Undertakings
Ruling

Introduction

1. This Ruling examines the question whether it would be conducive to the fulfilment of the Inquiry's terms of reference and, for that reason, in the public interest, for the Inquiry to invite the Attorney General to consider giving any undertaking whose effect would be to encourage witnesses to come forward and to give uninhibited and frank evidence on matters of public concern.

2. The Inquiry's terms of reference require investigation of, among other things:

   (1) the motivation for, and the scope of, undercover police operations in practice and their effect upon individuals in particular and the public in general;

   (2) the adequacy of justification for undercover police operations;

   (3) the scope for miscarriage of justice in the absence of proper disclosure of an undercover operation to a court during a criminal prosecution;

   (4) whether and, if so, to what purpose, extent and effect undercover police operations have targeted political and social justice campaigners; and

   (5) the undercover operations of the Special Demonstration Squad and the National Public Order Intelligence Unit.

3. In the course of its investigation the Inquiry will receive evidence from undercover officers as to their participation in the activities of those whose organisations they infiltrated and evidence from non-police witnesses ("civilians") who were members of those organisations. Having regard to the use of undercover police operations in the prevention and detection of crime, it is probable that some witnesses, both police officers and civilians, will have engaged in and/or observed conduct that was criminal or otherwise wrongful. It is in the public interest that evidence of wrongdoing by police officers should be disclosed to the Inquiry. It is also in the public interest that evidence of wrongdoing by civilians should be disclosed to the Inquiry where that wrongdoing is material to an issue whose resolution is necessary in fulfilment of the terms of reference.

4. It is a commonplace that witnesses are more likely to be frank and honest with their inquisitor if there will be no adverse consequences to them arising from their evidence, such as the use of their evidence in a criminal prosecution or disciplinary proceedings

against them. The Inquiry has no power to grant immunity from prosecution or to give any undertaking to witnesses that evidence given to the Inquiry will not be used in support of a prosecution for a criminal offence; nor does the Inquiry have power to grant immunity from disciplinary proceedings taken by an employer or to give any undertaking that evidence received by the Inquiry will not be used in support of disciplinary proceedings against a present or former employee. However, the Inquiry can, in the public interest, invite the Attorney General or an employer to consider whether it would be appropriate to grant an undertaking giving some measure of protection to witnesses.

5. The Inquiry's counsel team published a Note on Undertakings on 8 January 2016 and the Inquiry sought position statements from core participants. Position statements were received from the Metropolitan Police Service, the National Police Chiefs' Council, the National Crime Agency, Mark Kennedy, Peter Francis, the core participant police officers represented by Slater and Gordon, and the non-police, non-state co-operating group of core participants. Submissions in response were received from the Metropolitan Police Service, the Home Office and the non-police, non-state co-operating group of core participants.

6. Having received those submissions I issued a 'minded-to' note dated 3 March 2016. There was agreement among core participants that it would be appropriate to request from the Attorney General an undertaking at least co-extensive with the privilege against self-incrimination, whose effect would be to prevent or discourage a witness from refusing to answer a question at the Inquiry on the ground that to do so would incriminate them in the commission of an offence.

7. None of the police officers represented by Slater and Gordon or any police officer whose interests are being represented by the Metropolitan Police Service or Mark Kennedy submitted that the Chairman should seek from their employer or former employer an undertaking protecting the officer from the use of their evidence in disciplinary proceedings. Peter Francis, a former police officer who is not himself at risk of disciplinary proceedings, argued that an undertaking should be sought from "the relevant police disciplinary bodies" so as further to encourage frank responses from police officers to requests for information and evidence. I concluded that no need for any blanket undertaking as to disciplinary proceedings had been established. If the issue arose in the Inquiry it would be reconsidered. In its response the Home Office acknowledged the theoretical possibility that evidence given to the Inquiry may be relevant in disciplinary proceedings taken against a civil servant. However, no core participant suggested that I should seek an undertaking from the Home Office or the Cabinet Office at this stage.

8. There was one outstanding issue that required oral argument. The co-operating group of non-police, non-state core participants argued that the Chairman should seek from the Attorney General an undertaking not to use in a criminal prosecution against a person who was not at the relevant time a police officer or other state official or employee any evidence given in the Inquiry. In consequence, on 10 March 2016, the Inquiry notified core participants that an oral hearing would be held to consider this single issue. The oral hearing was held on 27 April 2016 in Court 76 at the Royal Courts of Justice.

9. However, on 12 May 2016 the Inquiry received from Robert Roscoe of Victor Lissack, Roscoe and Coleman an application on behalf of Mark Kennedy that the Inquiry should consider seeking from the Metropolitan Police Service an undertaking in the following terms:

> *"[W]e extend our submissions on Mr Kennedy's behalf to cover the possibility of his being required to appear as a respondent in any future police misconduct and disciplinary proceedings."*

Accordingly, Mr Kennedy is now seeking an undertaking to the effect that his evidence to the Inquiry would not be used in any future misconduct or disciplinary proceedings taken against him.

