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OPENING STATEMENT ON BEHALF OF SLATER AND GORDON CLIENTS

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1. My name is Richard Whittam. I am instructed by Scott Ingram of Slater and Gordon Solicitors. We represent 12 former undercover police officers in this Inquiry.
2. Only two of the 12 had a formal supervisory role. One was a Detective Sergeant, rising to the rank of Detective Inspector. Another was a Detective Chief Inspector when he was posted to the Special Demonstration Squad in 1998, long after the dye had been cast. By that time he reported to two Superintendents. Above them was a Chief Superintendent and a Commander. The Metropolitan Police Annual Report for 1974 relates this;

*“... the operations of the special squad were placed in July 1974 directly under the day-to-day supervision of a Chief Superintendent and Superintendent who were re-allocated from other tasks in order to provide a further degree of control.”*

3. None of those we represent have a corporate or institutional interest to protect. Significantly they and their families' lives have been impacted adversely.
4. An uninitiated member of the public looking into these proceedings might be forgiven for thinking that the Inquiry was solely concerned with the vexed issue of relationships formed between undercover police officers and members of the public whilst those undercover police officers were using their cover names and actively portraying their legend.
5. As has become clear, the Terms of Reference of this Inquiry go far beyond that task.
6. However wide the Terms of reference, they do not include ascribing individual blame to particular undercover police officers.
7. Further insight as to the issues to be examined are to be found in the Issues Lists published by the Inquiry.
8. The '*Other Undercover Policing Issues List*' includes operational failings and deficiencies. The Inquiry will consider to what extent, if at all, undercover policing operations have gone wrong or been defective for some reason. The headings include, but are not limited to:
  - 8.1. Poor support;
  - 8.2. Agent provocateur/entrapment;
  - 8.3. Ineffective governance and/or oversight;
  - 8.4. Inappropriate authorisations [i.e. unjustified authorisations for reasons including, but not limited to, inappropriate targeting or tasking];
  - 8.5. Inappropriate risk management;

- 8.6. Recruitment failures;
  - 8.7. Inadequate training and/or psychological support;
  - 8.8. Inappropriate period of deployment;
  - 8.9. Specific examples of inappropriate conduct [e.g. sexual relations, commission of criminal offences, taking of controlled drugs, engaging in acts of violence]; and
  - 8.10. Inappropriate deployment of undercover tactics;
9. By way of an example, the Issues for the Special Demonstration Squad [SDS] include, but are not limited to:
- 9.1. Management and supervisory structure and function;
  - 9.2. Training and guidance;
  - 9.3. Targeting and authorisation;
  - 9.4. Role of supervisors/managers;
  - 9.5. Reporting - justice campaigns;
  - 9.6. Reporting - the Stephen Lawrence campaign and Duwayne Brooks OBE;
  - 9.7. Management knowledge of and attitudes towards relationships between undercover officers and targets/those upon whom they reported;
  - 9.8. Management knowledge of and attitudes towards participation in, or encouragement of, crime by undercover officers;
  - 9.9. Management knowledge of and attitudes towards undercover officers' involvement in criminal proceedings;
  - 9.10. Management knowledge of and attitudes to infringement of legal professional privilege by undercover officers;
  - 9.11. Withdrawal from deployment;
  - 9.12. Debriefing;
  - 9.13. The welfare of undercover officers and their families;
  - 9.14. Interaction between Special Demonstration Squad managers and those responsible for overseeing its operation; [I interpose this comment, the Inquiry will

have to look at the difference between those who became operational managers having been undercover officers with the Special Demonstrations Squad and senior managers], and

