IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

WRITTEN SUBMISSIONS ON BEHALF OF THE DESIGNATED LAWYER OFFICERS ON:

CHAIRMAN'S STATEMENT ABOUT THE CONDUCT OF TRANCHE 1 EVIDENCE HEARINGS DATED 29 MAY 2020

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1. Introduction

1.1 These submissions are filed and served on behalf of the Designated Lawyer officers ("DL" and "DLO") in response to the inquiry's "Statement about the conduct of tranche 1 evidence hearings" dated 29 May 2020. The abbreviations "T1" and "M*x*" are used herein for tranche 1 and its various numbered modules.

1.2 The DL well understands that the inquiry's work has been adversely affected by the Covid-19 lockdown and that it is doing its best to find a way to progress its evidence hearings.

1.3 However, it is submitted that the plans set out in the inquiry's statement are so restricted and compromised as to be unfair and unworkable. Furthermore, and given the lapse of time since the relevant events, it is submitted that the prize of being able to say "evidence hearings began in 2020" is of no real value and cannot justify proceeding on the planned basis. A few months of additional delay pending the organisation of proper in-person hearings would make no material difference in the overall scheme of things and would allow greater disclosure.

1.4 The fundamental and insurmountable difficulties are not of the inquiry's making and flow from an unfortunate coincidence of circumstances:

(1) the age and vulnerability of the T1 witnesses - individuals in their 70s and 80s, mostly men - put them at particular risk from Covid-19 and make strict observance of social distancing and virus-control restrictions absolutely essential before, during and after they give evidence;

(2) the publication or unrestricted disclosure of images or audio-video footage of these individuals would be incompatible with upholding their real name restriction orders, not least because of facial recognition technologies;

(3) the various restriction orders made by the inquiry as to anonymity and the content of rule 9 statements and other documents create a complicated dividing line between open and closed matters ("the open/closed divide") and its navigation would be even more difficult if the inquiry, RLRs and witnesses were all in different places;

(4) the solution envisaged by the inquiry - the exclusion and differential treatment of core participants and their RLRs depending on who is giving evidence - would be procedurally unfair;

(5) the planned pre-hearing procedural timetable offers inadequate disclosure and insufficient time to prepare written opening statements;

(6) the (understandable) cessation of evidence collection from T1M2A managers and back office personnel means that the inquiry's plan would see T1M1 undercover officers give evidence without the inquiry, let alone the core participants, knowing what their supervisors may say about their deployments.

1.5 Although the giving of remote evidence by a particular witness may well be justified on a case-by-case basis, its wholesale use in conjunction with universal remote attendance by all concerned would entail an unjustified departure from the following general principle: "There is much to be said for the traditional means of eliciting the truth: the giving of evidence in the room in which the Chairman, lawyers and interested members of the public sit" ("Chairman's statement about the conduct of evidence hearings" dated 19 December 2018, para.9).

2. Lack of meaningful consultation or detail

2.1 It is submitted that the inquiry should have consulted the core participants on the conduct of the T1 evidence hearings, rather than issue a statement which appears to contain a concluded ruling and directions. The statement dated 29 May 2020 did not set out options, list pros and cons or otherwise read like a consultation document and its limited references to "proposals" were inconsistent with its substance and the accompanying press release.

2.2 The difficulties with this approach are two-fold. **First**, it is procedurally unfair and inconsistent with the legal requirement that the core participants should be listened to and treated with respect. See esp. *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115, per Lord Reed JSC at [67]-[71]:

> *67. There is no doubt that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested. As Lord Hoffmann observed however in Secretary of State for the Home Department v AF (No 3) [2010] 2 AC 269, para 72, the purpose of a fair hearing is not merely to improve the chances of the tribunal reaching the right decision. At least two other important values are also engaged.*
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> *68. The first was described by Lord Hoffmann (ibid) as the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel. I would prefer to consider first the reason for that sense of injustice, namely that justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken. As Jeremy Waldron has written ("How Law Protects Dignity" [2012] CLJ 200, 210):*
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> > *"Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with. As such it embodies a crucial dignitarian idea—respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves."*
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> *...*
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> *70. This aspect of fairness in decision-making has practical consequences of the kind to which Lord Hoffmann referred. Courts have recognised what Lord Phillips of Worth Matravers described as "the*

feelings of resentment that will be aroused if a party to legal proceedings is placed in a position where it is impossible for him to influence the result": Secretary of State for the Home Department v AF (No 3) [2010] 2 AC 269, para 63…

71. The second value is the rule of law. Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions: see e.g. Fuller, The Morality of Law, revised ed (1969), p 81, and Bingham, The Rule of Law (2010), ch 6.

2.3 **Secondly**, it is extremely unsettling for the relevant witnesses to be confronted with the unexpected publication online of apparently definitive plans for their future in circumstances where they are elderly, vulnerable and already understandably concerned about Covid-19. The detrimental impact of this approach is further compounded by the fact that the inquiry has not explained what its planned remote hearings might look like in practice, or given any reassurance about their compatibility with social distancing and virus-control requirements.

2.4 In this latter regard, the DL had the following exchanges with the inquiry between the imposition of lockdown and the unexpected issue of its statement late on Friday 29 May 2020. As is apparent, the DL has sought detailed information about the inquiry's video-link plans on numerous occasions without success:

(1) <u>7 April 2020</u>

Two weeks after the start of lockdown and three days before the Easter weekend, the inquiry issued a statement dismissing every DLO T1M1 application for special measures without reasons and giving 14 days (subsequently corrected to 28 days) for each applicant to elect to give evidence by video-link.

(2) <u>8 April 2020</u>

The DL contacted the inquiry by telephone and email to request (a) an extension of the 14 day deadline, (b) individualised reasons for the special measures decisions and (c) detailed information about the

practicalities of the contemplated video-link. The DL repeated these requests in emails dated 14 and 23 April and 22 June 2020 and at a virtual meeting on 28 April 2020 and the Commissioner's Lawyer ("CL") sought similar information in a letter dated 8 April 2020. The reasons and information sought have still not been provided.

(3) 1 May 2020

In the absence of individualised reasons for the special measures decisions and information about the practicalities of the contemplated video-link, the DL emailed the inquiry to seek an extension of time - until 2 June 2020 - for confirmation of each DLO T1M1 witness's position. This email set out a number of further specific questions regarding the taking of evidence by video-link and how this might work. The DL further chased answers to these questions by way of an email dated 22 June 2020, but none has been provided.

(4) 7 May 2020

The inquiry wrote to the DL to say that it was still hoping to hold effective evidential hearings - confined to the period 1968-1974 - in September 2020 and that, "The Inquiry is still looking at options for how best to receive evidence from witnesses at the September hearing. Where a witness is unable to attend the hearing venue and/or has expressed a desire to use video-link, we are exploring how this would best function practically. I recognise that this is of key concern to both the legal teams and their clients and we expect to be able to respond on this in more detail once our investigations are complete." The outcome of these investigations remains unknown.

(5) 13 May 2020

The DL emailed the inquiry to try and clarify which state and non-state witnesses it hoped to hear from in September 2020.

(6) 18 May 2020

The inquiry identified the relevant witnesses and said, "We are working

this week on the likely format of hearings in September and will update you on this point as soon as possible. Regarding those officers now listed for oral evidence it would be helpful to have any additional observations you are able to provide regarding practical considerations when it comes to the prospect of giving evidence remotely, including level of IT skill (supported or otherwise) and whether they have internet access." This implied that the inquiry envisaged witnesses giving remote evidence from their own homes, using their own internet connections and possibly their own IT equipment.

