IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

METROPOLITAN POLICE SERVICE RESPONSE TO CHAIRMAN'S STATEMENT OF 29 MAY 2020

Introduction

1. This is the MPS's response to the Chairman's Statement of 29 May 2020.

2. The MPS appreciates the difficult challenges posed by the Covid-19 health crisis for the Inquiry and its ability to carry on its important work, including conducting accessible open hearings. The MPS agrees with the Chairman's assessment (Statement at §3) that social distancing measures of some sort are likely to remain in place for some time; that in-person open hearings in the Inquiry's chosen venue at Pocock Street will not be possible until social distancing rules are considerably different; and that sufficient relaxation is likely to be many months away, given the age and profile of the Inquiry's witnesses and some participants. The MPS reiterates its ongoing commitment to assisting the Inquiry meeting its terms of reference, and emphasises again its willingness to assist in ensuring that whatever format is adopted, it is sufficiently secure. In terms of preparation, the MPS would have been ready for a hearing in September 2020, had it gone ahead, and will be ready for a hearing in November 2020, should it begin then.

3. The MPS acknowledges the Inquiry's current intention that, assuming safe technological means can be found, it will begin evidential hearings for the first phase of Tranche 1 with a 3-week hearing beginning on 2 November 2020 (Chairman's Statement at §2). From the dates provided in the Statement, it appears that the Inquiry envisages only 5-8[1] sitting days of evidence in November 2020. The MPS also notes that the Inquiry's intention is to continue with the remainder of Tranche 1 in February 2021, but that it might be possible to begin those hearings earlier, in January 2021, or later, in March 2021.

4. In light of the limited nature of what is proposed to be achieved in November 2020, the significant technological and other challenges posed by moving to a hearing then (some of which are discussed below), and the relatively short period until the remainder of the Tranche can be heard in early 2021, the MPS asks the Inquiry to consider whether the fairest, safest, and most effective course be to start the oral hearings and hear all of the Tranche 1 evidence in 2021, in an in-person format.

[1] Given that 7 days are to be used in opening submissions; and depending upon whether a 4 or 5 day sitting model is followed.

5. Beginning and completing Tranche 1 in early 2021 would have several important advantages:
    a. If the social distancing rules are relaxed further by the new year (or if the Inquiry were able to secure a more spacious venue than Pocock St), it will allow the Core Participants (CPs) to make their opening statements in person and to respond more effectively to the statements of other participants.
    b. Further relaxed social distancing (or a different venue, if achievable) will also afford the Inquiry a wider range of options as to how it could, effectively and securely, hear from witnesses and provide greater public access to its proceedings, avoiding some of the potentially disruptive logistical and security challenges addressed below.
    c. It will allow the Inquiry to complete all phases of Tranche 1 in a single sitting or in more proximate multiple sittings.
    d. Moving the hearings to early 2021 may allow the Tranche 1 managers' written evidence to be obtained before the evidence of UCOs is heard. If the managers' evidence were available before the 2021 hearings it would assist CTI and the CPs in preparing questions for the Tranche 1 UCOs; would reduce the risk of officers being reproofed or recalled to give further evidence once the managers have provided their evidence; and would avoid time-costly speculation on a range of topics more properly answered by managers (for example, what was done with intelligence reports).
    e. It will afford CPs a proper opportunity to consider the Inquiry's Tranche 1 bundle before the hearings, if needs be in two or even more batches. The current timetable envisages a very short window for CPs to access the bundle (the size of which remains unclear); with a very tight turnaround for the exchange of opening statements. This pressure – and the risks it brings – could be avoided.
    f. It will afford the CPs greater opportunity to consider CTI's and other CPs' written opening statements before they are presented orally, which would be invaluable as it would prevent duplication of subject matter and allow CPs to respond, as needed, to the issues raised.
    g. Finally, as the MPS has previously discussed with CTI, there is great value in some form of neutral timeline or historical evidence being circulated in advance of hearings. Such contextual evidence is essential for a proper understanding of the undercover work that is the subject of this Inquiry. Starting in early 2021 would allow the Inquiry more time to produce this type of evidence ahead of the hearings, to the benefit of all CPs.

