

<p>1 Monday, 31 October 2011 2 (10.30 am) 3 LORD JUSTICE LEVESON: We're in this court today for want of 4 room rather than for any other reason. 5 Right, this hearing is intended to deal with 6 a number of issues that remain outstanding. They 7 include further applications for core participant 8 status, the issue left over from last week in relation 9 to the submissions made by the Commissioner of the 10 Metropolitan Police and the Director of Public 11 Prosecutions, and the issue of the approach made to the 12 Inquiry by those who would like to give evidence 13 anonymously. 14 Is it sensible to deal with the matters in that 15 order, so that those who don't wish to remain for the 16 rather more detailed analyses need not do so? 17 Let me just start first, on that basis, with 18 Mr Beggs. 19 MR BEGGS: Sir, are you asking me the question or would you 20 like me to make the application? 21 LORD JUSTICE LEVESON: I think that you can make the 22 application. I've seen your detailed submissions on 23 behalf of Surrey Police. I think it's important to 24 appreciate the limit of the remit of this Inquiry at 25 this stage and to emphasise that I do not anticipate</p> <p style="text-align: center;">Page 1</p>	<p>1 the police during the course of that investigation. 2 Submissions by MR BEGGS 3 MR BEGGS: Sir, that's very helpful. It was never our 4 intention that our core participant status or applicant 5 status would touch upon the murder investigation itself. 6 We've always understood that that would be far removed 7 from your concerns. 8 Our concern, as you probably anticipate, was the by 9 now iconic status of the revelation on 4 July this year 10 that Milly Dowler's mobile telephone had been -- to use 11 the common word -- hacked, and the suggestions that have 12 been made most vividly on 14 October, just a few days 13 ago, by the Independent newspaper that Surrey Police 14 were at fault for failing to investigate 15 News of the World's activities after the Milly Dowler 16 investigation was put on ice or whatever. That's the 17 ambit of our concern. 18 Naturally, I and my clients who sit behind are 19 reassured to hear from you that you wouldn't be getting 20 into any further detail or be likely to criticise 21 Surrey Police, but I should say on that latter point our 22 concern remains very live, because not only do we have 23 national newspapers criticising Surrey Police in very 24 strong terms, I'm not sure if you've seen the article on 25 14 October where one of the core participants in this</p> <p style="text-align: center;">Page 3</p>
<p>1 that I will be going to great detail or indeed any 2 detail about the way in which the Surrey Police 3 investigated the murder of Milly Dowler. I have read 4 the terms of reference really to encompass the 5 investigation by the Metropolitan Police of phone 6 hacking, rather than the investigation of a murder, 7 which has, as its byproduct, the extent to which it was 8 appropriate to run down what in that investigation would 9 have been a side issue, namely how News of the World 10 obtained information about Milly Dowler's mobile phone. 11 If I were to go into the sort of detail that your 12 submission visualises for each victim, I think I would 13 be engaged for an extremely long time. 14 The reason I suggested that it was sensible for you 15 to make an application publicly was so that I could 16 share with you the four corners of what I wanted to do, 17 rather than allow you to proceed on a misunderstanding 18 of where I should be going. 19 I have no doubt that a police officer may very well 20 feel it appropriate to give some evidence, but I would 21 have thought that that was likely to be the limit of the 22 extent to which I would want to go down that route, 23 merely to identify the issue rather than to try and 24 resolve it. Still less to embark upon anything that 25 would be at this stage critical of the decisions made by</p> <p style="text-align: center;">Page 2</p>	<p>1 case criticised Surrey Police. 2 LORD JUSTICE LEVESON: Mr Beggs, the interesting impact of 3 this Inquiry into the press has caused as much press 4 comment as the subject matter of the Inquiry. I'm 5 afraid that everybody is going to have to get used to 6 comment and opinion being expressed in the public domain 7 and grin and bear it. 8 I have been surprised by some of the things that 9 have been put in the public domain about me, but I am 10 prepared to accept it. That's what a free press is all 11 about. 12 MR BEGGS: Certainly, sir. I'm simply making the point so 13 that you can better understand why the Chief Constable, 14 as he now is, the acting Chief Constable, would be 15 concerned to protect his legitimate interests in 16 relation to the allegations being made, the byproduct, 17 as you rightly described it. 18 If you're saying, sir, that that byproduct, in other 19 words what was done by Surrey Police in 2002 about the 20 revision that News of the World agents had hacked into 21 Milly's telephone will not surface in part one, then 22 I probably won't have very much more to say to you. 23 LORD JUSTICE LEVESON: Yes. I'm not saying that I wouldn't 24 like to know the answer to the question. Namely: was 25 consideration given to an investigation, and, if so, how</p> <p style="text-align: center;">Page 4</p>

<p>1 that spun out? That may be part of the general 2 narrative, but I will not be going into the detail, I do 3 not apprehend, and I'll ask Mr Jay whether I've 4 understood my own responsibilities accurately. That's 5 why I wanted it done in public, because to do so would 6 take me down a road which would take too long and be 7 insufficiently productive to the ultimate issue that 8 I have to address, which is the recommendations that 9 part one requires me to make. It may be part two would 10 be different, and I'm not suggesting that I wouldn't be 11 very interested if it was said -- which I don't believe 12 for a moment it will be said -- that the Surrey Police 13 in some way did not investigate for reasons to do with 14 the relationship with the press, but I'd be surprised if 15 that was suggested.</p> <p>16 MR BEGGS: It already has been suggested, explicitly, in the 17 media. To some extent, it's now being pursued via 18 a parliamentary route, namely the Home Affairs 19 Committee, which I don't know the extent to which, sir, 20 you're aware that Surrey Police are now being subject to 21 close questioning in correspondence from Mr Keith Vaz? 22 LORD JUSTICE LEVESON: I'm not aware of that, but -- 23 MR BEGGS: May I just deal with it only as a matter of 24 courtesy? 25 LORD JUSTICE LEVESON: Yes.</p> <p style="text-align: center;">Page 5</p>	<p>1 More importantly, may Surrey Police be the subject 2 of explicit or significant criticism during the 3 proceedings or in any of your reports, final or interim? 4 Sir, I confine my oral representations very shortly 5 just to that one point, without prejudice to what we say 6 are good points made in relation to 5(2)(a) and 5(2)(b), 7 you have them in writing, I can't improve upon them.</p> <p>8 To some extent, sir, you've already identified in 9 the exchanges we've just had that you will want to 10 know -- you are likely to want to know the answer to the 11 question: what Surrey Police did upon learning of 12 News of the World's intervention. Without going into 13 that detail, for the very good reason it's still being 14 investigated by those who instruct me, it's not 15 difficult to see how the test, may Surrey Police be 16 subject to criticism, is satisfied.</p> <p>17 The reason I was citing the Independent, was not to 18 criticise free speech in the press, or indeed that 19 newspaper, but simply to give you an illustration of an 20 agenda that is out there in public debate, which is 21 likely to gain momentum. Indeed, it was heralded a few 22 months earlier by another core participant, as 23 I understand it, Mr Chris Bryant MP is a core 24 participant. If I'm wrong about that, I apologise. 25 LORD JUSTICE LEVESON: Yes, he's a core participant in</p> <p style="text-align: center;">Page 7</p>
<p>1 MR BEGGS: One of the other less important -- but 2 nonetheless still important -- reasons for the 3 Chief Constable wanting us to attend today was simply to 4 record that if, as seems likely, we embark or continue 5 to embark upon correspondence with Mr Vaz, as is 6 probably the Chief Constable's public duty within 7 limits, such as contempt and prejudiced by proceedings. 8 Then the acting Chief Constable wants you to understand, 9 sir, that no discourtesy is intended towards this 10 Inquiry if another Inquiry -- which is also moving 11 rapidly -- starts to ask us penetrating questions.</p> <p>12 LORD JUSTICE LEVESON: That's entirely understandable, and 13 no discourtesy will be taken at all. I well understand 14 the enormous pressures that large numbers of different 15 people are under, not least because of the police 16 investigation, the Home Affairs Select Committee and the 17 general political debate as well as the debate in the 18 press.</p> <p>19 MR BEGGS: Sir, I don't want to take -- 20 LORD JUSTICE LEVESON: I will want to see evidence, not mere 21 argument. 22 MR BEGGS: Certainly. Sir, I don't want to take unnecessary 23 time when you have a busy agenda, but can I focus on the 24 limb under rule 5(2)(c), the potential for criticism of 25 Surrey Police.</p> <p style="text-align: center;">Page 6</p>	<p>1 relation to the allegation that he has been the subject 2 of phone hacking, but the Independent aren't, in fact, 3 core participants.</p> <p>4 MR BEGGS: No, but they quoted a core participant, who is 5 a lawyer -- 6 LORD JUSTICE LEVESON: Yes, but I don't believe that 7 Mr Bryant will be coming to this Inquiry to talk about 8 his views of other cases in which he is not personally 9 involved. I would be very surprised if he was.</p> <p>10 MR BEGGS: No, no. That wasn't my purpose in referring to 11 him. My purpose was to give you another illustration 12 beyond that in the Independent. I'll hand you up the 13 article up if you wanted to look at it for yourself, but 14 on 18 July of this year, which coincided with the very 15 public demise of several senior police officers from the 16 Metropolitan Police, that member of Parliament, in 17 questioning the Home Secretary, asked whether she would 18 ensure that there is: 19 "A proper investigation into the Surrey Police and 20 what happened between the police officers in charge of 21 the investigation following Milly Dowler's disappearance 22 and death and News of the World and other journalists at 23 the time." 24 He went on to say: 25 "I do not think that the collusion was only in the</p> <p style="text-align: center;">Page 8</p>

