Public Interest Lawyers],

1 in which she said that such is the strength of feeling
2 from core participants represented by the above
3 mentioned firms -- that is to say [Public Interest
4 Lawyers] and Deighton Pierce Glynn, that you have,
5 together with Mr Courtenay Griffiths, acted pro bono,
6 for which no doubt they are grateful.

7 I just want to be clear who it is that you
8 represent. Who are the core participants whose
9 interests you represent today?

10 MR CLARK: To answer that, the most careful way that I would
11 like to, Sir, if I might just take a moment.

12 THE CHAIR: Yes.

13 MR CLARK: Thank you very much.

14 Thank you, Sir. That has, as I understand it,
15 developed over the course of time, but at the present
16 time it is Mr Duwayne Brooks, Ms Hannah Sell, Ms Lois
17 Austin and Youth Against Racism in Europe...

18 THE CHAIR: Right.

19 MR CLARK: ... who instruct us and take the positions that they
20 do out of principle.

21 THE CHAIR: [Public Interest Lawyers] are the recognised
22 legal representatives for Hannah Sell and Lois Austin,
23 is that right?

24 MR CLARK: And also [Youth Against Racism in Europe].

25 THE CHAIR: Sorry?

1 MR CLARK: And also the organisation that I mentioned at the
2 end.

3 THE CHAIR: Yes.

4 What puzzles me is that when the position statement
5 prepared on behalf of the cooperating group of
6 non-state, non-police core participants was submitted,
7 [Public Interest Lawyers] were amongst those who were,
8 as it were, signatories to that position.

9 That was on 19 February 2016. When the skeleton argument
10 was received from the same group on 13 April 2016, they are
11 again signatories to that position. So how do we find
12 ourselves on 27 April 2016 with core participants who feel
13 very strongly that the group doesn't represent their
14 interests?

15 MR CLARK: Sir, it is important to be clear that that is not
16 the position. [Public Interest Lawyers] remain firmly
17 behind the submissions that you have heard and firmly
18 behind the positions being taken.

19 The position that is outlined in the skeleton that
20 you have received recently, Sir, is in my submission
21 entirely complementary to the submissions that you have
22 already --

23 THE CHAIR: No it is not. You are seeking an immunity from
24 prosecution.

25 MR CLARK: That is a position which is advanced for largely

1 the same reasons as those that you have heard. But
2 also --

3 THE CHAIR: Mr Bailin was very careful to point out to me
4 that he was not seeking an immunity, and that was
5 a reason for the Inquiry to consider seeking from the
6 Attorney General the extended undertaking relating to
7 the use of evidence given to the Inquiry.

8 MR CLARK: Certainly, Sir --

9 THE CHAIR: It is surely not being maintained that the
10 position of those you represent is the same as the
11 position of those represented by Mr Bailin?

12 MR CLARK: The focus, Sir, of the submissions that were made
13 yesterday, and the real reason why there is strong
14 feeling, is oriented around the issue of compellability.

15 THE CHAIR: Right.

16 The second problem we need to grapple with is why
17 these submissions were only made yesterday, when those
18 whom you represent have known at least since 19 February
19 2016 that the position taken by the majority was not the
20 position that you wanted taken.

21 MR CLARK: Sir, this has arisen out of, first of all,
22 discussions in which concerns being voiced by core
23 participants are translated into legal advice and advice
24 about what is possible within these proceedings.

25 First of all, I wish to convey the sincerest of

1 apologies for the timing of the arrival of those
2 submissions, and also to express the firm agreement with
3 the principles that underlie the deadlines that have
4 been imposed. Those deadlines, of course, are based on
5 the concerns and the needs that were set out in your
6 decision, Sir, of 16 December 2015. Now those are issues
7 that we recognise and value entirely: the importance of
8 avoiding delay in proceedings; the importance of the
9 public perception of these proceedings arising from the
10 speed at which they proceed; and the fact that we are
11 talking about the public purse in terms of money that's
12 spent. But, Sir, in my submission it is a corollary of
13 that that there is a public interest in effective
14 participation by the core participants.

15 THE CHAIR: Dealing with the timetable, it was pretty
16 generous, wasn't it? In December you are asked for
17 a position statement by the middle of February.

18 MR CLARK: Sir, it was generous.

19 THE CHAIR: There must have been discussions leading to
20 Ms Brander's submission of the position statement on
21 behalf of the cooperating group.