10. Mr Roscoe explained this late change of instructions. Mr Kennedy resigned from the police service in 2010. Under the current statutory scheme relating to police disciplinary matters, Mr Kennedy would not be at risk of disciplinary proceedings. Mr Roscoe pointed to an article in The Times newspaper of 11 May 2016, at page 7, in which the shadow Home Secretary, Andy Burnham MP, is reported as *"seeking cross-party support for reforms of police discipline and the justice system".* His aim was a change in the law to permit the institution of misconduct proceedings against retired police officers in which one possible sanction would be loss of pension benefits. It was Mr Roscoe's and Mr Kennedy's understanding of the newspaper report that in Mr Burnham's view the legislative changes required should be of retrospective effect, by which they understand that Mr Kennedy would be liable to disciplinary proceedings, notwithstanding that he left the Metropolitan Police Service in 2010. If legislation of this kind is a risk to which Mr Kennedy might be exposed, he would seek an undertaking that evidence given by him to the Inquiry would not be used against him as a respondent in such disciplinary proceedings.

11. The Inquiry has not received similar representations from any other retired police officer but it seems to me that there will be other retired officers who are in a similar position to Mr Kennedy. Given this change of circumstances I am unable to proceed on the basis

that there is no current call for an undertaking relating to police disciplinary proceedings. The Inquiry will need to give to any officer who wishes to re-consider their position the opportunity to do so, and to give the police services, the Home Office and the non-police, non-state core participants the opportunity to respond. The Inquiry will issue directions to this end in due course. However, I do not consider that a decision relating to the use of evidence in *criminal* proceedings should be delayed to await the outcome of that process. I shall therefore address in this Ruling (i) the consensus that it would be appropriate for the Inquiry to seek from the Attorney General an undertaking co-extensive with the privilege against self-incrimination, and (ii) the contentious argument that the Inquiry should seek an extended undertaking in favour of non-police, non-state witnesses in the Inquiry.

12. The Inquiry received skeleton arguments from Mr Alex Bailin QC and Ms Ruth Brander on behalf of the non-police, non-state co-operating group of core participants, Mr Jonathan Hall QC and Ms Sarah Le Fevre on behalf of Metropolitan Police Service, Andrew O'Connor QC on behalf of National Crime Agency and Ben Brandon on behalf of the core participant police officers represented by Slater and Gordon. Also attending the oral hearing were Ms Fiona Barton QC on behalf of the National Police Chiefs' Council, Mr Nicholas Griffin QC on behalf of the Home Office and, at the Inquiry's invitation, Mr Tom Little on behalf of the Attorney General and the Director of Public Prosecutions.

13. On the day before the oral hearing the Inquiry received from Public Interest Lawyers and Deighton Pierce Glynn a written skeleton argument prepared without fee by Mr Courtenay Griffiths QC and Mr Paul Kingsley Clark. They sought permission to advance their arguments orally either on 27 April 2016 or on some future date. Having considered the application I have refused it in writing in a separate Ruling of today's date.

The privilege against self-incrimination

14. As explained by Counsel to the Inquiry in their Note of 8 January 2016 at paragraphs 8 and 9, the ability of a witness in the Inquiry to rely on the privilege against self-incrimination is settled by section 22(1) of the Inquiries Act 2005. There is a consensus among the core participants, with which I agree, that it would be conducive to the fulfilment of the Inquiry's terms of reference and in the public interest of ensuring that police officers and others would not be deterred from giving frank and uninhibited evidence to the Inquiry that they should have the benefit of an undertaking whose effect would be to protect them from the consequences of self-incrimination.

15. I note the judgement of Lord Saville, expressed in the course of the Bloody Sunday Inquiry, that the effect of such an undertaking would be to remove a witness' ability *"to*

refuse to answer a question, or to produce documents on the basis of the privilege".[1] This may be a matter for further consideration in the event of an objection being made by a witness under section 21(4) of the Inquiries Act 2005 but it does not fall for consideration now. At the least the effect of such an undertaking would be to encourage truthfulness from witnesses who might otherwise be reluctant to expose themselves to the risk that their evidence would subsequently be used against them.

16. The common ground among the core participants raises the question as to what is the ambit of the privilege against self-incrimination. Again I am indebted to Counsel's Note.[2] Section 14(1)(a) and (b) of the Civil Evidence Act 1968 identifies the privilege as one that entitles a person *"to refuse to answer any question or produce any document or thing if to do so would tend to expose that person"* or their *"spouse or civil partner"* to *"proceedings for an offence or for the recovery of a penalty"* under the law of any part of the United Kingdom.

17. Counsel to the Inquiry have researched the authorities[3] from which I conclude:

    (1) The privilege protects witnesses from providing evidence that could be used directly against them or indirectly to set up a line of inquiry that leads to the discovery of real evidence of an incriminating character;[4] and

    (2) The direct or indirect subsequent use of the evidence in a criminal prosecution includes reliance on it for the purpose of making a decision whether to prosecute.[5]

18. Counsel to the Inquiry posed the question whether the privilege is available to a witness who has already been convicted of the offence and concluded that it is available in appellate proceedings or on a re-trial of a criminal charge.[6] I agree. Although the Inquiry is not aware of any decision on the issue, it seems to me that the words *"proceedings for an offence"* in section 14(1) of the Civil Evidence Act 1968 must embrace proceedings on appeal against conviction, just as the *"determination of ... any criminal charge"*, to which Article 6(1) of the European Convention on Human Rights refers, relates to trial of the charge and any appeal proceedings in respect of that charge.