<p>1 Metropolitan Police." 2 He's using his rights in parliamentary context to 3 allege -- make a serious allegation against my 4 clients -- 5 LORD JUSTICE LEVESON: I understand that, and I will be 6 seeking from ACPO evidence in relation to one of the 7 limbs, which is the relationship between the press and 8 the police. I don't limit that Inquiry to the 9 Metropolitan Police, and I will be looking for some 10 material. 11 Even if I engage with Surrey Police, or 12 Surrey Police may want to submit evidence; it doesn't 13 have to be as a result of my using my powers under the 14 Act, or indeed inquiring -- anybody is entitled to put 15 evidence before me who wishes to. Whether we use it, 16 that's the decision that I will make with the assistance 17 of the Inquiry team. That's a very, very limited remit, 18 and indeed, if there were to be -- first of all, if 19 there was a witness who was going to come along to 20 criticise the Surrey Police, the rules make it 21 abundantly clear that anybody acting for the 22 Surrey Police, you, would be entitled not only to 23 suggest questions that counsel might ask, but also to 24 apply to me to ask questions yourself, whether or not 25 you're a core participant.</p> <p style="text-align: center;">Page 9</p>	<p>1 MR BEGGS: I'm grateful. 2 LORD JUSTICE LEVESON: I'll think about it. 3 MR BEGGS: Particularly, I would invite you to decide only 4 when you've read some of the documents that I'll hand 5 up, because it may illuminate the debate. 6 LORD JUSTICE LEVESON: All right. 7 MR BEGGS: Our involvement would be, may I stress -- indeed 8 as you said -- very limited, principally because we have 9 only one interest and that's the issue that you describe 10 as the by-product, but it's an interest which has 11 already generated interest in the House of Commons, in 12 the media, with sensible and intelligent debate about 13 what Surrey Police did or didn't do. It relates, it's 14 fair to say, to the iconic revelation, which has become 15 the iconic revelation, not just in this country but 16 abroad, so therefore our interest is beyond that of 17 a mere interested observer. 18 LORD JUSTICE LEVESON: You are not in the same position, 19 I readily recognise, as a police force with one alleged 20 hacking victim, because I suppose if there was a tipping 21 point, it may be that the Dowlers provide that tipping 22 point, and I recognise that, but that's not quite the 23 same as saying that the role they will play in this 24 Inquiry creates a larger issue as a result. 25 MR BEGGS: We understand that, sir, and of course your</p> <p style="text-align: center;">Page 11</p>
<p>1 If a witness for the Surrey Police were to give 2 evidence, you would be entitled then to attend to answer 3 questions. If you then wanted to make submissions at 4 the end of the Inquiry, then I've made it clear that 5 under certain circumstances I'll be prepared to receive 6 written submissions from those who aren't core 7 participants. 8 In other words, it seems to me that the interests 9 which I quite understand the acting Chief Constable 10 wants to protect, are amply protected within the rules, 11 without you necessarily being involved throughout, and 12 that's a submission that I have -- that's not 13 a submission from me, it's a proposition which I have 14 put to other people who have sought to become core 15 participants, and who have a remarkable ability to use 16 the facility of making submissions as and when they 17 believe them appropriate. I will listen, but that's not 18 quite the same. 19 MR BEGGS: Sir, a number of points arising from those 20 observations. First of all, our involvement, if you 21 were to grant us core participant status, which 22 I appreciate is currently looking like an uphill 23 struggle for me, but our involvement would -- 24 LORD JUSTICE LEVESON: I'll think about it and I won't 25 decide now.</p> <p style="text-align: center;">Page 10</p>	<p>1 perspective and ours is bound to differ in that regard, 2 because we are concerned to avoid unfairness -- as are 3 you, and as you have repeatedly said -- ensuing 4 inadvertently towards Surrey Police as certain issues 5 become ventilated in the media and then potentially 6 ventilated, even if only in a relatively confined area, 7 in your Inquiry. 8 If we are not core participants, our ability to 9 input evidence, our ability to participate, is 10 undoubtedly less than if we were core participants, and 11 I have already given you the assurance that if you grant 12 it to us, it will be very focused indeed, to use your 13 words from 6 September. Not only because we wish only 14 to be focused, but also for other more prosaic reasons 15 of public funding. 16 I note that in paragraph 15 of your ruling of 17 14 September on the Metropolitan Police Service, one of 18 the reasons you granted them readily core participant 19 status was because they may be subject to criticism, so 20 may we be subject to criticism, even though you at this 21 stage anticipate -- 22 LORD JUSTICE LEVESON: You didn't start a wholesale Inquiry 23 into hacking. 24 MR BEGGS: That is the very point. 25 LORD JUSTICE LEVESON: Well, you didn't. Or maybe you did</p> <p style="text-align: center;">Page 12</p>

<p>1 but even if you did, it was in relation to one specific 2 phone. It wasn't in relation to a complaint which then 3 led to documents which may or may not have been 4 appropriate to investigate further. 5 MR BEGGS: No, but the -- 6 LORD JUSTICE LEVESON: You're in a very different position. 7 I don't think that this is contentious. 8 MR BEGGS: We are in a different position, because we're 9 a smaller force just south of the biggest force in the 10 country, and our involvement, I quite accept, in the 11 Inquiry is less than the Metropolitan Police Service. 12 However, our involvement was in the case which you have 13 accepted as if not iconic, certainly a tipping point. 14 It is that tipping point on 4 July which led two weeks 15 later to two of their most senior officers in effect 16 leaving their jobs in a hurry, and the agenda that is 17 being pursued by some, including those as I've mentioned 18 more than once who are participating, is the suggestion 19 made that, I quote: 20 "The failure by Surrey Police [I'm quoting from the 21 Independent] to pursue the Sunday tabloid meant that 22 phone hacking by its journalists continued for another 23 four years until Metropolitan Police intervened with 24 their arrest of Mulcaire and Goodman." 25 It's not difficult, we respectfully suggest, for you</p> <p style="text-align: center;">Page 13</p>	<p>1 to come to as the only fair conclusion -- that we are at 2 risk of being criticised. Therefore, as a matter of 3 fairness, the word that you repeated in all three 4 previous hearings, it wouldn't be right for us to be 5 denied the ability, albeit in that limited scope that 6 I've mentioned, to participate, in just the same way as 7 the larger force with a bigger involvement has been 8 granted that right. 9 There's one final point, before I try your patience 10 any more, which is this: it's also now emerging, perhaps 11 it was known before, but my instructions are that it is 12 very likely that a number of Surrey Police officers 13 themselves were victims at the time of the launch of the 14 Milly Dowler investigation, that's in March nine years 15 ago, themselves victims of hacking. 16 I don't want to develop that point any further in 17 terms of the detail for reasons that are probably 18 obvious. It's unnecessary to do so, but based upon your 19 previous utterances as to qualification for core 20 participant status, when you add that into the mix, it 21 seems to us that that's not an irrelevant consideration. 22 It may become more relevant as time effluxes and more 23 detail emerges. 24 I just give you that as an additional fact. 25 LORD JUSTICE LEVESON: I understand, Mr Beggs, as I say, it</p> <p style="text-align: center;">Page 15</p>
<p>1 to find at this stage -- if only under that one heading, 2 whereas we advance the submission under all three 3 headings and under general evidence -- that there is 4 a risk that Surrey Police may be criticised. As 5 importantly though, sir, your narrative, as you describe 6 it on 6 September and again on 4 October, from which you 7 launched part two, where we would have -- we say -- an 8 even stronger application for obvious reasons, your 9 narrative needs to be as accurate as humanly possible. 10 Even if our involvement in your narrative was very 11 narrow indeed -- 12 LORD JUSTICE LEVESON: I can do all that without making you 13 a core participant; can't I? 14 MR BEGGS: I accept that, sir. As a matter of fact, you're 15 right about that. I can see that, and I could see that 16 before I made -- 17 LORD JUSTICE LEVESON: Just occasionally, Mr Beggs, it 18 happens. 19 MR BEGGS: Yes. 20 LORD JUSTICE LEVESON: I'm sure it's just an accident. 21 MR BEGGS: That, of course, is not entirely the point when 22 it comes to exercising your discretion under rule 23 5(2)(c), because if on further reflection after today 24 and when you look at one or two of the documents I hand 25 up, you may come to the conclusion -- which we urge you</p> <p style="text-align: center;">Page 14</p>	<p>1 may be -- I will look at whatever material you want. It 2 may be that actually we're dancing a little bit on the 3 head of a pin here, on the basis that I won't make any 4 adverse comment about the Surrey Police without making 5 sure that you and your clients have absolutely every 6 opportunity to deal with it. Anything that 7 Surrey Police can do to make sure that my narrative is 8 accurate, Surrey Police will have the opportunity to do 9 and I will expect and hope that they would take it, 10 whether or not they are formally involved as core 11 participants. 12 MR BEGGS: Sir, in the light of that very helpful 13 indication, I'll now sit down, having, as I say, 14 formally made the application. 15 LORD JUSTICE LEVESON: Hand me whatever material you'd like 16 me to look at, and I shall look at it. 17 MR BEGGS: Thank you very much. 18 LORD JUSTICE LEVESON: Thank you very much indeed, Mr Beggs. 19 Mr Jay, is there anything you want to say about that 20 series of exchanges? 21 Submissions by MR JAY 22 MR JAY: Two points. First of all, as you know, the Dowlers 23 are on the list of witnesses who will be giving evidence 24 in the first week or second week of the Inquiry. Their 25 witness statements aren't available, and we don't know</p> <p style="text-align: center;">Page 16</p>

<p>1 what criticisms they may make, if any, of the 2 Surrey Police. 3 LORD JUSTICE LEVESON: Yes. 4 MR JAY: The second point, and the broader point: how much 5 detail are we going to go in part one of the Inquiry? 6 I deal with this in my written submissions starting at 7 paragraph 28. 8 LORD JUSTICE LEVESON: Yes. 9 MR JAY: Maybe the heart of the matter is to be found in 10 paragraph 32. It's the difference really between 11 a microscopic approach, which would plainly be mandated 12 by the part two terms of reference, and what we might 13 call the macroscopic approach, which no doubt you will 14 be adopting for part one purposes. 15 LORD JUSTICE LEVESON: Yes. 16 MR JAY: I have nothing to add orally to paragraphs 28 and 17 following of my written submissions, but I draw 18 attention to them. They are there in the public domain. 19 LORD JUSTICE LEVESON: All right. Thank you very much 20 indeed. 21 I have received other applications for core 22 participant status. They come under slightly different 23 headings. There has been an application by the 24 National Union of Journalists, and there have been 25 applications, one of which I have previously granted,</p> <p style="text-align: center;">Page 17</p>	<p>1 representations at every occasion that issues arise it 2 for me to make a decision. I will decide whether in my 3 discretion to allow submissions on a case-by-case basis, 4 and it may be that submissions in writing will be 5 sufficient. But other than that, I don't think it's 6 necessary to go. 7 Does anybody else want to say anything else on the 8 subject of core participant status? 9 Thank you. 10 Mr Beggs, you're very welcome to stay. If you wish 11 to, and listen to the other not unimportant issues, one 12 of which concerns the extent to which the Inquiry can 13 use material that is presently being looked at by the 14 police in connection with their investigation, but if 15 you don't want to, it won't in any sense be considered 16 discourteous. 17 MR BEGGS: Thank you. 18 LORD JUSTICE LEVESON: Right. I think that we will now move 19 on to the submissions made on behalf of the 20 Metropolitan Police from the Crown Prosecution Service. 21 I wonder whether -- and I'm open to suggestions -- 22 it's not sensible to start that with Mr Garnham rather 23 than Mr Jay, but I think that's probably easiest, and 24 then I'll hear Mr Jay at the end. 25 MR GARNHAM: Sir, thank you.</p> <p style="text-align: center;">Page 19</p>
<p>1 but will formally grant, from the two other media 2 groups. That is to say, the Telegraph and 3 Trinity Mirror, not, as I understand it, the 4 Independent. 5 I don't think I need trouble any of the persons who 6 make those applications to do so more formally. It's 7 impossible to distinguish between Trinity Mirror and 8 the Telegraph on the one hand and those whom I've 9 granted core participant status representing publishers 10 on the other, or editors, on the other. I do see the 11 National Union of Journalists as having a different 12 window on the subject matter of part one of this 13 Inquiry. I shall deal with all those by granting them, 14 but I shall reduce my reasons into writing so that it's 15 clear for everybody to see. 16 I shall look at the material that Mr Beggs has 17 produced and has asked me to before making a decision 18 about Surrey Police. 19 I shall also add a comment about the role that core 20 participants have and the role that they don't have in 21 connection with the Inquiry. I have said that there is 22 no bright line, and that might have been slightly 23 misunderstood because I don't intend that those who 24 might be affected, but who are not core participants 25 will necessarily be given the chance to make</p> <p style="text-align: center;">Page 18</p>	<p>1 LORD JUSTICE LEVESON: Thank you very much for the document 2 that, as it were, put it all together in one place. 3 I hope everybody has had the chance to read them, 4 because it struck me that if I asked -- I mean, the 5 reason I suggested that you should start is that Mr Jay 6 would then feel inevitably necessary to go into what 7 you've said, and whereas we can take what you've said as 8 read and then get into the detail more quickly with you 9 and then we'll work out where we are. 10 Submissions by MR GARNHAM 11 MR GARNHAM: Thank you, sir. I should say that for too 12 today's purpose, unlike last time, I represent both the 13 MPS and the CPS. 14 LORD JUSTICE LEVESON: Right. 15 MR GARNHAM: I don't repeat the submissions that we made 16 collectively either on the 26th or on the 28th in 17 writing. We stand by all of the points made in those 18 two documents, sir. 19 LORD JUSTICE LEVESON: Yes. Can I test that, but at some 20 stage. I'll let you run up to the wicket first, there 21 are some concerns I have about a number of the things 22 you've said, but develop it as you wish first. 23 MR GARNHAM: Sir, thank you. You will understand that I am 24 in a difficult position in one important respect. 25 Neither the MPS nor the CPS can safely enter a debate</p> <p style="text-align: center;">Page 20</p>

