IN THE UNDERCOVER POLICING INQUIRY

FURTHER SUBMISSIONS ON BEHALF OF THE NON-POLICE, NON-STATE CORE PARTICIPANTS FOR THE PROCEDURAL HEARING ON 26 JANUARY 2021

INTRODUCTION

1. The Non-Police, Non-State Core Participants ('NPSCPs') welcome the opportunity afforded by the Inquiry to make further written submissions on the application of duties under the Equality Act 2010 ('EA 2010') and related matters connected to the T1P2 hearings. These submissions consider the obligations on the Inquiry, and on its Chairman, to ensure non-discriminatory and meaningful access to the Inquiry proceedings by people, including NSPCPs and members of the general public, who by reason of their age, disability, race or pregnancy, are particularly vulnerable to the pandemic and who therefore cannot or should not attend the physical Inquiry hearings in person.

2. These submissions are to be read in conjunction with the submissions made on the NPSCPs, dated 20 January 2021. They are also to be read in conjunction with the submissions on behalf of Rajiv Menon QC and Una Morris dated 02 February 2021, which are adopted.

3. The NPSCPs note the acknowledgment from Counsel to the Inquiry ("CTI") that the decision not to provide audio-visual livestreaming of the evidence heard will have a discriminatory impact:

> "7. …The pandemic has the effect that some persons with protected chareacteristics will be at a particular disadvantage for the purposes of section 19 EA 2010, if the inquiries proceedings are not streamed on the internet: in particular, such disadvantage can arise on grounds of age and/or race and/or sex and/or pregnancy and/or disability. It arises fro the elevated risk of severe illness in the event that they contract the COVID-19 virus,

> which may deter attendance. Consequently, any decision which does not involve streaming audio and/or video would need to be justified"[1]

4. As CTI makes clear, a decision not to provide live-streaming will breach the prohibition on indirect discrimination under the EA 2010, the duty to make reasonable adjustments and the Public Sector Equality Duty unless the decision is: (i) exempt, and/or (ii) justified.[2] As CTI also notes, the obligation not to discriminate also arises also under the HRA 1998 and the common law.[3]

OVERVIEW

5. The NPSCPs submit that:

    i) The decision to provide audio-visual live streaming is subject to the duties and obligation under the EA 2010.

    ii) In any event, the decision is subject to parallel duties not to discriminate arising from the HRA 1998 and the common law, and to take reasonable steps to mitigate such discrimination.

    iii) The decision not to provide audio-visual livestreaming for T1P2 cannot be justified on the basis that there are pre-existing restriction orders ("ROs") which were made when the present pandemic was not in contemplation without, at a minimum, reviewing such ROs as relate to T1P2.

    iv) Any procedural matters arising, may be resolved without undue delay to the currently scheduled T1P2 hearings.

6. In making these submissions, the NPSCPs focus on the provision of audio-visual livestreaming in principle. It is for the Inquiry to determine such registration and other requirements regarding such livestreaming as may be necessary and proportionate.

7. Importantly, and for the reasons set out below, it is not accepted, as contended by the Chair at the hearing of 26 January 2021, that the provision of audio-

[1] Counsel to the Inquiry's Note for the Directions Hearing on 26 January 2021.
[2] CTI Note paras [7, 8 and 10].
[3] CTI Note para [9]

visual livestreaming, as compared to the provision of audio-only livestreaming, would be contrary to the ROs as currently drafted. However, insofar as the Chair interprets them in such a manner, they fall to be reviewed, urgently, in advance of the T1P2 hearings. As set out further below, such a review can be properly accommodated within the current timetable.

LEGAL FRAMEWORK: EQUALITY ACT 2010

Duty not to discriminate – services and public functions

8. The duty not to discriminate applies to both the provision of services (s29(1) EA 2010) and the exercise of public functions (s29(6) EA 2010).

9. Section 29 is subject to the following interpretation clauses (emphasis added):

> 31 Interpretation and exceptions
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> (2) A reference to the provision of a service includes a reference to the provision of goods or facilities.
>
> (3) A reference to the provision of a service includes a reference to the provision of a service in the exercise of a public function.
>
> (4) A public function is a function that is a function of a public nature for the purposes of the Human Rights Act 1998.

10. By virtue of Section 31(3) EA 2010 the same act may therefore fall within both the provision of a service and the exercise of a public function.

Duty to make reasonable adjustments

11. Section 29(7) EA 2010 imposes a duty to make reasonable adjustments on a person who is a service provider or who exercises public functions. The duty to make reasonable adjustments is set out in Section 20 EA 2010. That duty is anticipatory, rather than reactive: the Chairman cannot wait for a disabled person to identify themselves to him before taking steps to avoid an identified disadvantage: he must give advance and ongoing consideration to issues of discrimination, and to measures that disabled people with a range of disabilities might reasonably require, *before* making any policy decision that may affect them. He must also put in place such adjustments as are reasonable to mitigate any disadvantage that disabled people might otherwise experience.

Public Sector Equality Duty

12. The Public Sector Equality Duty ('PSED') is set out in Section 149 EA 2010. The PSED applies to all bodies exercising public functions, whether they are specified to be public authorities or not (s149(2) EA 2010). In parallel with Section 29 EA 2010, 'a public function' for the purpose of the PSED is defined as: 'a function of a public nature for the purposes of the Human Rights Act 1998' (s150(5) EA 2010).

Judicial function exemption

13. By virtue of s31(10) EA 2010, duties under Section 29 EA 2010 are subject to the judicial function exemption in Paragraph 3 of Schedule 3 EA 2010 which reads:

> 3(1) Section 29 does not apply to—
>
> (a) a judicial function;
>
> (b) anything done on behalf of, or on the instructions of, a person exercising a judicial function;
>
> …
>
> (2) A reference in sub-paragraph (1) to a judicial function includes a reference to a judicial function conferred on a person other than a court or tribunal.

