**IN THE UNDERCOVER POLICING INQUIRY**

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**SUBMISSIONS ON BEHALF OF NON-POLICE, NON-STATE CORE PARTICIPANTS,**
**DAVE SMITH, DONNA MCLEAN AND "LINDSEY"**
**RE SUBMISSIONS ON BEHALF OF "KTC" REGARDING THE RESTRICTION ORDER FOR HN104**

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**Introduction**

1. These submissions are made on behalf of those non-police, non-state core participants ("NPNS CPs") who have notified the Inquiry of an intention to state the real name of the undercover officer who was known to them as Carlo Neri ("HN104"), in the course of their oral opening statements to the Inquiry on 9 November 2020. They are:

   (a) Dave Smith of the Blacklist Support Group who will address the Inquiry concerning the supply of information gathered by covert policing operations to third parties for the purposes of blacklisting active trade unionists from work. He notified the Inquiry of his intention to state HN104's real name in his written opening statement dated 5 November 2020 at [20, 27, 28]. The Blacklist Support Group is represented by Imran Khan QC of Imran Khan & Partners.

   (b) Donna McLean (formerly known in the Inquiry by the pseudonym "Andrea") who was in an intimate relationship with HN104 between 2002 and 2004. She notified the Inquiry of her intention to state his real name in her written opening statement dated 26 October 2020 at [173]. Ms McLean is represented by Birnberg Peirce Ltd who instruct Phillippa Kaufmann QC and Ruth Brander.

   (c) "Lindsey" who was in an intimate relationship with HN104 between 2001 and 2002. She notified the Inquiry of her intention to state his real name by email to the Inquiry dated 4 November 2020 at 09:52. "Lindsey" is represented by Bindmans LLP who instruct Heather Williams QC and Fiona Murphy.

2. Mr Smith, Ms McLean and "Lindsey" each acquired knowledge of HN104's real name from sources other than documents, information or evidence produced or given during the course of the Inquiry and accordingly their publication of it does not fall within the scope of the Restriction

Order dated 7 August 2018 ("the Order") as is made plain by the Chairman's ruling of even date ("the Ruling").

3. We also address the potential additional directions identified at paragraphs 3.1 – 3.5 of Counsel to the Inquiry's Note for the Hearing on 9 November 2020 ("CTI's Note").

**The scope of the Order**

4. We agree with Counsel to the Inquiry that the statutory power under which the 7 August 2018 Restriction Order was made limits the scope of any restriction to the disclosure or publication of *"any evidence or documents given, produced or provided to an inquiry*".

5. The Chairman emphasised the limitations on the scope of the Order in the Ruling at [7]:

*"Finally, and most importantly, this ruling will not prevent any person from publishing his real name unless they have derived that knowledge from documents, information or evidence produced or given during the course of the Inquiry."*

6. As our clients' knowledge of HN104's real name is not derived from any evidence or document given, produced or provided to the Inquiry their statements disclosing his real name fall outside the scope of the Order. Further, our clients' oral opening statements are neither evidence nor documents. The terms of the Order for which the Ruling is an interpretative tool, delineate the precise scope of the restriction; the Order does not have the reach for which KTC contends. Specifically, the Order does not draw a distinction between disclosure/publication within or outside the *"context"* of the Inquiry whatever that might mean (see KTC submissions at [14] and [18]). References to HN104's real name during the course of oral opening statements simply do not fall within the scope of the Order.

7. As to the references to HN104's real name in the written opening statements of Mr Smith and Ms McLean, the Inquiry team is not itself bound by the terms of the Order but must take its own measures to ensure that information covered by the Order is not disclosed in such a way as to undermine its intended effect: see the Order at [7]. The Order did not intend – indeed could not lawfully have intended[1] – to prohibit individuals from publishing HN104's real name if that knowledge was derived from a non-Inquiry source. It is thus entirely within the Inquiry team's discretion to publish to its website those written opening statements that include references to HN104' real name. It would be a sensible and reasonable exercise of that discretion to do so in light of the Chairman's emphasis on the limits of the intended restrictions

[1] See the Chairman's Supplementary Minded-To-Note dated 23 October 2017 at [15] in which he indicated that he had in fact no power so to do.

(see paragraph 5 above). We also rely in this regard upon the submission developed below as to the absence of any need for additional directions.