<p>1 about abuse of process and perhaps contempt by reference 2 to the facts of the particular cases with which you're 3 concerned. 4 We can't be contending before you that certain 5 actions would ground an abuse of process argument when 6 the CPS may have to argue for the exact opposite in some 7 other tribunal. 8 LORD JUSTICE LEVESON: Let me make it abundantly clear. It 9 is not in the remotest bit surprising that the police 10 and the CPS should wish to argue for a default position 11 that was as minimal as could possibly be devised. It 12 doesn't surprise me that you do that. 13 MR GARNHAM: No, sir. 14 LORD JUSTICE LEVESON: It does not involve, in my judgment, 15 a concession of any sort that to exceed the minimum will 16 give rise to the remotest possibility of a successful 17 argument on abuse of process. 18 MR GARNHAM: Sir, I'm grateful for that indication, but our 19 concern is that some other judge in some other court may 20 be invited to take the submissions that I make on 21 behalf, particularly of the CPS today, as a useful 22 starting point for submission of -- 23 LORD JUSTICE LEVESON: I think that would be utterly to 24 misunderstand what is going on. I say that publicly on 25 the record to identify my anxiety that you do put the</p> <p style="text-align: center;">Page 21</p>	<p>1 MR GARNHAM: Absolutely, and I don't for one moment invite 2 you to do that. Nonetheless, we are in the peculiar 3 position, because of the stance that I am on 4 instructions taking, that you will have to do that 5 testing against the specifics for yourself without 6 receiving from the MPS and the Crown Prosecution Service 7 detailed factual submissions on the circumstances of 8 this case, because we will not do that. 9 LORD JUSTICE LEVESON: Well, that's -- 10 MR GARNHAM: That has to be a matter for us on this 11 occasion, sir. 12 LORD JUSTICE LEVESON: Yes, yes, I can't make you say 13 anything. I can make you do lots of things, but I can't 14 make you say anything. 15 MR GARNHAM: No. Sir, you understand the starting point of 16 these submissions? 17 LORD JUSTICE LEVESON: No, no, absolutely. 18 MR GARNHAM: The short response to the invitation you issued 19 last time is that we say the Inquiry ought not, as 20 a matter of principle, rehearse any evidence during part 21 one that's likely to prove central to the criminal 22 proceedings. We say that whether it is by way of public 23 disclosure of key documentation or by receipt of oral 24 evidence. 25 We say that to do so will create a risk -- and</p> <p style="text-align: center;">Page 23</p>
<p>1 case as forcefully as you feel it can possibly be put, 2 in such a way that does not in any sense suggest that 3 less -- that a decision that I make necessarily cuts the 4 line as to what you can argue or as to what a court may 5 articulate. 6 MR GARNHAM: I'm grateful for that and I'm particularly 7 grateful that you say that publicly, because that will 8 provide some comfort, but nonetheless both the MPS at 9 the senior level and the Director of Public Prosecutions 10 have given careful consideration to the extent to which 11 we can make submissions on the facts of this case 12 without running unnecessary risks. As a result the line 13 I am going to draw is a fairly firm one in not going 14 into the facts of this case. 15 LORD JUSTICE LEVESON: Well -- 16 MR GARNHAM: I will make submissions in the generality, but 17 not specifics. 18 LORD JUSTICE LEVESON: I understand that, and I don't ask 19 for submissions on the specifics. I will test the 20 generality. Of course, ultimately I have my own 21 statutory responsibilities and my own statutory powers. 22 MR GARNHAM: Yes. 23 LORD JUSTICE LEVESON: It would be an abrogation of those 24 responsibilities if I were simply to delegate or defer 25 the decision-making to the police.</p> <p style="text-align: center;">Page 22</p>	<p>1 that's the highest I'm prepared to put it -- of 2 prejudice to the investigation and to any subsequent 3 criminal proceedings. 4 We say that, with respect, neither we nor you can 5 pre-judge what another judge will make of the effects or 6 significance of evidence that has not yet been heard, 7 but which we're debating in the abstract. We say 8 nonetheless that the risk is a real one. 9 LORD JUSTICE LEVESON: I can do a bit of pre-judging, can't 10 I, because there's a wealth of authority on the subject? 11 MR GARNHAM: There is, sir, but as we in the note all that 12 authority is backward-looking and you're 13 forward-looking. 14 LORD JUSTICE LEVESON: Yes, I know, but even I am in 15 a position to visualise what I might do and what I might 16 say and put myself then in the position of a criminal 17 judge reviewing the law as it exists to decide whether 18 there is a risk of prejudice. 19 MR GARNHAM: Yes. What is difficult for you -- 20 LORD JUSTICE LEVESON: It's not my job, of course, 21 ultimately it will be a different judge to make it, but 22 that's what judges do all the time. 23 MR GARNHAM: What I say is difficult for you to do is to 24 anticipate what answers your team will obtain from the 25 questions you put based on the documentation we're</p> <p style="text-align: center;">Page 24</p>

<p>1 talking about.</p> <p>2 LORD JUSTICE LEVESON: Yes.</p> <p>3 MR GARNHAM: You might know what they are going to put and</p> <p>4 you might be in a position -- sir, you will be in</p> <p>5 a position to control that, but you're not in a position</p> <p>6 to control the answers you receive, and it's the answers</p> <p>7 that concern us most.</p> <p>8 LORD JUSTICE LEVESON: Yes, although everybody will be</p> <p>9 aware, won't they, of the provisions of section 22 of</p> <p>10 the Act.</p> <p>11 MR GARNHAM: Yes. Absolutely. Nonetheless, sir, although</p> <p>12 they are, that still doesn't ensure that you can know</p> <p>13 what answers they'll give. You can't, with respect.</p> <p>14 However scrupulously that provision is applied, we</p> <p>15 are crystal ball gazing when it comes to determining</p> <p>16 what answers you are going to get.</p> <p>17 LORD JUSTICE LEVESON: I absolutely agree. Somebody may</p> <p>18 say, "I exercise my right not to answer that question",</p> <p>19 or somebody might give an answer.</p> <p>20 MR GARNHAM: Or somebody might say, "Not me, guv, but it was</p> <p>21 somebody else and I'll give you the chapter and verse".</p> <p>22 LORD JUSTICE LEVESON: Yes, he might.</p> <p>23 MR GARNHAM: All of which, we say, has certain risk</p> <p>24 consequences. It is for that reason that we make the</p> <p>25 submissions in the way we do.</p> <p style="text-align: center;">Page 25</p>	<p>1 there is relatively little that it could achieve pending</p> <p>2 the conclusion of the IHAP."</p> <p>3 Which was the independent investigation into the</p> <p>4 events in Iraq.</p> <p>5 "... investigations and any ensuing prosecutions.</p> <p>6 It must not be forgotten that serious accusations of</p> <p>7 criminal misconduct have been made against British</p> <p>8 soldiers, both the Baha Mousa Inquiry and the Al-Sweady</p> <p>9 Inquiry followed the conclusion of relevant criminal</p> <p>10 proceedings. There would be an obvious risk of</p> <p>11 prejudice to criminal investigations and proceedings if</p> <p>12 an active public Inquiry ran in parallel with them.</p> <p>13 "Moreover witnesses implicated in alleged abuse</p> <p>14 would be unlikely to give evidence to a public Inquiry</p> <p>15 unless they were first given immunity from prosecution."</p> <p>16 LORD JUSTICE LEVESON: Yes, but there one has to look at the</p> <p>17 dynamic. Here an active public Inquiry is running in</p> <p>18 parallel with a criminal investigation, whether we like</p> <p>19 it or not.</p> <p>20 MR GARNHAM: Absolutely, sir.</p> <p>21 LORD JUSTICE LEVESON: The one thing I can't do is</p> <p>22 effectively shut up shop.</p> <p>23 MR GARNHAM: No, and nor do I invite you to do so.</p> <p>24 LORD JUSTICE LEVESON: I'm not so sure about that.</p> <p>25 MR GARNHAM: No, I most certainly don't. I invite you to</p> <p style="text-align: center;">Page 27</p>
<p>1 You will have seen, sir, I hope in a footnote to our</p> <p>2 submissions reference to the recent Divisional Court</p> <p>3 case of Mousa v Secretary of State for Defence. We say</p> <p>4 that captures pithily in a paragraph the caution that is</p> <p>5 normally exercised with regard to running</p> <p>6 contemporaneously public inquiries and criminal</p> <p>7 investigations. May I read just that paragraph, sir?</p> <p>8 I can pass up a copy of the authority if that helps.</p> <p>9 LORD JUSTICE LEVESON: Yes, I don't think I have that one</p> <p>10 here.</p> <p>11 MR GARNHAM: Can I pass that up to you? I'll also pass</p> <p>12 a copy of that to Mr Jay. No, Mr Jay has a copy.</p> <p>13 (Handed).</p> <p>14 LORD JUSTICE LEVESON: Thank you. Thank you very much.</p> <p>15 MR GARNHAM: This is the Divisional Court consisting of</p> <p>16 Lord Justice Richards and Mr Justice Silber deciding the</p> <p>17 application for judicial review of the Secretary of</p> <p>18 State for Defence's refusal to hold a single public</p> <p>19 Inquiry into allegations of abuse by British servicemen</p> <p>20 in Iraq. I only need to show you paragraph 129, sir, to</p> <p>21 make this general point.</p> <p>22 This is part of the reasoning why a public Inquiry</p> <p>23 was not ordered on the facts of that particular case:</p> <p>24 the court said this:</p> <p>25 "Fourthly, if a public Inquiry were established now,</p> <p style="text-align: center;">Page 26</p>	<p>1 conduct part one of this Inquiry with a weather eye on</p> <p>2 the fact that there are contemporaneous prosecutions,</p> <p>3 and as a result --</p> <p>4 LORD JUSTICE LEVESON: No, pausing there, absolutely.</p> <p>5 MR GARNHAM: As a result -- and I will be delighted if</p> <p>6 I receive a similar enthusiastic agreement to this</p> <p>7 proposition -- to introduce into the public arena new</p> <p>8 material only with great circumspection.</p> <p>9 LORD JUSTICE LEVESON: I don't think I necessarily disagree</p> <p>10 with that. Great circumspection is what I'm trying to</p> <p>11 adopt in relation to all aspects, because there is</p> <p>12 a real public interest in the police investigation, but</p> <p>13 there is a real public interest in moving through this</p> <p>14 Inquiry to deal with the recommendations within part</p> <p>15 one. Recognising that the consequence is, as I have</p> <p>16 said before on a number of occasions, in some regards to</p> <p>17 put the cart before the horse in relation to the</p> <p>18 investigation of facts.</p> <p>19 MR GARNHAM: Of course that's right, sir, but the part one</p> <p>20 was, it would appear, crafted in a manner to try and</p> <p>21 avoid the difficulties that now bubble to the surface,</p> <p>22 and we would invite you in consequence --</p> <p>23 LORD JUSTICE LEVESON: Not avoid; minimise, I think.</p> <p>24 MR GARNHAM: Minimise. Very well, I am happy to adopt that,</p> <p>25 sir.</p> <p style="text-align: center;">Page 28</p>