14. The judicial function exemption therefore applies to the non-discrimination duty in relation to both the provision of services and the exercise of a public function. It also applies to the duty to make reasonable adjustments on a person who is a service provider or who exercises public functions.

15. Similarly, the PSED is subject to a judicial function exemption in set out in Paragraph 3 of Schedule 18 EA 2010 (which reads in materially identical terms to Paragraph 3 of Schedule 3 EA 2010 as set out above).

Decisions of a public inquiry under the Inquiries Act 2005

16. The Chair of a public inquiry under the Inquiries Act 2005 is clearly exercising functions of a public nature in relation to decisions relating to the livestreaming of evidence[4].

17. It therefore follows that, unless it falls within the judicial function exemption, the making of a decision to livestream evidence is subject to the PSED, the duty to make reasonable adjustments and the duty not to discriminate.

18. The NPSCPs adopt the submissions made by Rajiv Menon QC and Una Morris dated 2nd February 2021 in relation to the scope of the judicial function exemption under the EA 2010. In order to avoid duplication and costs to the Inquiry, it was agreed that those submissions, rather than these, would focus on that issue, in particular.

19. The NPSCPs respectfully refer to submissions made by the Equality and Human Rights Commission in relation to the Grenfell Tower Inquiry regarding the duties imposed by the EA 2010 on a statutory public inquiry when exercises public functions.[5] Importantly the EHRC submitted that:

> "The prohibition on discrimination, the duty to make reasonable adjustments and the PSED do not apply to the carrying out of a *"judicial function"*. This expression is not defined by the EA 2010. However, it should not be afforded too wide a meaning not least because to do so may frustrate the effect of applicable international human rights laws which require courts to ensure the proper participation of groups who might be disadvantaged by the arrangements in place. These obligations include Article 14, ECHR which, read with Article 2, requires the Inquiry to take positive steps to secure proper participation for groups that would otherwise be disadvantaged. They also include the obligations under the UN Convention on the Elimination of All Forms Racial Discrimination, the UN Convention on the Elimination of All Forms of Discrimination Against Women and the UN Convention on the Rights of Persons with Disabilities." (at [34])

20. It is submitted that the decision in general terms to provide for audio-visual livestreaming of the evidence heard in T1P2 falls outside the judicial function exemption and that the PSED and non-discrimination duties under the EA 2010 therefore bind the Inquiry.

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[4] A decision in relation to the livestreaming of evidence may constitute both the provision of a service and the exercise of a public function (s31(3) EA 2010).

[5] https://www.equalityhumanrights.com/sites/default/files/following-grenfell-inquiry-submission-article-2-18-december-2017.docx

THE OBLIGATION NOT TO DISCRIMINATE: HRA 1998 AND COMMON LAW

21. As correctly set out at §9 of Counsel to the Inquiry's "Note for the Tranche 1 Phase 2 Directions Hearing to be heard on 26 January 2021", dated 25 January 2021, *"even if"* (which is disputed) the EA 2010 *"does not apply to a decision by the Chairman about streaming"*, or about access to the Inquiry generally:

> "then **the adverse impact of the pandemic** on the ability of those who would otherwise be protected by the EA to attend the hearings **is a relevant factor which must be taken into account under ordinary decision making principles**." (emphasis added)

22. Consequently, whether the Inquiry and/or its Chair are bound by the provisions of EA 2010 in determining whether to provide for audio-visual livestreaming is of limited consequence in practice: the duty of fairness in and of itself gives rise to an obligation on the Chair, quite separate from that arising under the EA 2010, to ensure that proceedings are conducted fairly, including by ensuring that such concrete steps are taken as are reasonable and necessary to redress inequality. That includes steps taken to ensure access to the Inquiry's proceedings. The obligation of fairness is enshrined in section 17 of the Inquiries Act 2005 ("IA"), which provides that:

> "In making any decision as to the procedure or conduct of an inquiry, the **chairman must act with fairness** and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others)." (emphasis added)

23. The obligation of fairness is also enshrined in the judicial oath of office pursuant to which judges pledge to "do right to all manner of people". As underscored in the Judicial College's *Equal Treatment Bench Book* at p.3:

> "**Fair treatment is a fundamental principle embedded in the judicial oath** and is, therefore, a vital judicial responsibility… For most, the principles of fair treatment and equality will be inherent in everything they do as judges and they will understand these concepts very well… **Treating people fairly requires awareness and understanding** of their different circumstances, so that there can be effective communication, and **so that steps can be taken, where appropriate, to redress any inequality arising from difference or disadvantage**."[6] (emphasis added)

24. In relation to remote hearings in particular, the Judicial College's ETBB's "*Good Practice for Remote Hearings*" underscores as follows:

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[6] Judicial College, Equal Treatment Bench Book (revised March 2020), p. 3 ("Introduction: Equal Treatment and the Judge"), available at: https://www.judiciary.uk/wp-content/uploads/2020/05/ETBB-February-2018-amended-March-2020-17.09.20-1.pdf.