6. The observations which follow are directed to the issues arising if hearings do go ahead in November 2020. They must, however, be regarded as provisional for two key reasons.

7. **First**, it is not yet clear whether the Inquiry proposes to allow the MPS CL team to see and hear the evidence of former UCOs in real time.[2] The MPS objects to a virtual hearing in which the CL legal team is only able to hear, and not see, evidence of former SDS UCOs who are represented by the DL. Put plainly, it would unfairly inhibit the Commissioner's ability to effectively participate in the Inquiry:
    a. An audio-only feed is more challenging to follow than an audio-visual feed.[3] Where one participant's access is significantly different to another's there is a real risk of unfairness, and the common law duty of fairness requires courts to protect not just from unfairness arising from differential access, but from the risk of unfairness so arising.[4] Given the Commissioner's expertise in respect of open and closed material, such an unfairness arises in her case.
    b. The Commissioner has an essential role in identifying security issues that would require the delayed feed to be paused/not broadcast. This role is made more difficult (or risks being more difficult) by having an audio-only feed. This is not a suitable subject for experiment and it is not reasonable or responsible to inhibit the CL team in carrying out this important role. It is not one which can be carried out by the DL, or one which should rest only on the Inquiry team.
    c. Further, the MPS has a direct interest in the evidence itself. These officers' were employed by the MPS. Their testimony will be understood by the public as representing the Commissioners' account and her legal team will need to assist CTI and the Inquiry *during the hearings* in respect of perceived gaps, inadequacies, or inconsistencies in their evidence, and in explaining and contextualising it. It is not fair to the Commissioner that her legal team should operate at a disadvantage in doing this.

    The Inquiry is therefore invited to confirm that the Commissioner's legal team is entitled to be amongst those seeing and hearing former UCO witnesses' evidence in real time.

8. **Second**, there remains a lack of clarity in respect of a range of important technical and security issues. These are detailed below. Given that these issues bear directly upon the safety, security and accessibility of proceedings, the MPS cannot make fully considered submissions as to the viability of the proposed November hearing – or any later virtual format hearing – until they have been clarified.

Opening Statements

9. The MPS recognises that this part of the Inquiry's process is most amenable to a virtual format. It is understood from the Hearings Protocol that the first openings will be generic,

[2] The letter from James Wilson dated 24 June 2020 indicates that this is a matter upon which the Chairman invites the MPS to make submissions.

[3] Indeed, in the court context users have confirmed that the experiences are not equivalent. See the Nuffield FJO rapid response consultation at §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."* https://www.judiciary.uk/wp-content/uploads/2020/05/remote-hearings-rapid-review.pdf

[4] *Kanda v Government of the Federation of Malaya* [1962] AC 322 at 337.

with the only specific observations being limited to phase 1 of Tranche 1, and that further windows for openings directed to the evidence of later tranches will be allowed at the beginning of each set of hearings (save in respect of Tranche 5).

10. In light of the confirmation of the running order for opening statements and the allowance of time, the MPS makes the following requests:
    a. That a period of one-half day be set aside for the Commissioner's opening statement. If this period proves more than is required, the MPS will inform the Inquiry as soon as possible.
    b. The MPS' opening should be the last of the 'state/police CP' opening statements. This is necessary to allow the Commissioner a proper opportunity to reflect upon the submissions made by officer CPs, where necessary.

11. The Inquiry proposes that written opening statements be provided by 23 October 2020, and that these will be circulated to all CPs on 2 November 2020 – that is, on the day that CTI's oral opening statement is presented. The MPS does not see why the circulation of the written opening statements to CPs should be delayed in this way. The MPS, like other CPs, would benefit from early sight of all opening statements, including that of CTI. Time for the CPs to consider those written statements would allow them to be responsive in their oral statements to the issues and concerns raised. Such a task is particularly difficult for those participants due to make opening statements on/close to 3 November 2020, whose ability to be responsive, and help narrow issues, will be markedly less than those whose statements are timetabled to be delivered later. The MPS therefore requests, in the interests of fair treatment of all CPs, that all written opening statements (including that of the CTI), are circulated several days before the oral statements are made. The MPS suggests 7 days is an appropriate window; this can be achieved by immediate cross-service.

