

IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

BEFORE SIR JOHN MITTING

**SUBMISSIONS ON BEHALF OF
THE NON-POLICE, NON-STATE CORE PARTICIPANTS ('NPSCPs')
IN RELATION TO THE LETTER FROM THE CHAIR 'RE: SUBMISSIONS: (FINDINGS
OF FACT SERIOUS CRIMINALITY)'**

I. INTRODUCTION

1. These submissions are made on behalf of the Non-Police, Non-State Core Participants ('NPSCPs') in response to the Chair's letter of 21 February 2024 ('the Chair's Letter') on the issue of findings of fact of serious criminality¹ in relation to non-state actors. As the Chair is aware, the co-ordination team does not act for individual Core Participants ('CPs') and so has not had access to the disclosure provided to individual CPs and has not had sight of the Rule 9 questions. These submissions cannot therefore deal with the concerns of those individual NPSCPs in relation to specific allegations of criminality that may appear in the reporting of undercover officers ('UCOs'), or the specific examples referenced in the Chair's Letter. These submissions only cover the broader concerns of NPSCPs and address a suggested way forward. Whilst individual teams have had input into these submissions, neither they nor we can refer to specific examples where that might breach a restriction order.
2. By way of background, the issue of findings from which criminality could be inferred arose following a meeting between counsel for Category H and Counsel to the Inquiry ('CTI') on 9 February 2024. The NPSCPs understand that in this meeting it was indicated that *'the Chair was... intending to make findings of fact concerning the historic conduct of individual CPs, including, or perhaps especially, where serious criminal allegations against them were made by the police CPs in their evidence or in contemporaneous documents'*.²

¹ "Serious crime" was defined as an offence for which a sentence of three years custody or more could reasonably be expected. The Interception of Communications in Great Britain (April 1980), Cmnd 7873 §4; Regulation of Investigatory Powers Act 2000 s.81(2) – (3)

² Letter from Birnberg Peirce Solicitors on behalf of Category H CPs to Katherine Ross of the ILT dated 20 February 2024

3. On 20 February 2024, the co-ordinating team requested further clarification on the Chair's intended approach to findings of fact in respect of NPSCPs (and civilians, whether or not they are witnesses). This included a request for clarification on the circumstances in which findings may be made, the burden and standard of proof that would be applied, the offences and alleged conduct that will attract potential findings of fact and how these might relate to any issues of justification particularly where, for example, no attempts were made to investigate or prosecute at the time. Clarification was also sought on whether there will be an entitlement to cross-examine witnesses directly, through a NPSCP's/civilian witness's own counsel, if there is a risk that adverse findings of fact will be made. Furthermore, clarification was sought about whether a NPSCP who chooses not to give evidence or withdraws from the Inquiry will have a finding of fact made against him or her based on the intelligence reports disclosed and alleged conduct.
4. The NPSCPs and Category H CPs received the Chair's Letter dated 21 February 2024 (Reference: OS 1173), in which the Chair states that:

“The terms of reference require me to address the following issues: the role and contribution of undercover policing towards the prevention of crime; the motivation for undercover policing operations; the adequacy of justification for them; and miscarriages of justice resulting from or associated with undercover policing. They have already been set out in paragraphs 33, 34, 35, 126, 127 and 128 of the issues list dated 5 July 2018 20180705_list_of_issues_module_one_SDS_final.pdf (ucpi.org.uk), paragraphs 33, 34, 35, 199, 200 and 201 of the issues list dated 7 March 2022 Module 2(a) Special Demonstration Squad Issues List (ucpi.org.uk) and paragraphs 34, 35 and 36 of the issues list dated 22 July 2022 Preliminary Module 2(b) Issues List - Special Demonstration Squad (ucpi.org.uk). It is self-evident that I cannot determine these issues and so fulfil these aspects of the terms of reference without receiving evidence about and considering alleged or proven criminal conduct on the part of those who were the subject of reporting by undercover officers.

I cannot at this stage identify every issue of fact about which evidence will be required to enable me to discharge that task. To enable those who wish to make submissions on behalf of individual NSCPs, I can, however, indicate the principal issues likely to arise in Tranche 2 and the view which I hold now about how they must be investigated.

One of the specific issues which I must investigate to assist the Court of Appeal to determine the pending appeal of Geoffrey Sheppard and Andrew Clarke is the role, if any, played by Robert Lambert in the planting of improvised incendiary devices in Debenhams stores on 11 July 1987 and in the plans, if any, for the planting of further devices in the West End in September 1987, which led to the arrest of Geoffrey Sheppard and Andrew Clarke on 9 September 1987. The contemporaneous reporting of Robert Lambert includes allegations about the conduct of one NSCP other than Geoffrey Sheppard and Andrew Clarke which must be investigated publicly to permit me to reach conclusions of fact about such plans.

The combined issues of the contribution of undercover policing towards the prevention of crime, its motivation and the adequacy of its justification will require at least the following issues to be publicly explored: the plans referred to above; other serious criminal acts

including home visits, arson and criminal damage committed or said to have been committed by animal rights activists; the claimed plan to contaminate Lucozade in department stores in 1991, about which ██████████ reported; and the alleged plan to commit serious acts of violence at the BNP bookshop in Welling on 16 October 1993, about which Trevor Morris reported. Reporting on alleged or proven acts of criminal misconduct at other public events must also be investigated, because the prevention of public disorder was one of the principal justifications relied on contemporaneously for the continued existence of the SDS.”