> "It is ultimately a balancing exercise for the judge as to whether or not a particular hearing should proceed remotely. The needs of the parties and their representatives will need to be considered alongside the importance of a speedy resolution of the issues, but **it is vital at this time**, when many are living under such difficult conditions, **to really listen to views as to** adjourning, or **hearing a case in a particular way**."[7]

25. The obligation of fairness is emphasised in guidelines relating to judicial conduct, such as the rules relating to the Supreme Court,[8] which, although directed at Supreme Court Justices, reflect values which are clearly common to the whole judiciary:

> "EQUALITY
>
> 6.1 A Justice should be aware of, and understand, diversity in society and differences arising from matters such as gender, race, ethnicity, colour, national origin, religion, caste, disability, birth or marital status, sexual orientation, socioeconomic or educational or occupational background, and the like. A Justice will not, by words or conduct, show any bias against or preference towards any person or group on any such ground.
>
> 6.2 In court, the Justices will strive to ensure that no one in the court is exposed to any display of bias or prejudice on any such ground and that **all are treated with equal respect** by the Justices, their staff and everyone appearing in or attending the court. The court will **strive to make reasonable adjustments** for people with disabilities and for those who wish to manifest their religion, so far as it is practicable to do so." (emphasis added)

26. There is also a distinct duty not to discriminate, arising under the Human Rights Act 1998 ('HRA 1998'). As highlighted by CTI at §9 of their submissions *supra*:

> "in relation to those who are the victims of a breach of their rights under Article 3 ECHR (i.e. deceived women), **there is a separate duty not to discriminate arising from section 6 Human Rights Act 1998** read with Article 3 and Article 14 ECHR. Any **indirect discrimination must be objectively and reasonably justified**."

27. Such a separate duty not to discriminate also arises pursuant to s. 6 HRA 1998, read with Articles 8, concerning private and family life, and 14 ECHR, having regard to the subject matter of the Inquiry and the fact that the Article 8 rights of the NSPCPs. It also arises in relation to Articles 2 and 3 ECHR, read in conjunction with Article 14, for those vulnerable NSPCPs who face a real risk of illness, hospitalisation and death, were they to become infected with COVID-19 while at, or *en route* to or from, the physical hearings.

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[7] https://www.judiciary.uk/wp-content/uploads/2020/05/Good-Practice-for-Remote-Hearings-May-2020-17.09.20.pdf.

[8] https://www.supremecourt.uk/docs/guide-to-judicial-conduct.pdf

28. The obligations under the HRA 1998 require the Inquiry to take positive steps to secure proper participation for groups that would otherwise be disadvantaged. As underscored by CTI, *"[a]ny… discrimination must be objectively and reasonably justified"*.

29. The common law duty to ensure fairness and the obligations under the HRA are properly to informed by the obligations set out in the United Nations ("UN") Convention on the Elimination of All Forms Racial Discrimination,[9] the UN Convention on the Elimination of All Forms of Discrimination Against Women[10] and the UN Convention on the Rights of Persons with Disabilities,[11] to which the United Kingdom is a signatory. Article 13(1) provides in particular:

> "States Parties shall ensure effective **access to justice** for persons with disabilities on an equal basis with others, including **through the provision of procedural and age-appropriate accommodations**, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages." (emphasis added)

30. Thus, even were the Chair to determine, contrary to the submissions of the NSPCPs, that in making operational decisions regarding the conduct of the Inquiry, he is engaging in a "judicial function" which is technically exempted from s.29 and/or s.149 EA 2010, he would nevertheless be bound by parallel obligations under the common law and human rights law, as informed by international law, to put in place measures to ensure access to the Inquiry proceedings of people who would otherwise be placed at a disadvantage as a result of those operational decisions. As held by Mr Justice Langstaff, then President of the Employment Appeals Tribunal ("EAT"), in the case of *Rackham v NHS Professionals Limited* [2015] UKEAT/0110/15, in the context of Employment Tribunals, the particular route by which the tribunal is bound to put in place such measures was unimportant:

> "**We do not think it could sensibly be disputed that a Tribunal has a duty as an organ of the state, as a public body, to make reasonable adjustments** to accommodate the disabilities of Claimants. [the Defendant] accepts, and indeed submits, that **the particular route by which the obligation rests upon the Tribunal is unimportant,** though it might be one of a number, because there can be no dispute there is such an

[9] Article 2.
[10] Article 2.
[11] Articles 4, 5, 9 and 13.

> obligation. It may be, as [the Claimant] submits, through the operation of the United Nations Convention by the route he suggests…. or it may arise simply as an expression of common-law fairness." (emphasis added)

31. Similarly, in our submission, it cannot be sensibly disputed that this Inquiry and its Chair, exercising public functions, have a duty to take steps such steps as are reasonable and necessary to redress inequality in access to its proceedings. It is difficult to conceive of a principled basis on which the Chair could or should, on an overly restrictive interpretation of the EA 2010 or otherwise, seek to carve out for himself the right to discriminate against NSPCPs or members of the public with particular vulnerabilities, in the context of the COVID-19 pandemic. It is similarly difficult to conceive of principled basis on which the Chair would refuse to take such steps as reasonable and necessary to ensure the safe and effective ability of those vulnerable individuals *"to attend the inquiry or to see and hear a simultaneous transmission of proceedings at the inquiry"* (section 19 IA 2005).

32. Insofar as the ROs which have been imposed pursuant to section 19 IA 2005 are interpreted as prohibiting the audio-visual livestreaming in the context of the COVID-19 pandemic, they have become discriminatory in their application, by virtue of a material change in circumstances (see further below). The Chair must therefore exercise his discretion pursuant to section 20 to review those ROs, including to determine whether they remain relevant and necessary, and whether their imposition continues "*... to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest",* having regard to those changed circumstances.

33. For the reasons set out below, the T1P2 ROs, granted by the Chair a number of years ago, in a wholly different context and climate, and without reference to the duty of fairness, to the NSPCPs' rights under the ECHR, or to the discriminatory impact of the ROs, must now be reviewed by the Chair in light of the extraordinary prevailing circumstances of the COVID-19 pandemic.

34. For the avoidance of doubt, the need for the Chair *"to avoid any unnecessary cost"* pursuant to section 17 IA 2005 cannot trump his obligation to ensure fairness, under the same provision, the common law, or the ECHR. That is

because measures put in place to facilitate access to the Inquiry proceedings of persons, including NSPCPs, with particular characteristics and vulnerabilities, could not properly be considered "unnecessary". A risk of delay to the commencement of the T1P2 hearings, is also incapable of displacing the obligation, not least in circumstances where the Chair has been on notice since at least 30 October 2020 of the NSPCP's submissions that the ROs fell to be reviewed in light of the COVID-19 pandemic. Moreover, we have set out at §76 *et seq.* below a roadmap to the hearings, that could obviate or mitigate any such delay.