1 LORD JUSTICE LEVESON: I accept that.
 2 MR GARNHAM: We would invite you to reflect that in the way
 3 in which part one is conducted, by ensuring that the
 4 level of detail to which you descend to describe your
 5 narrative is kept at a high level.
 6 I am immediately troubled by the difficulty
 7 I identified for myself of not straying into the
 8 particular facts, but I think I can probably say this
 9 much, that the sort of documentation that counsel to the
 10 Inquiry were indicating to us was likely to be opened by
 11 them raises precisely these risks.
 12 LORD JUSTICE LEVESON: This was indicated to you when? Some
 13 weeks ago?
 14 MR GARNHAM: Yes.
 15 LORD JUSTICE LEVESON: Yes, I understand the point.
 16 MR GARNHAM: Sir, I say nothing further about that.
 17 Our concern, in case there should be any doubt about
 18 this, sir, is not simply the prospect of pre-trial
 19 publicity generated as a result of this Inquiry. In
 20 other words, we are not looking simply at whether there
 21 is a risk the media might go beyond fair reporting. We
 22 are also concerned with fair reporting; in other words,
 23 with the media entirely properly reporting what happens
 24 in the course of this Inquiry because they are reporting
 25 what your team have made public.

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1 There is in some of what Mr Jay says, it seems to us
 2 with respect, an assumption that our attack is directed
 3 solely on the risk of irresponsible reporting. It
 4 isn't. It is the more difficult to advance in any
 5 public forum, the suggestion that this Inquiry itself
 6 may, by making public that sort of material, cause
 7 a risk to the police investigation and to subsequent
 8 criminal proceedings. I don't shrink from making that,
 9 but it does mean that we would invite you to consider
 10 the question at two levels: one, what's the consequence
 11 of what I as chairman of this Inquiry am going to do,
 12 and two, what's the consequence of both responsible and
 13 irresponsible reporting of what I do?
 14 LORD JUSTICE LEVESON: Yes.
 15 MR GARNHAM: Sir, we've set out in a little detail what we
 16 say about abuse of process in our written submissions
 17 and I'm not going to repeat that. It won't improve the
 18 argument by doing so.
 19 What we would say in summary is that there is, as
 20 yet, and I underline the words "as yet", no rule that
 21 pre-trial publicity is of no concern to a court
 22 considering an abuse argument. It's right, as Mr Jay
 23 points out, that in Abu Hamza, the court went a long way
 24 to suggest that it would be rare circumstances when
 25 adverse extreme publicity fans such a case. We accept

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1 that, but there is as yet no rule that it never will.
 2 LORD JUSTICE LEVESON: No. If you've been in one of these
 3 cases, as I have. One of the ones that some people have
 4 cited, and you are presented with hundreds of pages of
 5 press reporting, you have to compare and contrast that
 6 with the way in which we conduct our criminal justice
 7 system in the country. I agree there is no rule, but
 8 the experience of those who have been involved in
 9 criminal trials -- as I have for some 40 years -- is
 10 very, very telling.
 11 MR GARNHAM: I don't seek to suggest otherwise, sir. That
 12 is plainly -- Abu Hamza was a hard case for the
 13 prosecution, and they were successful, because there had
 14 been extraordinary publicity in that case. I recognise
 15 that and don't seek to invite you to do anything other
 16 than follow it, all I submit is that there is as yet no
 17 rule that it is irrelevant.
 18 LORD JUSTICE LEVESON: Yes.
 19 MR GARNHAM: You will have to, sir, with respect, consider
 20 those points against a background of the twin point
 21 I made earlier, that the concern is not just
 22 irresponsible reporting, but also responsible reporting
 23 of what you have done in the course of adducing evidence
 24 or having Mr Jay adduce evidence to you for the purposes
 25 of part one.

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1 We also refer in our written submissions to the
 2 issue of fade and fading memories and how important that
 3 often is. It's a matter for you, sir, and I say nothing
 4 more about it than these points in abstract: That the
 5 question of fade, especially when it's being considered
 6 in prospect rather than retrospect, is difficult to
 7 gauge, but one can with confidence submit that on the
 8 facts of this case the issues that are likely to be made
 9 public as a result of your Inquiry are going to stay in
 10 the public consciousness, aided, perfectly properly, by
 11 the press, for many, many months. This is not going to
 12 be a two-day wonder on the front page of a couple of
 13 tabloids. This is too important for that, and we invite
 14 you to bear that in mind --
 15 LORD JUSTICE LEVESON: Yes, but that runs literally counter
 16 doesn't it? Because it's too important and therefore it
 17 will generate stuff, but you have to be very careful and
 18 not do very much because of the risk that you will
 19 create. Therefore, I am conducting this Inquiry at
 20 enormous expense not just to the state, but to everybody
 21 who is involved, and I have to be very careful to make
 22 sure that it's worthwhile; haven't I?
 23 MR GARNHAM: You have, sir, but behind the decision to
 24 divide it into two parts lay recognition of that, and
 25 that's why we say in part one you have to be extremely

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1 careful as to the detail to which you go.
2 LORD JUSTICE LEVESON: You don't disagree with my view that
3 part one has to create a narrative upon which I can base
4 the recommendations, if any, that I might make.
5 MR GARNHAM: Absolutely.
6 LORD JUSTICE LEVESON: Otherwise, everybody will say, "Well,
7 this is all ..." I say everybody, I don't quite mean
8 that, but a lot of people will say, "Well, this is all
9 hypothetical and theoretical and not grounded in
10 reality" --
11 MR GARNHAM: You can largely do that, we would submit, sir,
12 by reference to material, and there's a vast amount of
13 it, that's already public domain material. What is
14 being contemplated by the Inquiry team is putting into
15 open a great deal more material which is critical to the
16 investigation the police are conducting and will be
17 important were there to be any prosecution.
18 LORD JUSTICE LEVESON: The police are investigating the
19 activity of specific individuals. I'm not asking
20 numbers at this stage, but specific individuals. You're
21 suggesting that every single piece of paper I or may be
22 interested in, it's Mr Jay who is conducting the case
23 before me, that he may be interested in, should be pass
24 beforehand you and every single name should be filtered
25 through you to make sure there's not a risk, whether or

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1 not that person is the subject of arrest and therefore
2 proceedings against him are active in the
3 Contempt of Court Act, should result in a self-denying
4 ordinance that we can't go anywhere if you put up one of
5 those wonderful red flags.
6 MR GARNHAM: In our 26 October written submissions we
7 offered, for the purposes of discussion with Mr Jay,
8 a suggestion of how this might be managed at a practical
9 level. I don't for one moment suggest that's the only
10 way in which it can be done.
11 LORD JUSTICE LEVESON: No. Your recent -- which is
12 contained in the joint submission now, would actually
13 lead to a risk, I appreciate you say it wouldn't really
14 happen, but a risk that every single piece of paper
15 would retire a separate ruling and could be the subject
16 of a judicial review. This could be the work of
17 a lifetime.
18 MR GARNHAM: It depends on the extent to which Mr Jay
19 intends -- how deep he intends to go with this. I mean,
20 our understanding was that it wasn't going to be a vast
21 quantity of new material as yet unseen by the public
22 that was going to go into the public domain. If that is
23 right, the sort of proposal we advance would be an
24 entirely practical one and it wouldn't cause swamping at
25 all.

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1 Most of the documents, I don't suppose they're all,
2 because I don't know what Mr Jay has, but most of the
3 documents have come from the MPS. They are material
4 that we are already looking at. As a result, the task
5 of identifying whether or not releasing that into the
6 public domain is one that can be -- if the volume is not
7 as vast as I think it is, can be done relatively quickly
8 and efficiently.
9 We're not suggesting -- as you will have seen,
10 sir -- that this is parked in the department of some
11 small number of junior officers who may or may not get
12 around to complying with Mr Jay's requests. Sitting in
13 front of me is --
14 LORD JUSTICE LEVESON: I know who is sitting in front of
15 you.
16 MR GARNHAM: -- a lady who you probably recognise, sir.
17 LORD JUSTICE LEVESON: Yes. I'm very grateful to her for
18 taking the time to come to listen to this when she has
19 many other things to do.
20 MR GARNHAM: She has, but this is important to the Met
21 Police as you will understand. She has indicated to me,
22 to Mr Jay, that she personally will arrange that
23 exercise to be done. That demonstrates not only the
24 importance with which the Met regard this, but also the
25 seriousness which we will apply to consideration of this

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1 sort of material Mr Jay wants to make public. Nothing
2 that we have learned from the Inquiry thus far suggests
3 that Mr Jay proposes the wholesale making public of huge
4 quantities of material. On the contrary. He looks for
5 the critical material and we understand why he would do
6 that and we will help him manage that process.
7 LORD JUSTICE LEVESON: What I am looking for is an
8 indication of length and breadth. I am not interested
9 in identifying people. That certainly may require to be
10 undertaken, but at this stage what I am looking at is
11 a culture --
12 MR GARNHAM: Yes.
13 LORD JUSTICE LEVESON: -- and practice, both of which are
14 certainly within my terms of reference.
15 One of the possibilities -- and I understand the
16 argument -- is that at a senior level activity was
17 condoned, encouraged, authorised, required.
18 Another possibility is that there was no such
19 behaviour at a senior level, but that more junior
20 members of staff or otherwise decided among themselves,
21 or individually, to take an approach to gathering
22 evidence or gathering material which breached either the
23 criminal law and/or an ethical code or both.
24 One possibility might be to say that which of those
25 two it is may not matter, because, in the one case then

