THE LEVESON INQUIRY

WRITTEN SUBMISSIONS
ON BEHALF OF ASSOCIATED NEWSPAPERS LIMITED
WITH REGARD TO THE STANDARD OF PROOF

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1. These submissions are made in response to an invitation by the Chairman to submit written submissions on the approach the Inquiry should adopt in relation to the standard of proof.

2. The 2005 Act does not prescribe what standard or degree of certainty is required before an inquiry is able to express its finding of facts and make its recommendations. It is therefore for the Chairman to decide what standard he should apply when reaching his findings, having regard to the overriding duty of fairness.

3. In ANL's submission the issues to be considered are as follows:

   (1) Whether it is open to the Chairman to express concerns based on suspicion?

   (2) If so, in what circumstances, including, whether the grounds giving rise to the suspicion must be reasonable grounds or whether a lower standard of proof is acceptable, having regard to the duty of fairness?

   (3) Whether it is fair or appropriate when dealing with allegations of a criminal or quasi-criminal nature for the Chairman to state that he finds such allegations proved on the civil standard?

(1) Whether it is open to the Chairman to express concerns based on suspicion

4. In the Note submitted by Counsel to the Inquiry dated 4 October 2011 it was stated at paragraph X(iii): "It would be open to the Inquiry Panel to include within its report concerns, based on suspicion, without being satisfied on the evidence that any particular fact-in-issue has taken place or occurred on the balance of probabilities".

This follows a ruling in The Baha Mousa Inquiry where The Rt Hon Sir William Gage rejected submissions that he could and should not do so and held that it did not lead to any unfairness to "sparingly and with fairness at the forefront of his mind, indicate, where appropriate, that reasonable suspicion remains in relation to an issue", but that the "circumstances in which [he felt] constrained to do so [would]…be comparatively rare".

5. On 1 May 2012 the Chairman in his ruling on the application of Rule 13 of the Inquiry Rules 2006 at §52 identified the question as being:

> "whether I must be sure that the press is guilty of a particular type of egregious conduct, or satisfied on the balance of probability or whether it is sufficient that I consider the evidence reveals such a concern about the conduct that regulatory arrangements should be put in place to deal with that type of behaviour should it arise. … I see force in limiting certain findings to an expression of concern sufficient to generate the need to ensure that a regulatory regime can address that behaviour."

6. In ANL's submission, the Inquiry should plainly not determine issues of fact on a basis of a degree of satisfaction below that of on the balance of probabilities, for example, on the basis of evidence giving rise to a reasonable suspicion.

7. Under s 24(1) of the 2005 Act the Chairman has power to include in his report anything that he considers to be relevant to the terms of reference, including sharing his reasoning or commenting on the evidence, but that power must be exercised fairly. It is submitted that for reasons of fairness this power should be exercised sparingly and subject to the following constraints as a matter of general principle and approach:

(i) The purpose of an inquiry is to inquire into particular events that have caused, or are capable of causing, public concern, or there is public concern that particular events may have occurred (s1(1) of the 2005 Act). The Inquiry is tasked with determining the facts and making recommendations based on those facts (s24(1)). The Inquiry ought not to include its suspicions in the report as this would be likely to increase concern and thereby undermine one of the very purposes of the Inquiry, namely to allay public concern. There would also be a real risk that the public may believe that the true meaning of what is being said by the Chairman is that the suspicion is well founded when

in fact the Chairman has made no such finding.

(ii) While an inquiry chairman has power to include in his report any statements that he considers to be relevant to the terms of reference, it is important to define in what circumstances it is fair for the chairman to report suspicions even before he has satisfied himself that they are proved. As a corollary to that, in the circumstances of this Inquiry when would a "concern based on suspicion" be relevant to informing the Inquiry's recommendations?

(iii) It is defamatory to state of any person that they are suspected of discreditable conduct. A statement that publishers within a section of the national press are suspected of discreditable conduct is defamatory of all publishers who are reasonably capable of being considered as within that section. Furthermore, it is defamatory of those individuals who are responsible for the content and governance of those publications and on whom it might well be said the allegations truly reflect. It would be unfair for the Inquiry to make any finding of suspicion without being satisfied that such a finding was justified as a matter of evidence and proper inference against all those who might reasonably be considered the subject of the adverse suspicion. Where the value of such conclusions is of such limited significance, the injury to the reputation of publishers and individuals must weigh heavily in the balance and the graver the conduct at issue, the more important it is have regard to the injury to reputation.

