IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

WRITTEN SUBMISSIONS ON BEHALF OF
THE DESIGNATED LAWYER OFFICER CORE PARTICIPANT GROUP
FOR T1P2 PROCEDURAL HEARING 26 JANUARY 2021

Introduction

1. These written submissions, on behalf of the Designated Lawyer Officer Core Participant Group ("DL" and "DLO") are filed pursuant to the Inquiry's Note of 7 December 2020 which confirmed that:

   1.1. A live-streamed directions hearing would take place at 10am on Tuesday 26 January 2021.

   1.2. The Chair would consider submissions made by the Core Participants and media on matters relating to the efficient and effective running of the Tranche 1 Phase 2 ("T1P2") evidence hearings. These have since been confirmed as starting 26 April 2021, with openings being given in the week before.

   1.3. The Chairman will be inviting submissions from Core Participants and the media on the broadcast of evidence hearings; in particular the use of a rolling text transcript and/or an audio feed of proceedings and any associated delay in transmission for security reasons. See **Broadcasting** heading below.

   1.4. The Chairman further invites submissions on the use and format of Rule 10 questions. See **Rule 10 questioning process** heading below.

2. These submissions also deal with:

   2.1. The opportunity for RLRs of witnesses to be heard in respect of oral applications to cross examine their witness (within the **Rule 10 questioning process** section below).

2.2. The Application by Rosa (and others) for a live stream to their homes. See **Applications made by Rosa and others** heading below.

3. These submissions are drafted:

3.1. As a summary of the DLO position rather than as detailed submissions, particularly as the DL broadly supports the status quo and would need better to understand the detail of any proposed changes, and reasons proposed, before addressing the same.

3.2. On the assumption that T1P2 will have a similar "hybrid" format to T1P1, i.e. that the witnesses (and, it is assumed, the Chair) will be remote from any hearing venue and that CTI and the RLRs may or may not be physically remote, but that all of those participants (Chair, witnesses, CTI and RLRs) will participate via the same Zoom Secure call, which is then broadcast live to a physical public viewing room, to be viewed live by the media and/or Core Participants and/or the public (Covid-19 restrictions permitting)[1].

3.3. Without prejudice to any special measures applications which may arise as a result of any change from the status quo.

Background context

4. The DL understand and respect the fact that the Chairman is having to weigh various and often competing interests when deciding how effectively to manage the forthcoming T1P2 hearings. The DL suggest that the three key issues are: (i) respect for the Restriction Order process and its outcome; (ii) effective participation for those most interested in the evidence being given; and (iii) potential Covid-19 restrictions in April/May 2021.

5. The DL submit that points (ii) and (iii) immediately above must not undermine the Restriction Orders granted or lead to the abandonment of decisions already made, in

[1] This is intended as a description of T1P1 evidential hearings that took place "at" the Amba Hotel, but allowing for CTI and RLRs to also be physically remote, which had previously been envisaged at least in respect of RLRs whilst their client was giving evidence. See further Chairman's Statement of 23 July 2020.

particular the Chairman's second statement about the conduct of Tranche 1 evidence hearings dated 23 July 2020.

6. It is further submitted that these same concerns formed a significant part of the basis for the Chairman's earlier decisions and are encapsulated at §5 of the Chairman's Statement of 23 July 2020:

> *The NSCPs and the media submit that evidence should be live streamed, with or without a delay, to a variety of locations not under the control of the Inquiry. For the reasons explained in paragraphs 19 and 20 of the statement made on 19 December 2018 that will not happen. The factors giving rise to that decision (security considerations and the need to minimise actions which may undermine restriction orders already made) have not changed. They must take priority over the wishes of those who may, for a variety of reasons, be unable to attend the hearing venue.*

7. In the 23 July 2020 Statement, the Chairman also decided that no audio recording of the evidence would be published online (§19) and made clear that each room to which there was to be a live feed would be "*under the control of the Inquiry, aided by security staff*" (§16)[2]. Further the Chairman said that *"Evidence from undercover officers deployed by the SDS between 1972 and 1982 approximately and non-state witnesses from whom the Inquiry has obtained witness statements about this period will be given or received in phase 2 of tranche 1… Arrangements for the giving and hearing of evidence* ***similar to those for phase 1 of tranche 1 will be made****". (Emphasis added.)*

8. Whilst it may be that *practical* lessons can be learned about the management of T1P2 hearings from the experience of T1P1, allowing for minor adjustments to the current processes, it is submitted that these must not compromise security or ROs or lead to wholescale revision of the *principled* basis upon which T1 hearings have been anticipated and planned.