*Name of undercover officer deleted at the request of RLR for a NSCP.

5. The NPSCPs understand that at this stage of the Inquiry, the Chair is still in the investigatory phase. The NPSCPs note the indication that has been given in relation to some of the issues that the Chair envisages exploring in public, however they remain concerned that there is a lack of clarity as to whether and in what circumstances the Chair may consider it necessary to make adverse findings of fact against non-state individuals and/or identifiable NPSCPs or civilians, where criminal liability may be inferred and which may have a significant adverse impact on the affected NPSCP/civilian. It is also unclear whether the Chair intends to go further and make findings of fact in respect of non-state individuals and/or identifiable NPSCPs where the alleged conduct falls short of the threshold of ‘serious criminality’.
6. Given the current timetable, the NPSCPs request further clarification on the matters raised within these submissions, as a matter of urgency, so that NPSCPs and civilian witnesses can take a view on how they wish to proceed and so that they can be assured that their rights will be safeguarded.
7. The NPSCPs support the request from Category H for a General Assurance.

II. SUBMISSIONS

8. It is accepted that the Inquiry may reach conclusions about the activities of groups and can consider criminal conduct which has resulted in criminal convictions. However, the NPSCPs submit that neither the Inquiry’s purpose nor the Terms of Reference (‘ToR’) can reasonably be understood to mean that the Chair is required to make adverse findings regarding the conduct of identifiable NPSCPs/civilians, including, findings from which criminal liability could be inferred. This Inquiry is constituted to investigate police abuses of power. The Inquiry is not constituted to investigate the actions of individual NPSCPs/civilians, nor can it do so fairly. There is a public interest in holding undercover police officers, police forces and state employees to account for the commission of criminal offences committed during undercover policing operations; there is no such public interest in similar findings being made in respect of named NPSCPs or civilians. On the contrary, the Inquiry should be seeking not to exacerbate previous invasions of privacy by making unnecessary findings of fact, which would of their

own accord constitute a disproportionate interference with the private lives of NPSCPs or civilians. The aim of any Inquiry is to help to restore public confidence in systems or services and by investigating the facts and making recommendations to prevent recurrence, not to establish liability or to punish anyone.³

9. The NPSCPs do not consider that findings could or should be made against them relating to their personal conduct based on evidence from the UCOs and particularly where criminal liability may be inferred. If the Chair is considering this as a possibility, then further clarification ought to be provided with clarity on the procedure that will be followed by the Inquiry by way of a Protocol, to ensure that NPSCPs rights are adequately protected.

Purpose of the Inquiry and Terms of Reference

10. This Inquiry was established by the then Home Secretary Theresa May because of serious public concern about *historical failings in undercover policing practices in the interest of learning the lessons of past failures and to ensure there is no repeat of these failings in the future.*⁴ (Emphasis added). As reiterated in the Legal Principles and Approach Ruling of the former Chair, Sir Christopher Pitchford of 3 May 2016:

“The public concern that caused the Secretary of State to announce the Inquiry relates to the past conduct and management of undercover police operations and the need to ensure that in future such operations are properly justified, managed and supervised; that the public should have confidence that future undercover police operations will be conducted in compliance with the rule of law and with due respect for the rights of individuals under the Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention on Human Rights” [§6].⁵

11. This Inquiry’s Terms of Reference include the following:

“Purpose

To inquire into and report on undercover police operations conducted by English and Welsh police forces in England and Wales since 1968 and, in particular, to:

- *investigate the role and the contribution made by undercover policing towards the prevention and detection of crime;*
- *examine the motivation for, and the scope of, undercover police operations in practice and their effect upon individuals in particular and the public in general;*
- *identify and assess the adequacy of the: 1. justification, authorisation, operational governance and oversight of undercover policing; 2. selection, training, management and care of undercover police officers;*

³ <https://www.legislation.gov.uk/ukpga/2005/12/notes> - Explanatory Note to the Inquiries Act 2005

⁴ <https://www.gov.uk/government/news/home-secretary-announces-statutory-inquiry-into-undercover-policing>

⁵ <https://www.ucpi.org.uk/wp-content/uploads/2016/05/160503-ruling-legal-approach-to-restriction-orders.pdf>

- *identify and assess the adequacy of the statutory, policy and judicial regulation of undercover policing.*

Miscarriages of justice

The inquiry’s investigations will include a review of the extent of the duty to make, during a criminal prosecution, disclosure of an undercover police operation and the scope for miscarriage of justice in the absence of proper disclosure.

The inquiry will refer to a panel, consisting of senior members of the Crown Prosecution Service and the police, the facts of any case in respect of which it concludes that a miscarriage of justice may have occurred as a result of an undercover police operation or its non disclosure. The panel will consider whether further action is required, including but not limited to, referral of the case to the Criminal Cases Review Commission.

Scope

The inquiry’s investigation will include, but not be limited to, whether and to what purpose, extent and effect undercover police operations have targeted political and social justice campaigners.

