24 April 2018

Dear Home Secretary,

Undercover Policing Public Inquiry chaired by Sir John Mitting

We write on behalf of the Non-Police, Non-State, Core Participants (NPSCPs) to ask you to reconsider the appointment of additional members to the Inquiry panel in accordance with your powers under s.7(1)(b) Inquiries Act 2005.[1]

As you are aware, this matter is now of acute concern to the NPSCPs. This came to a head at the last hearing on 21 March 2018. The group instructed their counsel and us, their RLRs, to convey the depth of their concerns to the Chairman and thereafter to play no further part in that hearing whilst their concerns were considered.[2]

This was not a step undertaken lightly. Members of the NPSCP group have spent years campaigning for this Inquiry – women who still do not know why they were deceived into a long term sexual relationship, who authorised it and who had access to the most intimate details of their personal lives; grieving families who were campaigning for justice for their loved ones; workers who have been kept out of work by blacklisting. All desperately want to be able to participate in the Inquiry and for it to be effective in getting to the truth. However, the approach taken by the Chairman, including comments made by him at previous hearings and in his 'minded to' decisions and rulings, has demonstrated the vital importance of appointing a diverse panel with a greater breadth of experience and expertise if the Inquiry is to be effective and to be seen to be so.

This Inquiry will have to engage, amongst other things, with three thematic issues of significant political sensitivity: it will need to assess institutional racism and institutional sexism and it will need to be able to assess critically the narrative of 'dangerous subversives' used by the SDS and NPOIU to justify political policing. This additionally raises issues of class, collectivism and moral judgments about tolerance of dissent in a functioning democracy. It is plainly deeply politically sensitive. These issues must be, and must be seen to have been, effectively addressed by this Inquiry. They are the themes which link the distressing human stories which have already come to light and which lie behind the deep public concerns which gave rise to the Inquiry.

As is explained in further detail below, the Chairman has repeatedly, both through his oral comments and his written decisions, demonstrated that he, sitting alone, is not in a position to address these issues effectively or in a way that will command the confidence of our clients whose participation is vital to the success of this inquiry, and public confidence generally.

Individual RLRs, on behalf of particular Core Participants, as well as Core Participants collectively, have raised with you over many months their concerns about the need for a more diverse panel with a broader spectrum of experience in order to address these concerns. We append a chronology of that correspondence to this letter and adopt the points that have previously been raised with you.

In the most recent correspondence received from your department – a letter to Ms Jane Deighton dated 29 March 2018, received on 3 April 2018 – it appears that there is some recognition of the benefits of additional panel members or assessors 'with broader non-policing perspectives'. The letter acknowledges that this issue should be revisited when the Inquiry approaches its 'lessons learned stage' (by which we assume Module 3). We understand that Sir John Mitting is in agreement with this approach, having been consulted by you directly on the point. We request disclosure of the

records of that consultation (e.g. correspondence and the minutes of any meetings or other discussions that have taken place).

Whilst we welcome this small step in the right direction, the appointment of a more diverse panel only at the 'lessons learned stage' would be far too late. The ability of the panel to identify the lessons to be learned for the future will depend on the quality of the assessment of what happened in the past. Whilst the Chairman, as a retired judge, will have the forensic skills and experience identified by the House of Lords Select Committee in its 2014 post-legislative scrutiny of the Inquiries Act 2005 (see in particular paragraph 116 – 117 of the HLSC report), there are very significant differences between the assessments required in the context of this Inquiry as compared with those required in a regular court case, or indeed in less politically sensitive inquiries.

The assessments required in the context of this Inquiry are not limited to determinations of fact, which are then to be applied within the framework of applicable law (although both such tasks will be required), a crucial additional step is that the panel will inevitably be engaged in sensitive value judgments at every stage of the process. The terms of reference require the Inquiry to reach moral and policy judgments as to the 'contribution' made by undercover policing and as to the 'adequacy' of numerous significant matters including the justification, authorisation and operational governance of undercover policing and of its statutory, policy and judicial regulation. Value judgments of such a sensitive and political nature are precisely those which the judiciary usually eschew and are not matters of special judicial expertise. Indeed, it is the ethical and political nature of such matters which are usually seen as being in tension with judicial independence. It is in this context that a diverse panel with a broader range of experience is needed.

This is the point recognised by the House of Commons Public Administration Select Committee report 2005 in the passage cited by Ms Deighton in her email of 23 March 2018 to Mr Cyrille Marcel of your department:

'We agree and endorse the view that the use of ‘wing members’ brings expertise, support and protection to inquiry chairs. We particularly recommend the use of panels in politically sensitive cases as a non-statutory means of enhancing the perception of fairness and impartiality in the inquiry process. We also recommend that where judges are seen as the most appropriate chair, they should usually be appointed as part of a panel or be assisted by expert assessors or wing members.' (HCPASC report paragraph 3.4)

We note Mr Marcel’s citation in response of the House of Lords Select Committee in its 2014 post-legislative scrutiny of the Inquiries Act 2005, that an inquiry panel 'should consist of a single member unless there are strong arguments to the contrary' and the Government’s response that this would be 'invariably the case and an important consideration in controlling the cost of inquiries'.

