
COUNSEL TO THE INQUIRY'S SUPPLEMENTARY NOTE FOR THE HEARING ON 5 APRIL 2017

Introduction

1. This Note provides a factual update to our Note dated 2 March 2017 and responds, where necessary, to the submissions made by core participants for the directions hearing on 5 April 2017.

Factual Update

2. Slater & Gordon have now provided the Inquiry with expert medico-legal reports in relation to all but one of their clients who wish to rely upon medical evidence. One of their clients has provided additional medical evidence, though not an expert report.
3. At the time of writing the Inquiry has not received the risk assessments in relation to Slater & Gordon's clients which the Metropolitan Police Service has been requested to produce and which are the Inquiry's first priority.
4. On 31 March 2017 the Inquiry received anonymity-related responses from the Metropolitan Police Service in relation to three former Special Operations Squad personnel. The position is summarised below:
 - 4.1 In two of the three cases, an application is made to restrict the officers' real names but not their cover names. The Inquiry will publish the cover names as soon as it has completed its pre-disclosure process (which includes checking whether there is anyone who should be given advance notice of the publication).
 - 4.2 The third officer is deceased. The Metropolitan Police Service has not been able to supply the Inquiry with the cover name used by this officer and is not seeking to restrict publication of the officer's real name. The Metropolitan Police Service has informed the Inquiry that it is currently establishing whether the officer has any surviving next of kin. The Inquiry will wish to inform the next of kin before publishing the officer's real name.
5. On 4 April 2017 the Inquiry received an anonymity application in respect of a further officer. In this case an application is made to restrict both the real and cover names of the officer.

UNDERCOVER POLICING INQUIRY

6. Members of the Inquiry Legal Team recently met with counsel acting for the Metropolitan Police Service who provided a detailed explanation of the approach which the Metropolitan Police Service is taking to the preparation of applications for anonymity. We note that counsel for the Metropolitan Police Service have helpfully appended a flowchart summarising that process to their submissions in response dated 30 March 2017. Although it is clear that the Metropolitan Police Service is now increasing the resources which it is allocating to the anonymity process, two aspects of the approach which has been adopted by the Metropolitan Police Service call for comment and are discussed below.
7. First, the Metropolitan Police Service is only approaching former Special Demonstration Squad officers to establish their stance on anonymity and risk at a late stage in the process. We would have preferred to see the Metropolitan Police Service engaging with the officers about these questions at a much earlier stage so as to enable a more focused approach to the identification and assessment of any risks. We accept that the investigation of risk cannot begin and end with the officer (who might, for example, subjectively believe that the level of risk is greater than is objectively the case). However, an undercover officer's understanding of his or her own deployment is a good starting point for the investigation of the question whether any harm might arise from the disclosure of their cover or real identities. We consider that engagement with the officers themselves should now be a priority.
8. Second, the Metropolitan Police Service has recently decided not to provide its risk assessors with current thematic risk assessments produced by personnel at the Counter Terrorism Policing – National Operations Command. This unit is the successor of both the National Public Order Intelligence Unit and National Domestic Extremism and Disorder Intelligence Unit. The former is at the heart of the Inquiry's substantive investigations and the latter is the subject of multiple ongoing investigations by the Independent Police Complaints Commission relating to the allegedly improper destruction of documents. The Inquiry understands that there remains other evidence which may be provided to the risk assessors with the assistance of members of this unit to inform the overall risk assessment. We regard it as particularly important that the Metropolitan Police Service takes steps to ensure that neither the personnel involved from this unit, nor their managers, include persons who are being investigated for document destruction or are otherwise conflicted from an objective assessment of risk. The Inquiry has sent a rule 9 request seeking further information about the identities of those who will be involved and conflict management in relation to this process.

