

## IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

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**NOTE ON BEHALF OF  
THE NON-POLICE, NON-STATE CORE PARTICIPANTS  
IN RELATION TO THE RESTRICTION ORDER APPLICATIONS OF  
HN83, HN302, HN349, HN35, HN298, HN331, HN334, HN332, HN338,  
HN300, HN118, HN339, HN345, HN77, HN79, HN45, HN356/124 and  
HN56**

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### INTRODUCTION

1. The NPSCPs object to the granting of restriction orders in respect of each of the above officers. However, they are unable to make effective submissions challenging the Chairman's minded to position, because of the inadequate disclosure that has been made. Some examples are highlighted in paragraphs 9-19 below.
2. In addition to inadequate disclosure, it is plain from the anonymity process to date that the submissions made on behalf of the NPSCPs have negligible impact on the Chairman's decision-making process or on the transparency of his reasoning. The only exception to this was in relation to HN297 'Rick Gibson', when the NPSCPs were able to provide evidence that this officer had engaged in sexual relationships whilst deployed.
3. It appears that unless the NPSCPs can prove sexual misconduct on the part of an officer, the Chairman affords their submissions little or no weight. This overlooks all of the other reasons why deployments need to be investigated - inappropriate surveillance of Members of Parliament, bereaved family and other justice campaigns; blacklisting; agent provocateur / miscarriages of justice; undermining political campaigns; or just plain disproportionality. It also creates a catch 22: evidence of sexual misconduct depends on the victim knowing that her ex-partner was a police

officer. By making disclosure of an officer's identity dependent on evidence of sexual misconduct, the Inquiry shuts down its opportunities for genuine investigation.

4. The most basic point the NPSCPs have repeatedly sought to make is that the Chairman cannot safely take decisions on the strength of the police account alone. Yet that is what the Chairman does. For example, in "minded to" note 8, the Chairman states in respect of HN8, "*The deployment was unremarkable*"<sup>1</sup>. This statement encapsulates what is wrong with the current approach. How is it possible for the Chairman to conclude that this officer's deployment was unremarkable? Because the officer said it was? Because it doesn't say in the police records that the officer conducted an abusive intimate relationship, or engaged in criminal activity? How is it possible for the Chairman to find that a deployment was unremarkable without hearing from those who might be in a position to contradict it? However, on the basis of such "findings", the Chairman goes on to conclude that there is no public interest in investigating and so nothing to outweigh the risk of interference with an officer's private life rights. As a result, names are restricted and the prospect of evidence emerging to show otherwise is lost.
5. An investigating body that makes decisions which radically shape the scope of its investigation and its ability to investigate on the basis of the account of the institution it is investigating and that of the individuals being investigated appears to be not fit for purpose. This inadequacy is all the more egregious when those under investigation are known to have kept sparse records, to have engaged in mass shredding, to be trained in deception and to have deceived previous investigators.
6. The NPSCPs understand the argument that in some *exceptional* instances the risk to an officer of disclosure of his/her cover identity could be of such magnitude that the Inquiry's ability to investigate the deployment has to be compromised. However, that is not the approach the Chairman is taking in the vast majority of cases. The reasons given for granting restriction orders to date are not those of a Chairman grappling with difficult decisions, which he recognises are made on the basis of partial

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<sup>1</sup> "Minded to" note 8, 26 April 2018, [1].

information, and that he acknowledges will curtail his ability to investigate. They are those of a Chairman who appears to consider that all of the information he really requires is available to him in the police accounts and records. Unless a non-police party is able to demonstrate a particular need to investigate a given deployment, or such a need has been identified by a previous investigation, the Chairman appears to assume that it can safely be concluded that the officer is truthful, the deployment unremarkable and there really isn't much to be lost if a cover name is restricted, because there's unlikely to be anything of value that could be said against the deployment in any event.

