IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

RESPONSE TO CONSULTATION ON THE APPROACH TO THE ADMINISTRATION OF EVIDENCE HEARINGS
ON BEHALF OF
THE NON-POLICE, NON-STATE CORE PARTICIPANTS

INTRODUCTION

1. The NPSCPs welcome the opportunity to make submissions as to the Inquiry's approach to the administration of evidence hearings. Their specific submissions in response to the five matters identified in the consultation document are set out below. However, they also wish to raise two prior points about the Inquiry's general approach and about venue.

GENERAL APROACH

2. In considering all aspects of the administration of evidence hearings, it will be important for the Inquiry to keep in mind the fundamental distinction between the status of state and non-state individuals in this Inquiry. As expressly recognised by the previous Chair in his ruling on undertakings: "*the main focus of the Inquiry… 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.*"[1]

3. The activities of undercover officers, their cover officers, managers and those who authorised or directed their activities or made use of their products are the subject matter of this Inquiry. The state witnesses will be giving evidence about the discharge of their public functions: "public" in the sense that the activities and events they will address were those they engaged in whilst discharging functions

[1] Undertakings ruling [57], 26 May 2016.

they were employed to discharge on behalf of the state, even if those functions themselves were covert. By contrast, non-state witnesses are members of the public who were the victims of undercover policing, whose private lives were invaded. They come forward in support of the "*important public interest in the Inquiry receiving the best evidence available on matters going to the main focus of the Inquiry*"[2].

4. The Inquiry must be alive throughout to the fact that the purpose of this Inquiry is to scrutinise the conduct of the state and its agents. In order to do that in any way effectively, it needs to hear from those who were spied on. It would be wholly wrong, and unlawful, for the Inquiry through the conduct of its own proceedings to exacerbate or repeat the invasions of privacy caused by the undercover policing it is tasked with investigating. Equally, it would be wholly wrong for there to be any restriction on publication of the evidence relating to the activities of the state agents other than that which is strictly necessary to give effect to anonymity orders or to protect the private life rights of non-state individuals.

5. For these reasons, the guiding principle in the Inquiry's approach to evidence hearings should be <u>maximal disclosure of state evidence, whilst taking every step to respect the privacy of those who were subjected to undercover policing</u>.

6. Submissions as to how this should work in practice are set out below in response to the specific issues identified by the Inquiry.

VENUE

7. Paragraph 1.3 of the consultation document states that *"[a]t present the Inquiry intends to hold its open proceedings at the Royal Courts of Justice with an overflow room (where there is a demand for it)*." However, the Chair indicated at a recent meeting with NPSCPs that nothing had yet been decided in relation to venue. The NPSCPs therefore raise here their strong opposition to the RCJ as a suitable venue for open proceedings in this Inquiry.

[2] Undertakings ruling [58].

8. The building itself is an imposing and intimidating venue; not at all conducive to public accessibility, or to reassuring those who were spied upon for speaking out against the state that their voices will be heard in a neutral space. The NPSCPs understand that the Inquiry has previously indicated its preference for the RCJ, because of its ability to accommodate closed hearings. However, there is no necessity for the Inquiry's closed and open hearings to be held at the same venue. Indeed, given the very different requirements of each, it may well make more sense to hold them at separate venues, thereby ensuring that the need for openness and accessibility in the open hearings is not compromised in the interests of having a venue that can also facilitate the closed hearings.

9. In addition to the limitations of the RCJ identified above, there are also real practical problems with it as a venue. The courtroom itself is not large enough to accommodate all those who would wish to attend public hearings. This has already been a problem at the procedural hearings to date. The NPSCPs understand that this issue was so acute during the Leveson Inquiry that even witnesses were given a specific time slot during which a seat was available for them in the courtroom in order to give evidence and were then required to leave shortly afterwards. One RLR in the present Inquiry who also represented a core participant in the Leveson Inquiry describes it as the least satisfactory practical arrangements for witness participation that he has experienced. This has obvious problems for both public accessibility and the ability of witnesses to feel comfortable in giving their evidence. There are also problems with the availability of breakout rooms and other facilities such as WiFi, which are addressed below.

10. The NPSCPs note that other inquiries, notably the Macpherson Inquiry, have been held in venues with a much greater degree of public accessibility, to good effect. The Independent Inquiry into Child Sexual Abuse is holding a number of its public hearings at different locations around the country, most recently at Nottinghamshire Trent Bridge Cricket Ground and it is understood that it may be moving to the Oval cricket ground for its London hearings.

11. The UCPI should consider this approach of identifying venues that are best suited to open, public hearings and of conducting hearings, where possible, in the locality where the activity under consideration took place. The Inquiry's terms

of reference span undercover policing throughout England and Wales. A considerable number of the witnesses from whom it will hear are located outside London and there is likely to be significant local interest in particular deployments – for example, the deployment of HN26 (Christine Green) had a particular impact in the area of the New Forest, with many local residents and businesses being affected. Consideration should be given to the Inquiry conducting open hearings in public venues outside London where this is conducive to local engagement and accountability.