Oral evidence of witnesses

12. The MPS notes the Inquiry's intention to deal with the oral evidence of witnesses in two ways: first, real-time audio-visual access for the Chairman, CTI and the recognised legal representative ("RLR") of the witness; and real-time audio-only access for those with a 'direct interest' in the evidence. As set out above, the MPS considers that where evidence is given by a former MPS (SDS) UCO who has their own RLR, the Commissioner's legal team should also be amongst those able to see and hear the witness in real time. The MPS does not accept that a virtual hearing in which the CL team cannot see and hear police witnesses in real time would be fair or secure.

13. The Statement does not contain the detail of the provisions or processes under consideration by the Inquiry, making it difficult to provide helpful submissions on their acceptability from a security or welfare basis. The MPS asked by letter dated 16 June 2020 (Emma Scott to James Wilson) for confirmation of a number of details necessary to evaluate the proposals. The response on 24 June 2020 ("the 24 June letter") has not provided the necessary clarity, and the MPS is therefore unable to set down its final views on whether virtual hearings in November 2020 offer an appropriate level of security. The MPS does

wish to engage in constructive dialogue with the Inquiry on these important points; in that spirit, observations are made below about some of the matters raised by the MPS in the 16 June letter and the 24 June response.

a. The Inquiry will not be able to confirm until the end of July which platform is to be used to host the hearings. Directed submissions cannot therefore be made, because different security issues may arise in respect of different platforms. That said, Microsoft Teams is the platform recommended by MPS Digital Policing and Cyber Crime Units. It is considered sufficiently secure for the transmission of material up to 'official sensitive' level. It has two factor authentication and encryption from transmission to receipt, and in storage.
b. It is noted that testing has (at this stage) been carried out on Zoom for '*proof of concept*' only. The National Cyber Security Centre advises that any organisation planning to use a virtual platform to transmit secure or sensitive information should first conduct a robust risk assessment. Guides are publicly available.[5] The risk assessment, along with the provider's terms and conditions, will allow consideration of how the provider implements basic security controls, where the data is held, and what they are able to do with it. Where, as in the Inquiry's case, personal or security information may be mentioned on the feed (inadvertently) further evaluation of the security of the platform may be required. In order to make focused submissions, the MPS requests the opportunity to see and consider the Inquiry's risk assessments.
c. The MPS asks which method of connectivity will be used. All virtual platforms are vulnerable to security breach, which could allow unknown, unauthorised persons to view the feed. The MPS Threat Mitigation Service advises that wi-fi networks are most vulnerable to third party intrusion and attack; and 4G, provided by a trusted UK Government partner, is likely to be more secure.
d. The MPS asks how the Inquiry intends to ensure that access to its audio-visual and audio-only streams is limited only to authorised persons. The 24 June letter does not provide the detail needed to assess this issue. It is very important in the context of this Inquiry, and the restriction orders in place, that the access to the feeds is only available to permitted persons. The 24 June letter does not explain whether individual logins will be given to users or whether some other method will be used. How does the Inquiry propose to ensure each login/access point does not have multiple viewers/listeners?
e. The MPS notes the Inquiry's indication that matters such as the location from which an individual will give evidence will be considered on a case by case basis, with a view to obtaining the best evidence from the witness and ensuring restriction orders are not undermined (Statement at §7). It is understood, nonetheless, that <u>all</u> witnesses in the November hearing will be required to give evidence via video link from some location remote to the Chairman and CTI. The MPS asks whether the Inquiry has any limits on venues from which, from its perspective, it would not be