7. That is not an approach in which the NPSCPs have any meaningful role. And having repeatedly tried and failed to persuade the Chairman of the error of this approach and the impact it will have on the Inquiry's ability to conduct a genuinely effective investigation, there is no meaningful basis on which they are able to participate in the determination of the current applications.
8. The points made below indicate some of the issues on which the NPSCPs would wish to be heard in the event of a change of approach by the Inquiry and/or in light of proper disclosure. There are, of course, likely to be further points arising if and when proper disclosure is made.

#### **SPECIFIC POINTS / DISCLOSURE REQUESTS**

##### **HN83**

9. The additional information to be read with the gist of this officer's risk assessment states that "HN83 assisted with domestic life of one of the target group." Additional disclosure should be made as to whether HN83 had access to the "assisted" person's children or other vulnerable family members. Involvement with domestic life is a particularly intrusive form of infiltration. It is plainly an area where the Inquiry could not reach any fair or sustainable conclusions about the level of intrusion or its proportionality without hearing from the victim(s). No weight should be placed on the officer's account unless there is a proper opportunity to challenge it.

10. The 'minded to' indication states that the "Nature of the deployment and what I know of the personal circumstances of HN83, then and now, are inconsistent with personal wrongdoing during the deployment." This indication was published on 7 March 2018, i.e. after the 5 February 2018 hearing at which the Chairman's view that a lengthy marriage is inconsistent with personal wrongdoing was stringently challenged. At the subsequent hearing on 21 March 2018, the Chairman was again challenged on this issue by Ms Sikand on behalf of Peter Francis. The Chairman then sought to suggest that he had rectified the position in his subsequent 'minded to' indications (including that in relation to HN83), because he was not relying on the officer's personal circumstances alone, but was also referring to the 'nature of the deployment'<sup>2</sup>. This completely misses the point. Such reasoning is unsustainable, it should not play any part at all in the Chairman's reasoning. It is unsustainable both as a matter of general observation of life, but also specifically in light of the known instances of relationships on the part of married undercover officers who remained married until their actions were exposed. It does not improve matters to say that it now only forms *part* of the Chairman's reasoning. It demonstrates an unwarranted assumption that an officer does not require investigation if he has maintained the outward trappings of respectability. Blinkers of that nature, particularly in the context of this Inquiry, will completely undermine its ability to get to the truth. It is of deep concern that when challenged on the inappropriateness of his views by Ms Sikand at the 21 March 2018 hearing, the Chairman's response was that he had said what he had "in the hope that it would prompt reactions from people."<sup>3</sup> This seems an unlikely and unacceptable reason for an inquiry chair to rely on such flawed reasoning and demonstrates a complete lack of understanding of how such comments would be received by the women who were deceived into relationships with undercover officers. That the Chairman has persisted in this view despite the strong submissions against it and the audible disbelief in court at the 5 February 2018 hearing when he sought to explain it suggests that such views are entrenched and that he is unable or unwilling to see beyond them. It also shows that the submissions of the NPSCPs in reality have no traction with the Chairman at all. The NPSCPs contend that either the Chairman

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<sup>2</sup> Transcript of 21 March 2018 hearing p.34 line 16 - p.35 line 6.

<sup>3</sup> Transcript of 21 March hearing p.34 lines 18-19.

should recuse himself or additional panel members should urgently be appointed with the necessary skills, knowledge and breadth of life experience to make this a fair and effective Inquiry and one that is seen to be so.

### **HN302**

11. This officer voluntarily participated in the True Spies documentary, with the support of the MPS. Plainly it was concluded by the officer himself and the MPS that the risks involved in doing so were manageable. Please disclose the risk assessments conducted at the time of the True Spies documentary.
  