THE SPECIFIC ISSUES IDENTIFIED BY THE INQUIRY

Handling of evidential documents

12. This is clearly an issue to which the guiding principle of maximal state disclosure whilst protecting the privacy of non-state individuals applies. The NPSCPs note that the Restriction Protocol provides for a procedure whereby CPs and witnesses will have the opportunity to consider references to themselves in documents which the Inquiry proposes to use *prior* to them being published by the Inquiry and that a similar opportunity will be afforded to persons who are neither CPs nor witnesses unless that person is not readily contactable. In circumstances where the individual is not readily contactable, the Inquiry legal team will decide whether to provisionally redact references to such persons applying the relevant legal principles (including consideration of that person's right to respect for his or her private life rights) and mindful of the fact that the person affected will not have an opportunity to apply for a restriction order. The NPSCPs note that a significant amount of highly personal information is likely to have been collected by undercover officers about those who are neither CPs, nor witnesses in the Inquiry. One obvious category is the families and children of those who were reported on. The Inquiry must be alive to the need to protect the privacy rights of those individuals, not least given the serious invasions privacy to which they have already been subjected as a result of undercover policing. Particular care must be given to the protection of information concerning children.

13. If the Restriction Protocol process works correctly then by the time of the evidence hearings any document the Inquiry proposes to publish, whether as part of the evidence bundle, or as a document referred to during the evidence hearing, should previously have gone through the above process. That is of the first importance if the Inquiry is to afford proper protection to the privacy rights of the victims of undercover policing.

14. At present, the Restriction Protocol only expressly addresses timeframes where documents are provided to CPs or witnesses at the point in time when the Inquiry approaches the CP or witness for a witness statement in relation to those documents. However, it is clear that situations may arise where the Inquiry intends to publish a document outside of the evidence gathering process. At present there is no agreed process or timetable for that to occur. The NPSCPs submit that there is a clear need for one.

15. An example of this occurred on 28 September 2018. At 18.02 on the Friday evening, the solicitor to the Inquiry emailed an RLR for an NPSCP indicating that the Inquiry was intending to publish a document referring to that NPSCP on Monday (the next working day). The initial email contained only an extract from the document the Inquiry intended to publish and other than being told that this came from the gist of a risk assessment for an officer who was applying for anonymity, none of the context was disclosed which would have enabled the NPSCP or the RLR to assess what impression might be given by the NPSCP being named in that context. Fortunately, the RLR checked her email out of office hours and the NPSCP in question was contactable. However, this was neither a fair nor efficient means of ensuring that the Inquiry respects the private life rights of non-state individuals.

16. A formal procedure and timetable should be agreed for affording non-state individuals a fair opportunity to ensure that the Inquiry is taking proper steps to secure their privacy in respect of any document the Inquiry is proposing to publish. This should apply in relation to all documents containing personal data that the Inquiry is intending to publish, at whatever stage in the proceedings. At a minimum, this should allow for at least 14 days between disclosure to the

affected individual(s) and proposed publication. In the context of lengthy and/or obviously sensitive material, the time afforded should be longer.

17. In the context of evidential documents at hearings, the Inquiry must ensure that all documents that are to be included in the evidential bundles, and/or are to be referred to at a hearing have been through the process set out paragraphs 27 – 34 of the restriction protocol sufficiently in advance of their onward disclosure to ensure that there is proper protection of the privacy rights of all non-state individuals whose personal data they contain. As above, it is submitted that the minimum period between disclosure to the data subject and onward disclosure or publication should be 14 days. Again, where the material is lengthy and/or obviously sensitive, the time afforded should be longer.

18. Assuming that that procedure has been complied with, and any resulting redactions to the personal data of non-state individuals have been made, there should be public access to the hearing bundles in advance of the corresponding hearing. That is because the unique circumstances of this Inquiry mean that many of those affected by its subject matter cannot know that they have relevant evidence to give until disclosure is made. Even where a cover name has been disclosed, as the NPSCPs have previously submitted, that alone may well not be enough to enable a person spied upon to realise that "John Smith" was *the* "John Smith" that they knew in 1976. There is considerable benefit to the Inquiry that any realisation of that nature should be arrived at before, rather than after, "John Smith" has given his oral evidence. If the documents relating to a witness are only published after the witness has given evidence, there is a real risk that it will only be at that point that non-state witnesses emerge. This then raises real potential for delay and for state witnesses having to be recalled. The NPSCPs submit that it is far preferable for the relevant documentation to be made publicly available in advance in order to maximise the prospect of relevant non-state witnesses and information coming forward before the corresponding state testimony has been given.

The giving of oral evidence

19. The NPSCPs note the Inquiry's commitment to considering applications for private hearings with restricted attendance, for example where sensitive evidence concerning NPSCPs is heard and to consulting on a case by case basis with witnesses on this. The NPSCPs submit that it will indeed be necessary for the Inquiry to address with each non-state witness sufficiently in advance of their oral testimony what, if any, aspects of their evidence will need to be given in private and/or whether any form of special measure will be required. It appears likely that there will be a range of responses, from the most sensitive personal information, which may need to be heard in private, or even closed proceedings, to that which a witness is willing to state in open court, but would not wish to have broadcast and made available online for posterity in audio visual format. The NPSCPs submit that the Inquiry should agree a protocol for consulting with each non-state witness and his/her RLR, if represented, a specified time in advance of oral testimony to agree with them what measures are necessary to fulfil the requirements of a public hearing, whilst affording proper protection for the witness' private life rights and enabling them to give their best evidence.

