IN THE UNDERCOVER POLICING INQUIRY

ISSUE: APPLICATIONS FOR RESTRICTED REPORTING
MPS SUBMISSIONS
FOR HEARING 12 APRIL 2024

Introduction and Summary of the Position

1. These submissions are prepared pursuant to the Chairman's direction of 4 March 2024, seeking the submissions of Core Participants (CPs) on whether and how he should exercise his power under s.19 of the Inquiries Act 2005 to restrict the publication of private information about individuals which is expected to be present in the Tranche 2 hearing bundle.

2. The MPS is grateful to Counsel to the Inquiry (CTI) for the careful note of 13 March 2024 setting out the nature of the applications received and CTI's initial response to them. The MPS respectfully agrees with CTI that:

    a. Article 8 ECHR rights are engaged;
    b. Some of the matters in scope of the applications include topics of significance to the Inquiry;
    c. In principle an anonymity order (where it is already in place) would protect the Article 8 rights of those persons;
    d. However where it does not, an order limiting onward reporting of the material giving rise to the concerns may often be appropriate.

3. The only caveats to the above is that the MPS would wish to be cited on any application seeking to limit MPS *attendance* at any session of the hearings, so it can consider its response.

4. Finally, the MPS is proceeding on the assumption that any final report and conclusions drawn by the Chairman will take into account the material subject to the RRO, even if any reference needs to be worded carefully or in general terms to honour the RRO. This means that CPs' submissions about them cannot and should not be fettered – but may therefore need to be redacted by the Inquiry before publication.

The nature of the applications and issue

5. The MPS understands that the position is that there will be only one hearing bundle, available to all CPs [CTI Note at §18]. Within the contemporaneous information that the Inquiry wishes to include in its hearing bundle, there are four classes of information over which application has been made for an order to restrict onward reporting (an "**RRO**") [CTI Note at §35]:

    a. Unproven allegations of criminality or other misconduct or reprehensible behaviour;
    b. Proven criminality;
    c. Highly sensitive personal information; and
    d. Slurs or negative comments on personal characteristics and private behaviours.[1]

6. The MPS acknowledges that these categories of information arise within the material that the Inquiry wishes to publish, as it has been recorded by the MPS or others contemporaneously, or commented upon by witnesses in response to requests from the Inquiry.

7. The MPS agrees that at least some of these categories of information are important in the context of the Inquiry and will require full exploration and examination if the Inquiry is to fulfil its Terms of Reference and to do so fairly (noting the common law and s.17(3) of the Inquiries Act 2005). The significance of the subject matter is encapsulated by CTI at §§44-45 of the CTI Note, with which the MPS agrees.

8. The MPS also agrees with CTI that these categories of information do in principle engage the Article 8 rights of the person referred to, if they were to be identifiable. It would follow that publication would be pursuant to a proportionality balance (considering s.19(3)(a) of the Inquiries Act 2005 and Article 8 ECHR). The matters to be considered in this Inquiry are well rehearsed (see Restriction Order Principles Ruling at Part 4 and Part 6 C3, mutatis mutandis).

9. One factor to weigh in the proportionality balance is how wide publication will go. Accordingly, in some cases dissemination and exploration only within the confines of the hearing room may be proportionate, but in other cases, publication of the material online via the Inquiry's website may also be proportionate. It follows that a form of order restricting onward reporting of the material outside the hearing room (i.e. an RRO) may be needed to ensure any interference with Article 8 rights is minimised to the appropriate proportionate level.

[1] The MPS deplores the use of such language and, while recognising that it is deserving of public criticism, does not wish to cause the NSCPs harm by its unnecessary publication or repetition.

10. However, where a person is not in any event identifiable, it is difficult to envisage how a breach of their Article 8 rights might occur.

How the RRO would operate

11. It has been made clear that the Inquiry has invited affected non-state CPs (NSCPs) and witnesses to make applications for restrictions on further dissemination of private information beyond the hearing bundle, defined as an application for a "reporting restriction order" or RRO. However, it is not entirely clear how an RRO would operate in practice or what its effects would be.

12. Based on CTI's Note, the MPS understands the envisaged RRO, if granted, would mean:

    a. That reports/documents dealing with the RRO restricted matters could be explored in hearings to the extent necessary, along with any associated witness accounts;
    b. However onward reporting of the RRO restricted matters beyond the hearing room and the CPs' legal and client teams would be prohibited [CTI Note at §25];
    c. Publication of the documents and witness accounts containing RRO restricted matters to the wider public outside the hearings would be delayed, for additional redaction to take place after the hearings [CTI Note §§26-27];
    d. Any mentions of RRO restricted matters in CPs' opening and closing statements and any other public addresses may be redacted by the Inquiry before publication [CTI Note at §28 – but see also paragraph 16 below].

13. The MPS respectfully agrees with CTI that an RRO of this type appears to be unnecessary for a person with anonymity – as the protection of their Article 8 rights is met by the anonymity order [CTI Note at §§31-32 and §34].

14. However, where the individual would be identifiable, the Article 8 considerations should be weighed, taking into account the relevant factors including the importance of the information to the Inquiry. This may on occasion lead to a conclusion that normal (i.e. full) publication of ostensibly private information would be proportionate. An example might be evidence of serious wrongdoing which is used to justify a particular deployment or set of actions. However in many cases the RRO as described above would provide a proportionate means to properly and fairly explore the information for the purposes of the Inquiry, whilst minimising interference with the Article 8 rights of the individual concerned such that any interference is proportionate.

15. It follows that the MPS has no objection in principle to an RRO of the type described at paragraph 12 above being made by the Inquiry in appropriate cases.

16. As to submissions and opening and closing statements: it should be noted that, in the interests of fairness, CPs must not be fettered in making submissions to the Inquiry. If detail

at the level of the material protected by the RRO is needed in such submissions or statements, this could be achieved via a closed addendum, or by Inquiry restriction prior to any onward publication. However, there can be no direction that such matters cannot be mentioned or their contents otherwise 'limited' (cf. CTI Note at §28 in this regard).

17. The Chairman's final report will also need to take fully into account all relevant and necessary material, including that which is restricted, and give it appropriate weight. Whilst honouring an RRO might mean specific details cannot be mentioned, the conclusion based on restricted information should be explicable – even if careful language is required.

18. CTI's Note also mentions that some applications seek limited attendance at hearings [CTI Note at §25]. In this regard the MPS observes only that it is engaged in all aspects of the evidence in Tranche 2 of this Inquiry and would need to ensure a legal and client team is able to attend and participate in each Tranche 2 hearing/session. In the event that any particular application seeks to limit MPS attendance at any evidential session below that which the MPS considers to be necessary, the MPS would oppose it. If the Chair is considering granting any such application the MPS would need to be fully sighted on it and given an opportunity to make representations.

Conclusion

19. The MPS agrees with CTI that a balance needs to be struck between the desirability of exploring evidence in public and the need to ensure private information is disseminated no further than necessary. The MPS considers that CTI's Note describes the relevant principles and proposes a sensible approach to be applied in a textual and fact sensitive way in the individual cases. The MPS agrees with this approach, subject only to the points set out above.

PETER SKELTON KC
AMY MANNION

2 April 2024