IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY:

METROPOLITAN POLICE SERVICE
WRITTEN OBSERVATIONS ON THE PUBLIC CONSULTATION
ON THE APPROACH TO THE ADMINISTRATION OF EVIDENCE HEARINGS

Introduction

1. This document sets out the response on behalf of the Commissioner of the Metropolitan Police Service ('the MPS') to the Undercover Policing Inquiry's *Public Consultation on the Approach to the Administration of Evidence Hearings* dated 30 August 2018. For ease of reference, the subheadings adopted in that document have been followed in these observations. In addition, references below to live-streaming should be taken to encompass both live-streaming and an Inquiry-managed internet channel.

2. The MPS submits that the right approach to the evidence hearings will depend very much on the particular circumstances of this Inquiry and suggests that comparisons with the approach of other Inquiries are of limited assistance. Similarly, whilst it is possible to identify a range of principles (openness, fairness, protection of individuals, protection of the public interest, efficiency), it is difficult to apply these in the abstract. There may be no substitute, in practice, for a taking a case-by-case approach. The MPS notes that the consultation does not cover all practical issues that will arise at hearings, such as how applications to ask questions of witnesses are to be considered.

3. The MPS also observes that there are still big practical questions to be addressed, such as how the Inquiry proposes to deal with witnesses who are overseas (noting the difficulties of enabling witnesses overseas to have access to sensitive police documents for the purpose of preparing for and giving their evidence). These are difficult issues and the MPS stands ready to respond to any and all practical issues that the Inquiry will have identified in readiness for the first hearings in June 2019.

One - Handling of evidential documents post hearing

4. The MPS agrees that during open hearings, pages of evidence that are referred to should be displayed on the screens within both the hearing and the overflow room.

5. The preferred approach of the MPS in relation to the publication of documents post-hearing is that such publication should be only of pages referred to during the evidence or submissions. The reasons for this are two-fold. Firstly, if a witness has not been asked about or shown a document during the course of their evidence, that document will be unexplained. It risks inaccurate public understanding, and it may be unfair to the witness concerned to publish documents upon which no comment has been sought. Secondly, the publication of large numbers of documents increases the risk of inadvertent disclosure of sensitive or personal material (for example, if there had been an oversight in the redaction exercise).

6. That said, the MPS is concerned that until the Inquiry confirms the extent to which, and terms upon which it proposes to circulate documents prior to the hearing, or make them part of a hearing bundle, it is not possible to respond fully to the matters raised in the Consultation about the conduct of the hearing. The MPS wishes to know whether there will be consultation and the opportunity to make observations about the hearing bundles. Topics would include representations about the manner in which, and extent to which, hearing bundles will be made available and accessible to Core Participants. For example, will there be limits on access determined by relationship to the issues? How would such limits be secured? Will access to the bundles be dependent upon agreement that their contents will remain confidential until the hearing (or some point thereafter?). These considerations will affect the issues raised in the Consultation.

Two – Giving of Oral Evidence

7. The MPS's submission, in summary, is that there are a range of options that the Inquiry will need to consider in relation to the giving of oral evidence, which vary by witness and by material under consideration. A great deal will depend upon the particular circumstances and applications for private hearings and/or special measures will need to be determined on a case-by-case basis.

Applications for special measures

8. The sooner the Inquiry can publish its list of witnesses who will give live evidence, the sooner those witnesses and their legal representatives can consider and make submissions on the appropriate and specific conditions for the evidential hearings at which they are to appear. Further, early confirmation from the Inquiry as to what special measures could be made available to witnesses would assist in alleviating some of the anxiety associated with giving evidence and allow for planning and preparation. With these factors in mind, the MPS invites the Inquiry to set a timetable for special measures applications to be made.

9. The MPS agrees *'that giving evidence can be regarded as daunting particularly when this is done in public, and that many of those who will be required to give oral evidence (both state and non-state witnesses), may find it a stressful experience'*. The MPS also agrees that ensuring that the best evidence is given may require special measures, especially where the evidence relates to sensitive personal matters. The MPS concurs with the proposal to limit public access to the hearing room when such evidence is being heard. Giving evidence which the witness knows will be broadcast to the world via live-stream may also be a highly stressful experience and one which the MPS opposes (see further at para 20 *et seq*). However, if evidential hearings were to be live-streamed or broadcast, the MPS submits that no broadcast should be made of the face of any person subject to a Restriction Order and the voice of any such person should be subject to disguise as part of the broadcasting process. This is dealt with further below.