However, it is clear from the full text of the Government’s response that it was not contemplating that there would never be inquiries where additional panel members would be necessary, indeed it could not have done so consistently with the terms of the Act or the HLSC’s recognition that in some cases there will be strong arguments for an increased panel. The Undercover Policing Inquiry is such a case.

First, as identified above, the context of this Inquiry is exceptionally sensitive and political. It is investigating police spying upon individuals involved in political and/or social justice campaigns including elected members of parliament, most if not all of whom were Labour party members. In this context, the first two sentences of the passage from the HCPASC cited above retain their full

force, even if the final sentence has been superseded by the views of the HLSC. A similar view was expressed recently by Lord Pannick QC, in an opinion piece in the Times[2].

Second, in light of the approach being taken by the Chairman to anonymity decisions (as to which see further below), it is now clear that significant portions of the Inquiry's proceedings will take place in closed session, from which both the public and all those other than the police and other state agencies will be excluded. The consequence of this is that the important benefits of open justice – judicial accountability, public scrutiny, informed public debate and confidence in outcomes[3] – will be diminished. This is an additional feature of this Inquiry which sets it aside from most other inquiries and which off-sets many of the advantages of having a lone chairman. In the context of hearings from which the public and dissenting evidence is excluded, it is likely to be a positive advantage for there to be a panel with a range of views. Although a diverse panel cannot replace the benefits of public scrutiny, it would at least provide some element of check on the unscrutinised decision-making of a single individual – a factor which is likely to weigh heavily on public confidence.

Third, the NPSCPs' concerns about the present Chairman sitting as a lone panel are not limited to the general points of principle outlined above. As has previously been brought to your attention, most recently in the letter of 3 April 2018 sent to you by 13 of the women who were deceived into relationships with undercover officers, there are significant concerns about assumptions that the Chairman has repeatedly made during the course of hearings, in his 'minded to' decisions and in his final rulings which call into question his ability to grapple with issues of institutional sexism in particular.

Mr Marcel, in his letter to Jane Deighton of 29 March 2018, notes the concerns about the Chairman's comments, but contends that 'taking into account the full transcripts of open hearings, it appears that the Chair has kept an open mind and accepted the force of arguments put forward by legal representatives to challenge assumptions made in 'minded to' notes and subsequent rulings on anonymity applications.'

With respect, this is mistaken. As you will be aware, there is particular concern about the Chairman's repeatedly expressed view that a long marriage is likely to be inconsistent with wrong-doing and his reliance on this assumption as a ground for discounting the importance of releasing a cover name.

It is right that when challenged on the validity of his assumption, the Chairman accepted being 'somewhat naïve and a little old-fashioned' and undertook to revisit his views[4]. However, his subsequent ruling and his 'minded to' note of 7 March 2018 belie this undertaking in that they repeat the very same assumption; based upon the Chairman's own limited knowledge and subjective perception of an officer's private and family history, he begins from the premise that the officer is unlikely to have committed misconduct[5].

For the avoidance of doubt, this is not an issue of whether or not the Chairman arrived at a different conclusion in relation to the grant or refusal of anonymity – which appears to be what the Chairman's response cited by Mr Marcel is directed at – the issue is his repeated reliance, even in the face of challenge, on reasoning which shows him to be out of touch with, not only a contemporary understanding of gender relations, but also the facts of the known cases of deceitful sexual relationships on the part of undercover officers. Mark Kennedy and John Dines, for example, remained married to the same women until their conduct whilst deployed was exposed. To

commence his inquiry on the basis of an assumption that certain officers are unlikely to have committed misconduct is explicitly operating from the assumption that the officers' accounts are truthful until proven otherwise. It is the antithesis of a fair and independent investigation and all the more troubling where there is in fact evidence to undermine the Chairman's assumptions and where, in some cases, final decisions will be made in closed proceedings, or in circumstances where the Chairman concludes that no reasons whatsoever will be disclosed by way of explanation for his findings[6].

At the hearing on 21 March 2018, Ms Sikand, acting for Peter Francis, challenged the Chairman yet again on his continued reliance on the untenable assumption that a lengthy marriage is inconsistent with wrongdoing. The Chairman's response was that he had said what he had 'in the hope that it would prompt reactions from people.'[7] This seems an unlikely and unacceptable reason for an inquiry chair to rely on such flawed reasoning and demonstrates a complete lack of understanding of how such comments would be received by the women who were deceived into relationships with undercover officers. It also calls into question the Chairman's ability to move beyond what are clearly, for him, entrenched views and raises doubts about his ability, or willingness, to look behind stereotypical indicators of conventional respectability – something which it is essential for the Inquiry panel to do if is to address the thematic issues identified above.