12. This officer admits to having had what is described as a “fleeting sexual encounter with a person of the opposite sex” whilst deployed. No explanation has been given as to what is said to constitute a “fleeting sexual encounter”. Further, this is the officer’s account alone. A proper investigation ought not to assume that it is necessarily correct. Secondly, and more importantly, however brief the sexual encounter, there is a real issue as to whether deception of this nature may vitiate consent. If so, then this was a sexual assault no matter how “fleeting”. It is at least arguable that a sexual encounter, even if “fleeting”, which was conducted, by someone whose entire identity was fabricated, for the purposes of furthering or maintaining an officer’s cover in circumstances where he had led the woman to believe it was for the purpose of mutual gratification would constitute a deception as to the nature or purpose of the relevant act such as to vitiate consent. Further, or alternatively, s.74 of the current Sexual Offences Act 2003 Act defines ‘consent’ for the purposes of the offences in part 1 of the Act in the following terms: “a person consents if he agrees by choice, and has the freedom and capacity to make that choice”. The judicial understanding of what “freedom of choice” entails in this context is developing: see <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-3-consent> and the authorities there referred to. There is, therefore, a real issue as to whether even a “fleeting” sexual encounter between an undercover officer and a member of the public whom he has deceived as to his entire identity and as to the nature and/or purpose of the encounter constitutes a criminal offence and as to whether there have been and are now sufficient safeguards in place in relation to such activity. In

addressing such questions it will be necessary for the Inquiry to gain a proper understanding of the frequency with which such encounters occurred, the nature of them and the impact on the women concerned. Such an investigation cannot be conducted without hearing from the women affected and it would be offensive to purport to reach findings in relation to these issues without hearing their account.

#### **HN349**

13. The police position is that this officer spent about a year trying to infiltrate anarchist groups in the 1970s, but failed to do so and so left the field. This risk of physical harm and risk to private life is assessed by the MPS to be “very low” - i.e. highly improbable - and yet the Chairman is minded to restrict both real and cover name.
  
14. This is a prime example of the Chairman’s flawed approach: the police account that there is nothing to investigate is accepted and on that basis the Chairman concludes that it would be disproportionate to investigate, however slight the purported interference with the officer’s article 8 rights. This is plainly neither a fair nor an effective method of inquiry. In the first instance, please disclose which anarchist groups it is said that this officer sought to infiltrate.

#### **HN298 and HN77**

15. It appears that it is not even known whether these officers wish for their names to be restricted. The MPS has made speculative applications in anticipation that they might. No restriction order should be granted unless or until the officers’ own position is known. The fact that the Chairman has indicated that he is minded to grant ROs on this speculative basis, rather than deferring the applications until the officers’ views are known, further demonstrates that the Inquiry is adopting a default position of anonymity.

#### **HN332**

16. It is said that this officer signed a significant memorandum dated 17 December 1971 and that but for this officer’s health issues the Chairman would have ordered disclosure of his real name. How can the NPSCPs be expected to make effective

submissions as to the weight of the public interest in favour of disclosure without sight of the significant memorandum?

**HN345**

17. It is said that there are differing accounts as to why this officer's deployment was terminated. This may plainly be relevant to the weight of the public interest in openness as to his real name. No decision as to restriction should be made until proper disclosure of the nature of the difference in accounts has been made and NPSCPs have had a properly informed opportunity to make submissions.

**HN300**

18. This officer's deployment was terminated and he went on to marry, and subsequently have a child with, a woman he met whilst undercover. It is said that steps have been taken to try to contact the woman concerned. Please disclose what steps have been taken. Please also indicate what consideration has been given to seeking to contact the child of this marriage (now presumably an adult).

**HN331 and HN338**

19. It is said that the cover names of these officers are not known. Disclosure should be made of the groups they infiltrated and of sufficient information, including any images of them in their undercover identities, to enable those they may have spied on to make meaningful submissions.

**The remaining officers in this group**

20. In respect of the remaining officers in this group of applications, the NPSCPs are unable to make any effective submissions in the absence of proper disclosure.

**PHILLIPPA KAUFMANN QC**  
**Matrix Chambers**

**RUTH BRANDER**  
**Doughty Street Chambers**  
**8 May 2018**