12. The question of adequacy/ justification is a higher-level question that ought to be investigated and answered by reference to institutional and systemic issues. This was explicitly highlighted by Sir Christopher Pitchford in the Undercover Policing Inquiry: Chair’s Opening Remarks 28 July 2015⁶ at [22]:

“Module Two: will investigate the systemic issues affecting the deployment of undercover police officers during the period under consideration. These will include institutional issues such as the adequacy of justification, authorisation, governance and oversight. They will include the selection criteria, training, management and care of undercover police officers. They will include the statutory regulation, policy guidance and judicial oversight of undercover policing activity. The role of Her Majesty’s Government, and especially the Home Office, will be considered.”

13. This approach has been reiterated in CP Rulings⁷ and reflected in the approach to justification in CTI’s closing submissions for Tranche 1 “104. *In these circumstances, we submit that the need for and value of the public order intelligence provided by the SDS was not an adequate justification for the intrusion caused by the SDS model of long-term undercover policing in the Tranche 1 era*”.⁸ The Tranche 1 Interim Report addressed the question of justification as

⁶ <https://www.ucpi.org.uk/wp-content/uploads/2015/07/Opening-Remarks.pdf>

⁷ <https://www.ucpi.org.uk/wp-content/uploads/2016/09/160921-ruling-core-participants-number-1-reissued.pdf>, 21 October 2015

⁸ CTI’s Closing Statement Tranche 1, 16 February 2023. See also para 101, “*I do not propose to conduct a systematic analysis of every group infiltrated by the SDS but the threat to public order posed by different groups differed widely both between groups and over time*”.

envisaged by Sir Christopher Pitchford, concluding that the SDS's long deployments into left-wing and anarchist groups were not justified because the end did not justify the means: "*The question is whether or not the end justified the means set out above. I have come to the firm conclusion that, for a unit of a police force, it did not...*" [§28].

14. The correct approach to justification has been fully addressed in the *Closing Submissions for Tranche One on Behalf of the Co-Operating Group of NPSCPs*⁹ and the *Cat H Core Participants Opening Statement Tranche 1, Phase 3 and Category H Legal Framework*¹⁰ and is not repeated in these submissions. However, the Inquiry is reminded that in the Investigatory Powers Tribunal judgement of *Kate Wilson v Commissioner of the Metropolis and National Police Chiefs Council* (NPCC) [2021] UKIPTrib IPT 11/167/H, justification, necessity and proportionality was considered by reference to the nature of the authorisations, safeguards and scrutiny/oversight of the UCO deployments and not on by reference to an investigation and findings on the content of the UCO reporting [§289 - 298].

15. In respect of findings relating to "*the role and the contribution of undercover policing towards the prevention and detection of crime*", the NPSCPs accept that high-level findings with a degree of generality may be necessary (akin to the findings in the Chair's *Tranche 1 Interim Report*¹¹). It is also envisaged that there may be instances where the Chair may find that there have been incidents of 'serious crime' during his investigations in this Inquiry. However, the NPSCPs are deeply concerned about how this Inquiry could fairly make findings in respect of non-state individuals and/or identifiable NPSCPs and civilians where such conduct has not been proven in the criminal courts and in reliance on the evidence from the police and UCO reporting.

⁹ https://www.ucpi.org.uk/wp-content/uploads/2023/02/20230222-T1_Closing_Statement-NPSCPs.pdf

¹⁰ https://www.ucpi.org.uk/wp-content/uploads/2022/05/20220504-TIP3-Cat_H_CPs-Opening_Statement.pdf

¹¹ "27. ... *If these issues had been addressed, it is hard to see how any conclusion could legitimately have been reached which would not have resulted in the closure of the SDS. The long-term infiltration of political or single-issue groups by a unit of a police force could readily have been justified if its purpose was to prevent or investigate serious crime, including terrorism and activities akin to it. In the era of the Cold War and the "Troubles", applying the standards of the time, the infiltration of groups which in fact threatened the safety or well-being of the state (or in the 1952 formulation, gave rise to an internal danger to it) could also have been justified. In the period covered by Tranche 1, only three groups penetrated by the SDS satisfied either of these criteria – (Provisional) Sinn Fein and two groups identified in the closed interim report. The great majority of deployments by the SDS in this period did not satisfy either criterion. 28. The principal, stated purpose of the SDS was to assist uniformed police to control public order in London. Long-term deployments into left-wing and anarchist groups did make a real contribution to achieving this end, even though this was or could have been achieved to a significant extent by other, less intrusive, means. The question is whether or not the end justified the means set out above. I have come to the firm conclusion that, for a unit of a police force, it did not; and that had the use of these means been publicly known at the time, the SDS would have been brought to a rapid end.*" <https://www.ucpi.org.uk/ucpi-interim-report-for-tranche-1/chapter-6/?>

16. The Inquiry must guard against any attempt by the police to retrospectively seek to justify their actions, as this will wrongly shift the focus of the Inquiry onto assessing the unproven conduct of NPSCPs/civilians and divert the Inquiry from its main purpose.
17. The NPSCPs reiterate their *Closing Submissions for Tranche One on Behalf of the Co-Operating Group of NPSCPs*, namely that the justification and motivation for SDS activities and whether they contributed to the prevention or crime or the maintenance of public order “*must be answered in the context of the unlawful and anti-democratic nature*” of the SDS.¹²

Inquiry’s approach and the basis on which the NPSCPs have engaged with this Inquiry