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<p>1 the senior staff are involved, and in the other --</p> <p>2 MR GARNHAM: There was a lack of supervision.</p> <p>3 LORD JUSTICE LEVESON: -- there was a lack of supervision</p> <p>4 and oversight which permitted a slightly different</p> <p>5 culture to develop --</p> <p>6 MR GARNHAM: Yes.</p> <p>7 LORD JUSTICE LEVESON: -- the Nelsonian eye or not. It may</p> <p>8 not matter. And for purposes of the future, that may</p> <p>9 not be the most critical decision.</p> <p>10 MR GARNHAM: No.</p> <p>11 LORD JUSTICE LEVESON: I would certainly need, if I went</p> <p>12 down that route, which would not require me to identify</p> <p>13 people, and perhaps need not require me to go into</p> <p>14 precisely what can be established about the knowledge or</p> <p>15 otherwise of individuals, but it would require a very</p> <p>16 clear enunciation of what had been learnt about the</p> <p>17 length and breadth of what had been going on.</p> <p>18 Now, within the public domain there was reference to</p> <p>19 a journal, which identified a vast number of names and</p> <p>20 may or may not, about which I say no more, link</p> <p>21 individuals.</p> <p>22 MR GARNHAM: Yes.</p> <p>23 LORD JUSTICE LEVESON: Now, do you argue that it would</p> <p>24 undermine the work that you want to protect if I were to</p> <p>25 put into the public domain (a) the fact of the</p> <p style="text-align: center;">Page 37</p>	<p>1 LORD JUSTICE LEVESON: Because I didn't want the possibility</p> <p>2 to take you by surprise in court.</p> <p>3 MR GARNHAM: No.</p> <p>4 LORD JUSTICE LEVESON: I am concerned to protect the</p> <p>5 integrity of the investigation. I am also concerned to</p> <p>6 protect the rights of those who may be the subject of</p> <p>7 further proceedings, not merely in relation to their</p> <p>8 evidence, should they give it, but also in relation to</p> <p>9 adverse publicity one way or the other.</p> <p>10 MR GARNHAM: Yes.</p> <p>11 LORD JUSTICE LEVESON: I'm conscious of the points you're</p> <p>12 making, but if I go down that route, then it will</p> <p>13 require the very, very greatest disclosure of length and</p> <p>14 breadth.</p> <p>15 MR GARNHAM: Yes.</p> <p>16 LORD JUSTICE LEVESON: And may require some effort, which</p> <p>17 isn't absolutely designed to further the detail that</p> <p>18 I know the police will want to further in the course of</p> <p>19 their enquiries --</p> <p>20 MR GARNHAM: Absolutely.</p> <p>21 LORD JUSTICE LEVESON: In order to present a picture.</p> <p>22 MR GARNHAM: Sir, work has already begun on that.</p> <p>23 LORD JUSTICE LEVESON: All right.</p> <p>24 MR GARNHAM: Serious work at a high level has begun on that.</p> <p>25 LORD JUSTICE LEVESON: All right.</p> <p style="text-align: center;">Page 39</p>
<p>1 journal -- no, because it's already there -- (b) the</p> <p>2 number of entries --</p> <p>3 MR GARNHAM: No.</p> <p>4 LORD JUSTICE LEVESON: In relation to victims who have been</p> <p>5 identified, they have been identified. I am not</p> <p>6 interested in identifying people whose numbers have not</p> <p>7 been identified, or who may or may not have been the</p> <p>8 subject. Also, the reference to the individuals, not by</p> <p>9 name, but by code, to identify the length and the</p> <p>10 breadth of what I have done, of what has happened.</p> <p>11 MR GARNHAM: No, we would have no objection to that.</p> <p>12 LORD JUSTICE LEVESON: Because in that way -- you might get</p> <p>13 some more instructions.</p> <p>14 MR GARNHAM: I haven't gone wrong yet, sir. The gown has</p> <p>15 not yet been tugged, metaphorically or otherwise.</p> <p>16 LORD JUSTICE LEVESON: Yes, but I can see reaction.</p> <p>17 MR GARNHAM: Yes. Just proving everybody's awake, sir.</p> <p>18 LORD JUSTICE LEVESON: In that way, it may be that the</p> <p>19 detail doesn't actually advance part one.</p> <p>20 MR GARNHAM: With that, sir, we would be entirely happy. We</p> <p>21 have been in recent communication with Mr Jay about</p> <p>22 precisely the possibilities of this.</p> <p>23 LORD JUSTICE LEVESON: Yes, that doesn't entirely surprise</p> <p>24 me.</p> <p>25 MR GARNHAM: No.</p> <p style="text-align: center;">Page 38</p>	<p>1 MR GARNHAM: We are keen, and we have been throughout, to</p> <p>2 find a way to meet the twin objectives of enabling you</p> <p>3 to conduct a proper part one of your investigation and</p> <p>4 for us to keep a live investigation.</p> <p>5 LORD JUSTICE LEVESON: I recognise the point. Although I am</p> <p>6 criticised as not having been a media lawyer, it may be</p> <p>7 that my advantage of having been a criminal lawyer will</p> <p>8 actually bear some fruit. All right.</p> <p>9 MR GARNHAM: I don't think I need to say anything more about</p> <p>10 abuse of process.</p> <p>11 LORD JUSTICE LEVESON: All right.</p> <p>12 MR GARNHAM: I think what I've said about contempt is clear</p> <p>13 enough from our written submissions.</p> <p>14 LORD JUSTICE LEVESON: Yes.</p> <p>15 MR GARNHAM: On Parliament and the sub judge rules, you'll</p> <p>16 see what we say.</p> <p>17 LORD JUSTICE LEVESON: Yes, of course, you used the wrong</p> <p>18 edition of Erskin May. I'm sure you've been told it's</p> <p>19 now an out-of-date edition you have used.</p> <p>20 MR GARNHAM: Somebody has said how well that part of our</p> <p>21 submissions were made and I was delighted that that was</p> <p>22 the case, I am appalled to discover we have the wrong</p> <p>23 edition. Doubtlessly I will listen to Mr Jay explain</p> <p>24 how the change in edition has affected the fundamentals</p> <p>25 of my argument.</p> <p style="text-align: center;">Page 40</p>

<p>1 LORD JUSTICE LEVESON: Now you're trying to tease him. 2 MR GARNHAM: Sir, nonetheless you have the point. 3 LORD JUSTICE LEVESON: Yes. 4 MR GARNHAM: Our concern is that the rules -- as Mr Jay 5 himself says -- as to when proceedings are live is 6 different for the purposes of parliamentary privilege as 7 compared with contempt, and the result will be that 8 there will not be the restraint on, if I can put it that 9 way, on what is said. 10 LORD JUSTICE LEVESON: Or at least there may not be. 11 MR GARNHAM: There may not be the restraint on what is said 12 in Parliament as might be the case elsewhere. The 13 dangers are obvious and, sir, you have the point. 14 I don't think I need to say anything about 15 self-incrimination beyond what we've said in writing. 16 LORD JUSTICE LEVESON: Yes, of course. It may be that even 17 if some of these witnesses are not called in relation to 18 the specifics of module one, some witnesses who may or 19 may not be suspect could very well fall into the frame 20 in relation to that module of part one that deals with 21 the relationship between the press and politicians. 22 MR GARNHAM: It may. 23 LORD JUSTICE LEVESON: In which event there could be no 24 concern, because that's not a feature of an 25 investigation which you're conducting, as I understand</p> <p style="text-align: center;">Page 41</p>	<p style="text-align: center;">Submissions by MR CAPLAN</p> <p>1 MR CAPLAN: Thank you very much. Sir, I apologise that our 2 submissions were sent and distributed late. 3 LORD JUSTICE LEVESON: No, well, I understand that the time 4 has been difficult for you and I'm sorry that I couldn't 5 accede to putting off the argument, but you will 6 understand why not. 7 MR CAPLAN: Indeed. 8 Sir, what we attempted to do in relation to the 9 matters which you are currently considering, the abuse 10 of process and contempt, is to simply summarise the 11 legal principles as we see them and to, I hope, give 12 some assistance to you in that way, although I'm sure 13 much of this, if not all of it, is very well-known to 14 you. 15 I think the conclusion which we come to, if it is of 16 assistance, is in paragraph 6 of our submissions, where 17 we respectfully suggest, of course, that you have 18 a statutory Inquiry with a duty to fulfil your terms of 19 reference as fairly and comprehensively as you can, that 20 they raise matters of considerable public importance. 21 When one reviews the authorities on abuse and one looks 22 at the authorities in relation to contempt, and of 23 course we're dealing here with statutory contempt under 24 section 2 of the 1981 act, then we would respectfully 25</p> <p style="text-align: center;">Page 43</p>
<p>1 it. 2 MR GARNHAM: That is right, sir, except there will be 3 collateral commentary in such material that may be 4 relevant to our investigations. 5 LORD JUSTICE LEVESON: Yes. I think I understand that, but 6 that's at a different order of -- 7 MR GARNHAM: It is. 8 LORD JUSTICE LEVESON: -- significance. 9 MR GARNHAM: Yes. 10 LORD JUSTICE LEVESON: All right. 11 MR GARNHAM: Sir, I have something to say about your last 12 topic, but I think you're going to deal with them issue 13 by issue. 14 LORD JUSTICE LEVESON: Sorry, the? 15 MR GARNHAM: Fast ball, the receipt of anonymous material. 16 LORD JUSTICE LEVESON: Let's deal with all this first and 17 then come to that. 18 MR GARNHAM: I'll sit down. 19 LORD JUSTICE LEVESON: Thank you very much. 20 Let's turn to what some of the other core 21 participants have to say about this. You're, if 22 anything. I'm conscious that I've received submissions 23 from Mr Mukul Chawla, to which I've already adverted, 24 but I'll come back to them slightly later. 25 Right, Mr Caplan, welcome back to jurisdiction.</p> <p style="text-align: center;">Page 42</p>	<p>1 suggest that it should not be too lightly assumed that 2 the existence of a police investigation will necessarily 3 require the curtailment of legitimate and relevant 4 avenues of inquiry, although of course all the matters 5 of caution, which your Lordship has referred to, are 6 matters which constantly need to be borne in mind, there 7 is no doubt about that. 8 The issue perhaps is this: Mr Garnham really raises, 9 as we see it, different risks. He spoke about causing 10 a risk to the police investigation. If that is 11 adverting to the risk of, in some way, interfering with 12 the operation of the investigation and there is some 13 special operational risk which arises on the facts, then 14 obviously that is something which one would expect there 15 to be private communication about between Mr Garnham and 16 counsel to the Inquiry. 17 It seemed to us that much of what Mr Garnham was 18 addressing your Lordship about was in relation to the 19 risk of prejudice. That is to say, either some 20 application being made to a judge -- in the event that 21 there are criminal proceedings -- for a permanent stay 22 of those proceedings as a result of fair reporting of 23 the Inquiry hearings, and as a result of prejudice 24 coming out of that reporting. 25 In our respectful submission, that risk is, we would</p> <p style="text-align: center;">Page 44</p>