22 MR CLARK: Sir, if I may, it is inherent in the approach
23 that is being taken that attempts be made to get to
24 a common position; that discussions are had --

25 THE CHAIR: I am so sorry to interrupt you, but we need to

1 push along if we can. That common position was reduced
2 to writing on 19 February 2016. So there you had it in black
3 and white what position was being taken by the majority.
4 And yet just over two months have passed before the
5 contrary submissions are received.

6 MR CLARK: Sir, I would like if I may to really present the
7 submissions that have been given as orientated primarily
8 around the issue of compellability.

9 Now it was following the restrictions order hearing
10 on 22 and 23 March 2016 that the issue first came up in
11 discussion about the question of compellability.

12 The issue of compellability of course arises from the
13 broader question of the treatment of witnesses in these
14 proceedings, the treatment of core participants, and the
15 process through which the evidence is received. That,
16 in my submission, is a broader concern -- albeit
17 a related one -- from the question of effectiveness of
18 receipt of evidence. The latter being directed at
19 making sure, as Mr Bailin rightly put it, that you are
20 in a position to pursue your task of getting at the
21 truth. The question of the way in which witnesses and
22 core participants are treated is a broader one.

23 Now following the --

24 THE CHAIR: Just pause. Let's see if we are agreed about
25 what it is you add to what Mr Bailin has already

1 submitted on behalf of the majority.

2 What you are asking for, as I understand it, is that
3 those you describe as victims -- and it's a useful label
4 for the moment because we all know whom we are talking
5 about -- should be entitled to invoke the privilege
6 against self-incrimination whether there is an
7 undertaking or not. That's a submission I understand
8 you to make.

9 MR CLARK: That's correct, Sir, yes.

10 THE CHAIR: Secondly, you wish to submit that a witness may decline to
11 give evidence on grounds that to do so would amount to a
12 disproportionate interference with that witness's [rights under
13 Article 8 of the European Convention on Human Rights]?

14 MR CLARK: That's correct, Sir, yes.

15 THE CHAIR: What does that have to do -- either of those
16 issues -- with today's hearing?

17 MR CLARK: It has been submitted, Sir, rightly in my
18 submission, that the core rationale for the undertaking
19 that is being sought is ensuring that evidence is
20 received by you effectively, and to ensure that its
21 quality is maximised. In other words to ensure that as
22 much evidence as is relevant and as would be helpful
23 would be received by you.

24 Also, in my submission, the question of how well
25 evidence is received is impacted upon the broader one of

1 individuals' experience of providing evidence in these
2 proceedings and the understandable impact that that
3 process could have, not only in terms of fear of
4 prosecution -- that's one of the reasons why the
5 evidence that we received could be affected -- but more
6 broadly because of the impact that the process of giving
7 evidence in public could have.

8 Now that is a question which is linked to the
9 possibility of fear of prosecution. But fear of
10 prosecution is only one of several reasons why there
11 could be an effect upon the quality of a person's
12 evidence. Some of those reasons are subjective in
13 nature and are particular to certain individual's
14 circumstances, but those circumstances that orientate
15 that potential effect are pinned to their status as
16 victims.

17 THE CHAIR: I am going to ask you to stop now.

18 MR CLARK: Certainly, Sir, yes.

19 THE CHAIR: The second area in which you go further is the
20 immunity that's being sought. Do I understand you to be
21 submitting that there should be an undertaking from the
22 Attorney General giving immunity from prosecution in respect of
23 any information received by the Inquiry that amounts to
24 or forms part of evidence of a crime committed by
25 an individual who was not at the time a police officer

1 or state employee?

2 MR CLARK: That's correct, Sir, yes.

3 THE CHAIR: Thirdly, with regard to the extended undertaking
4 sought by Mr Bailin, you submit that it should include
5 a requirement that in the event of a prosecution the
6 prosecutor must prove beyond reasonable doubt that it is
7 not founded wholly or in any part on evidence given to
8 the Inquiry?

9 MR CLARK: That's correct, Sir, yes.

10 THE CHAIR: Well, Mr Clark, I'm going to have to make
11 a decision whether to permit these submissions to go
12 forward. I can't expect other participants to respond
13 to them even if I were to admit them today. So what
14 I want to do is to make a decision as to admitting these
15 submissions which I will do in writing. Depending upon
16 what that decision is, I may ask for written submissions
17 from other parties.