9. T1P1 allowed the Chair to hear live evidence from witnesses, whose accounts were challenged on the basis of input by Core Participants, and live or near live access was given

[2] The one exception, for "Rosa" is the subject of further submission, below.

to the public by a written account of the evidence. Moreover, a permanent written record has been made by transcript and remains accessible. Core Participants have been able to engage and the public and media have been able to comment and report proceedings. Openings and procedural hearings have been live-streamed.

Broadcasting

Audio

10. The DLO maintains its objections to an audio broadcast for the reasons set out in its submissions dated 27 September 2018 (part 6) and 28 November 2019 (part 3) (submissions not repeated here). Any audio broadcast allows for permanent recording of a potentially identifying feature of, in the case of T1P2 DLOs, a witness who has already satisfied the Inquiry that their real identity should not be revealed. Furthermore, the Inquiry has accepted the need to consider technical evidence as to the risks arising from any such broadcast and has not yet done so[3]. As set out above, the Chairman had already resolved the question of audio broadcasts (§19 of 23 July 2020 Statement) and the DL do not understand there to be any material changes since that date.

Text

11. Whilst it is acknowledged that there were practical difficulties with how the rolling text worked in practice (and a change during T1P1 from a delayed rolling live feed to a delayed live feed which could be paused), the DL would need to know exactly what might be suggested as an alternative before responding fully.

12. For present purposes, the DL submissions about text feed are as follows:

    12.1. That the format of any proposed text feed must not prevent the proper resolution of valid objections to any evidence that has been heard live before it is published (such as a witness referring to an officer by their real name where the same was restricted)

[3] This is the DL's understanding taking into account, in particular, the Hearings Protocol published 19 December 2019 (see page 7), the Chairman's statement about the conduct of tranche 1 evidence hearings dated 29 May 2020 (see §6), the MPS CL's Submissions dated 29 June 2020 (§14-20) in response and the Chair's subsequent statement dated 23 July 2020. The MPS CL 29 June 2020 submissions §16 said: "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. 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."

and, where necessary, that text feed being permanently redacted and an appropriate RO being made over publication of the evidence given.

12.2. That there should be no shorter delay than 10 minutes between when evidence is given and published by text feed as it can take several minutes to be able to highlight any potential issue and liaise accordingly. The same delay should remain on texting, tweeting or other reporting from those with access to the hearing room[4].

13. The fact that a full transcript is published daily is relevant when considering any objections based on open justice. The more limited question of Core Participants being able to liaise with their own RLRs to propose questions is better addressed by earlier disclosure of hearing bundles and/or as part of the rule 10 process – see further below.

Further points

14. Were any exceptions to be made to the general position as currently understood, the Inquiry should consider registration, watermarking by specific user or otherwise enabling the tracing of potential breaches. If this is not possible (as it is assumed to be the case with audio broadcasts) then that should militate against adopting that method.

15. The Inquiry should be especially careful if considering applications for improved access from those outside of the jurisdiction.

Rule 10 questioning process

16. The DL oppose any changes to the rule 10 question format confirmed in its Note dated 14 October 2020. It is submitted that any difficulties which arose in respect of the timing of written questions being delivered to the ILT and any consequent need for oral applications to question witnesses can be adequately resolved by either earlier provision of hearings bundles generally (which it is hoped is made possible by the planned timing of the hearings) and/or potentially earlier distribution of the statement of a witness giving evidence to named persons under a Restriction Order.

[4] Without prejudice to what is said below in respect of Rosa's application, below, the 10 minute delay on reporting etc must apply to anyone granted supervised *or* unsupervised access to a live stream, save where that stream is already delayed.