(7) 22 May 2020

The DL emailed the inquiry to seek, *inter alia*, a response to the abovementioned email dated 1 May 2020 and to make clear that, absent the requested reasons and information, she would not be able to confirm by 2 June 2020 which of the DLO T1M1 witnesses wished to pursue the video-link option. The CL also wrote to the inquiry on the same day seeking further information about the format of the then proposed September hearings.

2.5 The inquiry's statement dated 29 May 2020 - published around close of play on a Friday evening - came as a further unexpected change of plan and yet still no indication has been given as to what the contemplated video-link evidence process might actually look like:

(1) Where will the witnesses be - at home or a neutral venue?

(2) Who will be present - RLRs, inquiry staff and/or IT support staff?

(3) What IT equipment and software will the witnesses need to operate - one device or screen for the video-link, one to view documents and one to communicate with their RLR?

(4) When, where and how will the witnesses be able to prepare, including by having access to their closed, unredacted statements and witness

packs?

(5) What access will the witnesses have to those closed, unredacted materials and/or the aide memoire of ciphers and pseudonyms referred to in the inquiry's "Statement about the conduct of evidence hearings" dated 19 December 2018 (para.24) and how will this be securely facilitated?

(6) Subject to the above, will the planned arrangements be secure against hacking or other compromise and can they all be carried out in a way that maintains social distancing and virus-control?

2.6 While the DL well understands the difficulties the inquiry team have had accessing their premises and documents and taking instructions from the Chairman, the consequence of the above is that these submissions have been prepared without any real understanding of what the inquiry's planned November hearings might entail for the DLO or indeed any other witness.

3. Opening statements: scope

3.1 Further to the above, it is also not entirely clear what the planned November hearings might cover and therefore what the core participants would need to address in their opening statements.

3.2 The inquiry's statement dated 29 May 2020 says, "Evidence in the first phase of tranche 1 will be given about the foundation of the SOS, the deployment of undercover officers in the weeks leading up to and immediately after the demonstration on 27 October 1968, the decision to continue and broaden the scope of undercover activities carried out by the SOS after its initial purpose was fulfilled and the undercover activities then undertaken before the unit was renamed the SDS" (para.10).

3.3 This suggests a scope of 1968-1972, but a number of DLO T1M1 deployments began before and extended beyond 1972 and the inquiry's earliest civilian witnesses were also active later than that. It is therefore unclear who might be

called in November, what they might be asked to deal with and, accordingly, what might need to be addressed in opening.

3.4 Para.5 of the inquiry's statement also refers to opening statements on behalf of "former undercover officers and managers". The DL represents a number of T1M2A managers whose rule 9 requests and witness packs have been delayed and who may not be able to meet with a member of the DL team for some time. The DL does not know what they will be shown or asked or what they may say in response and it is therefore difficult to know how an opening statement could be made on their behalf.

3.5 Furthermore, the opening statements would have to be prepared on the basis of limited disclosure confined to 1968-1972 and yet the inquiry envisages those with no first-hand knowledge of that era making such statements. This is confusing because the inquiry's "Hearings Protocol" dated December 2019 and para.5 of its accompanying statement dated 18 December 2019 contemplated "core participants with a direct interest in" each tranche making "a short opening statement about that tranche before evidence in that tranche is heard". The statement further said, "To do that, they will have to have disclosed to them the documents which will be deployed during the hearing of that tranche".

3.6 Counsel for the DL were contemplating an oral opening statement of approximately 4-5 hours for T1, including modules 1 and 2A, but are unclear what the inquiry is envisaging for November or how many other opportunities it will give for T1 opening statements. Before the second phase of T1M1 evidence? Before the T1M2A evidence? Before the T1M2B and T1M2C evidence?

4. Opening statements: order

4.1 Subject to the above, it is submitted that the order of opening statements set out at para.4 of the inquiry's statement dated 29 May 2020 should be amended so that non-state core participants go after CTI, but before the official police bodies, other state bodies and former undercover officers and managers. This is simply because the former will be advancing criticisms of the latter and it would

make sense and be fair for the subjects of those criticisms to be able to hear and respond to them.