18 Even if they are admitted I would be very reluctant
19 to spend public money on another day in order to hear
20 them, particularly having regard to the way in which
21 they have emerged over the last few days.

22 So unless there is anything further you want to say
23 about the merits of admitting these submissions, I'm
24 going to defer a decision and give you the answer in
25 writing.

1 MR CLARK: I am grateful, Sir. There are a number of
2 further points that I would like to make.

3 THE CHAIR: Please do.

4 MR CLARK: First of all, as a practical suggestion, bearing
5 in mind your comments about the expense of a further
6 hearing, it may be, Sir, that it is appropriate to defer
7 the decision on whether or not a further hearing is
8 needed until the possibility for other core participants
9 to respond has been explored. It may be, Sir, that
10 there is an opportunity for interaction between the core
11 participants so that we can react to what might be said
12 in response to our submissions or that they can react in
13 response to ours and that a more refined set of issues
14 can be presented for that purpose.

15 But going back to the issue of delay in the receipt
16 of these submissions. What I would want to point out,
17 Sir, is that it was following the Restriction Orders
18 hearing on 22 and 23 March 2016 that the process of
19 discussions between the recognised legal representatives
20 and the non-state core participants continued to take
21 place. It was in the process of that that exactly what
22 you have been suggesting that the core participants
23 would do would be pursued.

24 Now, without going into any details of those
25 conversations -- because that would be entirely

1 inappropriate -- it is clear, Sir, looking at the way in
2 which that chronology unfolded, that all concerned
3 cooperated to the greatest of their abilities and that
4 the process of discussions between core participants led
5 to the submissions that have been given to you being
6 made.

7 It was only in the course of those reflections on
8 the discussions that the possibility of instructing
9 other counsel was countenanced for the first time, for
10 precisely the reasons that you have recommended and
11 advocated in your decision on 16 December 2015. Once that
12 happened these submissions were drafted within a matter
13 of days.

14 Sir, in my submission the approach that is being
15 taken, quite understandably, as to the imposition of
16 deadlines and the questions of funding in this Inquiry,
17 necessarily will lead to a situation in which what
18 happens after the deadline has been imposed becomes
19 directly relevant and unforeseeable in relation to the
20 question of whether it is complied with.

21 THE CHAIR: I am very sorry. I don't for the moment
22 understand that submission. Could you repeat it,
23 please?

24 MR CLARK: Yes, Sir. The direction that has been given for
25 core participants to discuss matters between them and to

1 come to agreed positions to the maximum extent possible,
2 that direction means that any deadline which is imposed
3 in a framework in which that operates renders relevant
4 what happens as those discussions are happening in
5 relation to the question of whether the deadline can be
6 complied with. It may be that the possibility of making
7 submissions such as those that you received yesterday
8 arise only through the process of discussions.

9 THE CHAIR: Yes, but this is why we had a two part process:
10 position statements followed by skeleton arguments.

11 I repeat, everybody whom you represent knew on
12 19 February 2016 what the position was with the majority.

13 If there was a different constituency to be represented,
14 there was plenty of time to do it within the timetable.

15 MR CLARK: Sir, I would be very grateful for a very brief
16 moment to turn my back if I may.

17 THE CHAIR: All right.

18 MR CLARK: Thank you.

19 I am very grateful, Sir. Thank you.

20 The point really is this in relation to the
21 chronology of how all of this has unfolded. Without
22 going into the specifics, which in my submission would
23 be entirely inappropriate, it is 7 April 2016 which is the
24 key date in terms of instructions and discussions which
25 led to these submissions.

1 Following that, all involved have cooperated, as
2 they cooperated throughout this process, and eventually
3 it was recognised that it may be necessary to submit
4 complementary additional submissions.

5 The way that that has unfolded since 7 April 2016 has,
6 in my submission, been extremely fast and has been done
7 with a mind to assist this process more than anything
8 else because what's being asked for is ultimately
9 directed at ensuring that the quality of the evidence at
10 your disposal is at its highest.

11 Now, Sir, as I have said several times, without
12 going into the detail of what has happened --

13 THE CHAIR: No, I would not dream of asking you.

14 MR CLARK: Thank you.

15 THE CHAIR: The procedure that has been adopted by the
16 cooperating group has undoubtedly benefitted the public
17 interest. I am not for a moment criticising that
18 process. I am just disappointed that I am confronted
19 with submissions so late in the day when the timetable
20 has been deliberately set out in order to give ample
21 time.

