

## IN THE UNDERCOVER POLICING INQUIRY

---

### SUBMISSIONS ON BEHALF OF THE NPCC FOR THE HEARING ON 20<sup>th</sup> NOVEMBER 2017

---

#### **Introduction**

1. These submissions are offered in response to the Chairman's directions dated 23<sup>rd</sup> October 2017, paragraph 5.
2. The applications currently under consideration are in respect of MPS officers, and the applications by former NPOIU officers are being made on their behalf by their own legal representatives. The NPCC role in the latter cases is to arrange for risk assessments. Therefore the NPCC's interest is confined to the general principles applicable in such cases and it is not intended to comment on the merits of individual applications at this stage.
3. The general position of the NPCC remains as expressed in its submissions dated 12<sup>th</sup> February 2016 in which it supported and adopted the submissions then made on behalf of the MPS, and the Secretary of State for the Home Department.
4. Since then the former Chairman issued the 'Restriction Orders: Legal Principles and Approach Ruling' dated 3<sup>rd</sup> May 2016. It is not understood that the Chairman has indicated any intention to review that ruling or to change the principles upon which the Inquiry will proceed in deciding anonymity applications and therefore the NPCC does not wish to burden the Inquiry with detailed submissions on them. However it does seek to offer a limited number of observations on the submissions made on behalf of Guardian News and Media Limited (GNM) dated 4<sup>th</sup> October 2017, and those of the NPNSCP's dated 5<sup>th</sup> October 2017.

## ***“Open Justice”***

5. The GNM’s submission that a principle of “*open justice*” applies and should only be departed from if it is shown to be “*strictly necessary*” to do so, is inconsistent with the former Chairman’s ruling. In that ruling the former Chairman undertook a careful analysis of the authorities and concluded that decisions about restriction orders will depend on a balance of the public interest, the principal factors of which under section 19(3)(b) of the Inquiries Act 2005 were:
  - a. The need to allay public concern about the subject matter, process, impartiality and fairness of the Inquiry; and
  - b. The need to avoid or reduce a risk of harm to serving and former police officers and the need to avoid or reduce a risk of damage to effective policing [Part 6; paras A.1-3].
6. The main risk factors for harm to police officers and damage to effective policing were identified as (i) the disclosure of their true identity, whether directly or indirectly, and (ii) the disclosure of the operational techniques of undercover policing [para A.4]. The greater the risk of such harm and the more severe the harm, the greater would be the public interest in taking steps to avoid or reduce it [para A.5].
7. A number of balancing factors were described [paras A.6-11], subject to a starting position that no restriction order would be made “*in the public interest of openness in the Inquiry and its proceedings, unless it is necessary in the countervailing public interest of the protection of individuals from harm and/or effective policing*” [para A.11]. This balance has to be considered by reference to the facts of individual cases and not at the level of principle or generality.
8. Insofar as there is a principle of “*open justice*” (as opposed to “*openness*”) applicable to public inquiries, which the NPCC respectfully doubts, it is addressed by the former Chairman’s approach to the issue.

9. However the NPCC questions whether the suggested application of such a principle to this Inquiry takes sufficiently into account the statutory basis of a public inquiry and in particular:
- a. The prohibition on determining civil and criminal liability (section 2(1) of the Inquiries Act 2005);
  - b. The requirement that in making any decision as to procedure or conduct of the Inquiry the Chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (section 17(3) of the Inquiries Act 2005);
  - c. The requirement to act reasonably (section 18(1) of the Inquiries Act 2005);
  - d. The requirement to consider any risk of harm or damage (section 19(4)(b) of the Inquiries Act 2005);
  - e. The requirement to consider confidentiality (section 19(4)(c) of the Inquiries Act 2005); and
  - f. The requirement to consider delay, efficiency, effectiveness and cost (section 19(4)(d) of the Inquiries Act 2005).

### **Risk to life**

10. It is submitted that the GNM's contention that a risk to life has to be "*real and immediate*" before it can justify a restriction (see para 17b of their submissions) is incorrect and dangerous.
11. It can be accepted that the risk identified has to be a "*real*" one in the sense that it probably exists, but officers involved in undercover policing are entitled to be protected from risks which may not crystallise for years. To say otherwise is to accept that while it may be unacceptable to decline protection for an officer who may

be harmed today or tomorrow, it is acceptable to omit protecting an officer from such a fate over the rest of his or her natural life.

12. It is submitted that paragraph 48 and Part 6.C of the 'Restriction Orders: Legal Principles and Approach Ruling' dated 3<sup>rd</sup> May 2016 set out the proper approach: real and immediate threats of death or serious injury will be the first consideration [paras C.1 and C.2], but thereafter other considerations may also need to be addressed [para C.3], subject to the factual basis of any individual application.

6<sup>th</sup> November 2017

Sir Robert Francis QC  
Stephen Morley  
Cecily White  
Counsel for the NPCC