METROPOLITAN POLICE Working together for a safer London

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Dear

Justice and Security Green Paper Consultation

On behalf of Commissioner Bernard Hogan-Howe please find following the responses to the specific questions raised in the paper:

1. How can we best ensure that close material procedures support and enhance fairness for all parties?

The uses of CMP have been sufficient to date in supporting the protection of shared information with agencies and Counter Terrorism police teams. Hearings have been held involving a number of cases where information originating from police had been used in support of partner agency lead cases. The issues presently arising are also as potentially problematic for police information as for partner agencies in such cases. As joint working on terrorism cases continues to increase the use of police information will also increase in future civil proceedings. CT is very supportive of the extended closed material procedures as outlined in these proposals.

2. What is the best way to ensure that investigations into a death can take account of all relevant information, even where that information is sensitive, while supporting the involvement of jurors, family members and other properly interested persons?

In future this is the area most likely to impact on CT policing as joint working continues to increase nationally and covert working continues to evolve. There is the potential for an armed police deployment in support of a partner agency objective to result in a death by a police firearms team. Complications could arise as a result of the sensitive source of the information/intelligence to support the initial activity. This management of the presentation of such information could impact on future covert methods and on the confidence of the public in the oversight of the process.

The leading authority is *R (on the application of Secretary of State for the Home Department) v HM Coroner for Inner West London (2010)*. The court upheld the Coroner's decision in the

7 July London Bombings Inquests that although rule 17 of the Coroners Rules 1984 permitted members of the public being excluded when sensitive matters were being considered (including matters of national security), this did not extend to the exclusion of properly interested persons (PIPs) and their legal representatives.

The law as it currently stands permits PIPs to hear sensitive information unless the information is prohibited from disclosure by statute (e.g the Regulation of Investigatory Powers Act 2000 (RIPA) [redacted] Safeguards such as the use of redactions and gists can be employed if agreed by the coroner.

[redacted]

Proposed Way Forward regarding Part 1 RIPA Material

It is submitted that RIPA material should be admitted as evidence in coronial proceedings [redacted]

The law as it currently stands prohibits the use of RIPA material in any legal proceedings. [redacted] Inquests, unlike civil proceedings, cannot be settled with compensation nor can they be withdrawn (unlike a criminal prosecution) and must proceed on the basis of the admitted evidence. Where RIPA material is not admitted, the remaining evidence may provide a skewed picture of the circumstances leading to the death.

Consideration should be given to the admission of RIPA material in the exceptional and rare inquests where such evidence is pivotal to the actions taken by police. This could involve the following:

- The appointment of High Court judges as coroners sitting without juries. They, unlike coroners under the existing legislation, have the power to receive RIPA material (although only for the purpose of ensuring the fairness of the proceedings and not to rely on it as evidence).

- The judges could be empowered through legislation to proactively manage the proceedings in order to determine the types of information to be admitted.

- [redacted]Depending on the evidence, the judges would be empowered to determine the circumstances in which certain PIPs such as family members can or cannot hear the RIPA material. It is not necessarily the case that family members in all cases cannot be permitted to hear some RIPA material. [redacted]

- Where judges managing the admission of evidence determine that certain PIPs such as family members cannot hear RIPA material, it should be open to the judge to hold closed hearings to consider the evidence. There can be variations of the closed hearings depending on the evidence. Some cases may require the closed material procedure

without special advocates. Cases involving particularly sensitive evidence can be held in closed hearings with special advocates.

The above proposals will require amendments to the Coroners Rules 1984, the Coroners Act 1988 and RIPA. It should be emphasized that the proposals are not envisaged for the vast majority of inquests involving sensitive material because such proceedings are normally managed successfully with the use of gists and redactions. Evidence in such cases may be excluded on the grounds of public interest immunity where necessary. The proposals are intended for rare cases where RIPA evidence is material to inquest proceedings and particularly those involving death following contact with police.

3. Should any of the proposals for handling of sensitive inquests be applied to inquests in Northern Ireland?

No response

4. What is the best mechanism for facilitating Special Advocate communication with the individual concerned following service of close material without jeopardising national security?