22 Anyway, is there anything else you want to say in
23 support?

24 MR CLARK: There is not, Sir, other than to express again
25 the profoundest of apologies and understanding of

1 precisely the point you just made.

2 THE CHAIR: Well, Mr Clark, you have done everything you
3 could. Thank you very much indeed.

4 MR CLARK: Thank you. If I might add it is being said from
5 behind me that again it should be emphasised that all
6 concerned have been doing their very best in terms of
7 complying with the procedural requirements as they have
8 unfolded.

9 THE CHAIR: All right, thank you.

10 MR CLARK: It has been expressed to me repeatedly that that
11 is the case, and I can certainly see that that is
12 correct. Unless I can assist you further, Sir, those
13 are my submissions.

14 THE CHAIR: Thank you, Mr Clark.

15 MR BAILIN: Sir, I apologise for arising out of turn.

16 Can I simply say this: you have indicated that you will
17 make a decision on a later occasion as to whether to
18 admit those submissions. On behalf of those who I do
19 represent, we do support their right to be heard, Sir.
20 I don't say anything about the content or anything of
21 that nature, but to shut them out completely, Sir, we
22 submit would be wrong. So we support their right to be
23 heard with whatever directions you thought appropriate.

24 THE CHAIR: Thank you.

25 Now then, can we return to our speaking order?

1 Mr O'Connor, do you want to add anything?

2 MR O'CONNOR: Sir, no. You have our written note. The
3 submission we would make is that it would be premature
4 in the circumstances for you to seek the extended
5 undertaking that Mr Bailin has addressed you on. That
6 in itself is a matter that you have heard submissions on
7 both from Mr Barr and Mr Hall this morning. I have
8 nothing to add to them, unless I can assist.

9 THE CHAIR: Thank you very much.

10 Mr Brandon?

11 Submissions on behalf of the separately represented police
12 officers by MR BRANDON

13 MR BRANDON: Sir, I can be very short. Sir, tab 16, you
14 have the written skeleton argument submitted on behalf
15 of the officers or former undercover officers whom
16 I represent.

17 Sir, those submissions were addressed primarily to
18 two of the contentions advanced by Mr Bailin. The first
19 is the blanket application for extended undertakings;
20 secondly what has been described by counsel to the
21 Inquiry as their "asymmetry".

22 Sir, you will see from paragraph 17 of the written
23 submissions that those officers whom I represent accept
24 that exceptionally, and depending on the circumstances
25 which arise in an individual case, there may be a case

1 for making a request for a broader, wider undertaking,
2 extended undertaking of the kind contemplated in my
3 learned friend's submissions, but that it is premature
4 to do that until you, Sir, have evidence.

5 Sir, to make it clear -- and I think Mr Bailin has
6 picked up on this -- what we say is that there may be
7 circumstances in which an officer whom I represent may
8 wish to make just such an application for an extended
9 undertaking. But that I'm not in a position to be able
10 to do that now in the absence of evidence.

11 So, Sir, really to make our position clear on the
12 basis of the written submissions which we have already
13 made, we say that what my learned friend has asked for
14 is premature and that although there may be a case for
15 extended undertakings, the case must be considered on
16 an individual basis and should apply symmetrically, not
17 to be confined only to non-state core participants.

18 Sir, unless there is anything further I can assist
19 with, that is the submission that we make.

20 THE CHAIR: No, thank you very much.

21 MR BRANDON: Thank you, Sir.

22 THE CHAIR: Can I ask Ms Barton whether she wishes to say
23 anything?

24 MS BARTON: Sir, I have nothing to add, thank you.

25 THE CHAIR: Mr Griffin?

1 MR GRIFFIN: Nothing to add, thank you.

2 THE CHAIR: Thank you.

3 Any unrepresented core participant?

4 Mr Little, are you hear only to observe or to say
5 something?

6 Submissions on behalf of the Attorney General/Director of
7 Public Prosecutions by MR LITTLE

8 MR LITTLE: Both.

9 Sir, can I thank you for inviting Her Majesty's
10 Attorney General and the Director of Public
11 Prosecutions, because in essence any decision taken on
12 any undertaking would be the Attorney's but in
13 consultation with the Director.

14 THE CHAIR: Yes.

15 MR LITTLE: Just so that the public understand, because
16 obviously that is a decision for the Attorney, we don't
17 seek to make detailed submissions in relation to it
18 because it would be a matter for the Attorney to
19 consider in due course. But plainly attending a hearing
20 such as this assists in that process by hearing the
21 arguments developed orally, not just seeing them in
22 writing.

