**Undertakings**
**Application to receive late submissions**
**Ruling**

## Introduction

1. On Wednesday, 27 April 2016 the Inquiry held an oral hearing of the issue whether, for the purpose of encouraging frank and truthful revelation of matters of interest to the Inquiry, the Attorney General should be invited to consider giving to witnesses an undertaking protecting them from the possible effects of their evidence.

2. At 3.03 pm on 26 April the Inquiry received from Ms Maya Devi Lal of Public Interest Lawyers, on behalf of that firm and Deighton Pierce Glynn, a written skeleton argument, prepared by Mr Courtenay Griffiths QC and Mr Paul Kingsley Clark without fee. She applied for permission to advance additional arguments raised in the skeleton argument either at the hearing fixed for 27 April or on some future date, notwithstanding their late despatch. At my request, counsel, Mr Paul Kingsley Clark, attended the oral hearing to make the application in person. I heard Mr Clark and informed him that I would consider the application; I would later issue a decision in writing, either to allow the application and set a timetable for responses, or to refuse it.

3. Under section 17(1) of the Inquiries Act 2005, to the extent that the Act or the Inquiry Rules 2006 do not specifically or otherwise provide, I have authority to give directions for the procedure and conduct of the Inquiry. In making any such decisions I am required by section 17(3) of the Act to act with fairness and with regard to the need to avoid any unnecessary cost, whether to public funds or to witnesses or others. These are factors that I must apply to the present application.

4. On 16 December 2015 I set the timetable towards the Undertakings hearing. The Inquiry counsel team were to provide, by 4 pm on 8 January 2016, a Note “as to the undertakings the chairman might seek, making reference to undertakings requested and given on other occasions”. By 4 pm on 29 January 2016 the core participants, if they wished to respond, were to file a shared or separate “position statement … setting out the undertakings that should be sought from the Attorney General or the Metropolitan Police Service or anyone else”. On 27 January 2016 the timetable was extended so as to accommodate outstanding applications to the Police Federation for funding. Core participants were to file position statements by 4 pm on 19 February and any responses were to be filed by 4 pm on 26 February. I have not received an application from the present applicants for any further extension of time.

5. Many of the non-police, non-state core participants have a similar interest in the Inquiry. Nonetheless, for reasons explained in my first Recognised Legal Representatives Ruling, I acceded to submissions that solicitors of their choice should represent them and I made designations under rules 6 and 7 of the Inquiry Rules 2006 accordingly. For the purpose of avoiding unnecessary duplication of work, and therefore unnecessary cost, I also approved the appointment of Ms Tamsin Allen of Bindmans LLP as the co-ordinating legal representative for the non-police, non-state group of core participants during the preliminary stages of the Inquiry, when issues of law and procedure were to be addressed with the core participants. Those participating within this co-operating group are Shamik Dutta (Bhatt Murphy), Jules Carey (Bindmans LLP), Mike Schwarz (Bindmans LLP), Tamsin Allen (Bindmans LLP), Harriet Wistrich (Birnberg Peirce), Jane Deighton (Deighton Pierce Glynn), Stefano Ruis (Hickman and Rose), Jocelyn Cockburn (Hodge Jones and Allen), Imran Khan (Imran Khan and Partners), Paul Heron (Public Interest Lawyers), Nia Williams (Saunders Law Ltd), Richard Parry (Saunders Solicitors Ltd) and Lydia Dagostino (Kellys). Ms Allen's role is, with the assistance of recognised legal representatives in the group, to identify whether all could be represented at the preliminary hearings by one counsel team or, in the event that conflicting positions required further counsel teams, the number of counsel teams required. My approval was to be sought for the instruction of leading counsel.

6. The Inquiry's counsel team distributed their Note on Undertakings on 8 January 2016. Position statements were received from the Metropolitan Police Service on 13 January, from National Police Chiefs' Council on 25 January, from National Crime Agency on 10 February, from Mark Kennedy, the core participant police officers represented by Slater and Gordon and the co-operating group of non-police, non-state core participants on 19 February, and from Peter Francis on 26 February.[1] Filed with the co-operating group's position statement was a list of recognised legal representatives who wished to be associated with it. Included in the list were Paul Heron and Maya Devi Lal of Public Interest Lawyers but missing from the list was Jane Deighton of Deighton Pierce Glynn. The Inquiry did not receive notification of any conflicting position held by those represented by Ms Deighton.