- 9.15. Interaction with the Security Service;
10. Whilst that may appear to be a laboured recitation of some of the issues to be considered, they are of particular relevance to the 12 former undercover police officers that we represent. Those issues make it abundantly clear that in addition to the members of the public affected by undercover policing, there should be a sharp focus on the impact of the deployments on many of the former undercover police officers and their families.
11. This opening statement was drafted before sight of any witness statements to be tendered in the Inquiry. We do not know what is coming nor what is going to be disclosed to us. Further, it was drafted before any of the former undercover police officers we represent had been provided with their individual witness packs that set out the topics that they are required to address by the Inquiry.
12. Public Inquiries can be demanding for all those involved. As for a number of those we represent it will become clear that their service and this inquiry has had a significant impact on their mental health. The Terms of Reference were announced by the Home Secretary on 16 July 2015. At that time it was anticipated that the report would be delivered up to three years after that date. There have been a number of significant interruptions, not least the sad and untimely death of the first Chairman. That does not lessen the impact that such delay has had on those we represent. Some have had their identities protected, others have not. Some have been the subject of prolonged campaigns to expose their identities. Some have been the subject of considerable criticism before all relevant facts were known.
13. Of the 12 former undercover police officers we represent a number did have relationships. It is important not to have preconceived ideas about such relationships. For example, a relationship was renewed after the truth about the status of the undercover police officer was discovered. Another relationship continues to this day.
14. On 20 November 2015, the Metropolitan Police Service, in settling claims with seven women arising from long term intimate sexual relationships with undercover police officers, accepted that the cases demonstrated that there had been failures of supervision and management. In doing so Assistant Commissioner Martin Hewitt said that the Metropolitan Police Service had concluded a mediation process that had reached a settlement, the details of which remain confidential;

*“... arising out of the totally unacceptable behaviour of a number of undercover police officers”, and*

*“The forming of sexual relationships by an undercover officer would never be authorised in advance nor indeed used as a tactic of deployment. If an officer did have a sexual relationship despite this (for example if it was a matter of life or death) then he would be required to report this in order that the circumstances could be investigated for potential criminality and/or misconduct.”*

15. Former undercover police officers are affected individually, and significantly. Moral vilification can have a lasting impact, particularly when no criminal offence has been committed and in other circumstances the identity of those former undercover police officers would not have been made known.
16. When Assistant Commissioner Hewitt made those remarks in 2015 he knew that an Inquiry was to take place.
17. He raised the spectre of criminality and misconduct.

First, criminality:

18. Jim Boyling was investigated for an allegation of rape and the procurement of sexual intercourse by false pretences in the course of his undercover activities. The allegation related to what was a consensual relationship, albeit with an undercover officer using his cover name, which was not regretted until more than a decade later when his true identity was known. Such an allegation is a heavy burden to bear. The Crown Prosecution Service decided that there was insufficient evidence to prosecute the former undercover police officer for either offence. That decision was challenged in the High Court. In 2018, the Lord Chief Justice, sitting in the High Court, decided that the proposition that the law should be extended to establish a new understanding of consent for the purposes of rape was not permitted:

*“The claimant’s case is founded on the proposition that dicta in the cases to which we have referred should be extrapolated to establish a new understanding of consent for the purposes of rape and all sexual offences. That would inevitably result in the criminalisation of much conduct which, hitherto, has fallen outside the embrace of the criminal law. Whether sitting, as we are, at first instance in judicial review proceedings, or on appeal, such a step would not accord with principle.”*

19. Lord Burnett CJ described his position as follows:

*“On the facts of the instant case, Mr Boyling did not create the circumstances which led to the encounter in the first place; he was responding to the orders of his superiors.”*

Secondly, misconduct:

20. Since the events with which this Inquiry is concerned there has been significant changes in legislation that regulates the level and nature of interference that surveillance and active investigation can inflict on private lives.
21. In addition to those changes in legislation, the common law has developed as has public attitudes and opinion towards such interference.
22. The events with which this Inquiry is concerned took place between the middle of 1968 and 2008. As this Inquiry aims to get to the truth and provide recommendations for the future it is important to consider some of the things that have happened since that period started:
  - 22.1. The regulation of Covert Human intelligence Sources was placed on a statutory footing by the Regulation of Investigatory Powers Act 2000. That regulation was further refined by the Investigatory Powers Act 2016 . The use of Covert Human Intelligence Sources was made subject to oversight by a Commissioner [first the Intelligence Services Commissioner, and now the Investigatory Powers Commissioner] and review by a Tribunal.
  - 22.2. Since 2003 there has been a resolute policy adhered to as much as possible by Government Agencies of neither confirming nor denying whether a person is an informant [NCND].
  - 22.3. The Courts repeatedly have upheld that approach in the criminal courts, albeit the rule is not absolute, for example if adherence to it would be likely to cause a miscarriage of justice.
  - 22.4. The Courts have supported the protection of information supplied in circumstances of an implied undertaking of confidentiality.
  - 22.5. In March 2011 Security Service Guidelines were issued on the use of agents who participate in criminality. Under the heading '*Principles*', it stated:

*"The guidance explains the circumstances in which agent-running sections may use agents who participate in criminality and sets out relevant procedures [redacted]."*
  - 22.6. The guidance included:

*"(5) [redacted] The nature of the work of the Service is such that its agents are frequently tasked to report on sophisticated terrorist and other individuals and organisations whose activities may pose a threat to national security and/or involve the commission of serious offences. In*

*those circumstances, it may sometimes be necessary and proportionate for agents to participate in criminality in order to secure or maintain access to intelligence that can be used to save life or disrupt more serious criminality, or to ensure the agent's continued safety, security and ability to pass such intelligence."*

- 22.7. As already I have stated, on 20 November 2015, The Metropolitan Police Service, in settling claims with seven women arising from long term intimate sexual relationships with women accepted that the cases demonstrate that there have been failures of supervision and management.
- 22.8. In 2018 the Lord Chief Justice confirmed the decision of the Crown Prosecution Service not to prosecute a former undercover police officer for rape and the procurement of sexual intercourse by false pretences in the course of his undercover activities.
- 22.9. In 2019 a number of parties challenged the Government and the Security Services in the Investigatory Powers Tribunal about a policy that purported to 'authorise' the commission of criminal offences by officials and agents of the Security Service. It was alleged that the policy was unlawful both as a matter of public law and as being contrary to the rights in the European Convention on Human Rights as set out in Schedule 1 of the Human Rights Act 1998.
- 22.10. The Investigatory Powers Tribunal, rather like this Inquiry, sat both in public and in private.
- 22.11. At the Investigatory Powers Tribunal it was maintained by the Security Service that agent-running and its essential concomitant, participation in criminality, was an essential part of the work of MI5 long before the Security Services Act 1989 [which put the Security Service for the first time on a statutory basis].
- 22.12. By the smallest majority [3-2] the Investigatory Powers Tribunal ruled the policy lawful and argued that MI5 officers could not function without informants who could commit crimes, often while infiltrating criminal organizations.
- 22.13. On 24 September this year the Government introduced into Parliament the Covert Human Intelligence Sources Bill. The Government's position is that Covert Human Intelligence Sources are crucial in preventing and safeguarding victims from many serious crimes. The Government states that participation in criminal conduct is an essential and inescapable feature of Covert Human Intelligence Source use, otherwise they will not be credible or gain the trust of those under investigation. This enables them to work their way into the heart of groups that would cause the

public harm, finding information and intelligence which other investigative measures may never detect. It argues that the Bill provides an express power to authorise Covert Human Intelligence Sources to participate in conduct which would otherwise constitute a criminal offence. This is not a new capability; the Bill provides a clear legal basis for a longstanding tactic which is vital for national security and the prevention and detection of crime.

23. Given the Governments' attitude to Covert Human Intelligence Sources being involved in criminal offences, and given the then lack of statutory framework or supervision before 2000, Assistant Commissioner Martin Hewitt's settlement statement made in 2016 needs to be put into context. Not least as recently it has been widely reported that the College of Policing has altered its advice. Apparently:

*"If an undercover officer engages in an intimate sexual relationship (for example, they perceive an immediate threat to themselves and/or others if they were not to do so), this activity will be restricted to the minimum conduct necessary to mitigate the threat."*

*Undercover officers would be expected to record it and report it to their senior officers "immediately", so that it can be investigated and a decision made whether the operation should continue.*

*"Referral to oversight and governance bodies must be considered where appropriate,"*

*Senior officers overseeing the operation are also allowed to authorise "communications of a sexual nature (for example online)" where these are judged "necessary and proportionate" to achieve the "specific operational objectives".*

24. Was Assistant Commissioner Hewitt talking about the requirement for authorisation as it existed in 2016, when he made his statement?
25. Was he talking about the longstanding tactic [which is vital for national security and the prevention and detection of crime] that existed in the latter part of the last century when there was no statutory regime requiring authorisation?
26. Might there be a risk that Assistant Commissioner Martin Hewitt elided what he learnt of what happened - undercover police officers long term intimate sexual relationships with members of the public – with his knowledge of the need for prior authorisation under the statutory regime that did not commence until 2000? His statement was made in the context of a confidential settlement between the Metropolitan Police and the seven women who

brought the action. The former undercover police officers who were in the relationships played no part in the mediation process and do not know what the terms of that settlement were. The public does not know what the terms of that settlement were.