THE OBLIGATION OF REVIEW

35. It is clear that the original T1P2 ROs were made at a point in time when there was no contemplation of the present circumstances arising from the Covid19 pandemic. It is submitted that there is an obligation on the Inquiry to review any RO in light of a material change in circumstances. The discriminatory impact of the restrictions on access to a hearing venue faced by those with protected characteristics, as acknowledged by CTI, is clearly a change of circumstances. Insofar as the terms of existing ROs are relied on as a basis not to afford audio-visual livestreaming, the T1P2 ROs fall to be reviewed in light of the present circumstances.

Inquiries Act 2005

36. Section 18 IA 2005 identifies the starting point of an inquiry held under the Act "*as one of openness and accessibility, in conformity with the common law presumption of open justice, subject to the making of a restriction order or restriction notice under section 19*."[12] S.18(1)(a) requires the Chair, subject to any restriction order or notice, to "*take such steps as he considers reasonable to secure that members of the public (including reporters) are able to attend the*

[12] Legal Principles ruling, 3 May 2016 https://www.ucpi.org.uk/publications/restriction-orders-legal-approach-2/

inquiry or to see and hear a simultaneous transmission of proceedings at the inquiry."

37. Section 20(4) of the Inquiries Act 2005 provides a specific power to vary a RO previously made during the course of the inquiry. It states:

> 20 Further provisions about restriction notices and orders
>
> (4) The chairman may vary or revoke a restriction order by making a further order during the course of the inquiry.

38. It is of note that in the Manchester Arena Inquiry the Chair explicitly recognised the need to keep all ROs under review pursuant to Section 20, stating:

> "3. Section 20 makes further provisions in relation to restriction orders including a provision in subsection 4 which gives me the power to vary or revoke a restriction order by making a further order during the course of the Inquiry.
>
> 4. In the course of their submissions **the bereaved families urged me to keep the restriction orders under continuous review during the Inquiry**, **which I shall do**."[13]

39. The obligation on the Chair to ensure open justice is a continuing one, as are its obligations to ensure fairness, and to comply with Article 14 ECHR, and EA 2010. Any restriction order necessarily constitutes an interference with the principle of openness. Where an order is made on the basis of the balancing of Article 8 rights against the principle of openness there is clearly a need to keep the terms of the restriction order to the minimum necessary to preserve the balancing of rights at any time. Should there be a material change of circumstances affecting the balancing exercise then the RO falls necessarily to be reconsidered.[14] ROs should not be varied lightly, but a fair, lawful and reasonable exercise of the discretion to vary requires them to be reviewed in relevant circumstances. Those circumstances include where they are premised on an error of fact, where there is a material change of fact or circumstance and/or where they have become discriminatory in their impact.

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[13] https://files.manchesterarenainquiry.org.uk/live/uploads/2020/07/07204248/Rulings-following-hearings-on-23rd-July-2020-Final-PDF-Copy-89661086_1.pdf

[14] This may in principle require a restriction order to be varied either in favour of openness, by weakening its terms: for example, if the real name of a UCO has been independently released into the public domain by the former UCO himself or if the application is based on specific medical grounds from which the person concerned has recovered. Alternatively a change in circumstances may require the restriction order to be varied in favour of privacy, by strengthening its terms: for example, if new matters arise relating to the personal circumstances of the UCO concerned.

Approach by the courts

40. As determined by the Administrative Court in *Bernard Gray v. UVW* [2010] EWHC 2367 at [34] (in relation to the reviewability of anonymity orders made out of hours), *"the court's obligation to ensure open justice is a continuing one, as is its obligations to comply with Arts 10 and 8"*, and falls to be reviewed *"whether the original order provides for that or not"*.

41. In *R(Y) v Aylesbury Crown Court, Crown Prosecution Service, Newsquest Media Group Limited* [2012] EWHC 1140 (Admin), the Administrative Court considered the circumstances in which a Section 39 restriction on the publication of the name of a young person in connection with criminal proceedings.[15] The Court approved the following guidance which is now contained in 'Reporting Restrictions in the Criminal Courts' (April 2015, revised May 2016):

> "**Courts may review an order at any time** and frequently are invited to do so where a defendant named in an order has been convicted at trial. The courts have recognised that in considering whether to lift an order the welfare of the child must be taken into account, but **the weight to be given to that interest changes** where there has been a conviction, particularly in a serious case; there is a legitimate public interest in knowing the outcome of proceedings in court and the potential deterrent effect in respect of the conduct of others in the disgrace accompanying the identification of those guilty of serious crimes." (p41, emphasis added)

42. The Administrative Court stated:

> "…the onus lies on the party contending for an order restricting publication to satisfy the court that there is a good reason to impose it. (See also *Lee (1993) 96 Cr. App. R. 188*). It would seem to follow that, if a court is considering whether to discharge or vary an order already made, then **the party who had obtained the order restricting publication must satisfy the court that there remains a good reason not to discharge or vary it**." (at [30], emphasis added))

43. It is clear that even in the cases of final *contra mundem* orders made on the basis of Article 2 ECHR and the HRA 1998 restricting the reporting of details of persons at risk of death, the courts will entertain applications to vary the order in light of a change of circumstance (see *Jon Venables v News Group Papers and others* [2019] EWHC 494, where the application failed on the facts of the case (at [71]).

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[15] Section 39 Children and Young Persons Act 1939. This discretionary power no longer applies to criminal proceedings themselves, but continues to be available in family and civil proceedings and in relation to Injunctions and Criminal Behaviour Orders.

