**IN THE UNDERCOVER POLICING INQUIRY**

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**NPCC SUBMISSIONS REGARDING THE INQUIRY'S APPROACH**
**TO THE LEGALITY OF UNDERCOVER POLICING OPERATIONS**

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## Summary


1. These submissions on behalf of the National Police Chiefs' Council (NPCC) respond to submissions made on behalf of the Category H Core Participants ("CPs") in their *Opening Statement, Tranche 1, Phase 3* (dated 25th April 2022) and Counsel to the Inquiry ("CTI")'s *Submissions on Section 2 Inquiries Act 2005 and the Relevant Legal Framework applicable to Undercover Policing in the Tranche 1 Era* (dated 29th September 2022).

2. Two issues have emerged from the Cat H CPs' and CTI's submissions:
   a) The effect of section 2 of the Inquiries Act 2005; and
   b) The applicable legal framework governing undercover policing in the Tranche 1 era (1968-1982).

3. Linked to these issues is the extent to which the Inquiry may make, or purport to make, findings about the lawfulness of undercover policing since the 1960s and any wrongdoing under the applicable legal framework.

4. The NPCC respectfully submits that:
   a) The Inquiry is permitted to *consider* the legal framework governing undercover policing at any given time;
   b) However, the Inquiry is not permitted to make any findings of civil or criminal liability;
   c) The applicable legal framework is unlikely to be the same in every Tranche and, so far as Tranche 1 is concerned, both the applicable legal framework and the justification for the actions of undercover officers in that period are matters primarily for the Metropolitan Police Service (which was responsible for the SDS) and individual officers in that period. The NPCC has not taken an 'active' part in

Tranche 1 (in the sense of engaging in factual disputes) because its interest to date has been general;

d) Because of the prohibition against findings of criminal or civil liability, which reflects the inquisitorial cf. adversarial nature of a public inquiry, the Inquiry should refrain from reaching findings (or purported findings) about the lawfulness of undercover policing during Tranche 1 and/or other periods being considered by the Inquiry. It would be erroneous, and unfair, to 'read across' findings made in other jurisdictions in relation to other periods (such as the recent *Wilson* litigation, considered below).

5. The NPCC remains concerned that the timescale of the Inquiry, and the lack of any interim recommendations, is preventing the Police Service from making any necessary changes which might enable the tactic to continue to be successfully used.

**NPCC's role in this Inquiry**

6. The NPCC is a coordination body which, in April 2015, assumed the role previously performed by the Association of Chief Police Officers (ACPO).[1] The NPCC's primary purpose is to facilitate collaboration between the Chief Constables of operationally independent police forces across England and Wales.

7. The NPCC does not act for any individual officer or former officers in this Inquiry, whether NPOIU or SDS. Instead, the NPCC has generic interest in each Tranche, including Tranche 1, which derives from:

a) The fact that the NPCC has custody of the documentation generated by the NPOIU (by virtue of being the successor to ACPO) and is, therefore, involved in the disclosure and associated redaction exercise relating to former NPOIU officers. To date, in the order of 6 million documents have been disclosed to the Inquiry;

b) Nationally approved risk assessors, whose involvement was facilitated by the NPCC and whose reports have informed anonymity decisions taken by the Chair in respect of former NPOIU officers;

[1] ACPO ceased to perform a coordination role on 31 March 2015 but was not formally dissolved until the following year. The NPCC was formed on 1 April 2015.

c) The NPCC's ongoing role. The NPCC coordinates the operational response, across the Police Service, to some of the country's most serious threats including terrorism, organised crime and national emergencies.

8. The NPCC is particularly concerned to preserve the utility of undercover policing, and its associated tactics and techniques, as a vital tool in the fight against criminality in all its forms.

9. At the moment, there remains no published 'end date' for the Inquiry, which has been ongoing for nearly 8 years since its inception in 2015, when it was anticipated that the final report would be published within 3 years. Even if, as the NPCC understands, the Inquiry expects to complete the evidence on Modules 1 to 3 by mid-2026, the recommendations to emerge from the Inquiry may take longer still. On current projections, and in the absence of any interim recommendations, it appears that more than a decade will have passed until the Police Service is in a position to make any informed changes as a result of the Inquiry.