19. Mr Jonathan Hall QC, in the position statement submitted on behalf of the Metropolitan Police Service, did not challenge the correctness of Counsel to the Inquiry's conclusion

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[1] See Counsel to the Inquiry's Note paragraph 13, page 6
[2] Counsel to the Inquiry's Note paragraph 9, page 4
[3] Counsel to the Inquiry's Note paragraphs 17 - 25, pages 7 - 11
[4] *Rank Film Distributors v Video Information Centre* [1982] AC 380, per Lord Wilberforce at page 443D; *Sociedade Nacionale de Combustiveis de Angola UEE v Lundqvist* [1991] 2 QB 310 per Lord Justice Beldam at page 332B
[5] *Den Norse Bank ASA v Anonatas* [1999] QB 271 per Lord Justice Waller at page 289A
[6] Counsel to the Inquiry's Note paragraph 25, page 10

that a witness might decline to answer questions on the ground of self-incrimination in appellate proceedings relating to a criminal charge. Mr Hall QC suggested only that, if an undertaking co-extensive with the privilege against self-incrimination was to include self-incrimination in appellate proceedings, the undertaking should say so explicitly. He posed the question whether *"[it] might be considered anomalous if a person's conviction was referred for consideration as a miscarriage of justice as a result of the work of the Inquiry, but that the individual's own evidence, including any admissions ... made, could not form part of any appeal proceedings"*.[7]

20. I shall turn, therefore, to the public interest in seeking an undertaking that applies to the use of evidence given to the Inquiry in subsequent appellate proceedings. The Inquiry's terms of reference require examination of circumstances that may have given rise to a miscarriage of justice of the type that arose in *Barkshire and Others* [2011] EWCA Crim 1885 and *Theo Bard and Others* [2014] EWCA Crim 463.[8] The Court of Appeal Criminal Division quashed the convictions of appellants whose trials had been tainted by a failure of the prosecution to make disclosure of the participating role of an undercover police officer. The prosecution had failed to disclose material that could or would have required the trial judge to consider whether the trial should be stayed on the grounds of an abuse of the process of the court by reason of the undercover officer's possible role as an *agent provocateur*. That the appellants had committed the acts that constituted the offences charged was not material to the issue in the appeal. The convictions were unsafe because the appellants had been deprived of the opportunity to argue that the prosecution should be stayed as an abuse of process.[9] The anomaly to which Mr Hall QC referred in his position statement is most unlikely to arise in a miscarriage of justice context because the relevant evidence would, as in *Barker and Theo Bard*, concern (i) the activities of the police officer rather than the appellant and (ii) the obligation of the prosecutor to make disclosure of the officer's activity to the trial judge. To the extent that the appellant's evidence in the Inquiry implicated the police officer in unlawful activity, giving rise to his grounds of appeal, it is highly unlikely that his evidence in the appeal would be any different.

[7] Position statement of Metropolitan Police Service paragraph 18

[8] Paragraph 2 of the terms of reference requires a review of "the extent of the duty to make, during a criminal prosecution, disclosure of an undercover police operation and the scope for miscarriage of justice in the absence of proper disclosure".

[9] As Lord Nicholls said in *Looseley* [2001] UKHL 53, [2001] 1 WLR 2060 at paragraph 19: "A defendant is excused, not because he is less culpable, although he may be, but because the police have behaved improperly. Police conduct which brings about, to use the catch-phrase, state-created crime is unacceptable and improper."

21. I have considered a further factual matrix anticipated by Counsel to the Inquiry.[10] It is the possibility that a witness has appealed against conviction on a ground of appeal that does not concern the behaviour of a police officer acting undercover. Counsel anticipate that, in the absence of an undertaking, the witness' evidence to the Inquiry may be used by the prosecution to demonstrate that the appellant committed the offence and, accordingly, that the conviction was safe. I find it difficult to envisage circumstances in which a witness will have (i) given evidence to the Inquiry making admissions that did not have to do with the activities of an undercover officer, (ii) appealed against conviction for that offence on a ground other than the participation of an undercover officer, and (iii) advanced a case in the appeal that was inconsistent with his admissions to the Inquiry. Were these circumstances to arise (which I find very unlikely) the prosecutor would be unable to rely in the appeal on the appellant's evidence to the Inquiry. To this extent I acknowledge the anomaly to which Mr Hall QC referred. However, had the undertaking not been given, the witness could simply have exercised his right at the Inquiry not to answer, in which case the prosecutor would have been in no better position in the appeal.

22. In the 'minded-to' note I indicated the terms of an undertaking that I was provisionally prepared to invite the Attorney General to consider. It included the application of the undertaking to an appeal. Neither in his subsequent skeleton argument, nor in his oral submissions on 27 April 2016, did Mr Hall QC seek to persuade me to the contrary. In my view, the predominant public interest is in exposing any wrongdoing by police officers, or a failure of disclosure by a prosecutor, that may have led to an improper or unsafe conviction, whether, as Lord Nicholls put it in *Looseley*, the defendant was less culpable or not. In order to encourage the search for the truth non-police witnesses should not be inhibited from frank disclosure by the insubstantial risk that their evidence in the Inquiry would subsequently be used against them in an appeal. For this reason I consider that the Inquiry may properly suggest to the Attorney General that the public interest will be served by the giving of an undertaking co-extensive with the privilege against self-incrimination, applied both to a criminal prosecution and an appeal against conviction.

23. The terms of an undertaking co-extensive with the privilege against self-incrimination that I shall invite the Attorney General to consider are as follows:

> *"It is undertaken that, in respect of any person who provides evidence or produces a document, information or thing to the Inquiry, no evidence he or she may give to the Inquiry, whether orally or by written statement, nor any written statement made*

[10] Counsel to the Inquiry's Note paragraph 25, page 10

preparatory to giving evidence, nor any document, thing or information produced by that person to the Inquiry:

(i) will be used against him or her (or their spouse or civil partner) in any criminal proceedings (whether present or future or on appeal from a conviction); or

(ii) will be used when deciding whether to bring such proceedings,

except proceedings where he or she is charged with having given false evidence in the course of this Inquiry or with having conspired with or procured any other person to do so or is charged with any offence under section 35 of the Inquiries Act 2005 or having conspired with or procured others to commit such an offence.

