

IN THE UNDERCOVER POLICING INQUIRY

For hearing 27 April 2016

SKELETON ARGUMENT ON UNDERTAKINGS ON BEHALF OF THE MPS

Introduction

1. On 27th April 2016, a Preliminary Hearing will take place on the subject of Undertakings. The issue to be determined is:
‘whether and if so in what terms the Inquiry should seek from the Attorney General an undertaking to witnesses at the Inquiry that their evidence will not be used in the prosecution of a person who is not and was not a police officer, or in the decision whether to prosecute such a person.’
2. For convenience, this is described as the ‘extended undertaking’, and these submissions are concerned solely with whether the extended undertaking should be sought from the Attorney General.
3. It is clear from the 2 sets of submissions served by the NPSCPs (Position Paper, 19th February 2016; Skeleton Argument, 13th April 2016) that the proposed extended undertaking:
 - a. would cover any non-police third party: ‘any person’ means precisely that, and is not restricted to CPs or CPs who give evidence: Paper, §13; Skeleton, §1;
 - b. would cover any criminal offence, however serious: Skeleton, §33.
4. It is unclear from the proposed undertaking but assumed that the undertaking is directed at evidence to be given by non-police witnesses (rather than at evidence given by current or former police officers which might affect non-police third parties).
5. In summary, the MPS opposes the extended undertaking on 3 grounds:
 - a. Unintended consequences, namely the impeding of investigation and

- prosecution of serious crime if such offending came to light;
- b. General fairness;
 - c. It is without precedent where insufficient ground has been laid for setting a new one.

Unintended Consequences

6. The MPS respectfully agrees with the Chairman's observation at §12 of his 'Minded to' Note on Undertakings, 3rd March 2016: '*an undertaking in the blanket terms requested would tend to undermine the due administration of justice. It would fail to distinguish between extremely serious and comparatively trivial offences.*' This strongly militates against seeking the wider blanket undertaking sought, certainly at the present stage, and probably at any stage, of the inquisitorial process. The MPS does not rule out the possibility that some form of extended undertaking may be required at some stage in the Inquiry, but submits that it would not be justified at this stage.

7. The NPSCP's invitation to the Chairman ignores the scope of this inquiry:
 - a. Its purpose is to inquire into and report on undercover police operations: ToR §1.
 - b. Its investigation will therefore:
 - i. '*examine the motivation for ... and assess the adequacy of the justification*' for undercover policing operations': ToR §1
 - ii. '*include, but not be limited to, the undercover operations of the Special Demonstration Squad and the National Public Order Intelligence Unit.*': ToR §5.
 - c. The Inquiry is likely to hear evidence on the use of undercover policing as a tactic with respect to public disorder and to extremist targeting of individuals and businesses (which may comprise serious offending).
 - d. The Inquiry may well wish to hear evidence on the use of undercover policing as a response to crimes such as murder, child sex abuse, possession, use and supply of firearms, the supply of drugs, and terrorism.

8. In these circumstances it cannot be excluded that evidence will be heard that either ought to be available for use as evidence in criminal proceedings or, at the very least, which might prompt investigation. The effect of the NPSCP's submissions is that the police would not be even able to follow a lead if a crime was revealed, however serious, whatever its effect on the victim, or the public interest in that matter being investigated. That would be contrary to the administration of justice and would not be fair on victims.

9. This fear – that serious offending may come to light - may prove unfounded. It is common ground that the Inquiry is not concerned with identifying criminal wrongdoing on the part of members of the public (whether political activists, social justice campaigners, or others), but rather with considering the past present and future conduct of police operations. The question of whether it was right to authorize or continue a deployment may therefore be more effectively answered by considering what was known to the police before and during the deployment rather than considering the different question of whether in fact X or Y committed a particular offence. But the possibility that evidence or leads on serious offending will emerge from evidence given cannot be excluded.

10. To illustrate this point, it is public knowledge that arson attacks were carried out against a trio of Debenhams stores in July 1987, and it is further in the public domain that there is a live (2016) re-investigation into the attack on Debenhams in Harrow on 11 July 1987. It is essential that nothing is said by the MPS that could prejudice the investigation or any future prosecution if brought, but the impact of the extended undertaking on this concrete situation needs to be considered. If evidence was given that was relevant to this investigation:
 - a. The extended undertaking would prevent that evidence being used in evidence against any non-police third party, however serious that person's role;
 - b. The extended undertaking would prevent even its use as a lead in the current investigation against such a person.

Unfair distinction between categories of individuals

11. This is a public inquiry rather than a criminal or civil trial and it acts in a non-adversarial way. The starting point of the inquiry must be that all witnesses will give evidence in order to assist the Inquiry to fulfil its terms of reference, irrespective of loyalties to other persons. The MPS Commissioner does not propose to give an undertaking covering disciplinary offences as in the Rosemary Nelson, Hutton and Iraq Inquiries (NPSCP Skeleton, §28) which would prevent one officer incriminating another for disciplinary purposes, nor does he suggest that officers will only give accurate evidence if guarantees against criminal proceedings are given in respect of fellow officers. The same ought to be true of other witnesses.
12. The no-doubt unintended implications of the NPSCP argument are either that non-police members of the public are less likely to wish to assist the Inquiry than police witnesses; or that they should have special treatment if offending by them comes to light. Neither of those premises are fair.

Lack of precedent

13. The extended undertaking sought is without precedent. It is correct that the lack of precedent alone does not bind this Inquiry. However, as the Chairman has observed, it has no corollary in the law of privilege. It has no true corollary in the undertakings sought by and provided to previous Inquiries in respect of disciplinary proceedings. Such undertakings have without exception been effectively calibrated so as to have no application to serious – or gross - misconduct. The distinction between allegations of gross misconduct and misconduct has significant consequences for police disciplinary procedure and potential outcomes and is defined in the Police (Conduct) Regulations 2012.¹ No analogy exists in respect of alleged criminal conduct. So much is implicitly accepted by the NPSCPs.
14. The Chairman identified a range of potential protective measures at §13 of his 'Minded to' Note. Such measures are capable of providing a nuanced, tailored

¹ “*gross misconduct*” means a breach of the Standards of Professional Behaviour so serious that dismissal would be justified”: regulation 3

and proportionate response to the concerns raised by the NSPCPs. No basis for the NSPCPs assertions of a lack of independence on the part of the CPS or for its '*direct interest in securing convictions of NPSIs in order to bolster [its] claimed justification for undercover operations*' (Skeleton, §33(d)) has been identified.

15. The MPS recognizes a range of sensitivities amongst CPs, both police and non-police, about the process of giving evidence to the Inquiry. Witnesses, whether or not they have the status of CPs, are prima facie compellable. The Goddard Inquiry has sought to address the concerns of victims and survivors of sexual abuse in childhood, who would otherwise be compellable witnesses, by guaranteeing that no such witnesses will be compelled to attend. To the best of the MPS knowledge, no decision comparable to that given by the Goddard Inquiry in respect of the compellability of witnesses has been sought from this Inquiry's Chairman. Neither has the establishment of any vehicle analogous to that Inquiry's 'Truth Project' been proposed.²

Conclusion

16. The MPS does not exclude the possibility that an undertaking expanded beyond that which the Chairman already intends to seek may prove to be necessary. That stage has not been reached, and cannot be reached at the very least until the Inquiry is better informed about the potential ramifications of such an undertaking.

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² Independent Inquiry into Child Sexual Abuse, Opening Statement §§29-31.