10. The NPCC wishes to reaffirm its commitment to this Inquiry and to learning any lessons which may emerge from the Inquiry's findings within its Terms of Reference. From the outset the NPCC has welcomed this Inquiry and continues to share the view of former Chairman, Sir Christopher Pitchford, expressed in his opening remarks on 28 July 2015: '*An important part of the Inquiry's function is to make recommendations "as to the future deployment of undercover police officers". The public needs to be assured that when undercover policing is conducted, it takes place under satisfactory statutory and professional conditions. It is in the public interest that any recommendations the Inquiry has to make should not be unduly delayed*.'

11. It is essential that, where any changes do need to be made, that these are identified and implemented as quickly as possible so that the tactic can continue to be used, where appropriate, in the public interest and without causing harm. The NPCC is keen to ensure that any mistakes which may have been made in the past do not continue into the present and future, where there is an opportunity for these to be avoided.

**Section 2 of the Inquiries Act 2005**

12. Section 2 of the Inquiries Act 2005 provides as follows:

> **2 No determination of liability**
> (1) An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability.
> (2) But an inquiry panel is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes.

13. This provision, which is similar to the provision which applies in Coroners' Courts,[2] clearly precludes any determination by the Inquiry (in this case, the Chairman) of any civil or criminal liability, as would occur at the conclusion of a criminal prosecution or civil claim for damages. However, section 2 also makes clear that the Inquiry may still discharge its functions of (i) finding facts and (ii) making recommendations,[3] even where liability may thereby be inferred – indeed, it is not to be inhibited from doing so.

14. The Inquiry's Terms of Reference include (*inter alia*) to identify and assess the adequacy of the "*justification, authorisation, operational governance and oversight of undercover policing*" and the "*statutory, policy and judicial regulation of undercover policing*", as well as "*to what purpose, extent and effect undercover police operations have targeted political and social justice campaigners*".

15. This is reflected across the various Modules to the Inquiry, in particular Module 2 which will cover "*the management and oversight of undercover officers, including their selection, training, supervision, care after the end of an undercover deployment, and the legal and regulatory framework within which undercover policing was carried out*".

16. Thus, both the Terms of Reference and the contents of the Modules indicate that, as part of its work, the Inquiry will be considering the applicable legal framework for undercover policing at any given time. It has not hitherto been suggested (or the

[2] Section 10(2) Coroners & Justice Act 2009 precludes Coroners from framing their determinations "in such a way as to appear to determine any question of (a) criminal liability on the part of a named person, or (b) civil liability". As CTI have pointed out at §18 of their submissions, this is wider than s. 2 of the Inquiries Act since it precludes even the appearance of a determination; although, in relation to civil liability, there is no limitation in relation to a named person (unlike section 2 of the Inquiries Act).

[3] Section 24(1) of the Inquiries Act 2005 requires the Inquiry's report to set out "*the facts determined by the inquiry panel*", together with any recommendations.

subject of legal challenge) that either the Terms of Reference or the Modules offend against section 2 of the Inquiries Act.

17. Indeed, it is apparent from the series of public inquiries enumerated in CTI's submissions that many public inquiries have involved examination of the legal framework applicable to the situation being considered by the relevant public inquiry. To take the example of the **Bloody Sunday Inquiry**, it would not have been possible for that Inquiry to make factual findings or recommendations without considering the objective and/or subjective justification for any particular shooting, without determining whether any civil or criminal liability had thereby been established. Likewise, in the **Azelle Rodney Inquiry**, the Chairman concluded that there had been no lawful justification for the shooting.[4] The **Litvinenko Inquiry** concluded that named individuals had deliberately poisoned Mr Litvinenko, intending to kill him, probably at the direction of the Russian security service and with the approval of President Putin.

18. It follows that the Inquiry is permitted to *consider* the applicable legal framework for undercover policing at any given time. This is unlikely to be the same each Tranche, or even at every point within each Tranche, because the common law and statute have evolved significantly during the period covered by the Inquiry's Terms of Reference (undercover policing operations since 1968) up to the end of Tranche 3 (2007).

19. However, it will be important for the Inquiry <u>not</u> to determine matters of liability.

20. This is because a public inquiry is not designed to reach findings akin to those reached at the conclusion of civil and criminal trials – hence the prohibition on doing so under section 2 of the Inquiries Act 2005 – because:

    a) The proceedings are inquisitorial not adversarial, meaning that CPs have attenuated rights compared to those of parties in adversarial proceedings. They cannot, for example, generally question witnesses directly, and the conduct of the proceedings is determined by the Inquiry (Chairman) alone;

[4] Final report of Sir Christopher Holland in the Azelle Rodney Inquiry at 21.13, cited in CTI's submissions at §10.

b) The rules of evidence, including disclosure, are generally narrower, such that the Chairman may decide not to call all relevant evidence about an event; whereas in civil or criminal proceedings, a party will usually be unconstrained from advancing its own case.