44. Where reporting restrictions are made on the basis of Article 8 rights, the courts have shown further willingness to revisit the orders following a material change of circumstances. In *Torbay BC v News Group Newspapers* [2003] EWHC 2927 (Fam) the Court allowed the variation of a reporting restriction made to protect the privacy of a 13.5-year-old child when, at the age of 17, she was able to determine for herself what information she wished to make public. In *East Sussex CC v Stedman* [2009] EWHC 935 (Fam) the court refused to continue an injunction prohibiting reporting where the details it pertained to had entered the public domain notwithstanding the initial order.

45. In civil litigation, where an application is made to discharge an interim injunction on the basis of a change of circumstances (whether of fact or law) the application falls to be determined on the basis of the circumstances as they presently stand (*Regent Oil Co. Ltd v Leavesley (Litchfield) Ltd* [1966] 1 WLR 1210 at 1216G-H).

RESTRICTION ORDERS RELATING TO T1P2

46. ROs relating to T1P2 were sought on the express basis that restriction of the officers' real names would not *"interfere with the Inquiry meeting its Terms of Reference or the effective participation of Core Participants and witnesses"*[16]. That was because there was to have been no prohibition on Core Participants, witnesses, and the general public being able to *see* the UCO while s/he gave evidence and to be able to identify him/her in that way. The ROs sought were not for *shielding* from the general public, neither were such orders granted, even though UCOs could of course have been identified in real life by those NSPCPs, other witnesses, and/or members of the general public attending the hearings.

47. Notably, the restriction on the *"disclosure or publication"* of *"any description or image capable of identifying"* a UCO subject to a RO, which was itself derived from the restriction of the identification of the real name of the UCO,

[16] See e.g. the MPS application for anonymity on behalf of HN45 available at: https://www.ucpi.org.uk/wp-content/uploads/2018/01/20171221-HN45-Restriction-Order-CL.pdf

concerned *"any evidence or document given, produced or provided* to *the Inquiry"* (emphasis added). It was never directed towards any image *generated by* the Inquiry. As such, the ROs did not restrict, and have not been interpreted as restricting, the audio-visual streaming of UCOs' evidence from the main Inquiry hearing room to an overspill room at the Inquiry venue. Nor have equivalent ROs relevant to T1P1 witnesses been interpreted as restricting the audio-visual streaming by the Inquiry of UCOs' evidence from a location outside of the Inquiry venue to multiple screens in different rooms in that venue, to the Chair's home and/or to the home of NSPCP "Rosa" (for T1P2). No amendment to the ROs was made, or considered necessary, to permit such audio-visual live-streaming of images generated *by* the Inquiry for the purposes of the UCO witnesses giving evidence in T1P1 or T1P2. Indeed, in relation to the grant of "Rosa"'s application for an audio-visual live stream, the Inquiry stated:

> "there is no good reason why the evidence given in T1 P2 and 3 should not be transmitted to her by that means. She will be required expressly to acknowledge that a restriction order is in place prohibiting the recording of the transmission."

48. There was – correctly – no suggestion that there was any restriction order in place prohibiting such transmission.

49. Consequently and in any event, it is not accepted that the restriction on the disclosure or publication of an image *"given, produced or provided* to *the Inquiry"* as provided for in the current ROs, which was derivative of the prohibition on publication of the UCOs' real names, can properly be interpreted as restricting the audio-visual transmission of their evidence before the Inquiry, by the Inquiry, to NSPCPs in particular, or indeed to the public. Insofar as such a restriction is now contended for, it must be justified and proportionate, having regard to the current circumstances, including those of the COVID-19-related public health emergency, and to its discriminatory effects.

50. Moreover and in any event, the existent ROs were determined over two years, and in some cases, over three years ago. That is in circumstances where, as eloquently stated by L.P. Hartley, *"the past is a different country"*. Two years ago, the world had not yet heard of COVID-19, much less begun to imagine the

way in which life, including access to justice, would have been so profoundly affected by it. ROs imposed in the past, on the basis of wholly different realities and presumptions, must now be revisited in the light of fundamentally changed circumstances.

51. They include the prevailing change of circumstances brought about by the COVID-19 pandemic, just as much as they include individual changes of circumstances relating to individual ROs. In relation to the latter category, the Inquiry will be aware in relation to the evidence recently obtained from "Madeleine" that her evidence regarding her "relationship" with HN354 ("Vince Millar") calls into question his assertion, on which the RO relating to him was premised, that he had "two fleeting relationships" under his undercover identity.[17] The decision to grant Madeleine CP status refers to *four* sexual relationships, and notes that HN354's *"version of their relationship is different from hers"*; she in effect disputes that it was "fleeting". In light of that, and in light of the Chair's prior acknowledgment that*: "where a claim of an intimate relationship with an undercover officer is admitted or found by me to be true, the[… women concerned] have a compelling moral claim to know the true identity of the man with whom they had that relationship*",[18] the RO in relation to HN354 necessarily falls to be reviewed on the basis of new evidence and changed facts.

52. There can be no reasonable or lawful suggestion that that RO is somehow unreviewable on the basis of the new information that is before the Inquiry. Indeed, the Inquiry's approach in the past has been to review and indeed to revoke ROs in such circumstances.[19] There can similarly be no reasonable or lawful suggestion that the RO regarding HN354, and the other T1P2 ROs, should not be reviewed on the basis of the changed factual circumstances of the

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[17] https://www.ucpi.org.uk/wp-content/uploads/2021/01/20210106-ruling-CP_39-RLR_32-costs_31-anonymity.pdf.

[18] https://www.ucpi.org.uk/wp-content/uploads/2017/11/20171120-Chairman-statement.pdf, para 7.

[19] https://www.ucpi.org.uk/wp-content/uploads/2019/02/20190212-SDS_Minded_to_Note_14-_and_Ruling_14.pdf.