20. Consideration will also need to be given to the measures necessary to secure the private life rights of those whose personal information may be revealed in the oral testimony of others. For example, but not limited to, when an officer gives evidence about intimate details of a non-state individual with whom he had a relationship. Considerations of this kind should be addressed in the same way as restriction of documents. I.e. where a witnesses' oral testimony is likely to reveal personal information about a non-state individual, if that individual is a CP or witness, the Inquiry should afford them an opportunity to apply for any measures necessary to protect their private life rights. Likewise, in relation to any non-state individual, other than a CP or witness, who is readily contactable the same approach should be taken. In respect of those who are not reasonably contactable, as with restriction of documents, the Inquiry itself will have to take appropriate measure to secure their private life rights, taking into account the fact that they have not had the opportunity to make an application for themselves. Once again, there will be particular categories of non-state individual whose

personal data is at special risk of being referred to – for example the family members and children of those who were reported on. Special attention will need to be given to protecting the private life rights of such individuals and particularly children.

Facilities for witnesses on the day they give evidence

21. The NPSCPs welcome the Inquiry's indication that it will liaise with witnesses (and their representatives) to provide a package of support to ensure that they understand the process, and what is expected of them in terms of attendance and when giving their evidence. As above, the NPSCPs submit that this should also include consultation with each non-state witness (and their representatives, where represented) as to any measures that are sought in order to protect their private life rights.

22. Again, different witnesses will have different requirements in terms of support. However, the general submissions set out above in relation to the unsuitability of the RCJ are repeated. Most witnesses are likely to benefit from having a private room available to them and their representatives and/or supporters before and after they give evidence. However, it is not clear that this could be accommodated at the RCJ.

23. In respect of counselling, which is mentioned as a potential option in the consultation document, the NPSCPs acknowledge that counselling could be beneficial. However, in order to be in any way effective, there would have to be entirely separate provision for state and non-state individuals. Further, the provider of counselling to non-state individuals would need to have relevant knowledge and expertise in the particular issues faced by those individuals and be such as to enable a therapeutic relationship of trust. As the consultation acknowledges, there would also be questions about the duration of any counselling. To be of any real benefit it could not be limited only to the day or days on which the witness was giving evidence. The NPSPCs suggest that this is an issue that is best explored in dialogue between them and the Inquiry Legal Team.

Facilities for attendees

24. There have already been issues about sufficient public access at some of the Inquiry's procedural hearings. It is important that evidence hearings should be held at a venue with a hearing room that is large enough to accommodate those who wish to attend. In respect of significant witnesses, such as, for example, Bob Lambert, Mark Kennedy, Peter Francis, this is likely to be a considerable number of people and preparation should be made for an appropriate venue in particular for those witnesses who are likely to attract the most public interest.

25. In respect of an overflow room, unless the Inquiry moves to a venue with greater public access than Court 73 at the RCJ, an overflow room should always be available unless or until it becomes apparent that there is regularly sufficient space in the main hearing room for all who wish to attend. In any event, an overflow room will be required whenever access to the main hearing room is restricted for the purpose of ensuring the comfort of a non-state witness, but his/her evidence is otherwise public and so can be broadcast in the overflow room.

26. It would also be a considerable benefit for there to be consultation rooms available to NPSCPs in attendance at the hearings. There are likely to be a number of hearings at which a witness' evidence will be of relevance or interest to a number of NPSCPs. It would be of significant benefit for there to be private rooms available for NPSCPs to consult with their legal representatives. The Inquiry must also be alive to the fact that some of the evidence may have a significant emotional impact on NPSCPs. In such cases it would be desirable for there to be space for those affected to reflect and process what they have heard.

27. As for public WiFi access, this is essential. There has been a real issue at procedural hearings to date where bundles have been distributed in electronic format only and the Inquiry has refused to fund the provision of hard copy bundles to NPSCPs. This has made the hearings inaccessible for those in attendance. That should not be repeated. WiFi should be made available so that NPSCPs and members of the public are able to access the hearing bundle in real time.

This is also essential for NPSCPs to be able to provide fully informed instructions to their RLRs during hearings.

Live streaming and/or Inquiry-Managed Internet Channel

28. Live streaming is an important means of securing public accessibility and accountability in the Inquiry's proceedings. Subject to the steps set out above to safeguard the private life rights of non-state witnesses, NPSCPs and other non-state individuals, including the opportunity for them to apply for their evidence and/or the evidence of others that relates to private information about them not to be broadcast in this way, it is submitted that there should be live streaming of the Inquiry's evidential proceedings. This should be subject to a short delay in order to ensure that any inadvertent disclosure of material that ought not to have been disclosed is not broadcast.

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