21. Accordingly, public inquiries generally do not attract the protection of Article 6 of the European Convention on Human Rights (ECHR), the right to a fair hearing, in recognition of the fact that they do not determine civil rights and obligations or criminal liability.[5]

22. It follows that, whatever findings it makes, the Inquiry cannot frame its conclusions in such a way as to rule on civil or criminal liability – any such action would have to be brought entirely separately from the Inquiry, subject to inevitable restrictions such as limitation[6] and the availability of evidence, there being many witnesses, especially from the earlier Tranches, who are either infirm or deceased.

23. If the Inquiry were to contravene section 2 of the Inquiries Act, or to reach findings of fact in a procedurally defective or otherwise unlawful way, such determinations would be amenable to challenge by judicial review.[7]

**Applicable legal framework (Tranche 1)**

24. In their Opening Statement for Tranche 1, Phase 3, the Cat H CPs launched a wholesale attack on the lawfulness of SDS operations[8] by reference to what they contended, in an Annex to their submissions, was the applicable legal framework providing the 'backdrop' to those operations, namely:

a) **Police powers at common law** – primarily under the law of **trespass**: trespass to person, to land and/or to property. Trespass is a tortious cause of action which arises where there is interference in the absence of consent[9] or other lawful

[5] *Goodman v Ireland* (1993) 16 EHRR CD 26; *Fayed v United Kingdom* (1994) 18 EHRR 393.
[6] I.e. restriction on the period within which legal actions must be brought, e.g. under the Limitation Act 1980.
[7] As was the case in *Mahon v Air New Zealand* [1984] AC 808 and as is the view of the editors of the leading textbook, *Public Inquiries*, Jason Beer KC & others (Oxford University Press, first edition, 2011) at 11.24-11.27.
[8] See the Cat H CPs' submissions, para. 27.
[9] *Entick v Carrington* (1765) 95 ER 807 at pp.817-818: "*Our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser…" and IRC v*

excuse.[10] Reference was also made to powers of **detention, search and seizure**; actions for **breach of confidence**, subject to the defence of public interest; **deceit**, subject to a public policy defence; and **misfeasance in public office**, a condition of which is an unlawful act or omission in the exercise of power by a police officer.[11]

b) **Human rights** – although it is important to note that the UK did not incorporate the ECHR into domestic law until the Human Rights Act 1998 came into force (in 2000) with the result that before that time, the ECHR was only actionable in international law, by individual right of petition to the European Court of Human Rights (from 1966 onwards).[12]

25. The Cat H CPs have also placed heavy reliance on the judgment in *Wilson v Commissioner of Police of the Metropolis & NPCC* [2021] UKIPTrib IPT_11_167_H in which the Investigatory Powers Tribunal (IPT) held the MPS and NPCC in breach of Ms Wilson's rights under Articles 3, 8, 10, 11 and 14 ECHR in respect of a sexual relationship she entered into with an undercover NPOIU officer she knew as Mark Kennedy, between late 2003 and early 2005, and thereafter a "*close personal and affectionate relationship*" which persisted until Kennedy's true identity was revealed in October 2010.

26. Despite notionally recognising that the activities of the NPOIU in the *Wilson* period are not due to be considered by the Inquiry until Tranche 4, the Cat H CPs submitted that:

a) "*the evidence that has emerged in Tranche 1, assessed against the applicable legal framework … including the unappealed conclusions in the recent case of [Wilson…], demonstrates that the operations of the SDS failed to comply with numerous basic requirements of common law, international human rights law and*

*Rossminster Ltd [1980] AC 952 at p.1011: "the act of handling a man's goods without his permission is prima facie tortious…"* (emphasis added), cited in the Cat H CPs' submissions, Annex para. 1(1) and (4).

[10] *Collins v Wilcock* [1984] 1 WLR 1172 at pp.1177-1178 and *F v West Berkshire HA* [1990] 2 AC 1 at §73, cited in the Cat H CPs' submissions, Annex para. 1(2).

[11] Cat H CPs' submissions, Annex paras. 27-30.

[12] Cat H CPs' submissions, Annex paras. 35-37; CTI's submissions at para. 73.

