THE UNDERCOVER POLICING INQUIRY

UNDERTAKINGS HEARING

SKELETON ARGUMENT ON BEHALF OF

N10 [LAMBERT], N14 [BOYLING],

N15, N16, N26, N58, N81, N104, N123, N519

Introduction

1. This skeleton is confined to a single issue that arises following the Chairman's 'Minded To' note on undertakings dated 3 March 2016 and the NPNSCP submissions of 19 February and 13 April 2016, namely: whether the undertakings sought should be (a) co-extensive with the privilege against self-incrimination or (b) extended so as to prohibit the use of incriminating evidence given by witnesses and CPs against anyone other than police or state officials in criminal investigations or proceedings.

2. The officers named above ('the Slater & Gordon officers') adopt the position set out in Slater & Gordon's letter dated 19 February 2016. In short, the officers contend that an undertaking should be sought which is co-extensive with the privilege against self-incrimination, and are content with the indication given in the Chairman's 'Minded To' note that such an undertaking will be sought on their behalf from the Attorney-General.

3. The Slater & Gordon officers take issue with the NPNSCP's proposal that a wider undertaking be sought. The basis for the Slater & Gordon officers' approach is as follows:

    (1) The overriding principle should be that all CPs and witnesses should be treated equally before the Inquiry. There is no basis in law or the practice of public inquiries for distinguishing between state and non-state actors.

    (2) The NPNSCP's 'principled distinction' is premised upon and presumes findings of abusive or serious misconduct on the part of all police and state officials. No such findings have yet been made by any tribunal, still less this Public Inquiry.

(3) There are public policy reasons against extending the undertaking sought beyond one which is co-extensive with the privilege against self-incrimination, not least the investigation and prosecution of serious crime, should evidence of it emerge during the Inquiry.

(4) To make the distinction suggested by the NPNSCP's would have the effect of granting immunity to some persons and not others depending on their status at the time of commission of any offence. Such an approach is not consistent with the proper administration of justice.

(5) Such distinction as can be drawn between different categories of CPs and witnesses already exists: those police officers who remain in service can be disciplined, and potentially dismissed should evidence emerge that they have seriously misconducted themselves.

(6) The 'logic' of the NPNSCP's position (as it is described in the Chairman's Note of 3 March 2016 at ¶ 10) applies equally to the Slater & Gordon officers. Knowledge that the evidence they give to the Inquiry may be used to prosecute fellow officers or others may tend to have an inhibiting effect on their evidence. Nonetheless the Slater & Gordon officers recognise that they are expected to assist the Inquiry to fulfil its terms of reference.

4. In the circumstances, the Slater & Gordon officers invite the Chairman to request undertakings from the Attorney-General in the terms set out in ¶ 8 of his Note of 3 March 2016.

Assumption of abuse and misconduct

5. For understandable forensic reasons, the NPNSCP's submissions are premised on the claim of widespread abuse and misconduct on the part of undercover police officers. Although there have been a number of allegations of misconduct of varying degrees of seriousness made against undercover police officers attached to the SDS, there have been no findings made by any competent tribunal to date. In making this observation, the Slater & Gordon officers do not seek to underplay the conclusions of the Ellison Reviews or ignore the public statements made by the Home Secretary in establishing the Inquiry and fixing its terms of reference.

6. It may be that such allegations will be found to be of substance, even if no formal findings are made by the Inquiry given its terms of reference. Equally, and given that the majority of undercover officers have never provided an account of their activities in public, evidence may emerge that supports a contrary view in individual cases. Additionally, on the basis that there are officers about whom no allegations of abusive

conduct have yet been made, there may be individual cases where no evidence of misconduct emerges at all, either self-disclosed or from non-state witnesses or CPs.

7. In summary, the Slater & Gordon officers submit that it would be unsafe to depart from the established practice of public inquiries and seek the wider undertaking sought by the NPNSCP's on the basis of assertions of misconduct, before the inquiry has heard evidence.