18. The NPSCPs have always understood that their conduct is not the main focus of this Inquiry or the reason why this Inquiry was established. This is the basis on which applications for CP status were made by those affected by undercover policing. Whilst the NPSCPs’ co-ordinated group does not represent individual CPs, to the best of our knowledge the group is not aware of any grant of CP status to a NPSCP that made explicitly clear that a NPSCP was at risk of a finding from which criminality may be inferred and /or that they would be ‘*subject to explicit or significant criticism during the inquiry proceedings or in the report, or in any interim report*’ (Rule 5(2)(c) Inquiry Rules). The Inquiry has however indicated to a CP in a serious issue under investigation by the Inquiry, that the Inquiry would not adjudicate on their guilt or innocence.¹³ The NPSCPs were reassured by this indication from the Inquiry.
19. The Inquiry is reminded of the comments made by Sir Christopher Pitchford when considering the initial applications for CP status:

*“Campaigning applicants anticipate that, in the course of the Inquiry, a police service will identify a risk of public disorder as sufficient justification for an undercover operation, and to that extent only will be critical of them, and they wish to respond to the criticism. In my view, **there are likely to be several instances of mutual criticism during the course of this Inquiry, much of which will be on the margins of or outside the main focus of the Inquiry’s work, which will be the management and scope of undercover operations by the police.** I have concluded that many of these applications do not meet the rule 5(2) criteria that the applicant “played or may have played a direct and significant role” in relation to the subject matter of the Inquiry or has a significant interest in “an important aspect” of the Inquiry or that the applicant may be subject to “explicit or significant criticism” during the Inquiry. I have given particular attention to the capacity of the application to demonstrate that the applicant played a direct and significant role in the*

¹² https://www.ucpi.org.uk/wp-content/uploads/2023/02/20230222-T1_Closing_Statement-NPSCPs.pdf at [§§44 – 46, 380

¹³ see Core Participants Ruling re Geoff Sheppard and Andrew Clarke, at 54; see also re Gerrah Selby, Jason Mullan, Thomas Harris and Debbie Vincent, Stop Huntingdon Animal Cruelty, at 59

matters to which the Inquiry relates because historical fact finding is likely to form the weightiest part of the Inquiry's work'.¹⁴ (Emphasis added).

20. The NPSCPs were further reassured that their conduct was not the main focus of this Inquiry in 2016, when the Inquiry received submissions in relation to the proposed undertaking from the Attorney General and when it was made clear in the 'Counsel to the Inquiry's Note on Undertakings' which stated that:¹⁵

*"86. The subject matter to be investigated in order to discharge the terms of reference, and the nature of the events which have thus far come to public attention also indicate that questioning will need to touch on matters which seem certain to engage the privilege against self-incrimination in the absence of an undertaking. This is likely to apply not only to police witnesses but potentially also to some non-police witnesses (**not because their conduct is the focus of the inquiry but because it is so closely related to police activity as to be necessary in order to permit a full examination of police conduct**)."* (Emphasis added).

21. Further, reassurance was provided by Sir Christopher Pitchford in his 'Undertakings Ruling' dated 26 May 2016 in which he distinguished the status of those on whom the police were reporting and the police themselves:¹⁶

*57. Nonetheless, **the main focus of the Inquiry, as Mr Bailin QC and Mr Hall QC rightly submitted, is on the activities of police officers and not those on whom they were reporting. I accept that, for this reason, police officers and civilians do not have the same status in the Inquiry.*** (Emphasis added).

22. It was assumed by the NPSCPs that the focus of fact finding would relate to 'misconduct or other failure of duty', as paragraph 11 of the "Standard of Proof Ruling" stated:

*"11. It is appropriate that in a public inquiry the starting point should be the civil standard of proof. However, depending upon the inquiry's terms of reference, the issue of fact under consideration and the context in which the issue arises, an inflexible application of any particular standard may have the effect of stifling the ultimate purpose of the inquiry which is, usually, **to make recommendations in the public interest**. In my view, this is just such an inquiry. I am required to investigate what has happened during 47 years of undercover policing. **I will need to consider whether there has been misconduct or other failure of duty and, if so, in what areas and to what extent**. Public acknowledgement of some misconduct and failure of management has already been made on behalf of the Metropolitan Police Service. **In establishing the factual background against which the Inquiry will offer recommendations as to future conduct and management it seems to me likely to be more conducive to the public good if I am free to express my state of mind as to the existence (or non-existence) of a fact without being bound to any particular standard of proof.** As the counsel team put it at paragraph 38 of their note, recent public*

¹⁴ Core Participants' Ruling, 21 October 2015 (revised 21 September 2016)

¹⁵ <https://www.ucpi.org.uk/wp-content/uploads/2016/01/160108-undertakings-note.pdf>

¹⁶ <https://www.ucpi.org.uk/wp-content/uploads/2016/05/160526-ruling-undertakings.pdf>

*inquiries have adopted “a flexible and variable approach to the standard of proof so as to enable a full and nuanced approach to the determination of facts”.*¹⁷ (Emphasis added)

23. The NPSCPs have engaged with this Inquiry with an expectation and understanding that the Inquiry would be conducted consistently with the above principles and rulings. It has never been made explicitly clear in the long procedural history of this Inquiry that individual findings may be made against non-state individuals and NPSCPs from which criminality may be inferred. This issue was not dealt with explicitly during consideration of the various Issues Lists,¹⁸ in the current Chair’s opening remarks,¹⁹ nor in the Strategic Review of May 2018.²⁰ So far as the NPSCPs are aware this Inquiry has not produced a note setting out the approach to be taken to findings of fact (see the note for the Brooke House Inquiry).²¹

Fairness

24. By virtue of s.17(3) of the Inquiries Act 2005 the Chair is under a statutory duty when making any decision as to the procedure of conduct of the Inquiry to “*act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others)*”.