*administrative law*"[13] (emphasis added). It is said that "*all sources of law spoke then and speak now with one voice on three basic principles*", namely that:

i. No general authorisation may be given to the police (or security service) to search individuals or property for evidence of wrongdoing;

ii. Police powers to trespass on land, property and the person, and interfere with private and personal lives, "*will only be lawful where necessary and proportionate to meet a pressing social need, such as prevention or investigation of serious crime or an imminent breach of the peace*"; and

iii. The use of covert powers by the police (and security service) is subject to a "*particularly strict necessity test*" regarding the seriousness of the threat to justify their use, and lack of alternatives.[14]

b) "*given the similarity of the operations and conduct of the police throughout the period examined by the Inquiry, the IPT's conclusions are also relevant to the actions of the SDS in earlier Tranches*."[15]

c) The MPS and NPCC have "*already effectively accepted the SDS's operations were unlawful*" by their concessions in the *Wilson* litigation and by not appealing the IPT's findings in that case, said to concern "*parallel public order situations in the Tranche 4 period*" and to be "*substantially similar to [acts and intrusions by UCOs] carried out in Tranche 1*" (emphasis added).[16]

27. The NPCC makes two main points in response.

28. **First**, where there are common law defences to tortious actions such as trespass and breach of confidence, whether these are or were in principle available will depend on the particular facts and circumstances of individual cases. It is not for the NPCC to make the (individual) case since the NPCC does not act for any individuals in this Inquiry.

[13] Cat H CPs' submissions, para. 4, and para. 23 to similar effect.
[14] Cat H CPs' submissions, para. 23.
[15] Cat H CPs' submissions, Annex para. 54.
[16] Cat H CPs' submissions, para. 26.

29. Although the statutory basis for undercover policing may have been minimal before the Regulation of Investigatory Powers Act 2000, there is, in the case of every tortious and/or criminal basis for liability so far considered by the Cat H CPs and CTI, a common law defence to the use of the tactic – whether by consent, or some form of public policy or public interest defence.

30. See, in CTI's submissions, reference to:

    a) Justifications for police entry onto land by statute, common law, licence or necessity.[17] Although CTI have cited cases in which individuals were held to be trespassers by gaining entry purporting to be someone else, those were cases where they entered with the dishonest intention of stealing or otherwise committing a crime or tort[18], as opposed to believing they had a lawful excuse for gaining access.

    b) The law on breach of confidence, which recognises a public interest defence: see *Attorney General v Guardian Newspapers (No 2)* [1990] 1 AC 109 at pp. 281 and 482: "*..although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure*…"[19]

31. In the Cat H CPs' submissions, reference is made to consent not being a defence if induced by fraud, "*at least where the fraud goes to the identity of the person or the nature of the act done*".[20] However, the available case law tends to suggest that the

[17] See CTI's submissions at para. 47 onwards.
[18] See CTI's submissions at paras. 49-53.
[19] See CTI's submissions at paras. 69-72, in particular *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804, citing *Malone v Metropolitan Police Commissioner* [1979] 1 Ch 344, which held that the police will have a public interest defence to any action for breach of confidence where the information was used reasonably for the prevention and detection of crime, the investigation of alleged offences or the apprehension of suspects of persons unlawfully at large.
[20] Cat H CPs' submissions, Annex para. 14.

deception must bear upon the nature of the act, and not necessarily the identity of the person, in question.[21]

32. In *R (Monica) v DPP* [2018] EWHC 3508 an undercover officer who entered into a sexual relationship with an environmental activist could not be found guilty of rape because the deception had not been sufficiently closely connected to the performance of the sexual act, and the CPS had been right to conclude that the offence of procurement of sexual intercourse by false pretences or representations could not be established because the deception went to the circums/tances which had led the couple to encounter each other, rather than the act of sexual intercourse itself. Part of the reasoning of the High Court in that case was that a conclusion to the contrary would criminalise large swathes of human behaviour which may be unethical or immoral (such as bigamy, adultery or misrepresentations as to the "*financial standing of a potential sexual partner*") but which have not been brought by Parliament within the ambit of the criminal law on sexual offences.[22]

33. Such considerations may be relevant to whether:
    a) there is/was a common law defence to trespass in cases involving undercover officers who obtained access to premises either using information which was not in fact false (for example, as members of the public permitted to attend meetings) or where the nature of the deception may not have been such as to vitiate consent to the act of entry;
    b) there is/was a public interest defence to the suggestion that undercover officers improperly obtained confidential information. There may be a distinction to be drawn between the use of police powers to gather evidence in support of criminal prosecutions, and intelligence-gathering which does not contemplate any criminal proceedings.