Although the Chairman has stated that he does not expect to make any statement expressing suspicion in relation to the conduct of individuals (§62 Ruling on Application of Rule 13), it must be borne in mind that publishers and their titles are controlled by individuals, and the individuals who are responsible for the culture and content of their titles will inevitably be understood to be the focus of any criticism directed at publishers. It is respectfully submitted that it is unreal in this context for the Chairman to state that "corporate criticisms…in the wider context of the culture, practices and ethics of the press should not be interpreted without more as implying any individual criticisms" (§27 Ruling on Rule 13). If the damage to an individual attaching to a finding of suspicion is thought to justify the imposition of no lesser standard than the civil standard, in ANL's submission, by the same reasoning it would be unfair to attach such a finding to a publisher.

(iv) The circumstances in which the existence of a suspicion entitles an inquiry chairman to repeat a suspicion even before he satisfies himself that the suspicion is proved must be very limited. Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'. As the Chairman has stated "The purpose [of the Inquiry] (as defined by the Terms of Reference) is specifically to be able to make recommendations about an effective regulatory regime which itself requires me to look primarily at whether the present regulatory regime has either succeeded or failed: that is the reason why a narrative of facts is essential" (§20 Ruling on Application of Rule 13). Unresolved suspicions do not provide a sufficient evidence base for conclusions, in particular as to "whether the present regulatory regime has either succeeded or failed", or otherwise provide a sufficient degree of certainty to justify recommendations. Where the Inquiry has had the opportunity to determine the facts (and is not constrained, for example, by ongoing or reasonably foreseeable criminal proceedings), the Inquiry should not dispense with its obligation to make recommendations based on established fact.

(v) There is a clear contrast between a situation where a public complaint about press conduct has been made and a need to consider whether the regulatory regime effectively addressed that complaint and a situation in which an inquiry reports that there are unresolved suspicions that publishers may actually have committed the conduct in question. How the industry and PCC responded to complaints submitted to them or made in public about press conduct is obviously relevant to the effectiveness of self-regulation, and it is not necessary to determine whether the complaints were objectively merited (although the scope and extent of the evidence submitted is important to any analysis of whether the responses by the industry and PCC were appropriate). Other than in these circumstances, in ANL's submission, unresolved suspicion does not without more advance the Inquiry's analysis or justify recommendations. The Chairman has said that "[he sees] force in limiting certain findings to an expression of concern sufficient to generate the need to ensure that a regulatory regime can address that behaviour". It is submitted, however, that consideration of what complaints and press conduct the regulatory regime should in principle be able to address does not require the Chairman to express suspicions that such conduct has taken place or such

practices exist, and that it would be unfair to do so on such a thin justification for the reasons set out above.

(2) Whether the grounds giving rise to the suspicion must be reasonable grounds or whether a lower standard of proof is acceptable?

(vi) As was held by Sir William Gage, the grounds giving rise to the suspicion must be reasonable and the Chairman must be satisfied that there are, as a matter of objective fact, reasonable grounds for suspecting that the (identifiable) publishers have committed the conduct in question. This, it is submitted, must be right for the following reasons: (i) by repeating a suspicion or reporting that "I consider the evidence reveals that.." the Chairman is adding his authority to the suspicion and implying at a minimum that there are reasonable grounds for the suspicion; (ii) a mere subjective standard (which does not import an objective standard of reasonableness) cannot on any view provide a proper basis for conclusions which address the terms of reference; (iii) it would be contrary to the Chairman's statements that it is essential "to obtain a sufficient narrative account of what has transpired to provide a basis in the evidence for conclusions" and unnecessary to have adduced the evidence in Module 1 if mere assertion or bare belief were sufficient.

(vii) When considering what evidence can provide objective grounds, the principles relating to the publication of allegations of 'reasonable grounds to suspect' in defamation cases and the applicable standard of proof provide real assistance. Under the law of defamation an allegation that there are reasonable grounds to suspect someone of discreditable conduct may not be justified merely by reliance upon rumour or hearsay, without any need to make the underlying allegations good. The mere fact that someone has said that a claimant has done something discreditable, or that someone believes it to be so, cannot in itself constitute reasonable grounds to suspect as subjective views and judgments cannot justify what is alleged to be objectively credible. Anyone is entitled to believe what third parties tell them, but such belief does not establish that what is reported is objectively credible.