COVID-19 pandemic, and the fact – as accepted by CTI – that they now have a profoundly discriminatory effect. The principle of open justice dictates it.

53. Put simply, fairness, the weight of public interest including the interest in protecting rights under Articles 2, 3 and 8 of the European Convention on Human Rights, read in conjunction with Article 14, and the need to ensure equality of access for particularly vulnerable groups, requires the Chair to review the historic decisions to grant ROs. That is particularly so, insofar as they to be interpreted by him as preventing the audio-visual live-streaming by the Inquiry of the hearings to the NSPCPs and/or to the general public, including others who have been affected by undercover policing, but who have not been granted CP status.

54. Given the fundamental change in circumstance brought about by COVID-19, the Chair can no longer properly, fairly or lawfully maintain, without review, his previous determination in relation to each of those ROs that the balance of fairness, the weight of public interest, including their Article 8 rights, continues to fall in favour of maintaining the ROs.

55. Notably, ROs such as that relating to HN354 were made by the Chair on the *express* basis that the RO was premised on *"the facts currently known"* when the order was granted, now over two years ago. That left open the possibility, and necessity, of review. Those facts have now changed significantly in relation to all the T1P2 ROs: the material change in circumstance brought about by the pandemic, including the related risks to life and health, and the resulting restrictions on movement and access to the Inquiry venue, represent a fundamental and material change of the facts which requires the assessment to be undertaken again.

56. The need for such analysis to be undertaken again is particularly apparent from the fact that ROs were sought on the express premise that the restriction of publication of the UCOs' real names would not *"interfere with… the effective participation of Core Participants and witnesses"*. As set out above, those ROs *are* now undeniably and unequivocally interfering with the effective participation of Core Participants and witnesses, in circumstances where the

Chair is purporting to rely on them to deny Core Participants and witnesses the ability, through audio-visual streaming, to "see and hear" the witnesses in relation to whom ROs have been granted.

57. Moreover and importantly, the repeated determination by the Chair in relation to the ROs granted that the publication of the UCOs' real names *"would serve no useful purpose"*, is plainly no longer sustainable, given the Chair's interpretation of the attendant restriction on the disclosure or publication of *"any description or image capable of identifying"* a UCO subject to a RO. The lifting of the RO would serve the imperative purpose of enabling NSPCPs and members of the public to be able to see and hear the evidence. The latter is a purpose to which the Chair is *required* by s.18(1)(a) IA 2005 to attend. It also goes squarely to his terms of reference as a public inquiry.

58. Insofar as the asserted breach of privacy is premised on the possible identification of a UCO from the provision of audio-visual streaming by a person other than a CP or other individual who might have identified them in person at the physical Inquiry hearings, it is necessary to keep in mind: (1) that there is no evidence that such a breach would be likely, and (2) that it would require technical expertise: a person receiving an audio-visual livestream would first have to unlawfully[20] capture an image of the relevant witness, and would then have to have the will and necessary technical capability to perform an image search on the internet and thereby attempt to discover the relevant UCOs real name and details. Whether it would be possible to discover the real name of a UCO using such methods would depend on numerous factors, including what information about the witness was already publicly available on the internet. It cannot be safely assumed that such an exercise is even possible for each and every former UCO. Moreover, even if an individual were to discover the real identity of a UCO in this way, for an interference with privacy to eventuate, the person would then have to go on and take actions that would in fact interfere with the privacy of the relevant UCO. All of this must be evaluated in light of

[20] Assuming that restriction orders prohibit the recording or onward transmission of any livestream.

the fact that the relevant events occurred many decades ago and that any person seeking to act in this way would be a risk of penal sanctions under the relevant ROs.

INDIVIDUAL RESTRICTION ORDERS

59. Set out below are brief submissions on the individual ROs pertaining to officers due to give live evidence in T1P2, demonstrating the need for them to be revisited pursuant to the duty of non-discrimination and fairness as set out above. It is noted that:

    i) All are real-name only restriction orders.

    ii) All the ROs were granted on the basis of privacy concerns and not security reasons.

    iii) None of the orders appear to be such that the balancing of privacy concerns against the presumption of openness was overwhelmingly in favour of privacy. The making of the orders appears in most instances to be finely balanced. These are orders which, if revisited, the changed circumstances of the pandemic would make a material difference to the outcome.

    iv) In none of the orders do concerns relating to publication of images appear to play a significant role in either the application submitted by the MPS or the ruling of the Chair.

60. Plainly, the orders were made when it was assumed that the witnesses would attend the Inquiry to give evidence in person in circumstances where their physical appearance would have been unscreened, and therefore available to all those in attendance to see. There was, consequently, no analysis of the Article 8 rights of the NSPCPs. In a world without COVID-19, there was no need for the UCOs' Article 8 rights to be balanced against the Article 14 rights of the NSPCPs and of the general public, and no such balancing act was undertaken. And neither was their any consideration of the (un)fairness of preventing NSPCPs and the general public, including those with particular vulnerabilities,

from being able to see and hear the UCOs' evidence, quite simply because the ROs, when granted, did not impact on rights, including equality rights, in those ways. They do so now, and consequently they must be reassessed in that context.

HN045 – David Robertson

61. The RO relating to HN45 restricts disclosure of his real name, his application for restriction of his cover name was rejected[21]. In the Minded To Note 2 of 14 November 2017, the Inquiry found that there was a *"nil or negligible"* risk of disclosure of his cover name leading to identification of his real name. That was notwithstanding that he was to give his evidence in "open court". However, an RO was granted in relation to his real name, on Article 8 grounds, in particular due to stated concerns about the risk to his *"reputation which might result from association in the real name with other now notorious undercover officers and from lies which might be told by others about*" him.