10. The Chairman has, as part of the anonymity process, given a preliminary indication regarding some MPS witnesses who are likely to need protective measures or to give their evidence in closed hearings. As part of that process, the Chairman has also indicated a preference for evidence to be given in public without the use of screens or voice modulation where possible (see, for instance, Minded-to note in relation to N58 dated 20/12/2017). If screens are required, there is the subsidiary question of who may see behind the screen (for example, whether legal representatives or unrepresented CPs should be permitted to see a witness) and whether the layout of the hearing room will permit the desired configuration.

Covert photographs, voice recordings or other identifying material

11. A further concern for the MPS is the potential for persons in the hearing room taking covert photographs, unauthorised voice recordings or other identifying material during the course of oral evidence using a mobile phone, tablet or other portable device, and posting such material on social media sites.

12. There has been growing concern within the courts about the unlawful taking of photographs as a result of the ease with which they can be taken using modern portable devices (*Solicitor General v Cox and Another (Contempt of Court: Illegal Photography)* [2016] 2 Cr App R 15; *R v Ivanov* [2013] EWCA Crim 614; *R v D (Contempt of Court: Illegal Photography)* [2004] EWCA Crim 1271). In *R v D*, in the context of a criminal trial, it was said that (at [15]):

> *"It is well known that taking photographs using mobile phones in court has become a major problem and concern both in the Magistrates' Court and the Crown Courts of England and Wales. It is also of concern in the civil courts. The reason for this concern will be obvious after a moment's thought. Intimidation of juries and witnesses is a growing problem generally in criminal cases. Recently there have been physical attacks on prosecuting counsel in a case. A person could use photographs of members of the jury or a witness or advocates or even a judge in order to try to intimidate them or to take other reprisals.* ***Witnesses who are only seen on a screen or who are meant to be known only by an initial could possibly be identified. The anonymity of dock officers or policemen who are involved in a case could be compromised if a photograph is taken and is used to identify them****. It is clear, therefore, that illegal photography in court has the potential gravely to prejudice the administration of criminal justice."* (emphasis added)

The risks identified to the anonymity of witnesses and police officers in criminal trials apply equally to Inquiry proceedings. In addition, concerns about the breaching of orders relating to anonymity is a factor upon which the Attorney General has invited evidence for consideration as part of his review: *The Impact of Social Media on the Administration of Justice: A Call for Evidence* (Attorney General's Office 15 September 2017 at paras 3.5- 3.9).

Social media

13. In the non-evidential open hearings thus far, the Inquiry has permitted tweeting of proceedings subject to a requirement that those using Twitter or other social media wait for 60 seconds before posting. The MPS is concerned that once live evidence starts, a

60 second delay may be insufficient because it is too close to instantaneous: a three or five minute delay provides a clearer break between the evidence and its transmission, and a greater opportunity to object. However, there may be circumstances where - recognising that the Inquiry is determined to hear as much potentially sensitive evidence in public as possible - the Inquiry will need to take further steps, such as preventing social media communications from the hearing and in some cases requiring the surrender of mobile devices. In addition, like live-streaming, the knowledge that evidence is being shared on social media at a near-instantaneous rate may have the capacity to inhibit witnesses and is something on which individual witnesses may have a view.

Support and assistance before giving evidence

14. Given in particular (although not exclusively) the age and frailty of some witnesses, the Inquiry may wish to consider providing as much advance information as it can to those witnesses to let them know what to expect. For example, a timetable for the hearing of evidence comprising time markings for each witness; timetabling regular breaks for witnesses; giving advance notice – insofar as is possible - of who will ask questions, and of the topics to be covered (if not of the questions themselves).

15. The latter may also be appropriate given the need for former police officers to avoid straying in public into topics which are protected by Restriction Orders. A cipher list of cover names may need to be provided to police witnesses who are already aware of true identities. Police witnesses would welcome the opportunity to refresh their memory from their witness statements and/or other relevant documents before giving evidence.