<p>1 respectfully suggest, overstated. When one looks at the 2 jurisprudence on abuse of process, in our respectful 3 submission that is a risk which is unlikely to arise. 4 LORD JUSTICE LEVESON: I don't think Mr Garnham would 5 disagree with that. What he would say is: at this 6 stage, I have to be seen to be taking every point, 7 because otherwise somebody will say, well, you were 8 complicit in all this, you let it all happen and 9 therefore it's all your fault. 10 MR CAPLAN: I quite understand that. 11 LORD JUSTICE LEVESON: The responsibility for whatever I do 12 will be mine, it won't be Mr Garnham's or the deputy 13 assistant commissioner's. 14 MR CAPLAN: Yes, indeed. Of course, at the end of the day 15 the kind of prejudice one would have to be talking about 16 is the prejudice which Lord Phillips adverted to in 17 Abu Hamza. It has to be so extreme, at the very far end 18 of the spectrum, if one is to come to the conclusion 19 that the normal processes of the criminal justice system 20 can't accommodate it. 21 LORD JUSTICE LEVESON: Of course, what Mr Garnham does say, 22 and there's something in this, is that we can control -- 23 because the criminal law hopefully can control -- what 24 is published in relation to those in respect of whom the 25 proceedings are active. But it is rather more difficult</p> <p style="text-align: center;">Page 45</p>	<p>1 Your Lordship, everybody, will have, I'm sure, 2 regard to the risks involved, but they are not 3 insurmountable. 4 LORD JUSTICE LEVESON: Yes. Of course, it raises another 5 question, doesn't it, which is: to what extent in any 6 event it is necessary to go. That is what I was just 7 postulating to Mr Garnham, but actually, if one were 8 doing it all together, then one would look at all the 9 facts and be prepared to look at individual conduct and 10 make findings of fact about individual people to get 11 a picture. In an exercise like that, that in any event 12 will take an extremely long time, not least because, as 13 you become microscopic, then all sorts of other 14 considerations arise of fairness. Whereas there is 15 a macroscopic approach which takes me into the issues 16 about which I'm required to report within the year, but 17 still leaves open the microscopic for later examination, 18 should it be necessary to do so. 19 MR CAPLAN: Yes. 20 LORD JUSTICE LEVESON: Do you feel -- or is it the 21 submission of your clients -- that to adopt that latter, 22 the macro rather than the micro approach, would 23 undermine the validity of the work that is being 24 undertaken in relation to the recommendations? 25 MR CAPLAN: I would need, obviously, to speak at greater</p> <p style="text-align: center;">Page 47</p>
<p>1 to control that which enters the Internet, which is of 2 course one of the issues that I have to address in some 3 way, and I'm hoping that somebody will have some ideas 4 about that, still less in private communications that 5 then enter the public domain, still less that which 6 actually happens within the cloak of parliamentary 7 privilege. 8 MR CAPLAN: Yes. As far as the Internet is concerned, of 9 course, that is accommodated by special directions of 10 course to sitting jurors, so whatever may be on the 11 Internet is an access which they should obviously not -- 12 LORD JUSTICE LEVESON: No, I agree, I agree. 13 MR CAPLAN: Of course, all of these are value judgments. 14 Mr Garnham obviously makes this application and one 15 cannot deal with the application on a fact-specific 16 basis. One can, however, look at the legal principles 17 involved, how courts traditionally deal with the 18 presence of prejudicial publicity in the public domain 19 when one is dealing with a current criminal trial. 20 Our submission simply is: on the basis of 21 considerable dicta now from courts of many different 22 constitutions, both in this country and around the 23 world, this is not an unusual position, it can be 24 accommodated, and in our respectful submission, it is 25 right, obviously, that the matter is being considered.</p> <p style="text-align: center;">Page 46</p>	<p>1 length with them on that subject, but my immediate 2 response is that it would not. 3 LORD JUSTICE LEVESON: That's interesting, thank you. Yes, 4 thank you very much indeed. Mr Rhodri Davies? 5 Submissions by MR DAVIES 6 MR DAVIES: Sir, we would support, I think, the length and 7 breadth approach, if I can call it that, or perhaps the 8 macro approach, which you've mentioned just now to 9 Mr Garnham and Mr Caplan. 10 There are three points that I wanted to make, and 11 I'm actually going to take them in reverse order in the 12 view of the way the discussion has gone, but I'll just 13 mention them in their original order. 14 First of all, it seems to us that the terms, 15 structure and timing of the terms of reference make it 16 clear that the police investigation was to have primacy 17 over part one of the Inquiry. I might add that the 18 point mentioned just now as to the speed with which 19 you're required to report in part one, perhaps in itself 20 suggests that a macro approach is necessary. 21 LORD JUSTICE LEVESON: Yes. You're go to develop these 22 points; aren't you? 23 MR DAVIES: I am. 24 LORD JUSTICE LEVESON: Of course. 25 MR DAVIES: Secondly, the practical point is simply this,</p> <p style="text-align: center;">Page 48</p>

<p>1 that we've provided a schedule of those who have been 2 arrested so far, so far as we know. I don't want to go 3 throughout it, and perhaps not surprisingly there are 4 versions on the Internet all over the place, but what it 5 demonstrates, just looking at the names and the 6 positions they held, is that it is not really going 7 to --</p> <p>8 LORD JUSTICE LEVESON: Just a moment. This isn't on the 9 Internet, is it? This is your version.</p> <p>10 MR DAVIES: No, no, this is provided by us, but there is 11 a Wikipedia page listing everyone who has been arrested, 12 so far as is public knowledge, under Operation Weeting, 13 for example.</p> <p>14 LORD JUSTICE LEVESON: All right, that's right, but I do 15 think that we should not -- I mean, the submissions that 16 are made to the Inquiry generally are published.</p> <p>17 MR DAVIES: Yes.</p> <p>18 LORD JUSTICE LEVESON: Therefore I think that we should not 19 put into the public domain your schedule. It may be 20 other people can create the schedule, but I don't 21 believe it's appropriate that we should be adding to it.</p> <p>22 MR DAVIES: Yes, very well. It is only, I think, taken from 23 public knowledge. There may be other things. We simply 24 don't know.</p> <p>25 LORD JUSTICE LEVESON: If you tell me you obtained it from Page 49</p>	<p>1 LORD JUSTICE LEVESON: Yes.</p> <p>2 MR DAVIES: Those are the three points I want to make. As 3 I said, I'll take them in their reverse order. 4 The last one is really the length and breadth point. 5 It might be helpful just to bear in mind the 6 material which will be available anyway and which the 7 Inquiry has or will have. First of all, there are the 8 two reports of the Information Commissioner in 2006, and 9 we believe that those will be supplemented by additional 10 evidence as to Operation Motorman. We don't know what, 11 but we understand that there will be some such evidence. 12 Secondly, there are the convictions of Mr Mulcaire 13 and Mr Goodman, and what was said at the sentencing 14 hearing by the prosecution and by the defence. 15 I think it is at that point, really, that the 16 journal which you referred to earlier comes into play, 17 and we would certainly have no objection at all to the 18 type of analysis drawn from that which was mentioned 19 earlier. 20 Thirdly, there is the evidence which will be given, 21 although we do not know what it will be at the moment, 22 by members of the public who feel they have suffered at 23 the hands of the press. As we understand it, some 18 or 24 20 members of the public are going to be giving evidence 25 at the beginning of the evidential phase of the Inquiry. Page 51</p>
<p>1 Wikipedia, Mr Davis, then it won't matter.</p> <p>2 MR DAVIES: We didn't, we didn't. 3 Just looking at that indicates how very difficult it 4 would be for an Inquiry to go into the question of who 5 knew what at the News of the World at this stage, 6 because there are just too many people who you would 7 want to ask, who are almost bound not to answer 8 questions, given the criminal -- understandably, in view 9 of the criminal proceedings. There is a practical 10 difficulty in conducting a detailed examination now. 11 Thirdly, we would suggest that without carrying out 12 that micro investigation, there is, or there will be, 13 enough material available to the Inquiry to enable it to 14 form a proper view as to the nature and extent of any 15 problem in relations between the press and the public. 16 Therefore, to enable it to make recommendations in part 17 one to address any problem which it identifies.</p> <p>18 LORD JUSTICE LEVESON: Yes.</p> <p>19 MR DAVIES: We would say, in that regard, that the Inquiry 20 has been right in the seminars to focus on the interface 21 between the press and the public. That is where any 22 behaviour which is wrong or illegal makes itself felt 23 and it is the concern of the Inquiry to make any 24 necessary recommendations to rebalance the playing 25 field, change the approach in future. Page 50</p>	<p>1 LORD JUSTICE LEVESON: Yes.</p> <p>2 MR DAVIES: Lastly there is the material generated by the 3 civil proceedings. In that regard we have been asked by 4 the Inquiry recently to produce the admissions which 5 News International has made in those proceedings, and we 6 will do that. 7 That is no doubt not a complete list, there may be 8 more material which emerges in the course of the 9 evidence which is given. Mr Jay may have witnesses 10 I know nothing of who he intends to call. It is enough, 11 we would suggest, to indicate that the Tribunal will be 12 able to see the length and breadth of the problem as it 13 affects the public and as it arises at the interface 14 between the press and the public. That is the necessary 15 basis for recommendations in part one.</p> <p>16 LORD JUSTICE LEVESON: Yes.</p> <p>17 MR DAVIES: Sir, that was, in the order I'm taking them, the 18 first point I wanted to make. 19 Then the second one, which is really very short, is 20 just that, as I have said, there are, I think, 14 people 21 we know of, not all of them worked at the 22 News of the World, but most of them did, who have been 23 arrested. They occupy or occupied some key positions at 24 the paper, from reporter up to editor, as is well known. 25 If one was going to find out what had happened and who Page 52</p>