23 So we would not wish to nor be seen to be supporting
24 definitively the terms of any undertaking, in draft or
25 otherwise, particularly that which just covers the

1 privilege against self-incrimination, and so we take
2 a passive role. The undertaking must be
3 inquiry-specific, and the current draft in the "Minded
4 to" note does appear provisionally to us to do just
5 that. It is inquiry-specific, not least the reference
6 to appellate proceedings which would not ordinarily find
7 their way into such an undertaking, but properly appear,
8 provisionally to us to do so in this Inquiry.

9 Can I just briefly turn to the question of the
10 extension? The X and Y extension. Again, it would not
11 be appropriate for any detailed submissions to be made,
12 but I just make three outline points to assist if I can.

13 The fact that there is no precedent for it cannot be
14 a total answer, but we have made efforts to confirm
15 whether it is in fact the position that there is no such
16 precedent for it, and the individual who is no longer at
17 the Attorney General's Office but had been for many
18 years, has confirmed that there is no such precedent for
19 it. So that accords with the detailed research
20 conducted by your own team. Consideration will have to
21 be given as to why it is there has been no such
22 precedent for it, and therefore whether that supports
23 the submissions or not.

24 Secondly, the necessity for the granting of such
25 a blanket provision is a matter which would have to be

1 given very careful consideration, not just for the
2 reasons outlined by counsel to the Inquiry, but
3 developing just one of those, if I can, from a criminal
4 law context, what X says against Y in this Inquiry could
5 only be admissible as evidence against Y in a criminal
6 trial at which X was not a prosecution witness, if the
7 prosecution made a hearsay application.

8 The loyalty which it is said attaches to some of the
9 non-state participants might be thought to rather point
10 against the notion that in those circumstances X would
11 give evidence as a prosecution witness. So confronted
12 with that, as you well know, Sir, the prosecution's own
13 option would be [an application under section 114 of the
14 Criminal Justice Act 2003] and it may be that this
15 application, this hearing, would be a relevant factor
16 for the court considering any potential such
17 application.

18 So that safety valve, as it is, is a factor which
19 this Inquiry may wish to take into account when
20 considering how real or illusory the realities of any
21 potential prosecution are.

22 THE CHAIR: You are referring, Mr Little, as you have
23 acknowledged -- you are not talking just to an audience of
24 lawyers.

25 MR LITTLE: No.

1 THE CHAIR: The public interest consideration will embrace
2 the circumstances in which information came to light,
3 namely in a public inquiry whose purpose was to
4 investigate undercover policing.

5 MR LITTLE: Quite.

6 THE CHAIR: And in respect of which all the witnesses had
7 a protection against the evidence being used against
8 themselves and in the context envisaged by Mr Bailin it
9 would be where that protection extended also to the
10 evidence given against others.

11 So the Law Officers or the Crown Prosecution Service
12 would have to ask themselves what was the true worth of that
13 evidence in a prosecution for a criminal offence rather
14 than in a public inquiry as to what went wrong.

15 MR LITTLE: Quite.

16 The third point really relates to the question of
17 whether this is premature or not at this stage.

18 Plainly you will be able to regulate these
19 proceedings and there will be, it does appear
20 provisionally to us, occasions upon which some form of
21 anonymisation or other methods of adducing the evidence
22 will ensure that you can get to the truth without the
23 need for X to identify Y. But plainly that may not
24 always arise, as counsel to the Inquiry has indicated.

25 But, the ability for you to regulate those

1 proceedings is, it seems to us at this stage, a relevant
2 matter for you to take into account.

3 Can I just say this -- and I am sure that this
4 Inquiry would not be proceeding under this
5 misapprehension -- if the position was reached that this
6 was decided on a case-by-case basis, the reality is, and
7 of course you would receive all the assistance which you
8 would expect from the Law Officers and from the
9 Director, but it would not be a matter which could
10 instantly be determined. It would require careful
11 consideration on a case-by-case basis, being consistent,
12 and needing to look on occasions no doubt sometimes at
13 the broader picture and the public interest.

14 So the case-by-case basis although a sensible middle
15 ground at this stage should not be thought to be
16 something which could be capable of resolution within
17 minutes when a witness was in the witness box, for
18 reasons which I am sure are self-evident to you, Sir.