7. The position statement filed by Ms Ruth Brander and Tamsin Allen on behalf of the co-operating group included the following arguments which I paraphrase:

   (1) There was a difference in status or position of witnesses within the Inquiry between (a) police officers and state employees and (b) those non-police, non-state witnesses who had been affected by undercover police operations. The

[1] For sound reasons Mr Francis had sought a further extension that was granted.

main purpose of the Inquiry was to investigate undercover policing and not those who were affected by it. To the extent that the conduct of non-police, non-state witnesses was examined it was a collateral effect of the terms of reference.

(2) Non-police, non-state witnesses participated as 'victims' of invasion of privacy. They pursued their right under Article 8 of the European Convention on Human Rights to discover the truth.

(3) There was a public interest in making police officers and state employees accountable for the commission of criminal offences during the course of the undercover operations being investigated; there was no such public interest in the case of non-police, non-state witnesses. On the contrary, the obligation of the Inquiry was not to exacerbate previous invasions of privacy by exposing witnesses to the risk of prosecution of offences.

(4) All witnesses should receive the protection of an undertaking co-extensive with the privilege against self-incrimination.

(5) But, it would be unfair to expect victims of intrusive policing to come forward with evidence that might implicate and result in the prosecution of their friends and associates. Non-police, non-state witnesses should receive the protection of an extended undertaking: that their evidence would not be used in any way to initiate or support the prosecution of a person who was not a police officer or state employee at the time of the events described.

8. It is to be noted that the extended undertaking sought by the co-operating group of non-police, non-state core participants would be given to witnesses in the Inquiry for the purpose of removing an inhibition about disclosing criminal misconduct by their friends and associates. It would not amount to immunity from prosecution. Thus, if evidence completely independent of the Inquiry became available to the police a prosecution could ensue.

9. Under the amended timetable, submissions in response were to be filed by 4 pm on 26 February 2016. Responses were filed on that date by the Metropolitan Police Service, Tamsin Alllen on behalf of the co-operating group and the Home Office. The Inquiry received no separate responses from Public Interest Lawyers or Deighton Pierce Glynn.

10. On 3 March 2016 I issued a 'minded to' Note in which I indicated that I was minded to invite the Attorney General to consider giving an undertaking to all witnesses in the Inquiry that was co-extensive with the privilege against self-incrimination; but that I was not minded to invite the Attorney General to give an extended undertaking in the

terms sought by Ms Brander on behalf of the co-operating group. I also indicated that I was not at that stage minded to seek any undertaking from an employer. The core participants were invited to inform the Inquiry whether they wished to be heard in oral argument on the outstanding issues. On the same day, 3 March 2016, the Inquiry sent a report to the office of the Attorney General inviting any written representations the Attorney General wished to make.

11. On 10 March 2016 I issued further directions towards an oral hearing. The non-police, non-state core participants were to file any skeleton argument on which they wished to rely by 4 pm on Friday, 8 April. Responses were to be received by Friday, 15 April. The date for hearing on 27 April was set.

12. After a further extension of time, on 13 April 2016 Alex Bailin QC and Ruth Brander on behalf of Tamsin Allen for the co-operating non-police, non-state core participants filed their skeleton argument in support of the extended undertaking. Public Interest Lawyers (Paul Heron and Maya Devi Lal) were again included in the list of co-operating recognised legal representatives but Jane Deighton of Deighton Pierce Glynn was not. Skeleton arguments in response were received from the Metropolitan Police Service on 19 April, and from National Crime Agency and the police officers represented by Slater and Gordon on 20 April.

13. At no time between 16 December 2015 and 18 April 2016 did the Inquiry receive notification from Tamsin Allen, Paul Heron, Maya Devi Lal or Jane Deighton that there was any conflicting or further interest among the non-police, non-state core participants that required or might require separate representation.

14. However, at 09.57 on 19 April 2016 the Inquiry received an email request for additional funding from Ms Deighton on behalf of herself and Public Interest Lawyers. In it Ms Deighton said that the co-operating group had worked together to reach agreement “on broad issues”. However, there were “a number of issues” that Deighton Pierce Glynn and Public Interest Lawyers believed should be raised with the Inquiry. They were said to embrace “immunity, PSI v undertakings, asymmetry of undertakings and compellability”. Ms Deighton sought funding to obtain “an opinion on these issues to enable our clients to be properly advised, and if so advised, represented”. Ms Deighton observed in her email that counsel for the co-operating group of core participants had advised her to take her own course. I comment that this request for funding was made 2 months after the group had filed its position statement, 6 days after the submission of its skeleton argument and 8 days before the date set for the oral hearing. Far from being a “broad issue” document the non-police, non-state position statement was a closely reasoned exposition of the need for an extended undertaking. At 15.49 on 20 April 2016 the Inquiry sent notification that the application

for additional funding had been refused: in the Chairman's view the additional matters raised appeared to be covered in Mr Bailin QC's skeleton argument. The terms of the request were in any event so vague that the application did not come near "establishing need, reasonableness or proportionality".[2]