5. Opening statements: timetable

5.1 The inquiry's planned timetable allows less than five working weeks from service of the limited hearing bundles on Monday 21 September 2020 until filing of written opening statements on Friday 23 October 2020.

5.2 This would not allow sufficient time for the DL to take instructions on the civilian witness evidence disclosed in those bundles or an opening statement more generally, particularly when the intention is that the CL and MI5 should be able to review the latter in draft so that they can raise any concerns about the open/closed divide.

5.3 It is also submitted that service of all the written opening statements on Monday 2 November 2020 - the first day of the hearing and the day of CTI's opening - would be profoundly unfair. In particular, it would allow the legal teams making their oral opening statements immediately after CTI no time to read the written opening statements of their counterparts and give those going last a converse and unfair advantage.

5.4 If, notwithstanding the remainder of these submissions, open hearings in respect of T1 module 1 evidence were to proceed remotely in November 2020:

(1) the hearing bundles should be served no later than Monday 7 September 2020;

(2) written opening statements should be filed no less than six weeks after service of the hearing bundles, i.e. by Monday 19 October 2020;

(3) written opening statements should be served no less than one week before the hearing, i.e. by 26 Monday October 2020.

5.5 So far as concerns the plan to hear oral opening statements remotely, it is

submitted that this would be a profoundly unsatisfactory way forward. Each core participant is entitled to know that their views have been listened to and heard not only by the inquiry, but also by the other core participants and their RLRs. The physical presence and respectful engagement of all concerned is an important feature of this process.

6. Evidence hearings

6.1 Following a proper consultation exercise, the Grenfell Tower Inquiry concluded that it should not resume its oral evidential hearings by means of a remote video and audio platform (letter dated 20 April 2020, decision dated 15 May 2020). This decision was arrived at on the basis that it would not be appropriate to compel any witness to give evidence from home without their consent. The key conclusion reached was that the use of a virtual platform would deprive the questioning process of its essential effectiveness, dignity and solemnity. It was therefore held that "the best" and "indeed the only" way forward was to defer the resumption of hearings until a point when they could be safely held in accordance with government guidelines at the inquiry's premises.

6.2 This was consistent with the following finding in the report of the Nuffield Family Justice Observatory, "Remote hearings in the family justice system: a rapid consultation" dated 7 May 2020, para.3.1:

> *Many of the respondents expressed a concern about the difficulties of reading body language where there is no face-to-face contact with parties. This was particularly the case with phone hearings but also with video hearings. Respondents reported that it is difficult, if not impossible, to judge the reactions of a witness giving evidence or the reactions of a party hearing that evidence, either because they cannot be seen at all (phone hearings or some video platforms which only show a certain number of people on the screen regardless of how many are taking part in the hearing) or because they are only visible in miniature.*

6.3 The DL recognises that the two inquiries are very different, but it is submitted that this inquiry is even less suited to the holding of wholly remote proceedings for the reasons given by the Grenfell Tower Inquiry coupled with those summarised at paras 1.4-1.5 above.

6.4 The remaining submissions below proceed on the assumption it will be uncontroversial that no witness can be compelled to give evidence from their home without their consent or be exposed to a breach of social distancing or virus-control guidelines, e.g. in relation to third parties entering their homes. This is also consistent with the guidance issued by Sir Andrew McFarlane PFD "The Family Court and Covid-19: The Road Ahead" dated 9 June 2020, at para.28:

> *In all cases active thought should be given to arranging for a lay party to engage with the remote process from a location other than their home (for example a solicitor's office, barrister's chambers, room in a court building or a local authority facility) where they can be supported by at least one member of their legal team and, where appropriate, any interpreter or intermediary.*