19 But other than that, we have just highlighted some
20 provisional concerns that we have, but I stress that
21 these are matters for you to take into account and if in
22 due course the particular terms of the undertaking which
23 you plainly will ask the Attorney to consider, it will
24 be considered with great care.

25 THE CHAIR: Thank you, Mr Little.

1 MR LITTLE: Unless I can assist you any further, Sir, those
2 are all my submissions.

3 THE CHAIR: No, thank you very much indeed.

4 Mr Bailin, would you like the opportunity to
5 respond?

6 Submissions in reply on behalf of non-police, non-state
7 participants by MR BAILIN

8 MR BAILIN: I'll very grateful, Sir.

9 Just two points I wanted to raise actually arising
10 out of Mr Little's submissions primarily.

11 In relation to what Mr Brandon said, I think I have
12 already addressed that on symmetry on so forth. We say
13 in relation to symmetry it is premature. We have set
14 out the principal reason why we should have a wider
15 undertaking. If at some stage his clients seek one as
16 well, we would respond to that in due course. It is not
17 dodging the question.

18 In relation to it being premature and that the best
19 course of conduct is to leave it on an individual basis,
20 of course if, as we hope you are not, you are against us
21 on the general principle then we certainly would not
22 wish you to close off individual case-by-case basis.
23 However, we do emphasise the real difficulties that that
24 would cause. I already painted the scenario of
25 a witness who is reluctant to come forward because they

1 can't be told whether they would grant an undertaking,
2 even more a witness who is in the middle of their
3 evidence and then has to seek an undertaking. You have
4 added to that the issue Mr Little raised that of course
5 that can't be done instantly, even if you were minded.
6 So the witness is put under real pressure then.

7 If you were minded to say, "well I was not persuaded
8 by Mr Bailin at the outset, I was not persuaded at the
9 beginning of your evidence, but now, having seen the
10 terms of your evidence, I am persuaded and I am now
11 going to seek" -- and there is no guarantee the Attorney General
12 would give, it, except it would be pretty unprecedented
13 for it not to be -- but put yourself as it were in the
14 position of a witness in that situation. Is that really
15 a workable alternative to what I am proposing?

16 Lastly, in relation to the hearsay problem --
17 THE CHAIR: Mr Bailin, one of the difficulties in your
18 submissions, which I am sure you recognise, is its
19 open-endedness.

20 Perforce we are considering issues that properly
21 would arise when considering real cases. But we don't
22 know yet what they are. The undertaking which you seek
23 applies equally to a drug dealer or firearms trafficker
24 as it does to a political activist. I readily
25 understand that we cannot have a situation in which oral

1 proceedings are halted in the middle of a witness's
2 evidence in order to consider asking the Attorney General
3 to give any particular undertaking, but I am sure you
4 recognise that it is only when the picture emerges as to
5 in what contexts these problems are going to arise that
6 we can actually envisage what the effect of the
7 undertaking would be. Do you see what I mean?

8 MR BAILIN: Sir, I accept that of course.

9 THE CHAIR: Sorry to interrupt. You will have full
10 opportunity to respond.

11 So I am not suggesting that I am going to be ringing
12 up the Attorney General's Office every other day during the
13 course of the hearing. What I am suggesting is that the
14 Inquiry would, with the assistance of the core
15 participants, attempt to identify or recognise areas
16 where this problem really arises. Both you and Mr Clark
17 in your written submissions say that one shouldn't run
18 away with the impression that those whom you represent
19 were committing crime. Some of them may have done and
20 it would have been at a very low level with perhaps the
21 occasional exception, so I am going to have to approach
22 this problem practically so as to ensure we don't have
23 the ludicrous situation which you have just envisaged.
24 But on the other hand, in which I am asking the Attorney
25 General to give an undertaking and providing him with the

1 information I can which will go to inform his judgment
2 of the public interest.

3 MR BAILLIN: Sir, we recognise the force in that.

4 The difficulty we foresee -- it sounds like the
5 glass half empty, but unsurprisingly because our primary
6 position, obviously, is that the wider undertaking
7 should be granted -- the difficulty with, as it were,
8 identifying areas rather than the extreme example of
9 a witness halting in the middle of their evidence, the
10 difficulty is that we submit it underplays or downgrades
11 the witness's fear of the process because you are
12 expecting or hoping that a witness will nevertheless
13 feel comfortable coming forward and saying "don't worry,
14 it is nothing to do with drug dealing or firearms, but
15 it is to do with this which could be considered criminal
16 and involves a lot of my friends or co-activists and
17 therefore it's not purely a hypothetical submission,
18 I have put some real meat on the bones, and in those
19 circumstances please reconsider whether the wider
20 undertaking should apply to me and others in my
21 situation". The difficulty with that is, we submit,
22 that is possibly an over legalistic approach to the way
23 a witness might approach the whole process.