15. On 21 April 2016 at 14.52 Ms Deighton gave further details of the additional arguments about which she wished to obtain advice: first, whether non-police, non-state core participants should be compelled to give evidence; secondly, whether non-police, non-state core participants should be given immunity from prosecution; thirdly, whether non-police, non-state core participants should be given the choice of relying on the privilege against self-incrimination even if an undertaking to equivalent effect had been provided by the Attorney General; and, fourthly, without further explanation, that the asymmetry of undertakings to which she had referred in her email of 19 April meant asymmetry between "different levels of seniority of police officers". At 12.33 on 22 April the Inquiry replied with my decision that the refusal of additional funding would be maintained. In short, the additional arguments as explained were irrelevant or premature, or not properly arguable, or continued to be vague and obscure. Furthermore, it was far too late to raise them so shortly before the oral hearing date. I concluded that, in the circumstances, it was not necessary, reasonable or proportionate to make an award of funding for the purpose of obtaining advice about and/or advancing these arguments.[3]

16. At the oral hearing on 27 April 2016, Mr Clark was unable to explain to me why the Inquiry had not been notified at any time between 19 February and 18 April that the position statement filed on 19 February did not represent the agreed position of any represented non-police, non-state core participant who wished to be heard on the issue of undertakings. All that Mr Clark could vouchsafe was that discussions had been ongoing among the participating group of core participants. I did not expect Mr Clark to divulge privileged or confidential information.[4] However, it seems to me plain that Ms Brander had set out in her position statement in the clearest terms the stance that would be taken by the co-operating group. I do not understand why no approach was made then or shortly afterwards by Ms Deighton, Ms Devi Lal or Ms Allen in her role as co-ordinator explaining to the Inquiry that there were other positions to be represented. I infer that either these new arguments had not by then been raised or, if they had, that they had been rejected by counsel acting for the large majority of core participants within the group.

[2] See Secretary of State's Costs Determination paragraph 2a
[3] See Secretary of State's Costs Determination paragraph 2a
[4] Transcript of hearing on 27 April 2016, pages 38-43; 47-51

17. I turn now to the contents of the skeleton argument dated 26 April 2016 submitted by Mr Courtenay Griffiths QC and Mr Paul Kingsley Clark. I was informed at the hearing that the skeleton argument was submitted on behalf of Duwayne Brooks OBE (Deighton Pierce Glynn) and Hannah Sell, Lois Austin and Youth Against Racism in Europe (Public Interest Lawyers).

18. Mr Clark confirmed that he wished to advance three further arguments that were not contained in the submissions made by Mr Bailin QC:

    (1) Non-police, non-state core participants (and/or witnesses) who were 'victims' of undercover policing should be permitted to invoke the privilege against self-incrimination even if the Attorney General had given an undertaking co-extensive with it. Furthermore, they should not be compelled to give evidence that constituted a disproportionate interference with their own or another's right to respect for private life. It would be a breach of Article 8 of the European Convention on Human Rights to require a person, against their wishes, to give evidence about their own or another's activities that bore the stigma of criminality, or was disproportionately intrusive of their private life, or caused them to re-live the traumatic experience to which they had been subjected.

    (2) The Inquiry should seek from the Attorney General an undertaking to provide immunity from prosecution in favour of non-police, non-state core participants (and perhaps others) where documents or evidence given to the Inquiry, alone or in combination with other material, revealed, or contributed to the revelation or proof of, the commission by that person of a criminal offence.

    (3) If, in the alternative, the Attorney General was minded to give the extended undertaking sought by Mr Bailin QC, it should be a requirement, before a prosecution is permitted to proceed against a person who was not at the relevant time a police officer or state employee, that the Attorney General should be satisfied beyond reasonable doubt that the prosecution, the decision to prosecute and the evidence in support of the prosecution were entirely independent of the evidence given to the Inquiry. Such an undertaking is required, it would be submitted, to allay concern that a prosecution would be brought "to justify any wrongdoing that the Inquiry might expose, or to mitigate the resultant reputational damage", or to satisfy concerns that the extended undertaking could be avoided by the police and, for that reason, would be ineffective.

