

The police under investigation: witness incrimination at the spycops inquiry.

A guide to ‘undertakings’ in the Pitchford Public Inquiry into Undercover Policing.

Introduction

On 27 April 2016 another crucial hearing will take place in London, as part of the Public Inquiry into Undercover Policing. The one-day preliminary hearing is set to decide issues of ‘undertakings’ – what protections will be offered to witnesses giving evidence.

In advance of the hearing, different sets of Core Participants to the Inquiry have made submissions, setting out their legal arguments for the Chair’s consideration. These include the Metropolitan Police Service (MPS), Mark Kennedy, National Police Chief’s Council, Whistle blower Peter Francis, National Crime Agency and the Home Office.

A large group is the non-police non-state Core Participants (NSPCP) – that is, people who are part of the inquiry because they were affected by the police infiltrations.

For this crucial hearing, we believe strongly that every member of the public should have a chance to understand what is at stake. To that end, we have produced this briefing.

It should be noted, that this briefing was produced before the skeleton arguments were presented. These, and the submissions, can be found at the Inquiry website: <https://www.ucpi.org.uk/witness-statements-and-submissions/> under the heading ‘Undertakings’.

What is an undertaking in a public inquiry?

An undertaking is a promise by a relevant authority that evidence given by a witness during an inquiry will not be used against them in subsequent proceedings.

Undertakings are most commonly given by the Attorney General to protect a witness from criminal prosecution. An undertaking can also be sought from disciplinary authorities in respect of disciplinary proceedings.

It is the role of the Chair of an inquiry to determine if an undertaking should be sought; the relevant authority decides whether to grant the undertaking and in what form.

What is the purpose of an undertaking?

A key aim of a public inquiry is to uncover the truth about a particular issue. In order to discover the truth an inquiry is reliant upon witness evidence. Witnesses have a long established legal right to refuse to provide evidence to an inquiry if it could incriminate them (or their spouse or civil partner); this is called ‘the privilege against self-incrimination.’

An undertaking that evidence provided by witnesses will not be used against them in criminal proceedings allows witnesses to give evidence without fear of subsequent prosecution. Without such an undertaking an inquiry may be unable to fulfil its aims as witnesses can rely upon the privilege to avoid providing evidence.

An undertaking enables witnesses to give evidence without fear of subsequent prosecution

There is no privilege against self-incrimination in respect of related disciplinary proceedings. However, although witnesses can in theory be compelled to give evidence, concerns over subsequent disciplinary proceedings can limit the provision of full and frank disclosure. For this reason, undertakings which protect witnesses from subsequent disciplinary proceedings are also sometimes granted during a public inquiry.

How much protection can an undertaking provide?

In recent public inquiries there has been a move towards broad undertakings, some have been equal to the privilege against self-incrimination. **This means that a witness is protected not just from any direct evidence that they provide being used against them, but also from the derivative use of their evidence.** Protection against the derivative use prevents a witness’ evidence being used to decide whether to bring a prosecution against them or to initiate further investigations which might result in criminal proceedings.

This form of undertaking does not provide a witness with absolute immunity from prosecution; evidence which is not protected by the undertaking can still lead to the prosecution of a witness. Additionally, as it only protects against self-incrimination, it still allows evidence provided by a witness to be used in criminal proceedings against a third party.

Finally, if a witness commits an offence during the course of the inquiry, for example perjury, they can be subject to criminal proceedings for this offence.

What are the key issues relating to undertakings in the UCPI?

The UCPI aims to investigate the conduct of undercover officers and the purpose, legality, and management of their operations targeting political activists. **The Inquiry was initiated following grave concerns about undercover policing and it is the abuse of power by the state which is under investigation.**

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In order to meet its aims the Inquiry is dependent on the evidence of non-state witnesses. Without evidence from those who were spied upon it will be impossible for the Inquiry to assess the effect of the operations or to test the evidence provided by state witnesses.

It is recognised that non-state witnesses are victims of serious invasions of privacy. They are participating in the Inquiry to discover the truth about the spying operations against them and in the public interest, to assist the Inquiry in scrutinising these highly criticised police practices. For many, participation in the Inquiry will be painful and will involve disclosure of highly personal information.

During the Inquiry it may be necessary to hear evidence about the political activities of non-state witnesses. It is not uncommon for people engaged in political struggle to take part in activities which may be deemed to be illegal. Many laws have been introduced in order to restrict protest activity. Frequently laws are implemented more harshly against protestors when compared to the wider public. For example a few people handing out leaflets on a wide pavement outside a shop may be arrested for obstruction of the highway, whereas a crowd of people drinking outside a pub and blocking the entire pavement will be left alone. Additionally the law is not clear cut on many issues, for example damage to property which might otherwise be illegal can be lawfully justified if it is carried out to prevent greater harm to others.