25. The need to act in a manner which is proportionate in this Inquiry has also been recognised in Sir Pitchford’s *Standard of Proof Ruling* dated 13 January 2016, in which he stated:

*“From time to time I shall have to make a judgement whether and to what extent a particular issue of fact will be explored by the inquiry. When doing so I shall have in mind both the importance of the issue in itself and its importance in the context of the Inquiry as a whole. The Inquiry will be manageable only if an appropriate sense of proportion is applied.”*²²

26. The NPSCPs note that the Chair indicated the following in the Strategic Review of May 2018:

“If, as has been reported, some non-state core participants are undecided whether or not to continue to participate in the Inquiry, the time for decision will soon arrive. The strategic review sets out how the Inquiry will attempt to find out what happened and why on the assumption that non-state core participants do participate. I do not intend to use coercive powers to make them do so. If they do not, the Inquiry will get as close to the truth as it

¹⁷ <https://www.ucpi.org.uk/wp-content/uploads/2016/01/160113-Standard-of-Proof-ruling-including-annexes.pdf>

¹⁸ 5 July 2018; 30 September 2019 (revised 7 March 2022); 22 July 2022

¹⁹ <https://www.ucpi.org.uk/wp-content/uploads/2017/11/20171120-Chairman-statement.pdf>

²⁰ https://www.ucpi.org.uk/wp-content/uploads/2018/06/20180510-strategic_review.pdf

²¹ The Brook House Inquiry Report, BHI Report, Volume 1, Part C: Incidents of mistreatment, C.1: The approach to factual findings, <https://brookhouseinquiry.org.uk/main-page/volume-1/part-c-incidents-of-mistreatment/c-1-the-approach-to-factual-findings>

²² At [§13], <https://www.ucpi.org.uk/wp-content/uploads/2016/01/160113-Standard-of-Proof-ruling-including-annexes.pdf>.

can without them. There is abundant material in the police files, in the public domain and in the unpublished records of the Herne and Elter investigations. Every former Special Demonstration Squad and National Public Order Intelligence Unit officer able to do so will be required to provide a detailed witness statement."²³

27. Several NPSCPs have now received disclosure in Tranche 2. Disclosure for some NPSCPs and civilian witnesses remains outstanding. Those who have received disclosure can see the state of the evidence thus far. Having considered the way in which some UCOs and managers gave their evidence in Tranche 1, the NPSCPs are extremely concerned by any suggestion that this Inquiry could fairly and properly ‘*get close to the truth*’ by relying on the evidence of UCOs and any contemporaneous reports.
28. The NPSCPs submit that it would be deeply unfair and indeed disproportionate for the Inquiry to make findings against individual NPSCPs and civilians from which criminality could be inferred, where reliance is being placed on historical UCO reporting as the ‘primary’ source for an allegation, where significant potentially relevant material is missing and/or destroyed in the context where what is before the Inquiry from UCOs is compromised and inherently unreliable and where due process protections did not and do not apply.
29. Making findings against non-state individuals and NPSCPs where criminality can be inferred would require an in-depth investigation into events which took place decades ago. Even if such investigations were realistic and/or proportionate (which they are not), it is impossible to see how they could be achieved by this Inquiry properly and fairly given the state of the evidence before the Inquiry and the nature of the material under consideration.
30. It is now clear that the UCO reporting under consideration in this Inquiry is inherently unreliable. The Inquiry knows that the reporting is self-serving and partial, with its provenance often unclear. The motivation for UCO reporting has also included gathering information with the purpose of smearing campaigners;²⁴ as such, the Chair should exercise great caution in approaching recorded allegations made by UCOs against NPSCPs and civilians as accurate.
31. The Inquiry also knows that the material before it represents a fraction of the true picture because of document destruction/loss and in part because the scope of the Inquiry’s disclosure requests have not encompassed e.g. the wider MPSB and other state agencies which may hold

²³ Foreward at (iii), https://www.ucpi.org.uk/wp-content/uploads/2018/06/20180510-strategic_review.pdf

²⁴ <https://www.theguardian.com/uk/2013/jun/23/stephen-lawrence-undercover-police-smears>

evidence of relevance.²⁵ The Inquiry can only consider overt policing material in very limited circumstances which will lead to an incomplete evidential picture.