Fourthly, despite the positive spin placed on disclosure of names by the Inquiry, the figures on the outcomes of anonymity applications in fact tell a rather different story. In its press release of 28 March 2018, the Inquiry states that 'of the 128 officers considered in the anonymity process to date, 92 of the 128 officers will have real name, cover name or both made public subject to responses to the minded to decisions'.

However, what these headline figures do not make clear is that the vast majority of the names that will be released are those where no restriction order has been sought. It is not unreasonable to be concerned that those officers who have not sought restriction orders have done so because they are confident that they have nothing to hide, whereas the converse may be true where restriction has been sought.

The picture in relation to outcomes where restriction has been sought is significantly different. The figures in relation to the number of anonymity applications which have been granted (i.e. stripping out cases where names have been released because no application for restriction was made) are as follows: 87 applications have been made to date for restriction of either cover name, real name or both. Of those, 25 have been granted in full and the Chairman is minded to grant a further 31 in full. A further 5 applications have been granted in part and the Chairman is minded to grant a further 17 in part. Only **3 out of the 87** applications have been fully rejected, with the Chairman minded to fully reject a further 2. 2 of the applications were withdrawn following adverse 'minded to' indications and 2 are awaiting further information.

These figures show that in fact, in the cases where restriction is being sought, the vast majority are being granted. Meaning that the bulk of the names disclosed, or to be disclosed, by the Inquiry are those where, either the name is already in the public domain, or no application has been made for restriction. Further, as Peter Francis pointed out in his submissions before the 21 March 2018 hearing, of the 19 cover names released by the Inquiry at the date of that hearing, 10 were already in the public domain and the remaining 9 are 'shallow paddlers'.[8]

It is right that the Chairman has refused, or is minded to refuse, more applications to restrict cover names than he has real names: out of the 43 applications for cover name restriction made to date, 15 have been granted and the Chairman is minded to grant a further 3. He has refused 5 and is minded to refuse a further 14; a further 2 were withdrawn following adverse minded to indications.

There is nonetheless significant concern that the Chairman is not taking a realistic approach to risk and is granting restriction orders in circumstances where they are not justified. In general, the NPSCPs are not in a position to be able to challenge the Chairman's decisions, because they do not have disclosure of the evidence said to underpin them and because of the difficulties in obtaining funding for what would, of necessity, be a speculative challenge without sight of the underlying material. However, the Chairman's recent reasoning in relation HN15 / Mark Cassidy / Jenner strongly supports the NPSCPs' concerns.

Although the Chairman refused to restrict Jenner's real and cover names, he indicated that he would have made a restriction order in respect of both, but for the fact that both names are already in the public domain and Jenner admits to having conducted an intimate relationship with 'Alison' whilst undercover.

The fact that but for these factors the Chairman would have found restriction to be justified in Jenner's case is deeply troubling. First, it suggests a wholly unrealistic approach to risk and second, it suggests that other significant public interest factors telling in favour of disclosure are being ignored.

In respect of risk, although the MPS risk assessment placed the level of risk of harm to Jenner as being 'high', the credibility of that assessment is undermined by the reality of what has actually happened since Jenner's identity became public. Jenner's true identity has been public knowledge, nationally, since 2013. His name and images have been published in print and online, including in national media and in Rob Evans and Paul Lewis' book 'Undercover'. During those five years, Jenner has not come to any harm and indeed he has continued to maintain a social media presence in his real identity. This does not support any realistic assessment of harm.

The fact that the Chairman nonetheless considers that the risk of harm in this case would have justified restriction were it not for the fact that his identity is already in the public domain and he admits to having had a sexual relationship whilst undercover is a matter of deep concern.

Further, the Chairman appears to have discounted the very strong public interests in favour of disclosure of this officer's identity beyond the fact of his relationship with Alison. Mark Jenner infiltrated and sought to undermine two key community organisations (the Hackney Community Defence Association and the Colin Roach Centre) in their support for victims of police misconduct; he had access to legally privileged material; and he was involved in blacklisting in the construction industry and yet none of these factors would have been sufficient to persuade the Chairman to disclose his cover name had his name not already been in the public domain and had he not admitted to his relationship with Alison.

If the Chairman is applying this same approach to other cases where sexual relationships are not already known about, then other forms of serious wrongdoing of direct relevance to the Inquiry's terms of reference are likely never to come to light. This is particularly worrying because of the Catch 22 that intimate relationships will only become known about if the cover name is disclosed.

These are strong factors telling in favour of an expanded and more diverse panel.