16. The provision of secure live-links may need to be considered in order to enable police witnesses who live abroad to give evidence. The MPS would also welcome an opportunity to discuss with the Inquiry its expectations as to the funding of the travel and accommodation expenses of former UCOs whom the Inquiry wishes to call as its witnesses. The MPS, which is subject to very significant operational and budgetary demands, cannot commit to meeting expenses that might be met pursuant to the Chairman's powers under s 40 of the 2005 Act.

Three - facilities and support for witnesses on the day they give evidence

17. The MPS agrees with the provision of packages of support to assist witnesses in giving evidence. The MPS will be providing support and assistance to MPS witnesses on the day they give evidence. The MPS also agrees broadly with the helpful suggestions contained in paragraph 2.5 of the Consultation.

18. Personal security when giving evidence remains an ongoing concern for a number of former UCOs. Careful consideration will need to be given as to how those protected by Restriction Orders will enter and exit the building. Separate waiting rooms for police witnesses have been requested. Additionally, some police witnesses are now quite frail and secure access to disabled toilets will be required in some cases.

Four - facilities for attendees

19. The MPS agrees with the proposal for an overflow room serviced by live-link transmission subject to it being used only for open hearings, so long as any overflow room is effectively subject to the Chairman's control. Inquiry and court security staff will need to be present to draw attention to any attempts to breach, for instance, rules on covert recording and photographs. The MPS also agrees that the provision of Wi-Fi for the hearing and overflow rooms is necessary.

Five – live-streaming and/or inquiry-managed internet channel

20. As the Inquiry notes, the disadvantages to live-streaming relate to the creation of a permanent record (noting the Inquiry has recognised the need for expert assurance that recognition techniques could not be used on any permanent recording), with the opportunity to use image and voice data to undermine the Restriction Orders in place, as well as the potential that sensitive information is released through inadvertent disclosure. There is also the potential impact upon the quality of evidence given by witnesses who know their evidence is being broadcast to the world.

21. In this regard, the MPS makes a number of preliminary observations:

a. Live-streaming or public availability of recordings is not required under the Inquiries Act 2005 or the Inquiry Rules 2006.
b. The requirement under s18(1) that the Chairman take reasonable steps to ensure that members of the public and the press are able to attend or see and hear a simultaneous transmission does not relate to live-streaming or public availability of recordings, which fall within the broadcast provisions of s18(2).
c. Although live-streaming has similarities with allowing public access to the hearing room, it is not the same thing. Live-streaming involves the broadcasting of proceedings to an indefinite number of members of the public, and permits the creation of a permanent record of the hearing, which public attendance at the hearing does not.
d. The Undercover Policing Inquiry is an Inquiry into highly sensitive matters.
e. The process of making applications for the restriction of identities of SDS officers (the "anonymity process") did not proceed on the basis that there would be internet-broadcast live feeds or permanently available recordings of oral evidence. Whilst it can reasonably be expected that oral evidence, if so required, would be given in the witness's real name where there is no Restriction Order over it, the MPS was not invited to consider the risks on the basis that a permanent and publicly accessible visual and oral record would be produced.
f. The Inquiry is precluded from acting in a manner which violates Convention rights, yet the potential risks to rights under Articles 2, 3 and 8 of the Convention arising from the use of live-streaming in the context of this Inquiry are unexplored. In addition, the Inquiry is required to act with fairness (s17 of the 2005 Act). Once identifying information is made public, it would remain in the public domain and it may be too late to remedy any damage done to the public interest or risk of harm.

The creation of a permanent record

22. There can be no question of the recording or broadcast of the true image or voice of those who have a Restriction Order in respect of their real name. Such a broadcast would undermine the effect of the Restriction Orders which have been made (as is clear on their terms). It would also breach the Article 8 rights of the witnesses – bearing in mind those rights were, in the majority of cases, the basis for the restriction having been granted.