32. The NPSCPs and civilian witnesses who have received disclosure in Tranche 2 are shocked at the extent to which UCO reporting contains rumours, suppositions, exaggeration, unfounded allegations, slurs, snide comments, and lies. The NPSCPs consider that UCOs giving evidence before the Inquiry will be motivated to continue to lie about the matters contained within their reporting. Certain former UCOs, such as Bob Lambert, John Dines and Andy Coles, have professional careers and reputations that they will be no doubt seeking to protect. The NPSCPs question how the Inquiry could place any weight on former UCOs' accounts (whether historic or contemporaneous) in circumstances where their deployments were unjustified and unlawful and, in particular, where individual UCOs are known to have engaged in disreputable and unlawful conduct.
33. The Inquiry also knows that the material in Tranche 1 is incomplete and that a significant amount of reporting was missing,²⁶ incomplete or destroyed,²⁷ including the contemporaneous notes by UCOs.²⁸ The inadequate state of disclosure before the Inquiry in Tranche 1 and record retention was made clear by the Designated Lawyer CP in their submissions for Tranche 1 Phase 2.²⁹ With respect to the position in Tranche 2, missing police documentation is likely to remain as an issue of concern, as *Operation Herne, Report 2: Allegations of Peter Francis* at 13.2 notes that 'Operation Herne has not located raw intelligence product files from any SDS operative prior to 1998.'

²⁵ See NPSCPs' Opening Submissions Tranche 1 Phase 3 [§73]

²⁶ See re HN321, https://www.ucpi.org.uk/wp-content/uploads/2020/11/20201102_CTIs_T1P1_Opening_Statement.pdf at [26]; https://www.ucpi.org.uk/wp-content/uploads/2021/04/20210421-CTIs_T1P2_Opening_Statement.pdf?v2 re HN299 at [9], re HN200 at [23], [105], re HN353 at [18.32], re HN80 at [43.24]; https://www.ucpi.org.uk/wp-content/uploads/2021/04/20210420_Opening-Statement-DL-AMENDED.pdf at [2.4, 2.6];

https://www.ucpi.org.uk/wp-content/uploads/2023/02/20230220-CL-T1-Closing_Statement.pdf at [172]

²⁷ https://www.ucpi.org.uk/wp-content/uploads/2020/11/20201022-Opening_Statement-MPS_CL.pdf at [89-90]; https://www.ucpi.org.uk/wp-content/uploads/2020/11/20201028-Opening_Statement-DL_Clients.pdf at 6.3; https://www.ucpi.org.uk/wp-content/uploads/2022/05/20220508-CTIs_T1P3_Opening_Statement.pdf at FN 402; https://www.ucpi.org.uk/wp-content/uploads/2022/05/20220428-T1P3-MPS_CL-Opening_Statement.pdf at FN 38; Mark Ellison QC at 3.3 and 42; *Operation Herne, Report 2: Allegations of Peter Francis* at 26.1.14; *The Stephen Lawrence Independent Review: Summary of Findings*.

²⁸ "Individual undercover officers were not responsible for deciding what went into disseminated intelligence reports, to whom these were distributed or for how long they were retained", https://www.ucpi.org.uk/wp-content/uploads/2021/04/20210420_Opening-Statement-DL-AMENDED.pdf at [8.7]; see also https://www.ucpi.org.uk/wp-content/uploads/2022/05/20220508-CTIs_T1P3_Opening_Statement.pdf at [26.9, 38, 59.3, 82.19; 116.8; 122.21; 131.13]

²⁹ See Designated Lawyer Officer Core Participant Group ('DL' CP group) in their Tranche 1 Phase 2 Opening; https://www.ucpi.org.uk/wp-content/uploads/2021/04/20210420_Opening-Statement-DL-AMENDED.pdf

34. There is also an inherent unreliability in the material from UCOs and their managers before the Inquiry, which will no doubt continue into T2, because UCO reporting was central to how managers justified the continuation of the SDS, as set out in the NPSCPs' T1P3 Opening Submissions³⁰ and the NPSCPs' Tranche 1 Closing Submissions. As a consequence, at times, UCO reporting and deployments were clearly misrepresented and their utility overstated in the SDS Annual Reports requesting a continuation for funding from the Home Office.³¹ This is deeply concerning to the NPSCPs, particularly given the evidence at the close of Tranche 1 which suggested that senior Home Office officials appreciated that the activities of the SDS could not be lawfully justified on the grounds of 'countering subversion'. Nevertheless, on the cusp of Tranche 2, there is clearly a renewed drive to develop and bolster the use of this ground of justification (with the adoption of an expanded and nebulous definition of subversion) for the continued existence of the SDS to the Home Office.³²

Closed Proceedings (State CPs)

35. The NPSCPs are concerned to understand how the Chair intends to approach making adverse findings of fact, including from which criminality could be inferred, in respect of NPSCPs and civilians where the evidence from UCOs has been heard solely in closed proceedings and where there is no opportunity afforded to the affected NPSCP/civilian to submit detailed written questions or conduct oral questioning in the hearing. Several closed deployments were more dangerous than their open equivalents, hence the making of restriction orders over the real and cover names of those involved. The Inquiry produced an open gist of the Tranche 1 Phase 4 evidence which does not go into detail but confirms that most of these officers also described gaps in the reporting contained in their witness packs [§24] and incidents of public disorder [§30]".³³ In Tranche 1, findings on the closed material were made in the Interim Report with a high-level of generality. The NPSCPs submit that if the Chair considers that adverse findings may be necessary in respect of NPSCPs/civilians, then this ought to weigh heavily against the surrounding issues being heard from UCOs/other state CPs in closed proceedings. To the extent that the material must be considered in closed, NPSCPs/civilians likely to be impacted ought to be permitted an opportunity to respond and to challenge the oral evidence, with appropriate measures put in place.