UNDERCOVER POLICING INQUIRY

9. The Inquiry has today received a copy of the protocol which the Metropolitan Police Service requires its risk assessors to adhere to. We have circulated this to all core participants.
10. Turning to the questions of contact with and legal representation of the 168 former members of the Special Demonstration Squad, we understand the current position to be as set out below.
 - 10.1 Mr Francis and the nine Slater & Gordon clients who served with the Special Demonstration Squad are separately represented.
 - 10.2 Six other officers have been identified by the Metropolitan Police Service as requiring separate representation.
 - 10.3 Three officers have not been contacted by the Metropolitan Police Service because they are believed to be seriously ill. The Inquiry is taking steps to verify the position.
 - 10.4 The Metropolitan Police Service has not been able to contact two former officers for reasons which have been explained to the Inquiry. The Inquiry is considering whether there are realistically any further steps which can and should be taken to try to trace these officers.
 - 10.5 The Metropolitan Police Service has not yet established contact with seven former “back office” staff. Its efforts to contact them are continuing.
 - 10.6 The Inquiry has recently been informed that the Metropolitan Police Service now intends to offer legal representation (and not merely “legal support”) to all of the former Special Demonstration Squad officers with whom it is in contact and who do not require separate representation.
 - 10.7 The Metropolitan Police Service has informed the Inquiry that 25 former Special Demonstration Squad officers are deceased (17 former undercover police officers and eight former “back office” staff).
 - 10.8 Of the 168 former members of the Special Demonstration Squad, the Metropolitan Police Service has made decisions about whether to apply for restriction orders in respect of 18.
11. The Inquiry has written to 54 former members of the National Public Order Intelligence Unit who are believed to have been either undercover police officers or cover officers (26 undercover officers and 28 cover officers). All of those who have replied have

indicated an intention to apply for anonymity. 12 have provided an outline of their application with evidence. Legal representation has been confirmed by all but 17.

Observations on the core participants' submissions

12. Having considered all of the written submissions made to the Inquiry, we remain of the view that it would be preferable to set specific deadlines for the submission of tranches of applications for anonymity, together with all necessary evidence (or confirmation that no application is being made).
13. We also remain of the view that the change of approach to the anonymity applications process proposed by the Metropolitan Police Service is problematic and should not be adopted for the reasons which we set out in our Note dated 2 March 2017.
14. The very recent submission of risk assessments by the Metropolitan Police Service affords the Inquiry the opportunity now to assess their quality and utility. We remain of the view that if the Metropolitan Police Service is unable to produce risk assessments in a reasonable timescale then there are alternative approaches available.
15. It will be a matter for the Chairman, having heard submissions from the core participants, whether and, if so, to what extent the timetable should be reinforced through the use of notices under section 21 of the Inquiries Act 2005.
16. We are grateful to the non-police non-state core participants for their suggested approach to tranching applications and their draft directions. Their first proposal is that the Inquiry should write to all former members of the Special Demonstration Squad, the National Public Order Intelligence Unit and their predecessor / successor units who are contactable, effectively seeking to establish their basic position on anonymity. In relation to the Special Demonstration Squad, the Inquiry's letter to the Metropolitan Police Service dated 11 August 2016 sought from it, amongst other things, confirmation, in the case of each officer, whether an application for anonymity would be made. Responses in the case of all officers were due to have been provided by 4 November 2016. A complete answer to that request remains outstanding in that there are only 18 cases out of 168 in which the Metropolitan Police Service has informed the Inquiry whether an application for anonymity will be made.
17. The Inquiry's approach to the National Public Order Intelligence Unit to date has been to seek to establish at the outset the officer's position on anonymity, in addition to other things. To date, all respondents have intimated an intention to apply for anonymity. However, we propose continuing with this approach with further former members of this unit. Our current view is that a tranced approach is likely to be more efficient overall given the limits on the resources of all of those involved in the process.

