Chairman's statement about the Investigatory Powers Act 2016 section 56 and Schedule 3

1. At the invitation of the Designated Lawyers, I set out my understanding of the approach which the Inquiry must take to the statutory provisions identified. Because of their terms, this statement must be circumspect. The submissions made by the Designated Lawyers will not be published by the Inquiry lest their contents should prove to have infringed section 56(1)(b).

2. Section 56 provides,

> *(1) No evidence may be adduced, question asked, assertion or disclosure made or other thing done in, for the purposes of or in connection with any… Inquiries Act proceedings which (in any manner) –*
>
> *(a) discloses, in circumstances from which its origin in interception-related conduct may be inferred –*
>
> *(i) any content of an intercepted communication, or*
>
> *(ii) any secondary data obtained from communication, or*
>
> *(b) tends to suggest that any interception- related conduct has or may have occurred or may be going to occur.*
>
> *This is subject to Schedule 3 (exceptions).*
>
> "Interception -related conduct" includes conduct before the 2016 Act came into force governed by the Interception of Communications Act 1985 and the Regulation of Investigatory Powers Act 2000: section 56 (4).

3. Schedule 3 provides,

> *22 (1)* Nothing in section 56 (1) prohibits –
>
> *(a) a disclosure to the panel of an inquiry held under the Inquiries Act 2005, or*
>
> *(b) a disclosure to a person appointed as legal adviser to such an inquiry,*

where, in the course of the inquiry, the panel has ordered the disclosure to be made to the panel alone or (as the case may be) to the panel and any person appointed as legal adviser to the inquiry.

(2) The panel of an inquiry may order disclosure under sub paragraph (1) only if it considers that the exceptional circumstances of the case makes the disclosure essential to enable the inquiry to fulfil its terms of reference….

23 (1) Section 56 (1) does not apply in relation to any restricted proceedings of an inquiry held under the Inquiries Act 2005.

(Subsection (2) defines "restricted proceedings" in a manner consistent with the closed hearings which the Inquiry will hold)

(3) But sub paragraph (1) does not permit any disclosure which has not been made in accordance with paragraph 22 (1).

4. The statutory language is unequivocal. It does not apply only to evidence and disclosures, but to questions and assertions and any other thing done which tend to suggest that any interception-related conduct has or may have occurred. It prohibits all three, unless the requirements of paragraphs 22 and 23 of Schedule 3 are satisfied. Paragraph 22 creates a strictly limited exception, which requires two conditions to be fulfilled: the panel must be satisfied that the exceptional circumstances of the case make disclosure to the panel essential to enable the inquiry to fulfil its terms of reference and the inquiry must order disclosure to be made to the panel or to the panel and to its solicitor or counsel. Until both conditions are fulfilled, even closed disclosure is prohibited: paragraph 23 (3).

5. I do not accept that "the exceptional circumstances of the case" encompass the subject matter of the Inquiry generally. The Inquiry can investigate undercover policing without routinely asking questions or receiving evidence about interception-related conduct. I can conceive of two circumstances in which the Inquiry might wish to receive evidence about interception-related conduct: when investigating the justification for a deployment or for intrusive actions within a deployment. I do not exclude the possibility that other circumstances may arise. In each case, I would have to consider whether the exceptional circumstances of the case made the disclosure to me or to me and to the solicitor or counsel to the Inquiry essential to enable the Inquiry to fulfil its terms of reference.

6. In circumstances where it is not obvious that the issue arises, the only practicable method of alerting me to the need to consider whether disclosure is essential is for the legal representatives of a state witness to indicate to me or to me and the solicitor or counsel to the Inquiry that a question posed in a rule 9 request cannot be answered because the statutory prohibition may apply. I would then consider whether to require disclosure to be made. The procedure is cumbersome, but unavoidable.

7. Three commonly arising situations should not give rise to any difficulty.

   (i) "closed" documents provided to the Inquiry sometimes contain redactions. The fact of redaction may tend to suggest that interception-related conduct may have occurred and so fall foul of section 56(1)(b); but because there are other possible reasons for redaction – for example, to protect legally privileged material – the tendency is so faint as to be immaterial.

   (ii) asserting as justification for a deployment or for an action within a deployment that interception of postal or telecommunications systems was not a practicable or available alternative means of obtaining intelligence on the target does not infringe section 56, because it does not tend to suggest that interception-related conduct has or may have occurred.

   (iii) the routine reporting of postal and email addresses and telephone numbers of individuals by undercover officers does not suggest that interception-related conduct has or may have occurred or (in hindsight) may have been going to occur. At most, it may have provided information which might have facilitated the undertaking of interception-related conduct; and in any event there may have been other reasons for the reporting, such as to permit the surveillance of a postal address or the comparison of billing records.

14 October 2020

Sir John Mitting
Chairman, Undercover Policing Inquiry