It is further undertaken not to use in criminal proceedings (whether present or future or on appeal against conviction) against that person (or their spouse or civil partner) any evidence which is itself the product of an investigation commenced as a result of the provision by that person of any evidence, document, thing or information to the Inquiry.

For the avoidance of doubt, this undertaking does not preclude the use of a document and/or information and/or evidence identified independently of the evidence provided by that person to the Inquiry."

An extended undertaking

24. Having researched the work of other inquiries over a period of 20 years Counsel to the Inquiry in paragraph 88 of their Note posed the question:

> *"88. Should an undertaking significantly wider than the privilege [against self-incrimination] be sought? A wording wider than the privilege would not be justified on the basis of the effect of the privilege alone. An appropriately worded derivative undertaking could fully address any impediment which the privilege against self-incrimination might pose to the discharge of the Inquiry's terms of reference. A significantly wider undertaking could have a significant impact on the administration of justice and would only be indicated in the most exceptional circumstances. The absence of any recent precedents for such undertakings is telling."*

25. The Metropolitan Police Service, in its position statement, recognised that there may be circumstances in which a wider undertaking might be appropriate.[11] Mr Hall QC foresaw circumstances in which the Inquiry was investigating the activities of a group infiltrated by

[11] Position statement Metropolitan Police Service paragraphs 16 and 17

an undercover police officer. Members of the group might be reluctant to give evidence that would incriminate their friends and associates in criminal activity. If 'X' gave evidence implicating himself and 'Y', X himself would have the protection of an undertaking equivalent to the privilege against self-incrimination but Y would enjoy no protection from a prosecution supported by or derived wholly or in part from the evidence of X. Mr Hall QC suggested that the Inquiry should not rule out the possibility of seeking an extended undertaking so as to provide both X and Y with that protection in specific circumstances, but noted that there was no precedent for such an undertaking and the need for it was not yet established.

26. Ms Ruth Brander, in her position statement on behalf of the non-police, non-state co-operating group of core participants, identified the case for an extended undertaking that I summarise as follows:

(1) There is 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 have been affected by undercover police operations. The main purpose of the Inquiry is to investigate undercover policing and not the conduct of those who were affected by it. To the extent that the conduct of non-police, non-state witnesses is examined it is a collateral effect of the main focus of the Inquiry.

(2) Non-police, non-state witnesses participate as 'victims' of invasion of privacy. They are pursuing their Article 8 right to discover the truth.[12]

(3) There is 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 is no such public interest in the case of non-police, non-state witnesses. On the contrary, the obligation of the Inquiry is 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, namely 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 at the time of the events described.

[12] The extent of the state's obligation under Article 8 of the European Convention on Human Rights to investigate is not a matter for current decision.

27. In oral argument Mr Alex Bailin QC advanced the case put forward in Ms Brander's position statement and their joint skeleton argument for an undertaking in the following terms:

> *"No evidence [as defined] ... given to the Inquiry* ***by a person*** [13] *will be used in evidence* ***against that person or against any other person who was not at the time to which the evidence relates a police officer, state official or employee*** *in any criminal proceedings, or for the purpose of deciding whether to bring such proceedings, save that this undertaking does not apply to:*
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> a. *A prosecution where the person is charged with having given false evidence in the course of the Inquiry or having conspired with or procured others to do so, or*
>
> b. *Proceedings where the person is charged with any offence under section 35 of the Inquiries Act 2005 or having conspired with or procured others to commit such an offence.*
>
> *It is further undertaken that in any criminal proceedings brought against a person to whom this undertaking applies, no reliance will be placed on evidence which is obtained during an investigation as a result of the provision of evidence to the Inquiry by that person.*
>
> *Further, in any criminal proceedings brought against a person who was and is not a police officer, state official or employee, no reliance will be placed on evidence which is obtained during an investigation as a result of the provision of evidence to the Inquiry which could not, by virtue of this undertaking, be used in criminal proceedings against the person who gave it.*
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> *This undertaking does not preclude the use of information and/or evidence identified independently of the evidence provided to the Inquiry."* [14] [Emphasis added]

Counsel to the Inquiry

28. Counsel to the Inquiry prepared for use at the oral hearing a Supplementary Note. In it they examined the questions (i) in what circumstances might evidence provided by a civilian to the Inquiry be used in the subsequent criminal investigation and prosecution of

[13] Note: the effect of an undertaking in these terms would be to protect any person who was not at the relevant time a police officer or state employee from the use in a criminal prosecution of evidence given by any witness, including a police witness, to the Inquiry. This effect goes beyond that justified by the rationale of an undertaking to civilian witnesses that *their* evidence would not be used in the prosecution of their friends and associates, namely to encourage civilian witnesses to come forward and tell the truth.

[14] Position statement of co-operating non-police, non-state core participants paragraph 13

another civilian, absent an extended undertaking, (ii) whether an asymmetric extended undertaking would assist the Inquiry to fulfil its terms of reference, (iii) what would be the effect of an asymmetric undertaking on the administration of justice, (iv) whether an asymmetric undertaking is required in order to comply with section 6 of the Human Rights Act 1998, and (v) what has been the approach of previous inquiries.