For the avoidance of doubt, we do not suggest that in the event of additional panel members being appointed, the Inquiry should revisit the entire anonymity application process. It is accepted that this would cause delay and is unnecessary given that the anonymity decisions taken to date must be kept under review as the substantive evidence emerges and so will be reviewable by the panel in any event as the Inquiry progresses.

Finally, on the issue of cost, it is recognised that the appointment of additional panel members would give rise to additional expense. However, it is a false economy to conduct an inquiry that lacks the breadth of experience and diversity to credibly address the thematic issues with which this Inquiry must grapple. Over £9 million has already been spent on the inquiry and this does not include the money spent by the core participant state agencies. But this is a fraction of the cost that arises where investigations fail to get to the truth and allay public concern such that further investigative processes are required.

The history of the investigations into Bloody Sunday and the Hillsborough disaster are striking examples. The money spent on the undercover policing inquiry to date will have been wasted if it reaches conclusions which fail to command public confidence. The solution is to appoint additional panel members to engender the public confidence which the Inquiry currently lacks.

You will appreciate that our clients are finding the process of the Inquiry increasingly alienating and see it as a matter of the utmost importance that a more diverse panel be appointed in light of the reasons set out above.

We would ask you to please provide us with a substantive response to this letter within **21 days**.

Yours sincerely

Lydia Dagostino

Kellys Solicitors

(on behalf of the NPSCPs' RLRs and CPs who have expressed a view)

Notes:

1. The full transcript of Ms Kaufmann QC's submissions, on instruction from the NPSCP group, is available here https://www.ucpi.org.uk/wp-content/uploads/2018/03/20180321-draft-transcript-.pdf from pp.4-12.
2. David Pannick QC, The undercover policing inquiry cannot be allowed to collapse, *The Times*, 29 March 2018.
3. span>Al-Rawi v Security Service [2012] 1 AC 531; R (Mohammed) v Secretary of State for Foreign & Commonwealth Affairs (No.2) [2011] QB 218; R (E) v Chairman of the Inquiry into the Death of Azelle Rodney [2012] EWHC 563 (Admin); R v SSHD ex p Simms and O'Brien [2000] 2 AC 115; In re Guardian News and Media Ltd [2010] 2 AC 697; In Re S (A Child) [2005] 1 AC 593.
4. Transcript of 5 Feb 2018 hearing p.119.
5. See paragraph 10 of the 20 February 2018 ruling in relation to HN58 and paragraph 9 of the 5th minded to note, dated 7 March 2018.
6. See, for example in relation to HN109.
7. Transcript of 21 March hearing p.34 lines 18-19.
8. span>Written submissions of Peter Francis dated 18 March 2018, paragraph 3.

Key background information

1. It was Theresa May – Home Secretary at the time – who established the Undercover Policing Inquiry in 2015.

2. Sir Christopher Pitchford was appointed as Chair. He promised that the Inquiry's principles would include 'openness' and 'transparency'.
In May 2016, Pitchford said: 'I accept that if core participants and witnesses do not have access to information that directly affects them, their ability meaningfully to contribute to the resolution of important issues in the Inquiry may be compromised'.

3. There are several hundred 'non-state core participants' – ranging from families like the Lawrences, and those who discovered their dead children's identities had been used by these officers, to environmental and animal rights campaigners whose groups were infiltrated, to women deceived into long-term intimate relationships, to trade unionists who were illegally blacklisted. It was estimated by the police's internal Inquiry, Operation Herne, that over a thousand groups were spied on.

4. Sir John Mitting took over as Chair when Pitchford retired last summer. Core participants wondered if his membership of the all-male Garrick Club made him unsuited to investigating cases of institutional sexism. They were also alarmed to learn that he had spent many years working at the Investigatory Powers Tribunal, an extremely secretive system.

5. Within a short time, those fears were being realised. There has been a shift away from open-ness and towards more secrecy, with secret (closed) hearings and an almost-complete lack of disclosure about the anonymity applications being processed by the Inquiry. Core participants have become increasingly frustrated and disillusioned by these developments.

6. Matters reached a low point at the hearing in January, when Mitting made a series of comments about married men which showed him to be utterly unsuited to run this Inquiry. He does not have the life experience, sensitivity or understanding to explore issues like institutional racism and institutional sexism. This is why core participants have been calling for a panel of people with the relevant expertise.

7. At the same time, Mitting has made it clear that he is unwilling to share even basic information with us about the anonymity applications from Special Demonstration Squad officers. By the time of the Hearing on 21st March, we decided that we'd had enough. We instructed our Counsel to ask Mitting to 'recuse' himself, to make it clear that we felt unable to 'participate' in any meaningful way, and to walk out of the court room with us.

8. Today's letter is being sent by the group of 'Recognised Legal Representatives' (RLRs) who are instructed by the non-State core participants.

— end of background information —