17. The Chairman's statement dated 30 October 2019 about the conduct of evidence hearings and the Note on application of Rule 10 of the Inquiry Rules 2006 published 14 October 2020, made the following abundantly clear:

17.1. Topics/questions can routinely be suggested by RLRs or unrepresented Core Participants for questions to be put by CTI/the Chairman but these should be provided at least one week before any witness is to give evidence. See (§16) Chairman's statement dated 30 October 2019 about the conduct of evidence hearings.

17.2. Late requests would be entertained "with good reason" and considered on a case specific basis. (§16)

17.3. Applications for questions to be put to witnesses by RLRs themselves would *exceptionally* be entertained, but strictly limited to where "there is a significant dispute of fact between the individual or individuals represented by the recognised legal representative and the witness. This is likely to occur [in] three circumstances: when it is alleged that an undercover officer has encouraged, incited or participated in a serious crime alleged to have been committed by a core participant; when a deceitful sexual relationship is alleged, but disputed by the undercover officer; when there are significant disputes of fact between a manager and an undercover officer who is a core participant about what each did or knew. In each case, the individuals concerned are likely to know or assert the existence of facts which support their account against that of the other." (§17)

17.4. Requests to put questions directly to witnesses required forewarning: "Such requests, with details as to the questions or areas of questioning, must be made at least one week before the day on which the witness is scheduled to give evidence. In each case in which direct questioning is permitted, the person on whose behalf the questions are asked will be expected to be willing to give evidence themselves. If they are not, direct questioning on their behalf will not be permitted." (§17)

18. DL witnesses had been briefed on the basis of the above, but then had to wait whilst oral applications were made and determined in their presence, on a different basis, resulting in

wider ranging and speculative cross-examination as to irrelevant matters. No opportunity was given to hear from DL Counsel on these applications when made.

19. This relaxation by the Inquiry of its own processes during T1P1 itself gave rise to difficulties. Questions were put which strayed beyond the permission given and with the evidential basis for questions being unclear or entirely absent.

20. The above was the subject of the hearing on 17 November 2020, which further modified the procedure, allowing a pause between a witness giving evidence and oral application for questions. One matter raised at that hearing by the DL, but not resolved, was the unfairness of not hearing submissions in response from the witness's RLR where oral applications for questioning a witness are entertained.

21. For present purposes, the DL submit:

    21.1. The procedure needs to be clear, settled and known in advance. Witnesses and their representatives should not be surprised by modification of the process without consultation and the opportunity of being heard.

    21.2. Absent good reasons, the procedure should be that as originally set out by the Inquiry in the Chairman's statement dated 30 October 2019 about the conduct of evidence hearings and Note on application of Rule 10 of the Inquiry Rules 2006 published 14 October 2020. It is particularly important that this is intended to be an inquisitorial process and many RLRs represent Core Participants who have expressed extremely hostile and partisan views about those involved in undercover policing. For context, DLO witnesses were described as "scum" on social media while giving evidence.

    21.3. That procedure follows rule 10 of the Inquiry Rules 2006 and already allows for late applications for questions to be put by CTI "with good reason" and a route for the asking of questions directly by RLRs in specific circumstances (none met to date).

    21.4. Where exercised, that procedure should allow a right of reply by the RLR of the witness to any (necessarily) late application to cross-examine.

21.5. The complaints about the published procedure aired on 17 November 2020 generally appear to be based on the limited time that RLRs had access to the hearing bundle and the need to prioritise extensive preparation of Opening Statements. The latter is clearly less of an issue for T1P2 than T1P1 and it is hoped that earlier access can be given to the hearing bundle for all parties.

21.6. Any concern that an RLR does not have sufficient time to engage with their client before proposing questions arises mainly from the general process (rightly) adopted in inquiries of questions being put through CTI and there is a risk that the remote nature of the hearings is being given too great a weight in considering this complaint. The unlikelihood of any inquiry allowing extensive consultation between an RLR and client whilst a witness is giving evidence in the ordinary course of events must be kept in mind.