29. As to paragraph 28(i), the circumstances in which evidence given by a civilian to the Inquiry might be used in a subsequent prosecution, Counsel to the Inquiry expressed the view that evidence by one civilian implicating another might arise in the Inquiry when:

(a) the Inquiry was investigating reliance by a police service on the alleged criminal activity of a group to justify the continued targeting of that group;

(b) the Inquiry was examining evidence of the commission of a crime by an undercover officer together with members of a targeted group;

(c) a crime allegedly committed by a civilian was not at the time prosecuted for operational or security reasons.

Counsel to the Inquiry expressed the view that it was not possible, at this early stage in the Inquiry's work, to foresee the frequency with which the need to receive such evidence might arise. Even if it did arise the focus of the Inquiry would be upon the activity of the police rather than the activity of civilians.[15]

30. It followed that the circumstances in which a civilian witness in the Inquiry might be asked to implicate a friend or associate in a criminal offence were limited. Furthermore, in practice the evidence would be available in the prosecution of that friend or associate only if the offence was triable on indictment, the witness was prepared to repeat the evidence at trial and the witness was not himself or herself an accomplice.[16]

31. As to paragraph 28(ii), whether the extended undertaking would assist the Inquiry to fulfil its terms of reference, Counsel to the Inquiry noted that the Inquiry had other means by which to encourage a civilian witness to provide a truthful and uninhibited account, namely:

(a) an assurance that the Inquiry would only require a civilian witness to give evidence implicating another when it was relevant to the Inquiry's work;

(b) emphasis upon the dominant public interest in assisting the Inquiry to reach the truth, even where criminality was revealed, and securing relevant evidence to that purpose;

[15] Counsel to the Inquiry's Supplementary Note paragraphs 4-13, pages 1-3
[16] Counsel to the Inquiry's Supplementary Note paragraphs 14 and 15, page 3

(c) reference to the ability of the Inquiry to draw inferences adverse to a witness from his refusal to answer or from his evasive answer;

(d) the Inquiry's powers of compulsion under section 21 of the Inquiries Act 2005;

(e) the fact that a wilfully false answer from a witness designed to shield a friend or associate from prosecution would expose the witness to the risk of prosecution under section 1 of the Perjury Act 1911.[17]

32. Counsel to the Inquiry suggested that a need for an extended undertaking would be demonstrated only when it was clear that the Inquiry would otherwise be hampered in its task of uncovering the truth about matters that were relevant to the Inquiry's task. That judgement involved consideration as to not only whether it was necessary to require incriminating evidence to be given at all but also whether the undertaking, if given, would have the effect of overcoming the witness' reluctance to give it.[18]

33. As to paragraph 28(iii), the effect of an extended undertaking on the administration of justice, Counsel to the Inquiry noted that its unqualified nature would extend its reach to the most serious offences. It would apply even when the civilian witness would have given the evidence anyway. The effect on the due administration of justice, particularly on the need to do justice to victims of crime, could be far reaching.[19]

34. As to paragraph 28(iv), compliance with section 6 of the Human Rights Act 1998, there is no domestic authority, and Counsel to the Inquiry found no Strasbourg authority, for the proposition that in order to comply with its investigative obligations towards a 'victim' the state was required not to compel a witness to give evidence implicating another. No such authority had been cited in the position statements or skeleton arguments submitted by the core participants. There was good reason for this: such a prohibition would interfere with the rights of victims of crime.[20]

35. As to paragraph 28(v), the approach of other inquiries, it is common ground that no extended undertaking in the terms sought here has been granted on any previous occasion. Counsel to the Inquiry observed that there was a public interest balance to be struck:

> *"In the present case, any positive effect on establishing the truth falls to be balanced against any negative effect on the administration of justice."* [21]

[17] Counsel to the Inquiry's Supplementary Note paragraph 16, pages 3 and 4
[18] Counsel to the Inquiry's Supplementary Note paragraphs 17 and 18, page 4
[19] Counsel to the Inquiry's Supplementary Note paragraphs 19-22, page 5
[20] Counsel to the Inquiry's Supplementary Note paragraphs 23 and 24
[21] Counsel to the Inquiry's Supplementary Note paragraph 25-30

Oral submissions

36. Mr Alex Bailin QC distinguished the undertaking that he sought from immunity from prosecution.[22] The extended undertaking would protect Y from the subsequent use of X's evidence to the Inquiry, but a prosecution based on material wholly independent of evidence given to the Inquiry would not breach the undertaking. Mr Bailin went so far as to concede that if X volunteered to give the same account outside the Inquiry Y would not be protected from the use of that evidence voluntarily given. An immunity given to Y, on the other hand, would prevent a prosecution of Y whoever and whatever was the source of the evidence.