23. For the avoidance of doubt, the MPS view is that the protection necessary to meet the terms of the Restriction Order extends not just to visual image, but also to the voice. The creation of a permanent record of voices of particular witnesses protected by Restriction Orders leaves open the prospect of future identification, either by piecing together other information that comes to light (the 'jigsaw' or 'Mosaic' effect) or by being able to obtain a sample for comparison, thus contributing to the disclosure of real identity. The MPS's understanding is that current, established forensic voice recognition techniques involve a manual process of comparing acoustical measures, pronunciation quirks, accents, disfluencies and voice quality. However, electronic voice recognition software is freely available (for instance, Microsoft Azure Speaker Recognition). There are an increasing number of programmes that perform digital voice recognition as well as storing voice data (Alexa, Google's 'Cloud Speech to Text'). Although reference samples may only be publicly available for a limited number of individuals, some entities (for example banks, Google or Amazon) are likely to have large banks of data for voice recognition purposes and are subject to the risk of data breach.

24. The issue is, however, still complicated even for witnesses with no Restriction Order in place. The need to afford privacy to those giving evidence has long been established in the context of the prohibition on taking photographs during proceedings under s41 of the Criminal Justice Act 1925. The prohibition exists:

> *"...to afford necessary privacy to judges and others concerned from unwelcome intrusions or feelings of such which is an essential for the proper conduct of legal proceedings. Justice could not be properly administered if judges or witnesses suffered the pressures, embarrassment and discomfort of being photographed whilst playing their particular role in court with the expectation that every sign, mood, mannerism or observation should later be displayed on the public media."* (*St Andrew's Heddington, Re:* [1978] Fam 121 at 125).

The potential to increase the stress, anxiety or worry on the part of a witness is also recognised as a factor to be considered in relation to decisions to permit sound recordings and live texting from hearings (Criminal Practice Direction 6A.2 (a); *Practice Guidance (Court Proceedings: Live text-based Communications) (No 2)* [2012] 1 WLR 12). The potential for distraction or increasing the stress for witnesses

can only be magnified in the context of either live-streaming or broadcasting. Given the sensitivities of the issues that are likely to be aired, this must be of real concern.

25. There are a number of officers - typically police managers – where the MPS did not apply for Restriction Orders over their real names, because the use of their real names *in the context of giving evidence about their SDS work* did not generate a risk sufficient to require restriction of the name *in that context*. However, there are a significant number of officers who, because of their sensitive Special Branch work, might be at risk were a permanent visual and audio record of their account be broadcast. The issue is that these risks have simply not been assessed, that not being the context in which the SDS anonymity exercise was carried out. It would take time for that work to be undertaken and would require fuller risk assessment of those persons' wider career than has taken place to date.

Release of sensitive information

26. Even if the Chairman were minded to address the above concerns by prohibiting the broadcast of all former SDS officers' images, and permitting voice modulation on broadcast for all UCOs with Restriction Orders (as well as potentially other witnesses, that do not have a Restriction Order over their identity) this would still leave open the potential for sensitive information to be disclosed inadvertently during the course of live evidence. The MPS has real concerns about the release of highly sensitive information and would observe that this risk is the key distinction between this Inquiry and other recent inquiries which have been live-streamed. As noted in the MPS's submissions dated 12 February 2016, in order to be thorough, an inquiry into matters of undercover policing will involve considering matters of extreme sensitivity where there is a real risk of damage to individuals and to the public interest (II.8 MPS Submissions on Restriction Orders 12/2/2016). Inadvertent disclosure could include, for example, disclosure relating to sensitive tactics or techniques that would undermine lawful policing. Those giving evidence could also inadvertently disclose the real names of individuals subject to a Restriction Order. It was on this basis that Sir Christopher

Holland did not permit the televising of the Azelle Rodney Inquiry holding "that to do so would create unnecessary risk".[1]

27. The MPS does not believe that these issues can be remedied by a short delay before transmission. Some of the evidence might include sufficient details to identify a person, or the common features of a legend, or a sensitive tactic but may well need to be examined in its overall context in order for that assessment to be made. There is also the risk that witnesses who are aware of sensitive information may be more guarded in their open evidence if they are aware that proceedings are being immediately broadcast.

The MPS's preferred approach

28. The preferred approach of the MPS would be that there is no live-streaming or visual or sound recordings of witnesses giving oral evidence. It should be possible to live-stream other aspects of the proceedings with a short delay (such as opening submissions) which do not generate the same risks identified above.

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[1] Transcript of directions hearing 26.04.2012 available at : http://webarchive nationalarchives.gov.uk/20150406091745/http://azellerodneyinquiry.independent.gov.uk/transcripts/directions-hearing-260412.htm