The public interest

8. The 'public interest' is preyed in aid by the NPNSCPs in support of their contention that a wider undertaking should be sought. In seeking to dilute the obvious public interest in investigating and prosecuting crime, the NPNSCPs assert that '*there is not widespread...criminality*' among NPNSCP's. There are difficulties with this assertion. First, it is just that; an assertion. As above, it is unsafe to proceed on the basis of assertion before evidence has been heard.

9. Secondly, the quote from the Ellison review provides only limited support for the NPNSCP's position. The Ellison review of possible miscarriages of justice heard limited evidence, and in comparison with this Inquiry was limited in scope, time and resources. Even the quote relied upon admits of some criminality that was more serious than mere 'low level' offending.

10. It is suggested that the 'police' would seek to 'back-justify' their undercover operations by pursuing prosecutions against NPNSCPs. It will be appreciated that there is no evidence for this contention. Even if such a motivation did exist, the NPNSCPs fail to take into account the role of the CPS in the prosecutorial process. The 'police' do not decide who to prosecute. The CPS make such decisions in the majority of cases, and are required to apply the Code for Crown Prosecutors.

11. The CCP has two components: the evidential test and the public interest test. The CPS are not confined to making decisions as to whether it would be in the public interest to prosecute on 'seriousness' grounds alone. No doubt the CPS would be invited to consider that any prosecution of a non-state person arising from evidence given at the Inquiry would not be in the public interest for the same reasons as are advanced by the NPNSCPs in support of their contention that a wider undertaking should be sought by the Chairman to the Inquiry.

Immunity from prosecution

12. It would be contrary to the public interest to grant immunity to a class of persons by the back door. Despite the NPNSCPs claim, for all practical purposes the wider

undertaking would amount to an immunity from prosecution. Indeed, the NPNSCP's proposal appears to go further: there should not be any investigation of any criminal activity (including serious criminality) carried out by non-state persons were evidence of such activity to emerge at the Inquiry.

13. Moreover, the distinction relied upon by the NPNSCPs is arbitrary. It does not take into account (a) the nature or seriousness of the criminality alleged; (b) the age of the offence(s) or offender; (c) the strength or credibility of the incriminating evidence given; or (d) the interests of any victims who may have suffered harm or loss as a consequence. Instead, the only criteria is the status of the person against whom the evidence is given.

14. Whilst the Slater & Gordon officers are not in any sense 'guardians of the public interest' in these proceedings, they are concerned that the evidence they give should have the same status as evidence given by all CPs and witnesses.

The logic of the NPNSCP position

15. It is accepted that the prospect of giving evidence which may be used to investigate and prosecute others is a disincentive to give that evidence. The self-evident logic of this position applies with equal force to the Slater & Gordon officers. There may be a reluctance on their part to give evidence which may incriminate their fellow officers and conceivably, individuals who they encountered and formed relationships with during their respective deployments.

16. The Slater & Gordon officers respectfully agree with the Chairman that special circumstances may arise which require additional measures to be taken to allay the fears of individual witnesses as to the use to which their evidence might be put, depending on a number of factors. Such flexibility in individual cases may encourage witnesses to fulfil their responsibility to the Inquiry and give evidence to the fullest extent possible.

17. Exceptionally, and depending on the particular circumstances that arise in an individual case, it may be necessary to seek a wider undertaking of the kind contemplated by the NPNSCPs. But in the view of the Slater & Gordon officers, it is premature to make such an assessment in the absence of evidence.

Conclusion

18. The Slater & Gordon officers fully understand the Inquiry's terms of reference and that among other issues, it is their conduct rather than the conduct of the groups and individuals encountered by them during their deployments that will be of greater

interest to the Inquiry. Nonetheless, the Slater & Gordon officers would be concerned were an unprincipled and arbitrary departure from the established practice of public inquiries be adopted by seeking the wider undertaking sought by the NPNSCPs, which would have the effect of conferring a different status on the evidence given at the Inquiry depending on the status of the person against whom it was given.

BEN BRANDON

3 RAYMOND BUILDINGS

20th April 2016