<p>1 knew what inside the paper, you would need to ask those 2 people. Even if you have documents, as Mr Jay and 3 indeed the police have pointed out, you need to check 4 with the people who were there at the time that the 5 documents mean what you think they mean. 6 It is inevitable that those people are not going to 7 be answering questions in full whilst they have been 8 arrested and there is the prospect of criminal 9 prosecutions. 10 The effect of that is that we, as their 11 ex-employers, cannot obtain a full account of what 12 happened and nor, we would suggest, will the Inquiry get 13 one. The risk of investigating that sort of territory 14 is that it can only be half a job, and that is extremely 15 dangerous and would not result in satisfactory 16 conclusions. 17 We would say that there are great practical 18 difficulties in really digging into that area at all at 19 this stage, and it is better left for the moment for the 20 police and, if there are any, the criminal courts to 21 deal with prosecutions. 22 Lastly, there is the question of how that all fits 23 with the terms of reference. It is, we think, worth 24 putting them in their chronological context. 25 As you know, sir, the police Inquiry which is</p> <p style="text-align: center;">Page 53</p>	<p>1 organisations, and as appropriate, other organisations 2 within media." 3 Paragraph 6 is: 4 "To enquire into the extent of corporate governance 5 and management failures at News International and other 6 newspaper organisations." 7 There is no doubt that that is the micro level. 8 When one goes back to part one, all one has is 9 a general requirement to enquire into the culture of 10 practices and ethics of the press in general. 11 LORD JUSTICE LEVESON: You've seen Mr Jay's analysis of 12 that. 13 MR DAVIES: Yes. 14 LORD JUSTICE LEVESON: He doesn't submit that that prohibits 15 me, but does actually identify the corners. 16 MR DAVIES: Yes, absolutely, and the point I'm making there 17 is exactly the one which is raised but not decided, put 18 it that way, by Mr Jay. 19 LORD JUSTICE LEVESON: You're not suggesting, are you, 20 because nobody's actually suggested that this part one 21 shouldn't be touching any of this? 22 MR DAVIES: No. I think all I would suggest is that the 23 discussion about length and breadth and the macro 24 approach is consistent with the split in the two parts 25 of the terms of reference.</p> <p style="text-align: center;">Page 55</p>
<p>1 carrying on now, Operation Weeting, began in January 2 this year upon the delivery of further information by 3 News International. That Inquiry had been in existence 4 for six months when this tribunal was established, and 5 when the Prime Minister was addressing the House of 6 Commons on 13 July, before the terms of reference were 7 finalised, he noted that eight people had then be 8 arrested, including, as it happens, the government's 9 ex-director of communications, Mr Coulson. 10 It was on 13 July that the Prime Minister noted that 11 the police investigation was in very competent hands and 12 fully resourced, and he was anxious to reassure the 13 House of Commons on those points. He said that the 14 Inquiry into wrongdoing, that is this Inquiry, could not 15 take place in full until the criminal proceedings had 16 been concluded, that is why the terms of reference are 17 in two parts, as we know. 18 If one looks at the terms of reference, there is, we 19 would suggest, a clear indication of the difference. 20 Part 2, paragraphs 3 and 6, quite clearly requires 21 a detailed Inquiry into what was going on within 22 News International, and as appropriate, other 23 organisations within the media. Paragraph 3 is: 24 "To enquire into the extent of unlawful or improper 25 conduct within News International, other newspapers</p> <p style="text-align: center;">Page 54</p>	<p>1 LORD JUSTICE LEVESON: Yes. 2 MR DAVIES: If you give me a moment, I think that's all 3 I want to say. 4 LORD JUSTICE LEVESON: I have one other question to ask you 5 MR DAVIES: Yes. 6 LORD JUSTICE LEVESON: I have no doubt at all that 7 News International have disclosed -- I haven't actually 8 looked at them, but I understand they've disclosed their 9 corporate governance procedures. 10 MR DAVIES: Yes. 11 LORD JUSTICE LEVESON: It is also, I think, in the public 12 domain that News International have been reviewing all 13 that? 14 MR DAVIES: Yes. 15 LORD JUSTICE LEVESON: Would it be unreasonable for me to 16 enquire of News International whether the result of 17 their investigation has itself revealed any 18 shortcomings, whether or not that requires descending -- 19 not requiring descending into people, but into systems 20 and the way in which they operate? 21 MR DAVIES: My initial reaction to that is I don't think so. 22 LORD JUSTICE LEVESON: No. 23 MR DAVIES: It is the case that, as I indicated earlier, our 24 own enquiries have been rather limited by things its 25 police have asked us not to do.</p> <p style="text-align: center;">Page 56</p>

<p>1 LORD JUSTICE LEVESON: I understand that. 2 MR DAVIES: In terms of, if I can call it that, at the macro 3 level, whether it is now thought that the governance 4 systems were unsatisfactory and in need of improvement, 5 that -- I would think -- was an acceptable enquiry to 6 make. 7 LORD JUSTICE LEVESON: It's well within the public domain 8 that News International have appointed extremely 9 distinguished leading counsel to conduct that 10 independent examination. The interesting question 11 arises, which won't have to be resolved today, whether 12 I could not ask him -- well, I could, actually, but 13 whether it's appropriate to ask him to provide evidence 14 on that topic. 15 You don't need to answer that now. 16 MR DAVIES: Yes. 17 LORD JUSTICE LEVESON: But I do think it's an interesting 18 question. 19 MR DAVIES: Yes. We will bear that in mind, sir. 20 LORD JUSTICE LEVESON: Yes. 21 MR DAVIES: I don't think -- (Pause) 22 I have very up to the minute instructions, as it 23 happens, sir, that the relevant committee has not at the 24 moment reached any conclusions, but I'm sure it's 25 working hard.</p> <p style="text-align: center;">Page 57</p>	<p>1 I don't touch, sir, if I may say so, on issues of 2 abuse or potential abuse or contempt. It's premature at 3 this stage. What may happen, we simply don't know, and 4 how that may be viewed, we also simply don't know. 5 I'm more concerned with the practicalities now, and 6 the practicalities are that there are likely to be 7 a number of people in a position who, like my client, 8 possibly some who may not be like my client, who want to 9 help, but find that the restrictions being placed upon 10 them make it difficult for them to assist. 11 For example, I have previously raised the 12 fundamental importance of having documents and 13 contextual documents from which to inform my client in 14 relation to any topics that she is asked. There is 15 clearly now a suggestion -- and I don't criticise this, 16 but it obviously has practical ramifications, that if 17 someone in my client's position does not have such 18 documents, she or someone in that position is going to 19 be substantially hamstrung before they even start to try 20 and assist. That is a practical difficulty. 21 LORD JUSTICE LEVESON: Well, the practical difficulties for 22 your client, as I understand what you say, however 23 anxious she is to help, are far more fundamental than 24 that, because she has her own position to consider. 25 MR CHAWLA: Precisely.</p> <p style="text-align: center;">Page 59</p>
<p>1 LORD JUSTICE LEVESON: Yes. It might have six months to do 2 it. 3 MR DAVIES: Well, possibly. 4 LORD JUSTICE LEVESON: I would pay attention to any concern 5 that Lord Grabiner expressed of potential embarrassment 6 before I decide whether to issue a notice. 7 MR DAVIES: Yes. 8 LORD JUSTICE LEVESON: That's why I say you can consider it. 9 MR DAVIES: We, and I'm sure he, will consider that. 10 LORD JUSTICE LEVESON: Yes. All right, thank you. Thank 11 you. Right, I think it's logically Mr Mukul Chawla now. 12 I think it's rather interesting, your status at this 13 stage. You're not a core participant. 14 MR CHAWLA: Yes. 15 LORD JUSTICE LEVESON: Yet your contribution has been as 16 full as anybody else. I have read your submissions. 17 I have concerns about how far this stretches, but in the 18 context of this particular question, it seems to me that 19 it's sensible that I do read them and have regard to 20 them. I don't ask you to elaborate upon them, but if 21 there's anything that you want to say, having heard 22 what's passed this morning, then I would listen to it. 23 Submissions by MR CHAWLA 24 MR CHAWLA: Can I just make some supplementary submissions 25 in that case?</p> <p style="text-align: center;">Page 58</p>	<p>1 LORD JUSTICE LEVESON: She may have a very strong view as to 2 what happened or didn't happen, or what is right or 3 isn't right, but at the end of the day, she will be 4 advised as to what's sensible for her to do and what's 5 not. That's why I -- what I would be grateful for your 6 views on are not the practical problems which you've 7 actually set out in your submissions, but the approach 8 that I have just suggested to Mr Garnham. 9 MR CHAWLA: The macroscopic and microscopic approaches, we 10 have no difficulties with that as an approach. The 11 difficulty is that the macroscopic approach involves 12 a broad consideration, for example whether at different 13 levels of the organisation the activity was encouraged 14 or condoned in any way, or whether that activity was 15 confined to a more junior level. If it was, whether 16 that amounted to a lack of supervision by supervisors or 17 not. 18 LORD JUSTICE LEVESON: It may be that all I have to do -- 19 this is what I was rather suggesting to Mr Garnham. 20 I actually was very keen to ask Mr Caplan the question, 21 that may be sufficient, might is not, for my 22 consideration of those topics that I must cover in part 23 one of this Inquiry? 24 MR CHAWLA: Even those macroscopic topics cover precisely 25 the area of, as I understand it, the various police</p> <p style="text-align: center;">Page 60</p>

<p>1 investigations.</p> <p>2 LORD JUSTICE LEVESON: Of course they do, but if I am not</p> <p>3 going to ask questions as to whether -- for example --</p> <p>4 your client knew this, that or the other. If I'm not</p> <p>5 going to -- if it's not necessarily for me to go down</p> <p>6 that route, then I won't need to ask the question; will</p> <p>7 I?</p> <p>8 MR CHAWLA: That's why we ask, as the conclusion of our</p> <p>9 submission, whether there are some lines drawn in terms</p> <p>10 of what is going to be asked and is not going to be</p> <p>11 asked.</p> <p>12 LORD JUSTICE LEVESON: Well, I'll be drawing lines.</p> <p>13 MR CHAWLA: I understand that, but it's a question of having</p> <p>14 notice of those lines in advance rather than having to</p> <p>15 meet them on the hoof.</p> <p>16 LORD JUSTICE LEVESON: I understand the point, but one of</p> <p>17 the things I'll have to consider is whether on this</p> <p>18 topic -- I mean we're talking about hacking.</p> <p>19 MR CHAWLA: Yes.</p> <p>20 LORD JUSTICE LEVESON: Whether on the topic of hacking, in</p> <p>21 the present state of the nation, including the police</p> <p>22 investigation and what else I otherwise know, and what</p> <p>23 inferences I can otherwise draw, it's necessary for your</p> <p>24 client to give evidence at all I'll have to consider</p> <p>25 that, or Mr Jay will consider it.</p> <p style="text-align: center;">Page 61</p>	<p>1 with the witnesses who are giving evidence.</p> <p>2 MR CHAWLA: Well, that I am reassured by, but I have to say,</p> <p>3 sir, that up until today we had not quite understood</p> <p>4 that to be the position.</p> <p>5 LORD JUSTICE LEVESON: I'm not so sure about that.</p> <p>6 MR CHAWLA: If you go back to the questions that were raised</p> <p>7 in the notice in August, it's pretty clear that those</p> <p>8 questions are specific.</p> <p>9 LORD JUSTICE LEVESON: Of course they are, and you shouldn't</p> <p>10 be at all surprised about that, but that's not to say</p> <p>11 that I am constrained by the questions that were asked</p> <p>12 in the notice in relation to what I adduce by way of</p> <p>13 evidence to the Inquiry. It's pointless not asking the</p> <p>14 specifics, because one doesn't know what answers one is</p> <p>15 going to receive.</p> <p>16 MR CHAWLA: The danger then arises is in relation to</p> <p>17 questions posed of others, where they touch upon her</p> <p>18 position, quite what happens.</p> <p>19 LORD JUSTICE LEVESON: The same is going to be so for</p> <p>20 everybody. That's the point. That's precisely the</p> <p>21 problem.</p> <p>22 If I can't descend into who -- and I don't want to</p> <p>23 descend into who did what to whom, as I have now made my</p> <p>24 mantra, then inevitably there is a knock on. What is</p> <p>25 important is that everybody understands the knock on,</p> <p style="text-align: center;">Page 63</p>
<p>1 MR CHAWLA: It's an area that we have specifically raised.</p> <p>2 LORD JUSTICE LEVESON: It's interesting, your submission</p> <p>3 initially to become a core participant was that your</p> <p>4 client was so heavily involved, therefore she's bound to</p> <p>5 be the subject of intense scrutiny and therefore ought</p> <p>6 to be a core participant. Now --</p> <p>7 MR CHAWLA: My Lord, I don't resile from that. That remains</p> <p>8 the position. The difficulty that is now layered upon</p> <p>9 that is the approach being taken in terms of her ability</p> <p>10 to deal with things and also the public perception.</p> <p>11 For example, I raise this in the context, and it's</p> <p>12 not specific to her, but in the context of raising the</p> <p>13 privilege against self-incrimination. I deal with this,</p> <p>14 in fact --</p> <p>15 LORD JUSTICE LEVESON: I've seen what you've said.</p> <p>16 MR CHAWLA: It's paragraphs 21 and 22 and 27 and 28. The</p> <p>17 difficulty, of course, arises that she, in common with</p> <p>18 a number of others, is going to be, if giving evidence,</p> <p>19 going to be giving evidence in the full glare of live</p> <p>20 TV, and therefore the raising of that right is itself in</p> <p>21 many ways a self-defeating proposition --</p> <p>22 LORD JUSTICE LEVESON: I don't accept that it's</p> <p>23 self-defeating. I understand the point, but if I'm not</p> <p>24 going to be specific with the way in which the evidence</p> <p>25 is put before the Inquiry, then I can hardly be specific</p> <p style="text-align: center;">Page 62</p>	<p>1 but nobody has yet suggested that I can't do the job</p> <p>2 notwithstanding that knock on.</p> <p>3 MR CHAWLA: I'm not suggesting that either.</p> <p>4 LORD JUSTICE LEVESON: That's what's critically important.</p> <p>5 MR CHAWLA: What I am suggesting is that those -- while</p> <p>6 everyone may be affected by that general proposition,</p> <p>7 there is a category of persons, of whom my client is</p> <p>8 one, who are in a peculiarly vulnerable position at the</p> <p>9 moment.</p> <p>10 LORD JUSTICE LEVESON: Well, Mr Chawla, I hope I have</p> <p>11 demonstrated that I understand that.</p> <p>12 MR CHAWLA: No, I'm conscious of --</p> <p>13 LORD JUSTICE LEVESON: I understand why you repeat it, and</p> <p>14 I'm not being critical of you, but I am acutely</p> <p>15 conscious, but that won't necessarily -- do you suggest</p> <p>16 that that impacts on other parts of the Inquiry?</p> <p>17 MR CHAWLA: The difficulty at the moment, sir, is I don't</p> <p>18 know, because unless we know -- for example -- what the</p> <p>19 different witnesses are saying, both whether giving</p> <p>20 evidence or submitting or, and this will touch on</p> <p>21 anonymous witnesses as well, whether, for example,</p> <p>22 allegations are being made. To go back to something</p> <p>23 that Mr Jay raised at the beginning of this month,</p> <p>24 whether you, sir, are entitled, and if so how you are</p> <p>25 entitled, to deal with any concern raised based upon</p> <p style="text-align: center;">Page 64</p>