[5] https://www.ncsc.gov.uk/guidance/video-conferencing-services-security-guidance-organisations

appropriate for a witness to give evidence. The MPS suggests that in most cases a witness's home will not be an appropriate venue from which to give evidence, given the challenges posed for social distancing in domestic settings, limits in many homes on quiet and private space away from distractions, the sensitive content of evidence, and security reasons. As to appropriate neutral venues, care will need to be taken that the location is not communicated or displayed as this could risk showing where the UCO is based (for example, a Crown Court feed stating the court centre name could assist with mosaic identification or with targeting enquiries).

f. The MPS letter asked a series of detailed questions about venue and the security provisions. Some of these have not yet been responded to. Of core importance: who will be in possession of the cipher key and any other secret material required for memory refreshing? The cipher key in particular is a highly sensitive document. How will such documents be stored and handled securely? The 24 June letter does not appear to contemplate any Inquiry presence.

g. The MPS is concerned about the level of technical support that appears to be proposed for witnesses (telephone only support on the day), bearing in mind the age and vulnerability of the cohort and the apparent decision that no Inquiry personnel will be present. What contingency plans does the Inquiry propose if technical challenges arise which are not resolvable by the witness by phone?

Until this information has been confirmed the MPS cannot provide final, definitive, submissions on the security or welfare compliance of the plans/proposals. The MPS therefore reserves the right to respond further on these issues once these matters have been made clear.

Publication of an audio recording of the evidence

14. The Chairman's Statement at §6 states: "*An audio recording will be made and, once checked to ensure that it contains nothing which should not be broadcast, will be uploaded onto the UCPI website.*"

15. To the extent that this statement reflects a change from the position set out in the Hearings Protocol or the Chairman's statement to accompany it, the MPS objects strongly. In the 18 December 2019 statement, the Chairman stated that in considering the balance to be stuck when deciding whether or not to publish an audio record of open proceedings to its website:

> *…the Inquiry will need to consider, on a case by case basis, the extent to which the publication of an audio recording would undermine existing restriction orders, or otherwise undermine the provision of evidence. For example, in the event that proposed publication of an audio transcript would require evidence to be given with voice modulation, the disruption of the evidence being given by modulation would be likely to outweigh the limited benefit flowing from publication of a transcript of modulated evidence. With that significant proviso, it is the intention of the Inquiry to upload as much of the audio recording of open proceedings onto its website as can safely be broadcast.*

16. The Hearings Protocol states 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.[6] By the 24 June letter, the Inquiry confirmed that it has not, in fact, sought this advice, as it had indicated to the CPs and the public.

17. Despite this, a number of applications made by the DL for voice modulation as part of special measures exercise were refused, without detailed reasons having been given.

18. The MPS is concerned that the warnings of policing bodies about the risks of this course are not being fairly or properly considered by the Inquiry. The MPS has seen the NCA submissions on this point and agrees with them. The reasons why an online permanent audio record of a person's voice would undermine a restriction order have also been raised in previous submissions on this topic, in which the MPS stated:[7]

> *[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.*
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> *[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.*
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> *[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:*

[6] Hearings Protocol at page 7.
[7] See the MPS response to the 30 August 2018 request for views dated 27 September 2018 (at §22-25); which were repeated in the MPS response to the 30 October 2019 request for views dated 6 December 2019 at §15-16.

> *"...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.

19. A person's voice is unique. As with visual imagery, technological advancements will only increase the ability of hostile researchers to use the audio record to assist in the identification of former UCOs. It is understood that voice modulation is widely viewed to be vulnerable to reverse engineering, and so may provide a low level of protection.[8] The creation by the Inquiry of a permanent database of the voices of its witnesses is unpredictable from a security perspective. The risks created are also unmanageable, and would exist long into the future, long after the evidence has been given. This is one reason why, in criminal proceedings, audio recordings made by UCOs and containing their voices are not disclosed to the defence (transcripts are typically provided).[9]

20. There has, as yet, been no explanation by the Inquiry of how publishing online an audio recording of the evidence of a former UCO with a real name restriction order, does not breach that order (even with voice modification). The Inquiry has not sought advice on the issue. The MPS position is therefore a stark one: there should be no uploading of the evidence of any former UCO with a real name restriction order to the Inquiry website.