62. The chair stated that HN45 "*undertook the role of an undercover officer in the expectation that identity would not be revealed. In respect of real identity, this expectation should be fulfilled unless it is in the public interest that it should be set aside – for example, if it were necessary to do so to permit an accusation of misconduct to be determined*". The Chair concluded on the facts as they then prevailed, that it was not so necessary "*in order to fulfil the terms of reference of the Inquiry*". Considerations of the public interest, including considerations of open justice, and the interest of the public and NSPCPs being able to effectively participate in the Inquiry, now require the analysis to be taken afresh. It is the NSPCP's submission that the expectation should now be set aside in the public interest, including having regard to the ECHR considerations set out above, and those of fairness, having regard to the obligation on the Inquiry to ensure access to its hearings for those who are particularly vulnerable to COVID-19.

[21] Chair's Ruling of 15 May 2018.

HN096 – Michael James

63. The RO relating to HN96 restricts disclosure of his real name. Minded To Note 5, read in conjunction with Ruling 13 rejects his application for restriction of his cover name, on the basis that the restriction is not necessary to protect his Article 8 rights. However, it grants a restriction in relation to his real name, on Article 8 grounds, on the basis that its publication is *"not necessary to permit the terms of reference of the Inquiry to be fulfilled"*, and therefore that *"any interference it would occasion to private and family life is not proportionate or justified"*. Minded To Note 5 makes reference in particular to an express assurance purportedly given to him that his real name would never be disclosed, and to the assertion that there is a *"sterile corridor"* between his real name and cover name. As above, it does not have regard to other considerations to which the Chair must have regard, including the impact of the RO on the ability of the general public and the CPs to participate in the Inquiry. Nor does it have regard to questions of fairness or access for people with particular protected characteristics or vulnerabilities.

HN080 - Colin Clark

64. HN080 was deployed as a UCO against the Anti-Nazi League in the late 19870s and early 1980s. An application for a real-name RO was made by HN080 on the basis of an unjustified interference with his private life. The Chair's Minded To Note 6 states that HN080's deployment: "*is of significant interest to the Inquiry because of its length and range and because, according to HN80, it involved a good deal of self-tasking*". The Note states that fears expressed by HN080: "*do not appear to be objectively justified*". Therefore "*on the basis of what is at present known*" it would not be proportionate to override those fears by refusing a real name RO. The RO is hence explicitly premised on information that is "*at present known*" indicating the potential for review should further information arise.

HN126 - Paul Grey

65. An application for a real name RO was made on behalf of HN126 on the basis of privacy and risk of harm. The Chair's Minded To Note 11 states that: "*None of the members of the targeted groups pose any risk to the safety of HN126, even if publication of the cover name were to lead to discovery of the real name and whereabouts of HN126, which is far from certain. The risk of harassment is negligible. The worst consequence likely to be faced by HN126 is unwelcome media attention. The risk of that occurring is a price which must be paid to permit the Inquiry to get at the truth*." On the basis that the worst that may occur should HN126's real name become known is "*unwelcome media attention*" and this is explicitly stated to be "*a price which must be paid to permit the Inquiry to get at the truth*" is unclear on what basis it is necessary to prohibit audio-visual livestreaming of this witnesses' evidence. In any event, there is no assessment in making the RO of the importance of all those with an interest in proceedings from being able to see the evidence.

HN155 - Phil Cooper

66. HN155 was deployed between 1980 and 1983. As the Chair's Minded To Note 7 states: "*His deployment is of interest to the Inquiry because it included regular contact with a Member of Parliament*". An application to restrict the real name of HN155 was made on the basis of privacy. Minded To Note 7 states that the threat to his safety is "*nil or negligible*". Reference is made to the fact that the real name of HN155 and allegations relating to the circumstances in which he left the police are "*known to responsible journalists*". Nonetheless HN155 sought a RO on the conjunction of the real name of HN155 and his deployment as an undercover officer. This was held to be "*at least arguable*". The making of a RO was therefore "*not futile*". It is plain that no consideration is given in the making of this RO to the need for those with an interest to see the evidence given.

HN200 - Roger Harris

67. Following his deployment in the SDS, HN200 went on to have a senior management role in the MPS. An application was made on the basis of preventing interference with private and family life. The Chairman's Minded To Note 6 states that HN298 and his wife "*are not in the best of health and are understandably concerned about the impact of traditional and non-traditional media*" on their private life. These concerns are assessed as "*not irrational*". The Chairman's Ruling of 08 November 2018 confirms the Minded To decision. There is no assessment of the ability of the public to follow proceedings or access for those with particular protected characteristics.

HN298 - Michael Scott

68. HN298 was deployed against two groups between 1971 and 1976. During his deployment in the anti-apartheid campaign HN298 took part in a demonstration where, along with others, he was arrested, charged and convicted under his cover name. The facts giving rise to this prosecution are disputed by the CPs concerned[22].

69. An application to restrict the real name of HN298 was made on the on basis of Article 8 and fairness. The Chairman's Minded to Note 2 of 14 November 2017 states that HN298: "*has politely declined to cooperate with the Metropolitan Police risk assessor. In consequence, the Inquiry does not know whether he wishes to protect his real name*". Nonetheless that Chair was minded to make a RO which was to be reviewed "*when he has made his own position clear*". No further information appears to have been received by the Inquiry and in 2018 a RO was made without further delay: "*to permit document processing*"[23].

70. The initial application to restrict the real name of HN298 was made without any evidence of his personal wishes. To date it appears that no further information has been provided in this regard. There was no consideration of the impact of the RO on the ability of those affected to see the witness giving evidence.

[22] See Opening Statement made by Matthew Ryder QC on behalf of Jonathan Rosenhead and Ernest Rodker.
[23] Restriction Order Ruling 15.05.18.

Importantly, where HN298 is to give evidence in relation to a factually contested prosecution, his demeanor whilst giving evidence is of significant importance to those following the evidence heard by the Inquiry.