    While Mr Bailin QC was not making or supporting these arguments he did support Mr Clark's application for their receipt by the Inquiry.[5]

[5] Transcript of hearing on 27 April 2016, pages 42-46; 51

19. Argument (1) at paragraph 18 above does not touch on the issue whether the Inquiry should seek any particular form of undertaking from the Attorney General. It is an argument to the effect that the Inquiry should not exercise its power to compel a witness to give evidence whether or not an undertaking has been given. Those powers are contained in section 21 of the Inquiries Act 2005. It is provided in section 21(4) that the recipient of a notice to give evidence, or produce a document, may object to the notice on the ground that he is unable to comply with it, or that *"it is not reasonable in all the circumstances to require him to comply with such a notice".* It may be that a witness might raise with the Inquiry an objection that relied on Article 8. However, even if this argument was relevant to the preliminary issue of "Undertakings", which it is not, it seems to me that the Inquiry could not decide, in advance and in general, without knowledge of the facts of the individual case, whether a witness should or should not be compelled to provide evidence to the Inquiry.

20. Argument (2) seeks immunity from prosecution for all core participants (and perhaps others) who were not police officers or state employees in respect of all offences, however serious they may have been. The immunity would make no distinction between serious criminal offences, such as arson or blackmail, on the one hand and, say, public order offences committed during a demonstration on the other. It would make no distinction between the circumstances of individual cases. It would make no distinction between a prosecution that to any degree depended upon evidence given in the Inquiry and a prosecution that was entirely independent of the evidence given in the Inquiry. I can see no reason why the immunity sought could in principle be confined to core participants. If the argument is sound it must apply to all putative witnesses who were not at the relevant time police officers or state employees. Whether or not the immunity was limited to existing core participants I would have to ask the Attorney General to consider announcing the immunity from prosecution while having little or no knowledge of the consequences that may follow to the due administration of justice (in the interests of the public and of the victims of such offences). In my view, an argument that the public interest could support such an all-embracing *immunity*, whether to core participants alone or to witnesses in general, would be bound to fail.

21. Argument (3) pre-supposes that the Attorney General has undertaken that:

> *"No evidence given to the Inquiry by a person will be used in evidence against that person or against any other person who was not at the time to which the evidence relates a police officer, state official or employee in any criminal proceedings, or for the purpose of deciding whether to bring such proceedings … It is further undertaken that in any criminal proceedings brought against a person to whom this undertaking applies no reliance will be placed on evidence which is obtained during*

*an investigation as a result of the provision of evidence to the Inquiry by that person. Further, in any criminal proceedings brought against a person who was and is not a police officer, state official or employee, no reliance will be placed on evidence which is obtained during an investigation as a result of evidence to the Inquiry which could not, by virtue of this undertaking, be used in criminal proceedings against person who gave it."*

22. Assuming such an undertaking to be in place and that a prosecution was brought against a person who wished to object that the evidence had been given in the Inquiry, or that the decision to prosecute was made in consequence of evidence given to the Inquiry, or that the prosecution depended on a line of investigation that arose from the evidence given to the Inquiry, the defendant would challenge the admissibility of the evidence or would argue that the prosecution constituted an abuse of the process of the court.

23. I can see no justification for seeking from the Attorney General the application of any particular standard of proof to the question whether a prosecution complied with or breached the undertaking he had given. On the hypothesis I would be asked to adopt, the Attorney General will have given an undertaking that evidence, documents or information *would not* be used for the prohibited purposes. It is entirely a matter for the Law Officer giving the undertaking how that undertaking will be met. Should a prosecution ensue and should the defendant take objection, the obligation of the prosecution would be to make full relevant disclosure to the defendant and to the court. The decision whether the prosecution should be stayed would be one for the court and not for the Attorney General.

24. In deciding whether to admit Mr Clark's skeleton argument it seems to me that I must have regard to the circumstances in which the late application came to be made, the impact of its lateness upon the other participants in the Inquiry and upon the costs of the Inquiry, and the ostensible merits of the arguments Mr Clark wishes to advance.

25. I can find no satisfactory explanation for the extreme lateness of the application. Had the Inquiry received notification by or shortly after 10 March 2016 that further submissions were being prepared, it would have been possible at least to consider re-setting the timetable for a hearing that accommodated them without wasted costs.

26. If I admitted these submissions the other core participants would have to respond to them in writing and a further hearing would have to be arranged for oral argument. Substantial additional costs would be incurred by other core participants and by the Inquiry.

27. Despite the failure of diligence, had I been persuaded that there was some merit in the arguments that deserved further consideration I would have admitted them because this is an inquisitorial process in which the core participants have a significant interest as prospective witnesses rather than as parties to a cause. However, for the reasons I have given I regard the further arguments advanced as either premature or without merit and, for those reasons, I shall refuse permission.

26 May 2016

Sir Christopher Pitchford
Chairman, Undercover Policing Inquiry