³⁰ https://www.ucpi.org.uk/wp-content/uploads/2022/05/20220426-T1P3-NPSCPs-Opening_Statement.pdf at [30, 36, 42]

³¹ NPSCPs' T1P3 Opening Submissions [§42]; NPSCPs' T1 Closing Submissions [§310]

³² NPSCPs' T1 Closing Submissions [§§130-131]

³³ https://www.ucpi.org.uk/wp-content/uploads/2021/04/20210420_Opening-Statement-DL-AMENDED.pdf at [2.8]

36. The NPSCPs have previously made representations and submissions requesting a formal Protocol for closed hearings,³⁴ which was responded to by the Inquiry in a letter dated 13 October 2021 and which stated (*inter alia*), that (8) “*the proposal for notification of NPSCPs affected by particular closed witnesses is impracticable as doing so would risk undermining the restriction orders.*”³⁵ The NPSCPs ask that this issue is revisited by the Inquiry to ensure that the Inquiry addresses the issue of fairness and how NPSCPs facing adverse findings in closed proceedings will have their rights protected and a right to reply.

Breach Article 8 ECHR / right to privacy

37. The NPSCPs and civilian witnesses participate in the Inquiry as victims of invasion of privacy. The NPSCPs are also seeking to discover the truth about police interference with their lives. As a public authority, the Inquiry must ensure that NPSCPs’ and civilians’ rights are protected and safeguarded, as has been the case in the Inquiry’s approach to the UCOs and other state CPs. Adverse findings against NPSCPs and civilians are likely to cause serious reputational damage, psychological injury, and further trauma / traumatisation and therefore there is a real and significant risk that any such findings will constitute an unjustified, unnecessary, and disproportionate interfere with individual NPSCP’s and civilian’s right to private and family life, contrary to Article 8 ECHR.

38. The potential for this Inquiry to breach the ECHR rights of CPs has clearly been recognised. The Inquiry has engaged in a long-drawn-out process over a number of years (which has significantly delayed the progress of this Inquiry), whereby state CPs and the UCOs in particular have been permitted to make multiple submissions, including relying on expert medical evidence, to testify to the effect that participating in this Inquiry will have on them and their families. This has all then been considered by the Chair (including in oral hearings) leading to the granting of anonymity to approximately 50 UCOs and/or managers in Tranche 1 and 32 in Tranche 2. The ‘Minded-to’ Notes and rulings on Restriction Orders illustrate the factors considered by the Chair and have included the impact on the private and family life rights of UCOs,³⁶ mental health considerations in respect of UCOs,³⁷ and the impact on a UCO’s

³⁴ Letter from NPSCPs’ co-ordinating solicitor to the ILT, 9 May 2020; Submissions on behalf of NPSCPs in relation to closed proceedings, 5 October 2021 Amended 13 October 2021

³⁵ Letter of 13 October 2021 from Paul Bishop, ILT to NPSCPs’ co-ordinating solicitor

³⁶ HN1, HN4, HN56, HN60, HN65, HN80, HN88, HN96, HN106, HN118, HN122, HN126, HN200, HN296, HN301, HN303, HN304, HN334, HN336, HN340, HN347, HN348

³⁷ HN6, HN7, HN9, HN21, HN72, HN86, HN101, HN102, HN104, HN112, where their real names and in some cases cover names were restricted

family.³⁸ Reputational damage was also referred to within the Chair's 'Minded-to' note 2 with respect to HN45, both to the UCO and their family; at [12] "... *reputation is an aspect of HN45's private life to which respect must be shown. Interference with it is not necessary to fulfil the terms of reference of the Inquiry.*"³⁹ Additionally, the Chair has granted restriction orders to UCOs based on the impact on a UCO's current job or their 'economic activity'.⁴⁰

39. It was late in the pre-Tranche 2 stage that the Inquiry engaged with NPSCPs and their RLRs in a meeting on 27 September 2023 on the issue of how the rights of NPSCPs and civilian witnesses would be protected in the context of publication of the Tranche 2 evidential hearing bundle, in tandem with rolling disclosure. The approach that ought to be adopted by NPSCPs in regard to (1) applications for redactions to the hearing bundle on behalf of NPSCPs (and civilian witnesses), and (2) applications for 'restricted reporting' orders (and any related restrictions which may be sought) was set out in a letter from the Inquiry Legal Team dated 2 October 2023 and further clarified in a letter of 15 January 2024. This is clearly at a time when NPSCPs and civilian witnesses were struggling to process the disclosure but also where some significant disclosure remained outstanding.

40. However, since that meeting and subsequent correspondence, the NPSCPs have discovered that potential findings from which criminality could be inferred in respect of individual NPSCPs and civilians and findings of fact may be made. A hearing has been listed for 12 April 2024 to consider applications for Restricted Reporting Orders in relation to privacy redactions for the open hearing bundle for the Tranche 2 hearings.⁴¹ The NPSCPs are in the position of now having to anticipate whether they face the potential risk of findings being made against them personally (which risks breaching their rights under Article 8 ECHR and causing serious damage) and whether they then need to make any applications in advance for privacy redactions, anonymity, special measures, or a restriction order which limits the information in the public domain. The NPSCPs consider that this Inquiry must be conducted in compliance with the principles of open justice but also with respect for the NPSCPs' right to privacy, particularly in the circumstances where such extensive invasions into their privacy have already occurred.