27. The Inquiry will have to scrutinise with great care the distance that it may be suggested lay between those who had, or should have had, responsibility for the overall policy and conduct of the undercover police officers, and the individual undercover police officers. Is it credible that no senior police officer knew about the relationships that had been formed? Did any either expressly authorise or condone the behaviour? Did any give tacit approval? Perhaps there are just too many relationships for the responsibility to rest solely on the individual officers who formed intimate sexual relationships.
28. Whilst this Inquiry will examine the structure put in place by the Metropolitan Police Service it is important to note that in its "*Special Demonstration Squad Issues List*" the Inquiry limits itself to the, "*Management knowledge of and attitudes towards relationships between undercover officers and targets/those upon whom they reported*". It is important to understand that there were relationships with people who were neither targets nor directly reported on. The Inquiry does not appear to have made provision for the examination of such relationships which do appear to have existed.
29. Given the nature and functioning of the Special Demonstration Squad it may be that everyone was too deferential to the principle of secrecy that clouds such operations. Whilst the safety of those being deployed in the field is paramount, a structure must be in place to ensure that there is sufficient oversight of the operation, the tactics deployed and the potential consequences of such deployment. Those consequences include the targets of the operation, other members of the public, the police officers and their families. This Inquiry will examine whether a former undercover police officer was required to report a sexual relationship in order that the circumstances could be investigated for potential criminality and/or misconduct. Hindsight is no answer to what system was or was not in place. Assumption and expectation have no place in circumstances as serious as these.
30. Jim Boyling, in addition to the failed attempt to prosecute him for rape, has been subject to misconduct proceedings and the Metropolitan Police Service has commenced yet further misconduct proceedings against him. This Inquiry will throw light on whether, in the circumstances existing at the time, it amounted to misconduct to engage in a personal and sexual relationship '*without a policing purpose*'. What does, '*without a policing purpose*,' mean? For example, was it permitted to enter into a sexual relationship to maintain cover, rather than only when it was a question of life and death? It appears that the Government of today is of the view that it may be necessary to commit crime in order to be credible or gain the trust of those under investigation and to enable agents to work their way into the heart of groups that would cause the public harm, finding information and intelligence which other investigative measures may never detect.

31. There is a general understanding that, save in wholly exceptional circumstances, the State will neither confirm nor deny [NCND] whether a person was or was not an agent. This Inquiry has decided that in some cases that principle does not apply to some of those who we represent. Whilst it is accepted that the general principle of NCND cannot be run up a flagpole of convenience, if undercover police officers did not create the circumstances which led to the encounter in the first place, but were responding to the orders of their superiors, is it they, or the system that led to their deployment, that was at fault? There was an expectation, legitimately held, that the former undercover police officers would not have their true identities revealed.
32. We also represent a black police officer who was deployed as a member of the Special Demonstration Squad. The Inquiry may conclude that he was an extremely able undercover police officer. Because of his ethnicity once his cover name was known he was far more readily identifiable than any other undercover police officer and once his real name is known he will be easily targeted by the media and campaigners.
33. The Inquiry will consider the interaction between the Special Demonstration Squad and the Security Service. Also it will consider the support given to undercover police officers after their deployment and what, if any, impact their undercover deployment had on their subsequent police careers or future deployment. Did the State positively benefit from the experience gained by members of the Special Demonstration Squad in future deployments immediately afterwards?
34. Dealing with two particular aspects of concern our position is that:
  - 34.1. First, none of the 12 former undercover police officers we represent tasked other officers to report on the family of Stephen Lawrence or Duwayne Brooks OBE. Nor were any of the 12 former undercover police officers we represent tasked to report on the family of Stephen Lawrence or Duwayne Brooks OBE.
  - 34.2. Secondly, none of the 12 former undercover police officers we represent participated in breaching legal professional privilege.