HN304 – Graham Coates

71. The RO relating to HN340 restricts disclosure of his real name. As set out in the Chair's "Minded To Note 3" of 15 January 2018, read in conjunction with the Chair's "Ruling 11" of 30 July 2018, the basis for the RO is that *"publication of his real name would not serve… the end"* of prompting a member of the public to give evidence about his deployment and consequently *"is not necessary to permit the Inquiry to fulfill its terms of reference"*. On that basis, the Chair concluded that the interference with his Article 8(2) rights to which publication of his real name would give rise would not be *"justified"*. Present circumstances warrant a review of this balancing exercise.

HN347 – Alex Sloane

72. The RO relating to HN347 restricts disclosure of his real name. While the RO was sought on the basis of both security and privacy, Minded To Note 2 of 14 November 2017, read in conjunction with the Chair's Ruling of 15 May 2018, grants the application on privacy grounds alone, finding that *"the latter concern"* (as compared to the former, relating to security) *"is not irrational*". As with all the ROs set out above, the rationale for granting an RO concerning his real name is that the publication of the cover name was deemed to constitute a sufficient prompt to those who might be minded to give evidence to the Inquiry, such that *"publication of his real name would serve no useful purpose"*. On that basis, the Chair concluded that *"the infringement of his right to respect for his private and family life and that of his family"* that the publication of his real name could entail *"would not be justified under Article 8(2)".*

73. That is not the analysis with which the Inquiry must now be concerned. It is whether an RO, being interpreted by the Chair as to restrict the audio-visual livestreaming of the UCOs' evidence, is itself lawful, reasonable and proportionate, having regard to the Article 14 rights of the NSPCPs, read in

conjunction with their rights under Articles 2, 3 and 18, and whether it is fair, having regard to the impact of that RO on the ability of vulnerable NSPCPs and members of the public to access the Inquiry proceedings, including to "see and hear" witness evidence. It plainly is not.

HN353 – Gary Roberts

74. HN353 does not live in the United Kingdom. As summarised in the Chair's Minded to note 4, HN353's application for a RO was made on the basis of privacy in that: "*he does not wish to cause apprehension and worry to his wife and/or subject both of them to media or other intrusion*". No further basis or specific concern appears to have been raised. In light of this, should the RO fall to be reconsidered in the present circumstances it cannot be said that the provision of audio-visual livestreaming would be precluded in this case.

HN354 – Vince Millar

75. The RO relating to HN324 restricts disclosure of his real name. The Chair's "Minded To Note 3" notes that he is now married with adult children, but has acknowledged engaging in two sexual "relationships" with female activists. Those relationships were, necessarily, deceptive. The Note, coupled with the Chair's Ruling 11 of 30 July 2018, make clear that the basis for the RO is that *"publication of his real name would not"* prompt those women or others to provide evidence about his deployment, and that consequently it *"is not necessary to permit the Inquiry to fulfill its terms of reference"*. On that basis, the Chair concluded that the interference with the UCO's Article 8(2) rights to which publication of his real name would give rise would not be justified *"on the basis of the facts currently known"*. As set out above, the facts provided by Madeleine, and HN354's apparent subsequent admission of *four* sexual relationships, requires the RO to be revisited, and the analysis as to whether the interference is justified to be taken afresh. So too does the fundamental change of circumstance brought about by the pandemic: it requires a clear analysis of the proportionality of the interference, in circumstances where witnesses, including female victims of the deceptive sexual relationships in

which he engaged (and about which he appears , from Madeleine's account, to have misrepresented to the Inquiry) would no longer be able to identify him on sight at the Inquiry venue.

PROPOSED PROCEDURE

76. The NPSCPs are conscious of the concerns raised by the Chair at the hearing of 26 January 2021 relating to the procedure for determining the provision of audio-visual livestreaming.

77. Should the Chair accede to the submissions that the provision of audio-visual livestreaming should be considered in order to avoid discrimination than the NPSCPs respectfully submit that a suitable procedure can be implemented without causing undue delay. Potential steps would be as follows:

    i) Chair to issue a minded to note indicating: (a) that audio-visual livestreaming is to be made available (indicating any conditions of registration the Inquiry deems necessary); (b) that relevant restriction orders are to be varied to allow for this; and, (c) the Chair is to review restriction orders for T1P2 witnesses on the basis of original material, unless notified there has been a significant change in circumstances of the UCO.

    ii) Officers due to give evidence in T1P2 afforded opportunity to make submissions on the proposal and to provide any further evidence relating to a relevant change of circumstance and not already submitted in the original application for restriction orders.[24]

    iii) NPSCPS to be given a short period to respond to any open material provided by the UCOs

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[24] It is not anticipated that such evidence will be particularly complex. If UCOs have relied on health reasons for the original restriction order application that was determined in 2018 then this evidence may well stand unaltered. Similarly, if UCOs are to assert that they are of specific risk of identification or particular risk of intrusion into their privacy then it is anticipated that such evidence will have been submitted in relation to the original restriction order application..

iv) Chair to review the restriction orders in relation to the relevant UCOs in light of the current circumstances and proposed conditions for audio-visual livestreaming.

78. It is submitted that the procedure outlined above may be competed within the time available prior to the T1P2 hearings without undue delay.

CONCLUSION

79. On the basis of the above, it is submitted that the Inquiry is bound by the duties under the EA 2010 in relation to audio-visual livestreaming. Decisions in this regard must comply with the PSED, must make reasonable adjustments for persons with disabilities and must not indirectly discriminate. Further, or alternatively, the Inquiry is required not to discriminate on the basis of duties under the HRA 1998 and common law.

80. Existing restriction orders must therefore be reviewed in light of the present circumstances. When such a review is carried out, the balance now falls in favour of openness in allowing the limited form of audio-visual livestreaming with such safeguards the Inquiry sees fit.

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02.02.21