UNDERCOVER POLICING INQUIRY

18. The Inquiry has been prioritising its investigation of the Special Demonstration Squad and the National Public Order Intelligence Unit (although not to the exclusion of all else). We consider that this remains an appropriate strategy. However, when the Inquiry does turn to the latter unit's predecessor and successor units, we agree that establishing whether or not a witness seeks anonymity is an important initial step.
19. The non-police non-state core participants' second proposal is that the Chairman should give early benchmark rulings. We agree to the extent that early rulings will act as a guide to those who have yet to decide whether to make an application for anonymity and to those who have a pending application for anonymity. It is for this reason that the Inquiry Legal Team is particularly keen for a first tranche of applications to be submitted and determined.
20. The non-police non-state core participants' third proposal relates to the identification of those officers who are deceased and suggests that there should be a presumption that the officer's cover name should be released. Self evidently there can be no risk of harm to the deceased officer. However, the force which formerly employed the officer will need to be afforded the opportunity to consider whether or not there are other grounds for applying for a restriction order (either on public interest grounds or harm to third parties). It is also becoming apparent that in some older cases the cover name of an officer is not, at present, known and will require investigation. In terms of the priority which these cases are afforded, their resolution seems unlikely greatly to assist with providing guidance to future applicants, nor is dealing with them early as a group likely to enable hearings to be commenced earlier. Applications involving difficult issues are more likely to provide guidance. In order to progress towards the hearing of a particular section of Module One, all of the anonymity applications relating to that section need to be determined (for example, all Special Operations Squad applications need to be determined before we can progress to the hearing of that subsection). We submit that there is a strong case for prioritising those applications the determination of which is most likely to contribute to useful guidance and/or best assist the progress of investigations towards the commencement of the evidential hearings.
21. The non-police non-state core participants' fourth proposal is that a schedule of HOLMES nominal numbers is published identifying each officer's years of deployment, the identity (or cipher) of supervisors with dates and the names of groups infiltrated. It is proposed that this is done for the Special Demonstration Squad, the National Public Order Intelligence Unit, and their predecessor and successor units. We submit that what needs to be explored about this proposal is whether and, if so, to what extent it risks pre-empting the restriction order process by putting into the public domain information which might be used (together with information which is already in the

UNDERCOVER POLICING INQUIRY

public domain) to piece together the identity of a person before his or her anonymity application is fairly determined.

22. Turning to the publication of the names of groups infiltrated by undercover officers, the Inquiry Legal Team considers that there are real difficulties in dealing with this issue before individual applications for anonymity are determined. The problem is the risk that disclosing the name of a group which has been targeted might pre-empt the determination of an anonymity application by indirectly identifying an undercover police officer. The non-police non-state core participants' submissions also rightly record that the Inquiry has been concerned to prioritise the anonymity process and has doubts about the appropriateness of publishing at an early stage the names of groups infiltrated in the abstract. Unlike the publication of an officer's cover name, which allows those affected by that officer's deployment to come forward, the publication of the name of a group on its own does not permit a focused response from the public.
23. The non-police non-state core participants' fifth proposal is for the disclosure to identifiable non-police non-state core participants of police files about them. This request goes beyond the scope of the Inquiry which is required by its terms of reference to investigate undercover policing. The Inquiry's current intention is, in the first instance, to provide non-police non-state core participants, in due course, with the relevant and necessary documents which they need to make a witness statement.
24. The non-police non-state core participants' sixth proposal concerns steps to ensure that all Special Demonstration Squad and National Public Order Intelligence Unit officers who can be contacted are contacted. As explained in the factual update section of this note, information of this sort is being provided by the Metropolitan Police Service to the Inquiry in relation to the Special Demonstration Squad. It will be done in relation to the National Public Order Intelligence Unit (although it is in large part not a matter for the Metropolitan Police Service, because officers from the latter unit were drawn from many different police forces).
25. The non-police non-state core participants' seventh proposal is to the effect that preliminary witness statements should be taken from the former holders of certain offices, such as ministers and very senior police officers. The Inquiry Legal Team agrees that this is a proposal which deserves consideration. However, we consider that in the case of people being asked about matters many years ago, the provision of memory refreshing documents, insofar as they can be provided, will be very important. The Inquiry is already considering such an approach in relation to surviving officers from the Special Operations Squad.