(viii) The approach to proof of justification in 'reasonable grounds to suspect' cases was summarised by the Court of Appeal in *Musa King v Telegraph Group*

Limited [2004] EWCA Civ 613 and *Shah v Standard Chartered Bank* [1999] QB 241 as follows:

(1) Where the nature of the plea is one of "reasonable grounds to suspect" it is necessary to plead (and ultimately prove) the primary facts and matters giving rise to reasonable grounds of suspicion objectively judged;

(2) It is impermissible to plead as a primary fact the proposition that some person or persons (e.g. law enforcement authorities) announced, suspected or believed the claimant to be guilty;

(3) A defendant may (for example, in reliance upon the Civil Evidence Act 1995) adduce hearsay evidence to establish a primary fact - but this in no way undermines the rule that the statements (still less beliefs) of any individual cannot themselves serve as primary facts. (It will not do to regurgitate allegations from newspaper articles and add the assertion that the allegations are credible: *Shah v Standard Chartered Bank* [1999] QB 241 (Hirst LJ), 269-270 (May LJ));

(4) Generally, it is necessary to plead allegations of fact tending to show that it was some conduct on the claimant's part that gave rise to the grounds of suspicion;

(5) It was held by the Court of Appeal in *Chase v NGN Ltd* [2002] EWCA 1772 that this is not an absolute rule, and for example strong circumstantial evidence can itself contribute to reasonable grounds for suspicion;

(6) A defendant may not confine the issue of reasonable grounds to particular facts of his choosing, since the issue has to be determined against the overall factual position as it stood at the material time (including any true explanation the claimant may have given for the apparently suspicious circumstances pleaded by the defendant).

(ix) In ANL's submission the Inquiry has to address as a minimum the inherent credibility of the underlying facts. What others have said about those facts does not advance their inherent credibility, nor does bald assertion of credibility.

Expression of suspicions in respect of voicemail interception

(x) There has been no focused investigation of whether voicemail interception

extended beyond the NOTW, or that there was knowledge of such conduct, sufficient to make a finding of fact that there was such a culture or practice within the press. Equally, in ANL's submission there has been no investigation sufficient to make a finding that there are reasonable grounds to suspect such practice or such knowledge (which, it is submitted, is to the same effect as the Chairman's formulation: 'that there is a real risk..''). Whether suspicions exist on grounds that are objectively reasonable needs to be determined against the overall factual position. It would be unfair to include in the Inquiry's report a statement to the effect that the Inquiry finds that publishers within the press are suspected of such practices or of such knowledge on grounds that are reasonable on such a partial investigation. Further, absent knowledge on the part of senior executives within the industry or the PCC, a statement to the effect that the Inquiry suspects voicemail interception extended beyond one title does not take forward the analysis of whether the regulatory regime was effective – and without 'where and when' whether there has been a failure of corporate governance at titles other than the NOTW.

(xi) In accordance with ANL's earlier submissions on Rule 13 any general statement that there are grounds to suspect senior executives within a section of the national press of knowledge, concealment or acquiescence (and impliedly, in some cases, dishonest misrepresentation) raises very serious reputational issues for those senior personnel reasonably considered by the public to be within that section of the press (and, as previously submitted, anyone reading such a reference in the report will reasonably understand the relevant "section" to be the tabloid or popular press). Such statements should not be advanced unless the evidence discloses that there are objectively reasonable grounds to suspect those executives of knowledge - which it cannot as there has been no proper investigation of this issue.

Inclusion in report of evidence base for suspicion

(xii) If, contrary to the submissions above, the Inquiry proposes to include a general criticism amounting to suspicion against some publishers, the specific evidence, and the limits of it, giving rise to the suspicion must be made clear in the report. For example, it would be unfair and invidious if a conclusion to the effect that the Chairman considers that there are reasonable grounds to

suspect that voicemail interception extended beyond the NOTW might be reasonably understood to be based on evidence called by the Inquiry which did not form part of the Chairman's evidence base justifying such a conclusion, either because it did not give rise to reasonable grounds objectlvely judged or because the Chairman made an express decision not to investigate such evidence. Where the Inquiry has called evidence, which might be said to support such a conclusion but does not in fact provide reasonable grounds objectively judged, the Inquiry should be careful to acquit such evidence, and identify in the report the evidence relied on as establishing the grounds for its suspicion consistent with the approach set out at §41-43 of the Chairman's Ruling on Application of Rule 13.

(3) Is it fair or appropriate when dealing with allegations of a criminal or quasi-criminal nature for the Chairman to state that he finds the allegations proved on the civil standard?

8. Where the Chairman is considering specific examples of practices which might be illegal by identifiable titles and individuals that are said to support general criticisms, examples of which are set out at §47 of the Ruling on the application of Rule 13, it is accepted that the Chairman is not limited to making findings of fact to the criminal standard in relation to the alleged criminal and quasi-criminal activity, but may where appropriate, and subject to fairness, find a fact proved on a balance of probabilities. However the Chairman should (a) make clear the standard of proof (be it civil or criminal) to which he has been satisfied in making the relevant finding; (b) that where the evidence is only sufficient to establish the civil standard, that it is made clear that the evidence is not sufficient to meet the criminal standard; and (c) have in mind that although the civil standard of proof is the balance of probabilities, the more improbable an allegation the stronger must be the evidence that it did occur before, on the balance of probabilities, its occurrence will be established.

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