37. Mr Bailin QC identified the difference in status in the Inquiry between those being investigated (police officers) and those who were not (civilians). He called this an "asymmetry" requiring an asymmetrical undertaking that applied for the benefit of civilians only. Any examination of the conduct of civilians, who should be classified presumptively as victims, would be "ancillary" to the focus of the Inquiry, as recognised by the Metropolitan Police Service in paragraph 4 of its skeleton argument. Non-police, non-state core participant victims have a difficult decision to make: whether to talk about the most private aspects of their lives in order to gain accountability and understanding or to avoid the Inquiry. The civilian activists enjoy loyalty and friendship. It would be wrong, Mr Bailin submitted, to require the victims of undercover policing to give evidence under the pressure and distress of exposing their friends and associates to the risk of prosecution. Without the willing participation of the civilian activists the Inquiry would be left with a one-sided view of the facts. This is not to suggest that there was widespread criminality among the activists. Mr Bailin recognised that it is improbable that witnesses in the Inquiry would be required to give oral evidence in criminal proceedings against their will and it is unlikely that a court would permit the use of evidence given to Inquiry as hearsay; but, in the absence of the extended undertaking, Mr Bailin argued that a putative witness is likely to be discouraged from taking part in the Inquiry.[23]

38. Mr Bailin QC suggested that there was a risk that police officers, protected from the consequences to themselves of admissions against interest, would be emboldened to "back-justify" their targeting of civilians by exaggerating the alleged misconduct of civilians. Civilian witnesses, deterred by the risk of exposing others, would be reluctant to speak, perhaps giving the appearance of closing ranks. If this were to occur the Inquiry would receive a lop-sided view of events.[24]

[22] Transcript of hearing on 27 April 2016, pages 11-12
[23] Transcript of hearing on 27 April 2016, pages 12-19
[24] Transcript of hearing on 27 April 2016, pages 19-20

39. Mr Bailin QC addressed the practical consequences of adopting alternative means of protecting X and Y from the threat of prosecution of Y. For example, X need not be required to identify Y in the evidence. Y could be described by way of a cipher. If so, Mr Bailin submitted, witnesses would wish to know in advance of providing a statement whether or not they were going to be required to identify Y. Further, by reason of information already in possession of the police they might be able to make the identification by a process of elimination. Alternatively, a witness may not wish to say anything that could, unwittingly, incriminate a friend or associate.[25] Mr Bailin acknowledged that the Inquiry could approach this issue on a case-by-case basis. It could be done but it was likely to be a difficult approach to manage. The witness would require a guarantee of confidentiality while the Inquiry decided what means should be employed to protect X and Y from the risk of Y's prosecution. A witness may be reluctant to commit information to writing, even under an assurance of provisional confidentiality, if it incriminated a friend or associate. However, in response to a question from me, Mr Bailin conceded that even with the advantage of an extended undertaking a witness, by virtue of the very loyalty on which Mr Bailin was relying, may not wish publicly to accuse a friend or associate of misconduct. Mr Bailin responded that the extended undertaking would at least improve the prospects of the Inquiry receiving uninhibited and frank evidence. He pointed out that the experience of the Baha Mousa Inquiry showed that an undertaking limited in extent to the privilege against self-incrimination may not have the effect of curing "collective amnesia".[26]

40. In my 'minded-to' note I referred to the use of prosecutorial discretion in the judgement whether it would be in the public interest to prosecute a defendant relying on evidence given in the Inquiry. Mr Bailin QC acknowledged that where a witness was protected from the effects of giving evidence against their own interest a prosecutor may decide that it was not in the public interest to rely on that person's evidence against another. However, he submitted, at the Inquiry X would have no way of knowing in advance what the subsequent approach of the prosecutor might be.[27]

41. Mr Bailin QC accepted the rationale for an undertaking co-extensive with the privilege against self-incrimination. He acknowledged that since there was no privilege against the incrimination of others there was no equivalent mandate for a more extensive undertaking. However, Mr Bailin submitted that there was a sound practical reason for the extended undertaking: persuasion, not compulsion, was more likely to achieve the Inquiry's objective. The lack of equivalence between the privilege against self-

[25] Transcript of hearing on 27 April 2016, pages 20-23
[26] Transcript of hearing on 27 April 2016, pages 23-27
[27] Transcript of hearing on 27 April 2016, pages 28-29

incrimination and an undertaking protecting a witness from the use of their evidence against them in disciplinary proceedings had not prevented the chairman of the Al-Sweady Inquiry from seeking such an undertaking.[28]

42. Finally, Mr Bailin QC addressed the question whether it was possible to confine the extended undertaking that he sought to offences of any particular level of seriousness. His skeleton argument stated the position succinctly: *"There is no class of offences which ensures that the undertaking is limited to situations of the greatest relevance to the Inquiry, or to offences below a particular level of seriousness"* that would allay the concerns of the core participants whose interests he represented.[29] In oral argument Mr Bailin recognised that "summary only" offences had a 6 months limitation period and, for that reason, comparatively minor offences were unlikely to be prosecuted as a result of evidence given to the Inquiry. However, Mr Bailin argued that offences of conspiracy to commit summary only offences might not be so limited.[30]

43. I observe that section 1 of the Criminal Law Act 1977 created the modern offence of conspiracy to commit a substantive offence, including a conspiracy to commit a summary only offence. However, Counsel to the Inquiry have reminded me that under section 4(1) of the 1977 Act a prosecution for such an offence can be brought only with the consent of the Director of Public Prosecutions. As to the limitation period for such an offence, section 4(4) of the Criminal Law Act 1977 provides:

> *"(4) Where—*
>
> *(a) an offence has been committed in pursuance of any agreement; and*
>
> *(b) proceedings may not be instituted for that offence because any time limit applicable to the institution of any such proceedings has expired,*
>
> *proceedings under section 1 above for conspiracy to commit that offence shall not be instituted against any person on the basis of that agreement."*

44. The prosecutor's argument that Mr Bailin QC anticipates is that a charge of conspiracy to commit a summary only offence that has not *"been committed"* within the meaning of section 4(4) of the 1977 Act would not be subject to the 6 month time limit. Further, since criminal damage is an offence triable on indictment, and section 22 and schedule 2 of the Magistrates Courts Act 1980 require only that certain offences of criminal damage *"shall proceed as if the offence were triable only summarily"*, it is arguable that the time limit of

[28] Transcript of hearing on 27 April 2016, pages 29-33
[29] Skeleton argument non-police, non-state co-operating group of core participants, paragraph 33a-c, page 12
[30] Transcript of hearing on 27 April 2016, pages 34-35

6 months set by section 127 Magistrates Courts Act 1980 does not apply to such offences.