[21] The Cat H CPs cite *Clerk & Lindsell on Torts*, 23rd edn. at 14-96-14-97, although those passages give as examples a defendant who, knowing he was HIV positive, recklessly transmitted the disease through consensual sexual intercourse, being capable of being found guilty of inflicting grievous bodily harm contrary to s. 20 of the Offences against the Person Act 1861 (*R v Dica* [2004] EWCA Crim 1103); and consent to medical treatment which has been obtained by fraud or misrepresentation. The editors of that volume give the view that consent induced by fraud is invalid "*where the misapprehension of the consenting party goes to the root of the whole transaction and affects the nature and quality of the act done*", at 14-96.
[22] See *R (Monica) v DPP*, op cit at §52 and 83-86.

34. The NPCC notes that the Cat H CPs appear to accept that undercover tactics will generally be justified and lawful in cases involving serious criminality.[23]

35. It follows that it is not the tactics themselves, but their use in particular situations – especially, so far as the Inquiry is concerned, to infiltrate "*protest and social, environmental and political groups*"[24] – which is the subject of particular scrutiny. The circumstances in which undercover tactics may be deployed will necessarily depend upon the facts in each instance and the potential criminality in issue. This cannot permit a blanket prohibition of the tactic's use in and around any protest[25].

36. Whether any defence actually arises will necessarily depend on the facts and circumstances of individual cases; and will not be for this Inquiry to determine.

37. **Secondly**, the approach adopted by the Cat H CPs involves using findings made in a different jurisdiction (the IPT), on the facts of a particular case (*Wilson*), and applying them to a period which long predated it (Tranche 1) and/or to evidence yet to be considered (in Tranche 4).

38. This attempt at 'retro-fitting' is clearly inappropriate, and risks leading the Inquiry into unfairness and error, because:
    a) The *Wilson* case related to a particular factual scenario which was the subject of extensively tested evidence before the IPT;
    b) It related to a period clearly governed by the HRA. Only breaches of ECHR rights were alleged and ultimately determined in *Wilson*;
    c) The outcome was the product of an adversarial procedure within the IPT, in which both the MPS and NPCC had the ability to advance their respective cases including through the calling of relevant evidence.

[23] Cat H CPs' submissions, para. 13; and para. 16 in terms: "*the undercover tactic should be reserved for the most serious crimes*".
[24] Cat H CPs' submissions, para. 12. The Terms of Reference include specific reference to the use of the tactic to target "*political and social justice campaigners*".
[25] S29 Regulation of Investigatory Powers Act 2000 specifically provides for the authorisation of the deployment of covert human intelligence sources '..for the purpose of … preventing disorder'

39. Accordingly, it is neither accurate nor fair for the Cat H CPs to suggest, by reference to *Wilson*, that the NPCC has "*already effectively accepted the SDS's operations were unlawful*" within this Inquiry. That is not the case.

**Conclusion**

40. Because both the applicable legal framework, and the justifications for undercover deployments, have evolved over the lengthy period with which the Inquiry is concerned, it would be unwise, and probably unlawful, for the Inquiry to consider the "*legality of tactics such as entering the homes of activists, taking and disseminating confidential information*"[26] in the abstract, without grounding that inquiry in the facts of particular situations. The Inquiry's primary task is to make findings of facts as to what occurred, in accordance with its Terms of Reference.

41. Accordingly, it will be important for the Inquiry to:

    a) Focus on the justification for particular operations and/or tactics which were deployed at particular times and in particular situations. The extent to which the Inquiry can reliably make findings about the justification for particular deployments will depend on the strength and cogency of the evidence it has considered in relation to those deployments.

    b) Refrain from, and make clear that it is refraining from, making any determinations of civil or criminal liability which are not matters for the Inquiry and which would be unfair and unlawful given the nature and purpose of a public inquiry and the prohibition contained in section 2 of the Inquiries Act.

42. The more pressing interest, so far as the NPCC is concerned, is for the Inquiry's findings to enable meaningful recommendations to be made and acted upon within a reasonable period.

**GERARD BOYLE KC**

**STEPHEN MORLEY**

[26] CTI's submissions at para. 79.

**CECILY WHITE**

Serjeants' Inn Chambers

London EC4Y 1AE

8 February 2023