6.5 The inquiry's plan would involve real-time audio-visual streaming of each witness's live evidence to his or her RLR, the Chairman and CTI and, by contrast, audio-only streaming to any other core participants with a direct interest in that evidence and their RLRs. It is important to note that, as part of this, all of the aforementioned would also be in different places and on different computer terminals or telephones. It is submitted that this would create insurmountable difficulties and unfairness for all the witnesses and core participants and their RLRs:

(1) Being able to hear evidence over a speaker phone is not the same as being present and the inquiry's plan is therefore inconsistent with the entitlement recognised in its "Further statement about the conduct of evidence hearings" dated 30 October 2019 - "When a core participant is giving evidence or when evidence directly affecting that core participant is given, he or she is entitled to have his or her legal representative present when that evidence is heard" (para.19).

(2) The House of Lords Select Committee on the Constitution's inquiry into the constitutional implications of Covid-19 has heard powerful evidence that "hybrid" or "partial" hearings - where one party is present physically and one attends remotely, or where one party has video access

and another audio-only access - are inherently imbalanced and liable to be unfair. See transcript of evidence of Professor Dame Hazel Genn on 3 June 2020 at p.7:

> *One thing that is emerging quite clearly is that the video hearing, in broad terms, is better than the audio hearing. A lot more information is conveyed. For example, if we were all on an audio call, we would have a less rich experience. I can see your faces and your expressions. A second finding is that it is very tiring to do these hearings. Judges who are used to sitting for two and a half hours in the morning and in the afternoon report that more breaks are needed. A third thing that is emerging is that there needs to be ways for lawyers and clients to communicate with one another during the hearings, because they are not sitting together and are not able to write notes or talk to one another. A fourth thing that is emerging is that it is quite hard to handle cases where there are large bodies of documents involved. We do not have good document management systems to support these kinds of hearings.*
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> *Generally, I think many people have been surprised at how effective a video hearing can be. Another finding or conclusion emerging is that partial hearings are not so effective and throw up questions of procedural fairness. That is to say, if some people are in a physical courtroom and others are communicating by video, there seems to be an imbalance…*

See also the transcript of the evidence of Dr Natalie Byrom on 10 June 2020 at p.3:

> *Also, and this is important because I have just seen the guidance that the President of the Family Division has issued about the roadmap forward, our findings raise real concerns about hybrid hearings, so part video and part audio hearings, where some parties are in the physical courtroom and other parties are joining remotely. In our study we found that hybrid hearings experienced a greater number of issues with technology, a greater number of issues with parties expressing fear and distress, and higher rates of issues with lawyers finding it difficult to communicate with their clients. This reflects the findings of both a rapid evidence review I conducted for the Family Justice Review, looking internationally at research on hearings, and EHRC-funded research on the experience of disabled people in the criminal justice system, and Home Office research on video-enabled justice, which found that hybrid hearings impact negatively on participation and outcomes for people. I very much urge huge caution when we are thinking about hybrid hearings as a solution to medium-term issues around Covid.*

6.6 The most important points from the DL perspective are as follows:

(1) the DL would be limited to audio-only streaming of the evidence of any non-DL SDS witnesses and the non-state civilian witnesses notwithstanding that:

(a) they may be answering questions proposed by the DL or giving evidence about the conduct of DLO;

(b) the DL may need to intervene at short-notice during that evidence and make submissions about relevance, admissibility, the open/closed divide or whether any matter should be withheld from further publication or broadcast;

(2) save to the extent that the CL are treated as the RLR for those SDS witnesses who do not have DL or other representation, they would be limited to audio-only streaming of the evidence of every witness notwithstanding that they have a more important institutional role in relation to the open/closed divide than the DL;

(3) whenever limited to audio-only streaming, the DL and CL would not easily be able to communicate with each other or CTI or the Chairman about whether evidence has crossed or may be about to cross the open/closed divide or whether any matter should be withheld from further publication or broadcast;

(4) many of the DLO witnesses have expressed concerns and anxiety about the use of real and cover names and ciphers, breaching restriction orders and navigating the open/closed divide - the scope for them to signal a possible concern will be extremely limited if they are in a different place and on the other end of a video-link;

(5) if a witness is required to give closed evidence following on from,

connected with or arising out of their open evidence, any delay in them doing so should be kept to an absolute minimum and yet it is not known if in-person closed hearings could realistically be held this year.