45. On behalf of the Metropolitan Police Service, with which the National Crime Agency agrees, Mr Jonathan Hall QC submitted that Mr Bailin QC was advancing a case for an extended undertaking irrespective of the circumstances and the nature of the offence. While Mr Bailin had raised practical objections to any pragmatic measures less protective than a blanket extended undertaking, these were still early days for the Inquiry. Mr Hall suggested a cautious approach in order to test Mr Bailin's arguments against real situations.[31]

46. Mr Ben Brandon, on behalf of the core participant police officers represented by Slater and Gordon, agreed with Mr Hall QC that it would be premature to seek from the Attorney General a blanket extended undertaking. Furthermore, the police officers' position was that witnesses should be treated equally whether they are police officers or civilians. The logic that X's evidence against Y creates an exposure to prosecution that may inhibit frankness in the Inquiry applied equally to one officer giving evidence that implicated another. As to Mr Bailin QC's submission that civilian witnesses should be treated as victims, Mr Brandon submitted that to do so would pre-judge one of the objectives of the Inquiry, namely to identify whether the targeting of undercover operations was properly justified.[32]

47. Mr Tom Little, on behalf of the Attorney General and the Director of Public Prosecutions, was invited to make such observations as he wished. Mr Little expressed his provisional view that an undertaking co-extensive with the privilege against self-incrimination in the terms set out at paragraph 23 above would meet the Inquiry-specific criteria for which the Attorney General would be looking in his judgement of the public interest.[33]

48. Mr Little informed the Inquiry that his instructing team had also researched the archives for a precedent of the extended X against Y undertaking given in any other inquiry and was aware of none. Should such an undertaking be sought it would be necessary to consider with some care the reasons why there was no such precedent. There were other means available to the Inquiry to give re-assurance to witnesses. In practice a witness in the Inquiry, X, with a tie of loyalty to his friend or associate, Y, would not make himself or herself available to give evidence in a subsequent prosecution of Y. In that event, the only route by which the evidence of X could be admitted in the trial of Y was through the 'hearsay' gateway provided by section 114 of the Criminal Justice Act 2003.

[31] Transcript of hearing on 27 April 2016, pages 37-38
[32] Transcript of hearing on 27 April 2016, pages 52-53; skeleton argument Slater and Gordon police officers, paragraphs 3-7, pages 1-3
[33] Transcript of hearing on 27 April 2016, pages 54-55

Given the circumstances in which that evidence came to be provided to the Inquiry, it would be improbable that a prosecutor could satisfy the interests of justice test provided by section 114(1)(d) and (2) of the 2003 Act. It followed that the prospect of a prosecution based on such evidence was remote.[34]

49. Finally, as to a case-by-case consideration of applications for an undertaking, Mr Little pointed out that this would be a far from instantaneous process. If an approach were to be made, time would need to be afforded for proper consideration of the circumstances and the public interest issues that arose.[35]

Discussion and conclusion

50. In my 'minded-to' note of 3 March 2016 I acknowledged the logic of the civilian core participants' case for an extended undertaking, as follows:

> *"10. There is some logical force behind this submission. X may give evidence to the Inquiry that implicates him and Y in the commission of a criminal offence. Without an extended undertaking X's evidence could not be used against him but could be used in a prosecution against Y. This knowledge may tend to have an inhibiting effect on the evidence of X to the Inquiry."*

51. I adhere to this acknowledgement. It is inevitable that the Inquiry will need to consider evidence of the activities of groups of political, social justice, environmental and other campaigners for the purpose of assessing (i) the justification for their infiltration by undercover police officers and (ii) the effects, beneficial or otherwise, upon the public of undercover policing. In some of those cases it may be necessary to examine the conduct of the group and the role of an undercover officer in activities that led to the commission or the prevention of a crime. It is not difficult to anticipate that one campaigner, X, will describe the development of planned activity in which Y and/or an undercover police officer were engaged. It is not likely that X will be able satisfactorily to explain the role of the undercover officer in the activities of the group without describing the officer's interaction with X, Y and other campaigners. I am quite prepared to accept that, given his status in the Inquiry, X will be content to give evidence that tends to implicate the officer in the activities of the group but reluctant to provide circumstantial detail in his evidence of the officer's role by disclosing the full contribution made by Y and the others. Factual issues of this kind may be of public importance. It would be wrong either to stigmatise an officer or to exonerate him or her without an adequate means of testing the evidence on

[34] Transcript of hearing on 27 April 2016, pages 55-57
[35] Transcript of hearing on 27 April 2016, page 58

'both sides'. The result of X's reluctance may be an incomplete examination of the circumstances and, as a consequence, a lack of satisfactory fact finding.

52. In assessing the *need* for an extended undertaking the first question that arises is whether any fear of the use of X's evidence in a prosecution of Y would be reasonable. If the offence were summary only, by virtue of the limitation period of 6 months it is highly unlikely that any prosecution of Y could be mounted. An assurance authoritatively given by the witness' legal advisor to that effect should have the same effect in the mind of X as would an extended undertaking.