The Green paper is written from the perspective that the parties dealing with the intelligence information will be the government Counsel and Treasury Solicitors. [redacted] the matter has been handled by the in-house lawyers, using appropriately vetted Counsel from the panel approved by the MPS. Some of the observations which are made with regard to how issues can be managed do not naturally carry across to Metropolitan Police Service scenarios.

If the Metropolitan Police Service is relying upon material provided by another source, for example the Security Service, then it is accepted that that other source will be able to make a judgement as to the potential dangers involved in the Special Advocate communicating on that issue with the Claimant. However some of the information may have been provided by Metropolitan Police Service sources or other Police Force sources but still needs to be covered by the closed material procedures [redacted] *There appears to be no mechanism proposed in the Green paper, for dealing with this type of issue.*

It has been our experience that certain material, which on the face of it appears to be innocuous, has subsequently transpired to have been of significance to the intelligence community; particularly in terms of potentially revealing the identity of the covert human intelligence source. Our experience is that the parties who can assess the potential danger in revealing any intelligence, which it is proposed to release, are those with the knowledge of how that information was received.

It is noted that in Appendix F, Further analysis on Special Advocates, it is proposed that the Home Office take forward work to develop closed head notes for closed judgements, which will be available to assist Special Advocates in assessing relevant case law. Clearly the MPS would request that such a closed database should have also been made available to MPS counsel where appropriate. Presumably government Counsel would request the same.

[redacted]

5. If feasible, the Government sees benefit in introducing legislation to clarify the contexts in which the AF (No 3) "gisting" requirement does not apply. In what types of legal cases should there be a presumption that the disclosure requirement set out in AF (No 3) does not apply?

The determination as to the types of legal cases where there is no requirement to provide gisted material is not an exact science. Any prescriptive guidance as to when gisted material is not required may in practice be unworkable.

Deciding whether gisted material is not required depends on the circumstances of each case. The court must determine whether the information that can be supplied without gisting is sufficient to ensure a fair hearing. If it is not, it must consider whether gisted material can be provided. All such considerations depend on the particular facts of each case.

6. At this stage, the Government does not see benefit in introducing a new system of greater active case management or a specialist court. However, are there benefits of a specialist court or active case management that we have not identified?

[redacted]

Our experience [redacted] has suggested that providing the panel is properly trained and vetted, they are quite capable of dealing with security issues [redacted]

A suggestion is made that, on the move into a closed material procedure, only the Judge, government Counsel and the Special Advocate would remain. Closed witnesses will need to give closed evidence and presumably suitably vetted solicitors for both sides will remain, as necessary, to assist the Court and Counsel. As advised previously in this submission, it would not always necessarily be government Counsel.

7. The Government does not see benefit in making any change to the remit of the Investigatory Powers Tribunal. Are there any possible changes to its operation, either discussed here or not, that should be considered?

Given the functions of the IPT and the role of CMPs there appears to be no advantage to expanding the remit of the IPT from a policing perspective.

8. In civil cases where sensitive material is relevant and where closed material procedure not available, what is the best mechanism for ensuring that such cases can be tried fairly without undermining the crucial responsibility of the state to protect the public?

Experience within CT cases has shown an increase in the use of civil proceedings [redacted]

[redacted] The PII process has been successful to date but with the introduction of new legislation the potential for unforeseen cross-over will no doubt be exploited in some cases. Similar to when the SIAC process was introduced, the criminal court PII process was initially affected and resolved through time and a number of cases together with changes to the approach by police in more appropriate disclosure and revelation processes with prosecutors.

Where issues about disclosure of sensitive information arise in civil claims brought against the MPS, public interest immunity (PII) applications are the usual mechanisms for protecting such information from disclosure. The court may not grant applications for PII where it would result in unfairness to the other party meaning that in civil claims, settlement of the case would have to be considered.

However, where the court permits the non-disclosure of some categories of documents on the grounds of PII in civil claims, it may also allow disclosure of some remaining documents which although sensitive can be disclosed subject to appropriate redactions. Cases may therefore proceed provided that the party receiving the redacted information considers that it does not hamper their case.