24 A witness is more likely to say, "do I have
25 protection? Is this the kind of process I want to

1 cooperate with? It is already a painful process. Or
2 not?"

3 So that is, as it were, Sir, why we would encourage
4 you to go as far as we do invite you to.

5 The last point I wanted to make was in relation to
6 the hearsay issue which Mr Little picked up on.

7 THE CHAIR: Yes.

8 MR BAILIN: It is suggested that that is either
9 a self-safety valve or it is in reality not very likely
10 that X would be a prosecution witness in Y's case. More
11 likely where X and Y are loyal to one another it is more
12 likely they would be co-defendants and how likely is it
13 that the prosecution would make a hearsay application
14 for X's Inquiry evidence in Y's trial. That is the
15 scenario that is painted as a push back.

16 Sir, we have already made the point that X won't
17 know his or her status in any criminal trial in advance,
18 and so the inhibiting affect on X operates. In any
19 event it is open to a prosecution, if it was a serious
20 criminality, to make X hostile if they had critical
21 evidence to give about serious crimes that Y had
22 committed, and of course it ignores the fact that X's
23 evidence could be used in the investigation of Y. And
24 if X is loyal to Y, X will not want to give that
25 evidence before you. So those are reasons which

1 cumulatively mean that that prospect is not a remote
2 one, we submit.

3 Unless I can assist, Sir?

4 THE CHAIR: Thank you very much.

5 MR BAILIN: Those are my submissions.

6 THE CHAIR: Mr Barr?

7 Submissions in reply by COUNSEL TO THE INQUIRY

8 MR BARR: Just on one point. You asked my learned friend
9 Mr Bailin about terms in which the Chairwoman of the
10 [Independent Inquiry into Child Sexual Abuse] had
11 expressed herself in relation to the compulsion of
12 witnesses.

13 Ms Wilkinson has found the relevant passage. I will
14 read that now if I may. It is paragraph 42 of the
15 opening statement:

16 "The [Inquiries Act 2005] contains a power to order any
17 person to attend and give evidence at a hearing. I have
18 decided as a matter of policy that this power will not
19 be used to compel victims and survivors to give evidence
20 about their experiences of being abused. While it would
21 obviously be of assistance to the Inquiry to hear as
22 much direct oral evidence from victims and survivors as
23 possible, they must never be made to carry the weight of
24 proving anything. The focus of attention must remain
25 firmly on scrutinising the institutions concerned and

1 their handling of cases of child sexual abuse."

2 THE CHAIR: The implication behind that is that the Inquiry
3 would or might be prepared to receive an account from
4 a witness in writing. The weight to be attached to it
5 and the purpose for which it is used would be different
6 matters.

7 What is your understanding?

8 MR BARR: It seems to go to the question of compulsion in
9 circumstances in which a witness might be compelled to
10 give evidence. It seems on its face to be limited to
11 saying that the victim of child sexual abuse will not be
12 compelled to relive the trauma of that by giving
13 evidence of that to the Inquiry.

14 THE CHAIR: Either orally or in writing?

15 MR BARR: It is not limited on the face. It says "to give
16 evidence", it is not limited to any particular form. It
17 seems to be designed to reassure victims of child sexual
18 abuse that they will not be compelled to give evidence
19 about the abuse itself.

20 THE CHAIR: Yes.

21 Thank you very much, everyone.

22 Mr Barr, can you remember if the timetable specifies
23 any particular date by which I will give a ruling on
24 this issue?

25 MR BARR: I don't believe it does, Sir.

1 THE CHAIR: Well, I am first going to have to make
2 a decision whether I am going to admit the further
3 submissions submitted by Mr Clark. If I do then of
4 course I will have to give others the opportunity of
5 responding to them and that will put back the date of
6 any ruling.

7 If I don't admit them, then obviously the material
8 upon which I will make a decision I have heard today.
9 I will not give a date, but as usual I will say that
10 I will give a ruling as soon as I can.

11 Thank you very much.

12 (12.38 am)

13 (The Inquiry adjourned to a date to be fixed)

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