53. However, the same could not be said for indictable offences. I shall assume for the purposes of this Ruling that the time limit for summary offences does not apply to offences of criminal damage or conspiracy to commit criminal damage.[36] It is possible at the level of generality to state that a Crown prosecutor would be unlikely to seek to prosecute 'old offences' or to rely upon the evidence of X if he was reluctant to give evidence in the criminal trial of Y. It would be unlikely, if X did not appear at trial when summoned to do so, that the prosecution would succeed in persuading the trial judge to admit the witness statement of X as hearsay. This too would influence the decision whether a prosecution should take place. However, I am persuaded that advice as to these probabilities may be insufficient to allay X's fears altogether when he is deciding whether to implicate his friend Y in his evidence to the Inquiry. On the other hand an extended undertaking may do nothing to remove X's inhibition: X may be concerned not just about the risk of prosecution but also with his reputation among other witnesses having the same or a similar interest in the Inquiry.

54. I wish to make it clear that only when the identity of those involved is critical to a judgement of an issue that it is *relevant and necessary* to pursue for the fulfilment of the terms of reference that I, as Chairman, would require the identity of campaigners implicated to be revealed. It seems to me that on some occasions when this problem arises I shall be able to indicate that the identity of those civilians implicated by X need not be revealed, with no adverse consequences to them being likely to result.

55. Again, I can anticipate circumstances when X's concern may not be allayed even by such assurances given by the Inquiry. Each of X, Y and Z may give evidence implicating both himself or herself and the other two without identifying them. I can see that each of the three witnesses may be worried that, while his admission against interest could not found

[36] Section 127(2) of the Magistrates Courts Act 1980 provides that the 6 months time limit for the prosecution of offences enacted in section 127(1) shall not apply "to any indictable offence". Criminal damage is an indictable offence that is triable either way. Section 22 of the Magistrates Courts Act 1980 is procedural and does not have the effect of imposing a time limit for the offences listed in schedule 2: see *Director of Public Prosecutions v Bird* [2015] EWHC 4077 (Admin) at paragraphs 11 and 12.

or support a prosecution of himself, he can be identified as either X, Y or Z and, for that reason, liable to summons as a witness against the other two in a criminal prosecution. This may not seem a probable concern but it is by no means outlandish.

56. I accept, therefore, that there may arise in the Inquiry circumstances in which only the protection of an extended undertaking would be calculated to meet the public interest in reaching the truth on an important issue. My starting point is not that all non-police, non-state core participants and witnesses are victims of unjustified interference by undercover police operations and should therefore be absolved from the obligation of full and frank disclosure or from the consequences of telling the truth. That would be to pre-judge one of the central issues in the Inquiry. Even applying Mr Bailin QC's presumption, however, I cannot in the abstract make decisions as to what evidence witnesses should and should not be compelled to give.[37]

57. Nonetheless, the main focus of the Inquiry, as Mr Bailin QC and Mr Hall QC rightly submitted, is on the activities of police officers and not those on whom they were reporting. I accept that, for this reason, police officers and civilians do not have the same status in the Inquiry. My starting point is that in order to fulfil the Inquiry's terms of reference I must receive relevant evidence from members of the public who were caught up in undercover police activity, whether they were targeted by the police or not. Some of that evidence may involve the implication of others in criminal offences.

58. Since there is an important public interest in receiving the best evidence available on matters going to the main focus of the Inquiry, it seems to me that an insubstantial risk of prosecution, particularly of old and less serious offences, is unlikely to deserve much weight in the public interest balance to which Counsel to the Inquiry have referred.

59. For this reason I also accept that circumstances may arise during the Inquiry that may require me to seek from the Attorney General an extended undertaking for the assurance of civilian witnesses. At present I do not foresee circumstances in which it would be appropriate to seek a similar undertaking for the assurance of police witnesses, but I do not rule it out.

60. However, Mr Bailin QC was arguing for a blanket undertaking to be given at the outset of the Inquiry in favour of all non-police, non-state witnesses. Such an undertaking would be given without knowledge of the factual context, and the effect of the undertaking upon the administration of justice would be open-ended. In particular, the interests of victims are at present completely unknown. I do not consider that it would be appropriate to seek an extended undertaking from the Attorney General in respect of the evidence of any

[37] These may be further matters for decision under section 21(4) of the Inquiries Act 2005

witness or group of witnesses until the Inquiry has a better comprehension of the factors for and against it. First, a blanket undertaking would make no distinction between comparatively serious and comparatively minor offences; secondly, a blanket undertaking would apply whether or not the witness was willing to give the evidence in any event; thirdly, it would apply without regard to the existence of other, independent, evidence; fourthly, I do not in advance have any knowledge of the surrounding circumstances that would go to the public interest balance to be reached; and fifthly, I have, as yet, no reliable way of knowing that the extended undertaking would have the effect of encouraging witnesses to give frank and uninhibited evidence about their friends and associates.

61. I will not request the Attorney General at this stage to consider giving an extended undertaking in the terms sought by the non-police, non-state co-operating group. But I will keep this issue under review and will not dismiss the prospect of such a request altogether. Should appropriate circumstances arise in the Inquiry, when it seems that such a request is desirable in the interests of fulfilling the Inquiry's terms of reference, and should the Inquiry then be in a position to provide the Attorney General with the information necessary to make an assessment of the public interest balance, I shall raise the issue for further consideration.

26 May 2016

Sir Christopher Pitchford
Chairman, Undercover Policing Inquiry