21.7. To the extent that questions arise out of oral evidence which comes as a surprise, oral applications for further questioning may be appropriate, but that is covered by the current published procedure (but should additionally allow a right of reply by the witness's RLR).

21.8. To the extent that proposed questions arise out allegations that a UCO "incited or participated in a serious crime alleged to have been committed by a core participant; when a deceitful sexual relationship is alleged, but disputed by the undercover officer; when there are significant disputes of fact between a manager and an undercover officer who is a core participant about what each did or knew", the Inquiry must carefully police the evidential basis of the allegation and willingness of the other alleged participant to give evidence.

Applications made by Rosa and others

22. On the evening of 12 October 2020, the DL were invited to make submissions in respect of applications made on behalf of Rosa (in respect of all the T1 hearings) in a letter from Birnberg Peirce dated 25 September 2020, as well as in respect of an application by Richard

Chessum for T1P1 consisting of correspondence between 31 July 2020 and 8 September 2020.

23. On 16 October 2020 the DL made submissions by letter resisting the Applications by Rosa and Richard Chessum for unmonitored live streams at home.

24. On 22 October 2020, the DL were notified that the Chairman had rejected Mr Chessum's application for a live link, but had accepted Rosa's application for an unmonitored live link (on the basis that it is not reasonably practicable for anyone else to be in her house), but delayed by 10 minutes and only for T1P2 and T1P3. Reasons were provided on 29 October 2020.

25. On 30 October 2020 the DL filed submissions opposing similar applications by (i) Ellie and Wendy; (ii) Jessica; (iii) Donna McLean; and (iv) Naomi for a live video feed into their homes (either live or with a short delay) in respect of the T1 evidence hearings. Save, in relation to Wendy (whose application is linked to Ellie's), the applications were all made on the basis that the Applicants had intimate relationships with former UCOs. None of those UCOs are DL clients.

26. For the avoidance of doubt, these submissions are in no way personal to the various applicants. Rather, they are made to support the position already advanced on behalf of DL officers (with restriction orders) in respect of how their evidence is to be given and received by Core Participants and members of the public without giving rise to valid security concerns.

27. Within the 30 October 2020 submissions, the DL said:

> *Whilst the DL respect the Chairman's decision in respect of Rosa's application when seen as a one-off, they wish to make further submissions in respect of T1P2 and T1P3, and the proposed provision of a live link to Rosa (or others) including whether other lesser measures may achieve the same aim.*

28. And, noting that the Chairman had confirmed that Rosa will be required to expressly acknowledge that a restriction order is in place prohibiting audio or visual recording of the transmission, the DL said:

> *The DL is grateful for clarification that a restriction order will prevent recording of the transmission, which will presumably include a restriction on making any copy including any still image or photograph or screenshot. The DL would request that the Inquiry give consideration to whether other security measures could be considered such as watermarking or requiring remote monitoring, and to confirm what steps will be taken to ensure that no other person will be permitted or able to view the feed or inspect the equipment provided by the Inquiry.*
>
> …
>
> *Alternatively, the Inquiry may be able to set a timetable at T1P2 that builds in time for consultation between RLRs and those who wish to contribute to questions but are unable to attend the hearing venue (wherever that may be). This adjustment may assist each of the Applicants to participate in the proceedings without undermining the restriction orders.*
>
> *However, given that all parties are concerned with preparation for the forthcoming hearings, the Chairman is invited to confirm that his decision regarding Rosa in relation to T1P2 and T1P3 is a minded to position and that further submissions will be considered once the nature (and date) of the hearings is confirmed. The DL particularly note that the decision appears to have led to an additional five applications this week and it may be that others will follow.*

29. The DL maintain that Rosa's application (and other similar applications) should be tested and determined against the nature of T1P2 (and T1P3) hearings and the Covid-19 restrictions applicable at the relevant time before being finally determined.

OLIVER SANDERS QC
1 Crown Office Row, Temple

ROBERT McALLISTER

London

CLAIRE PALMER
5 Essex Court, Temple

6 January 2021