UNDERCOVER POLICING INQUIRY

26. Turning to the choice and priority of tranches of applications for anonymity, we remain of the view that these should be as set out in at paragraph 75 of our Note of 2 March 2017, namely:
 - 26.1 The applications of Slater & Gordon’s clients.
 - 26.2 The applications of officers from the Special Operations Squad.
 - 26.3 The applications of those whose anonymity status needs to be determined in order to process documents relating to the deployment of those officers who have already been officially confirmed.
27. After that, tranches of officers from the Special Demonstration Squad, in chronological order, appears to us to be an approach which will best assist the Inquiry to prepare for the oral hearings.
28. We share the non-police non-state core participants’ concerns about document preservation. The Inquiry has recently requested that members of the Inquiry team be permitted to visit Counter Terrorism Policing – National Operations Command.
29. We note the proposal in the non-police non-state core participants’ proposed directions for a “fully reasoned and evidenced application” for any restriction order over the evidence and submissions provided in support of an anonymity application. In practice, parts of the application will need to be provided by way of closed evidence and submissions because it reveals the identity of the officer in question (or another matter over which restriction is sought). No restriction order is required in such a case because this information is potentially restricted evidence under rule 12 of the Inquiry Rules 2006. Moreover, we consider that the process set out in the Inquiry’s [Process Map for Determining Key Anonymity Applications](#), which ensures that the Chairman will decide in case of dispute what evidence is provided in the open application and provides for him to consider the need for disclosure of closed evidence to individuals in accordance with rule 12(4), ensures fairness and avoids undue delay.
30. We also note the proposal in the non-police non-state core participants’ directions for an addition to the process of separation of open and closed evidence to ensure the appropriate protection of their privacy (by incorporating the relevant parts of the restrictions protocol). We agree that appropriate protection of their privacy must be incorporated into the procedure, and will not publish private information without following the procedures set out in the Restrictions Protocol. It is right to note that the time which this will take in cases where it arises was not fully reflected in the illustrative timeframe appended to our Note dated 2 March 2017.

UNDERCOVER POLICING INQUIRY

31. Turning to the submissions made on behalf of the trades unions, the Inquiry's investigations will incorporate investigation of the cases of the trade union core participants in both Module One and Module Two. It is and will continue to be a part of the investigation of the Special Demonstration Squad and the National Public Order Intelligence Unit. It has also been incorporated into the Inquiry's work to date in relation to undercover policing by police forces more widely.
32. Moving to the submissions made on behalf of the National Police Chiefs' Council, we agree that applications for anonymity by former members of the National Public Order Intelligence Unit should be prioritised and tranced. This is the approach which is already being taken.
33. We agree that some mechanism should exist to avoid a waste of time and resources in the event that there is a seemingly very strong case for anonymity on a narrow ground. The approach which the Inquiry is taking with the applications for anonymity by National Public Order Intelligence Unit officers already allows for early consideration on that ground. In cases where it considers that a particular ground appears very strong, the Inquiry Legal Team will place before the Chairman documents which provide a summary of the application for anonymity and the evidence in the form of a signed personal statement from the officer (these documents are the first in a series of documents to be provided to the Inquiry by a National Public Order Intelligence Unit officer seeking anonymity). If the Chairman considers that this evidence is sufficient that he would make an order for anonymity irrespective of any other ground that might also be advanced, he will publish a 'Minded to' Note and the applicant will be notified that he or she can pause the preparation of any resource intensive evidence. As has been the position to date, any 'Minded to' Note will provide an opportunity to those who wish to oppose it to do so. If the Chairman does not agree that it is a clear case for anonymity, the applicant will follow the normal course of providing a fully evidenced and argued application.
34. In addition, an exceptional process has been set up for applications for anonymity in respect of Special Demonstration Squad officers. In seemingly very strong cases for anonymity on a narrow ground, an application can be made on that narrow ground, similarly to be followed up with a full application only if the Chairman considers it necessary. A "two bites at the cherry" approach should not be the norm. Such applications should not be submitted by the Metropolitan Police Service in respect of Special Demonstration Squad officers without prior discussion with the Inquiry Legal Team.
35. So far as guidance is concerned, applicants for anonymity already have the guidance as to risk assessment published by the Chairman on the Inquiry's website and dated 20 October 2016. As we have already made clear, we consider that further guidance

UNDERCOVER POLICING INQUIRY

will be available from the rulings on anonymity which the Chairman will make in due course.

36. We recognise that there is likely to be a need for forces which are responsible for the safety of former National Public Order Intelligence Unit staff to be provided with any information necessary to ensure their safety.
37. We agree that determination of applications for restriction orders over cover names are a higher priority than applications for the restriction of publication of real names. However, in practice consideration has to be given to whether publication of a cover name will lead to the disclosure of the real name. If and insofar as paragraph 33 of the National Police Chiefs Council's submissions suggests that there may be a quicker route to the disclosure of cover names, we would welcome development of the proposal.

DAVID BARR QC
KATE WILKINSON
EMMA GARGITTER
VICTORIA AILES

4 April 2017