Procedural fairness and next steps

³⁸ HN12, HN25, HN200, HN353, resulting in the restriction of their real names.

³⁹ <https://www.ucpi.org.uk/wp-content/uploads/2017/11/20171114-SDS-anonymity-Minded-to-2.pdf>

⁴⁰ E.g. HN8, HN79, HN88, HN118, HN339, HN343, HN345

⁴¹ Letter from ILT to RLRs for the NPSCPs, 4 March 2024

41. The NPSCPs are concerned about the lack of a Protocol on how the Inquiry intends to approach this issue. The NPSCPs and civilian witnesses should be confident in engaging with the Inquiry in proceedings in a context where they know their rights will be safeguarded and that this Inquiry will not inflict devastating and lasting long-term damage upon them but rather protect them in the way that allows the Inquiry to satisfy the ToR.
42. At present the NPSCPs are concerned that the Inquiry's processes do not adequately safeguard NPSCPs or civilian witnesses from adverse findings, in particular, the NPSCPs' right to challenge evidence given by UCOs in the oral hearings is extremely limited as it only applies as follows:

*"...[W]hen 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 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."*⁴²

Furthermore: *'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.'*⁴³

43. The above does not envisage the likelihood of permission and encouragement of the questioning by an RLR where there are simply allegations of criminal conduct against a NPSCP or civilian, it is only where it is alleged that a UCO has encouraged, incited, or participated in a serious crime alleged to have been committed by a NPSCP or civilian. Further, given that requests to question must be submitted in advance and in writing, there is a limited opportunity and no guarantee that the right to question an UCO in response to their oral evidence will be granted by the Chair. There is therefore no clarity as to how NPSCPs or civilian witnesses

⁴² Chairman's further statement about the conduct of evidence hearings, 30 October 2019 at [17], https://www.ucpi.org.uk/wp-content/uploads/2019/10/20191030-Chairman_further_statement-conduct_of_evidence_hearings_san.pdf

⁴³ Chairman's further statement about the conduct of evidence hearings, 30 October 2019 at [17], https://www.ucpi.org.uk/wp-content/uploads/2019/10/20191030-Chairman_further_statement-conduct_of_evidence_hearings_san.pdf

facing allegations of criminal conduct arising from evidence given in oral hearings have any meaningful right to respond. This does not appear consistent with the Inquiry's stated purpose of getting as close to the truth as it can.

44. The NPSCPs note the guidance in the Inquiry's Protocol for Warning Letters and that:

“The Inquiry's general approach will be to ensure that significant criticisms of relevant individuals and organisations are aired, as far as practicable, during the Inquiry's investigation, and in the Inquiry's hearings in the interest of fairness, transparency and avoiding unnecessary delay. The Chair will be guided in such determinations by section 17(3) of the Inquiries Act 2005 (the 2005 Act), which provides that the Chair 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) when making any decision as to the procedure or conduct of the Inquiry.”⁴⁴

45. However, where NPSCPs or civilian witnesses receive a Warning Letter they will appear to have only 14 days to respond:

“As Counsel to the Inquiry and core participants have made opening statements and will have the opportunity to make closing statements. Consequently, the issues will have been ventilated to such an extent that it is anticipated that recipients will be able to respond to warning letters promptly. Recipients can normally expect to be given 14 days in which to respond”.

46. The NPSCPs do not accept that it would be fair for an individual NPSCP or civilian to have this as the only opportunity to respond to an adverse finding of fact, including one from which criminal liability can be inferred where the evidence from the UCO has not been challenged in evidence on behalf of the NPSCPs by their counsel. Oral evidence cannot be addressed or ventilated in opening statements. Without knowing more, the NPSCPs and civilian witnesses cannot be reassured that the fact of the requirement of Warning Letters for those subject to criticism will be a protective measure in the way that it is supposed to be.

47. The Inquiry is therefore invited to publish a Protocol which sets out the practice and principles that will be followed in the event that the Chair considers that an adverse finding is likely to be made against a named NPSCP or civilian, including one from which serious criminality/criminality could be inferred.

48. Such a Protocol ought to include, as a minimum:

⁴⁴ https://www.ucpi.org.uk/wp-content/uploads/2022/10/20221024-ucpi_warning_protocol.pdf

- a. That sufficient notice is given to an NPSCP/civilian that they may face an adverse finding. This should happen at an early stage (including in advance of the oral hearings) in order that submissions may be made regarding the relevance of a specific finding, and how the evidence should be dealt with, including anonymity/special measures and publication of related material;
- b. A presumption that counsel for the relevant NPSCP/civilian witness will be granted permission to question relevant witnesses pursuant to Rule 10 of The Inquiry Rules 2002;
- c. The procedure to be followed in the event that the Chair intends to make any adverse findings in respect of an NPSCP/civilian, with clarity as to whether the Warning Letter process will ensure that the NPSCP/civilian can provide further evidence to the Inquiry and an assurance that that such evidence can and will be considered by the Chair;
- d. The procedure to be followed in respect of state CPs' evidence to be heard in closed proceedings setting out a process to allow an NPSCP/civilian facing an adverse finding to have a right to respond/challenge the evidence heard in closed proceedings.

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6 March 2024