**Additional directions**

8. Contrary to the submissions on behalf of KTC at [2] and for the reasons set out above, no additional steps are in fact needed to *"pre-empt a prospective breach"* of the Order.

9. The Chairman may use his powers under section 17(1) of the Inquiries Act 2005 ("the 2005 Act") to issue additional directions as to the procedure and conduct of the Inquiry provided, he acts with fairness: CTI's Note at [3]. However, any resultant restriction on disclosure or publication may only be made pursuant to section 19 of the 2005 Act. The Inquiry has given detailed and lengthy consideration over some 2 years between 2016 and 2018 to the scope of the Order restricting HN104's real identity. In particular consideration was given to the potential of interference with the private and family life of HTC and HN104's children. Since that time HN104's real name has circulated in the public domain (see further below at paragraphs 10 and 12). In those circumstances there can be no justification for revisiting the Order and/or imposing additional restrictions whether by way of directions or otherwise. If contrary to our primary submission in that regard, the Chairman is minded to give fresh consideration to additional restrictions and/or directions, the matters to which he must have regard include the extent to which any such restriction might *"inhibit the allaying of public concern*" and "*any risk of harm or damage that could be avoided or reduced by any such restriction"*: section 19(4)(b).

10. Interferences with private and family life of sufficient seriousness to engage Article 8 may qualify as harm within the meaning of section 19(4)(b): Restriction Orders: Legal Principles and Approach Ruling at [154]. The existence of a risk of harm and the likelihood of avoiding or reducing it must be based on reasonable grounds which show that subjective fears are objectively justified: *Family of Derek Bennett v Officers "A" and "B"* [2004] EWCA 1439 at [30] (in the context of Article 2). Moreover, in conducting the exercise of balancing the public interest in this Inquiry being undertaken in conditions of maximum openness, the more serious the risk and the stronger the evidence objectively justifying those fears, the more likely the balance will favour the restriction: Ibid.

11. There has been extensive circulation of the real name since the Order was made over two years ago (see CTI's Note at [4] and KTC's Submissions at [9]). This has included the mainstream media: KTC's makes reference to the Scotsman albeit with a subsequent redaction from the online publication at [FN 1] and HN104's real name was published in Private Eye on 4 March

2020. The extent of publication has been significant: a Boolean "google" search specifying only those returns that included HN104's real name gave 232 hits on 8 November 2020. The circulation in social media has been even more extensive.

12. The circulation of HN104's real name since August 2018 is a material change of circumstance relevant to considerations of both the public interest and the risk of harm: this public Inquiry would undermine its essential purposes by imposing additional directions at this extremely late stage - immediately before the opening statements of our clients are to be delivered; the controversy of the Inquiry acceding to requests to impose additional restrictions over information that is freely available would likely risk greater publicity than if matters were simply left to run their course; the passage of time is in any event relevant to the assessment of harm. CAT M CPs, including KTC, in their opening statement to the Inquiry on 4 November 2020, made reference to their historical subjective fears of reprisals based on the erroneous belief that their husbands had been targeting serious and violent criminals or extremist as opposed to *"protesters that posed no significant threat to the officers or their families"*: Transcript 4/11/20 at p385, lll 13 – 21. Our clients have sympathy for the officers' ex-wives and their children with whose experiences they note parallels, but would invite similar reflection with regard to the risk of interference with the children's Article 8 in light of how matters have in fact unfolded over the last two years. We infer from the lack of any disclosure that there has either not in fact been any sufficiently serious intrusion upon the children's private and family life arising from the disclosure of HN104's real name to engage Article 8 or no objectively reasonable grounds to establish that the imposition of additional restrictions at this stage would reduce or mitigate the risk of future harm. In any event, the passage of time serves only to tip the balance against the existing restrictions not in favour of the imposition of additional restrictions. Further, the children are no doubt now aware of the background and they have matured in age.

13. In conclusion, our clients invite the Chairman to simply maintain the status quo as it has arisen from his original Order and Ruling.

**HEATHER WILLIAMS QC**
**PHILLIPPA KAUFMANN QC**
**IMRAN KHAN QC**
**FIONA MURPHY**
**RUTH BRANDER**
**CHLOE GARDNER**

**BINDMANS LPP, BIRNBERG PEIRCE LTD, IMRAN KHAN & PARTNERS**

**8 NOVEMBER 2020**