From anti-war campaigners to environmental activists, individuals frequently expose themselves to criminal sanctions in fights for justice. Accordingly, it is likely that the Inquiry will hear evidence of activity undertaken by some non-state witnesses which could be deemed unlawful.

It is therefore important to remember that the Inquiry was **not** set up to examine these activities. **Non-state witnesses' are not giving evidence of their activities because their conduct falls to be examined by the Inquiry.** Their evidence is provided solely because it is so closely related to the police activity that it may need to be considered in order to scrutinise state witnesses' attempts to justify the tactics used in undercover operations and the conduct of officers.

The Inquiry was not set up to examine illegal activities of non-state witnesses

There is a danger that in assisting the Inquiry to scrutinise undercover policing operations, non-state witnesses could give evidence which is used to incriminate their friends and comrades. Considering that non-state witnesses are victims of state misconduct and serving a public interest through their participation, this possible consequence is unjustified.

Understandably, awareness of this risk is likely to inhibit non-state witnesses' engagement with the Inquiry. Consequently, **if the Inquiry does not find a way to allow these witnesses to participate without the possibility of exposing others to criminal prosecutions, it is highly unlikely to be able to discover the truth and fulfil its terms of reference.**

If non-state witnesses cannot participate without fear of incriminating themselves or their associates, the Inquiry will not discover the whole truth

A broader undertaking which protects third parties from criminal prosecution arising from witness evidence at the Inquiry could address this problem. However, if this undertaking was universal, it would also prevent the possibility of holding state agents to account for criminal misconduct exposed during the Inquiry. Considering the serious allegations against the police which have led to the Inquiry, it would be hard to justify allowing state witnesses the protection of a broader undertaking.

What undertakings are the police and other state witnesses requesting?

The police and other state witnesses are requesting a blanket undertaking which is equivalent to the privilege against self-incrimination.

The police and Home Office recognise that witnesses may be cautious about giving evidence which relates to associates; they have submitted that the possibility of a wider undertaking should be kept under review. However the Metropolitan Police Service asserts that any broader undertaking should apply equally to all witnesses. It claims this is justified on the premise that the inquiry is a non-adversarial truth finding exercise and all witnesses are giving evidence to enable the inquiry to fulfil its aims. **This view fails to take into account the different positions of state and non-state witnesses: the Inquiry is investigating serious state misconduct; non-state witnesses are participating to enable a full investigation of that misconduct.**

The Inquiry is investigating serious state misconduct and must be able to hold its agents to account.

Finally, the state witnesses submit that they do not wish to seek an undertaking which would prevent future appropriate disciplinary proceedings. While this implies the possibility of some level of accountability, it is important to remember that disciplinary proceedings can only be brought against serving officers and that it is the police and IPCC who have responsibility for initiating any proceedings.

What undertakings are the non-state core participants requesting?

The non-state core participants are also in favour of a blanket undertaking equal to the privilege against self-incrimination.

They further submit that there should be an additional, broader undertaking which prevents non-state witness evidence being used against other non-state witnesses in criminal proceedings. As with the undertaking equivalent to the privilege against self-incrimination, this broader undertaking would cover the direct and derivative use of evidence.

It is submitted that this protection should be asymmetrical and not applicable to state witnesses. Non-state witnesses assert that as the Inquiry is investigating abuse of power by state agents, when wrong doing is uncovered, it should be possible to hold those agents to account under criminal law.

Are there any precedents for a broader undertaking?

It does not appear that a broad undertaking, as requested by the non-state core participants, has been given in previous inquiries. However, the Inquiries Act allows Pitchford to request this form of undertaking if he deems it necessary for the Inquiry to fulfil its terms of reference.

The possibility of a broader undertaking was considered in the Baha Mousa Inquiry into British soldiers' ill treatment of Iraqi detainees. Here, the Chair rejected the need for a wider undertaking on the basis that it went beyond the privilege against self-incrimination. Notably, he recognised that there was a balance to be struck between measures which allowed openness and the need to obtain the relevant facts in a way which enabled those responsible for wrong doing to be held to account. **As the UCPI has been called solely to investigate wrong doing by the state, these concerns would be addressed if Pitchford sought an asymmetrical undertaking from the Attorney General. This would enable non-state witnesses to provide the evidence necessary for the Inquiry to achieve its objectives, while still leaving open the possibility for state agents to be held to account.**

Asymmetrical undertakings are needed, enabling non-state witnesses to participate, and the state to be held to account for misconduct.

Disclaimer: This briefing was prepared to the best of our ability by the support group, Police Spies Out of Lives, and if it contains any factual errors we will endeavour to correct them. Please contact us by email, contact@policespiesoutoflives.org.uk or twitter @out_of_lives