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[8] The NPCC stated in its written submissions dated 28 September 2018 at §30 that '*voice modulation technology may itself be capable of infiltration and compromise, and that technical steps may need to be taken to ensure that this is not possible*.'; see also the NCA submission prepared for this exercise.
[9] *R v DPP, ex p J* [2000] 1 WLR 1215.

21. The MPS is mindful that this will inhibit access by the public to the evidence of former UCOs. However, the demands of open justice could nonetheless be properly met by: the publication of daily transcripts (after editing), the audio access granted to interested CPs after a short time delay and, if it can be arranged securely, an Inquiry-controlled live viewing room for in-person public attendance (see below under "Delayed streaming").

22. If, however, the Inquiry takes the view that the above measures do not comprise sufficiently open proceedings, the MPS submits that the answer is to wait until such time as those hearings can be conducted in a venue to which the public may have in-person access: the answer is not to risk identification from a permanent voice record being online.

Delayed streaming

23. The MPS has indicated in previous submissions that it does not object to a form of overflow room in which people may view the Inquiry proceedings, so long as that room remains in the effective control of the Inquiry, and proper protections (legal *and* practical) are in place to ensure that personal recordings of the proceedings are not made from this room.

24. An in-person delayed stream room is similar, and the MPS does not object in principle to it. However, it will be considerably more challenging for the Chairman to maintain effective control over such a room remotely. Accordingly, the MPS would wish to know what security, practical and legal measures the Inquiry envisages putting in place to ensure that the room does not present unacceptable risks that restriction orders would be breached. At the least, there would need to be:
    a. Searches of those seeking to enter to ensure that the only devices brought in are those permitted by the Inquiry;
    b. Vigilant Inquiry security and a legal presence at the venue and within the delayed stream room, to ensure no audio recording, video or photographs are taken of the stream, and to advise immediately on response if an illicit recording is made;
    c. Immediate action, including seeking injunctive relief, if a person is discovered to have obtained images/audio in breach of the directions and orders of the Inquiry;
    d. Proactive response to any credible individual threat/risk which is drawn to the Inquiry's attention; and
    e. A sufficient delay between the evidence and the stream to ensure mistaken closed evidence given in the open proceedings is not broadcast.

25. As to the length of delay between the evidence and the delayed stream, the MPS is concerned that a 5-minute delay for streaming is insufficient *for a virtual hearing*: the legal representatives using the 5-minute window to notify issues will now be engaging in the hearing from remote locations and relying on internet connections which may mean they suffer delays on the stream. Communications with clients for instructions will also have to be done by email/message rather than directly. There is a risk of other technical issues. These factors mean that the 5-minute delay suitable for a live hearing is not suitable for a remote one. The MPS suggests that 10 minutes is more appropriate.

The hearing bundle

26. The MPS notes the date for the publication of the hearing bundle to Core Participants (21 September 2020). As has been stated before, it is impossible to make meaningful, definitive, submissions about the adequacy of the window in which to prepare for the hearing (and draft opening statements) without having a clear indication of the size of the hearing bundle.

Questioning witnesses

27. The MPS requests that, a few days in advance of the hearings, CTI provide the CPs with a list of topics/themes that they intend to cover in their questioning of each individual witness, together with a list of documents to which they intend to refer. This procedure has been adopted in the Independent Inquiry into Child Sexual Abuse. It allows witnesses and CPs to prepare more effectively for hearings, without placing an undue burden on CTI (who will be preparing the hearing in any event). In the context of this Inquiry, where witnesses will be questioned about matters that have previously been secret, it will also allow the MPS, and other stakeholders such as the NPCC and NCA, to better manage the risks that witnesses may inadvertently disclose information that may compromise their or others' safety, or cause real harm to policing tactics and techniques.

PETER SKELTON QC
AMY MANNION

29 June 2020