Family Proceedings

The MPS also deals with orders for disclosure of highly sensitive documents in family cases involving persons who are in receipt of protective measures for their safety. The documents often refer to criminal investigations where police have investigated alleged threats by one party in the proceedings to harm or kill another party. The sensitive information in such cases has so far been dealt with by the courts using the closed material procedure.

Al Rawi [2011] UKSC 34 held that courts have no common law power to adopt the closed material procedure in ordinary civil claims for damages. It appears therefore that the ruling does not apply to family cases. Family cases are indeed distinct from civil claims for damages in that disclosure of sensitive material is not sought for compensation/ ancillary relief matters but to decide contact and residence applications in relation to minors whose welfare is the paramount consideration. The option of settlement although undesirable in civil claims where the court permits disclosure of sensitive information is not an option in family cases.

If the *Al Rawi* decision is to extend to family proceedings and the closed material procedure is not allowed, family courts would have to determine such applications based on the open material which may not address the serious risk of a party's Article 2 right to life being imperilled by an order for contact or residence made by the court.

9. What role should UK courts play in determining the requirement for disclosure of sensitive material, especially for the purposes of proceedings overseas?

The impetus and driving force behind the question is the decision in the Binyan Mohammed case and the equitable remedy requiring a Respondent to disclose certain documents/information to the Applicant. This is where a Respondent may be involved in wrongdoing by others (innocently or not) and results in an order that documents/information shall be disclosed to the Applicant (the Norwich Pharmacol case).

This is of particular importance to national security as sensitive information produced by foreign states could be released into the public domain either in the United Kingdom or outside the UK jurisdiction. The circumstances where such issues would arise in the context of fighting and preventing crime are perhaps less controversial in that where police have information of wrongdoing the Court can manage the disclosure of such information by the principles adopted in Woolgar. In summary, it is for the information to be assessed and for the Court to adopt a balancing exercise as to whether or not it is in the public interest for such information to be disclosed. There may well be other matters where the interest of Public Interest Immunity may apply but again that is a matter for the Court to determine balancing the interest of disclosure and the public interest. In cases where there are concerns or disputes then the CMP could be adopted by the Courts.

10. What combination or existing or reformed arrangements can best ensure credible, effective, flexible independent oversight of the activities of the intelligence community in order to meet the national security challenges of today and of the future?

The increase in joint working results in police working alongside agencies in the use of covert methods. The police oversight of such methods (regulation of Investigatory Powers Act 2000) is governed by the Office of Surveillance Commissioners (OSC) whilst the agencies are governed by the Intelligence Services Commissioners (ISC). This on occasions results in different and sometimes conflicting advice being provided to practitioners by each of the Commissioners. This has the potential of creating vulnerability in future when sensitive intelligence is to be used in proceedings where police have used one procedure to obtain the information and the agency has used a slightly different procedure to gather the information both following the instructions provided by their respect Commissioners about the same legislation. This situation has not yet arisen the potential could arise in future.

11. With the aim of achieving the right balance in the intelligence oversight system overall, what is the right emphasis between reform of parliamentary oversight and other independent oversight?

No response

12. What changes to the ISC could best improve the effectiveness and credibility of the Committee in overseeing the Government intelligence activities?

No response

13. What changes to the Commissioners' existing remit can best enhance the valuable role they place in intelligence oversight and ensure that their role will continue to be effective for future? How can their role be made more public facing?

A consistent approach in interpretation of legislation would benefit the joint working of police and agency practitioners to ensure no vulnerabilities are created when gathering sensitive information. The publication of documents annually has proved a good approach and a reference point for the public providing transparency of the use of sensitive methods and their oversight in a consistent way.

14. Are more far reaching intelligence oversight reform proposals preferable, for instance through the creation of an Inspector-General?

No response

15. In addition to responding to the consultation questions within the Green Paper, readers are also invited to comment on the analysis contained within the impact assessments.

[redacted] We support, however, that the purpose of these proposals is to seek to improve the current system in respect of Special Advocate concerns.

Yours sincerely

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