6.7 As already mentioned, a further difficulty arises in connection with the cessation of T1M2A evidence collection and the fact that such evidence is unlikely to be available by November. Had the evidence hearings gone ahead as planned in June and September of this year, the inquiry, the DL and CL and possibly the other core participants would have known the questions and documents put to the SDS managers and their answers. This information could have informed the questions put to the T1M1 undercover officers working under them and minimised any risk of those officers needing to be recalled. The lack of this information may hamper the inquiry and the core participants if remote T1M1 hearings are proceeded with as planned in November 2020.

6.8 Although the answers to the questions set out at para.2.5 above are not known, the DL also anticipates that remote evidence hearings would be particularly disjointed and unsatisfactory in this case. In this regard, issues over references to documents, the selection and formulation of questions and the open/closed divide will be particularly difficult to manage without the usual facility for "robing room" type discussions between the legal teams.

6.9 The tiring nature of remote hearings and the need for shorter sessions and additional breaks has been consistently highlighted in, e.g.: joint message of the LCJ, MR and PFD dated 9 April 2020; MacDonald J, "The Remote Access Family Court", version 4, dated 16 April 2020, para.5.19.4; Nuffield Family Justice Observatory, "Remote hearings in the family justice system: a rapid consultation" dated 7 May 2020, para.5.1; Civil Justice Council and Legal Education Foundation, "The impact of COVID-19 measures on the civil justice system" dated May 2020, paras 1.20, 5.1, 5.74 and 5.85-5.88; evidence to the House of Lords Select Committee on the Constitution (transcripts of evidence of Lord Burnett LCJ on 13 May 2020 at p.4 and Professors Richard Susskind and Dame Hazel Genn on 3 June 2020 at pp.6 and 7 respectively)

7. Inquiry controlled room for live video-stream

7.1 The arrangement proposed at para.8 of the inquiry's statement dated 29 May 2020 broadly reflects its plan for the overflow room at Pocock Street as referred to in the "Hearings Protocol" dated December 2019.

7.2 However, together with the other features of the plan outlined in that statement, this proposed arrangement would create a particular difficulty for core participants who do not represent a particular witness, but nevertheless have a direct interest in the evidence he or she is giving. In short, such persons and their RLRs would have to choose between hearing an audio-stream of that evidence in real-time or viewing a video-stream of it after a five minute delay.

7.3 This would adversely affect (1) the DL - when non-DLO police witnesses and non-state civilian witnesses are giving evidence - and (2) the CL - when the DLO are giving evidence. If either were to opt to view the video-stream, they would inevitably be deprived of any opportunity to intervene and make submissions about the open/closed divide or whether something has been said that should be withheld from that stream. In practice, the DL would have to forego sight of the video-stream and would therefore be put at an unfair disadvantage.

7.4 Furthermore, oversight and control of a live video-streaming room by the Chairman - when he is not in the same building - could become extremely problematic, e.g. if there is an allegation of illicit smartphone recording.

8. Audio uploads

8.1 The inquiry's statement dated 29 May 2020 contemplates audio-recordings of witness evidence being uploaded to its website. However, the "Hearings Protocol" dated December 2019 indicated that the inquiry intended to "seek advice on the practicability of broadcasting oral evidence given by a witness without the use of voice modulation techniques in such a manner as to protect the identity of the witness where a relevant restriction order is in place".

8.2 So far as the DL is aware, no such advice has yet been obtained or disclosed and

the scope for identifying speakers with real name restriction orders using voice recognition technology therefore remains contentious for a number of state core participants.

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