<p>1 suspicion, these are all questions about which I'm not 2 yet clear. 3 LORD JUSTICE LEVESON: Well, suspicions are one thing. If 4 I am not going to do who did what to whom but I am 5 concerned about risks that require to be regulated, then 6 the position of individuals may become less significant. 7 MR CHAWLA: Sir, to go back to what you have previously 8 said. This may simply be a question of the granularity 9 of this. 10 LORD JUSTICE LEVESON: Yes. 11 MR CHAWLA: Quite whether one goes -- how far one goes in 12 respect of an individual. I have to say I am -- 13 I thought it right to air the concern that we have in 14 the way that we hope will be most helpful to the 15 Inquiry. 16 LORD JUSTICE LEVESON: As I said, I am prepared to receive 17 them and I was prepared to listen to you as well. 18 MR CHAWLA: I'm grateful. 19 LORD JUSTICE LEVESON: Thank you. Mr Sherborne. 20 Submissions by MR SHERBORNE 21 MR SHERBORNE: Sir, I have very little to say on behalf of 22 the core participant victims. The starting point, as I 23 said last week, is that no one, certainly not the 24 victims themselves, wishes to risk the prosecution 25 succeeding or hinder any investigations, far from it.</p> <p style="text-align: center;">Page 65</p>	<p>1 As I say, no one is naming names, and indeed, sir, 2 as you will appreciate, in the civil litigation before 3 Mr Justice Vos, the use of cyphers for the names of 4 those potentially involved is commonplace, and it's 5 a practice which, sir, no doubt you will adopt. 6 LORD JUSTICE LEVESON: That's what I have rather suggested 7 to Mr Garnham earlier this morning. 8 MR SHERBORNE: Sir, yes, exactly. But it's artificial, in 9 my submission, to ignore the reality of what is already 10 in the public domain, because, put bluntly, the question 11 of whether this was simply checks and balances which 12 weren't observed in relation to a number of very junior 13 journalists -- thankfully the fantasy of one rogue 14 journalist has since been put to bed -- or whether 15 rather this was a deliberate and systematic employment 16 or encouragement at the highest levels of unlawful 17 activities in order to obtain stories about private 18 lives of individuals must be relevant, sir, in my 19 respectful submission for you to decide when determining 20 the true and unvarnished state of the culture, practice 21 and ethics of the media, and relevant, we say, to the 22 recommendations you must make. 23 LORD JUSTICE LEVESON: What -- 24 MR SHERBORNE: Whilst I understand the macro and the micro 25 level, we say it's rather a question of who did what and</p> <p style="text-align: center;">Page 67</p>
<p>1 A number of my clients will be giving evidence 2 during part one, module one, about the extent and the 3 manner of what happened to them in terms of the unlawful 4 accessing of their voicemails and other private 5 information. The types of interceptions they suffered 6 and the number of interceptions they suffered and so on, 7 and the effect on them as a result. 8 LORD JUSTICE LEVESON: That's precisely the evidence that 9 I expect them to be giving. 10 MR SHERBORNE: Sir, indeed. 11 LORD JUSTICE LEVESON: I would be right in saying that they 12 won't be in a position evidentially to name names or 13 identify who they say was responsible specifically or 14 generally. 15 MR SHERBORNE: Sir, their evidence is at a micro level, but 16 not in terms of naming names. Naming names is 17 different, I understand that. 18 LORD JUSTICE LEVESON: That's fair. 19 MR SHERBORNE: Of course you'll be aware that there are 20 a considerable number of matters already in the public 21 domain, not just about the types of interception, but 22 also the level of knowledge and involvement of those at 23 high levels within the newspaper industry. That's 24 already in the public domain, at least in general, 25 rather than specific terms.</p> <p style="text-align: center;">Page 66</p>	<p>1 to whom, that might be the better way of looking at it, 2 if I can put it that way. 3 LORD JUSTICE LEVESON: The only phrase that I think I might 4 cavil with in what you've just said are the words, "At 5 the highest level", because deliberate and systematic 6 might be capable of inference from length and breadth. 7 In other words, the inference that it can't be -- 8 MR SHERBORNE: Indeed. 9 LORD JUSTICE LEVESON: -- one or two youngsters anxious to 10 make a good impression -- 11 MR SHERBORNE: Sir, yes. 12 LORD JUSTICE LEVESON: -- might be, and indeed I will know 13 the names of those persons who are linked in, even if 14 the -- it's not their names that matter, it's their 15 length of service, their position within the 16 organisation. 17 MR SHERBORNE: And their levels of seniority. 18 LORD JUSTICE LEVESON: That's the point. Without 19 necessarily putting that into the public domain, because 20 it's simply a question of linking -- I mean, they could 21 be put in bands of seniority. 22 MR SHERBORNE: Sir, yes, bands of seniority. 23 LORD JUSTICE LEVESON: I have no problem about that. I'm 24 just looking for ways of making sure the picture is as 25 clear as possible without doing anything that runs the</p> <p style="text-align: center;">Page 68</p>

<p>1 risk of creating an argument that somebody may say, 2 "Well, of course I can't possibly be fairly tried." 3 Which I have no doubt is the very last thing your 4 clients want. 5 MR SHERBORNE: The very last thing, indeed. 6 LORD JUSTICE LEVESON: I understand that. My question to 7 you is: having heard what I've put to Mr Garnham and 8 debated with others, I deliberately went to Mr Caplan 9 not because I wanted to welcome him back to the 10 jurisdiction, but because he represented a media 11 interest that wasn't News International. And then have 12 worked my way through counsel accordingly, whether you 13 felt or wanted to submit that I could not satisfactorily 14 cope with my terms of reference by doing that which 15 I have suggested. 16 MR SHERBORNE: Sir, I'm not suggesting that. 17 LORD JUSTICE LEVESON: All right. Thank you very much. 18 MR SHERBORNE: I'm grateful. 19 LORD JUSTICE LEVESON: Does anybody else want to say 20 anything who has not had a chance to say anything? 21 Submissions by MR CHRISTIE 22 MR CHRISTIE: My Lord, I would. Richard Christie, appearing 23 on behalf of Mr Jonathan Rees. You will remember that 24 we appeared before you some while ago. 25 LORD JUSTICE LEVESON: Yes, I remember.</p> <p style="text-align: center;">Page 69</p>	<p>1 Mr Sherborne has already made reference. 2 LORD JUSTICE LEVESON: I don't know. I don't know whether 3 we're talking about the same people or not. I simply 4 don't know. In any event, what you did miss this 5 morning, Mr Christie, was a debate that I had with 6 leading counsel for the Surrey Police, who were 7 concerned to be made core participants on the basis of 8 the criticism of the police arising out of their failure 9 to investigate, if there was a failure -- as to which 10 I know nothing -- in 2002 at the time of an awareness 11 that Milly Dowler's telephone had been intercepted. 12 MR CHRISTIE: Sir, I appreciate that that has been debated 13 this morning, because Mr Shepherd(?), my instructing 14 solicitor sitting beside me, has kept we abreast of some 15 of the developments, albeit in short form. 16 We had, I think, two points to make, one macro, to 17 use the in vogue expression, and one micro, both of 18 which we set out in that letter of 22 September, and 19 relating back to your judgment, sir, on whether we 20 should become a core participant, and in particular 21 paragraph 32 of that judgment. 22 LORD JUSTICE LEVESON: If you're wanting a response to your 23 letter of 22 September and you've not yet received one, 24 then you don't need to make a submission to me now to do 25 that.</p> <p style="text-align: center;">Page 71</p>
<p>1 MR CHRISTIE: I hope that the solicitor for the Inquiry has 2 passed on the information that I was delayed in another 3 court this morning so I have only just arrived but 4 I have been kept abreast of what has been -- 5 LORD JUSTICE LEVESON: Have you put anything in writing on 6 this? 7 MR CHRISTIE: We've put nothing further in writing, but we 8 did submit a letter to you, dated 22 September, which 9 I trust made its way to you. 10 LORD JUSTICE LEVESON: Yes. 11 MR CHRISTIE: I say that, because we received a reply, as 12 I understand it, acknowledging the letter, but without 13 any comment upon its content. 14 LORD JUSTICE LEVESON: All right, but that's not dealing 15 with the subject that I have just discussed. 16 MR CHRISTIE: I think it almost certainly touches on it only 17 tangentially, because what we would wish to suggest to 18 you today was because of the position in relation to one 19 of Mr Sherborne's clients, we ought to be a core 20 participant, if that core participant was going to be 21 addressing you about any details in relation to his 22 particular claims. The reason that we think it is 23 likely that he might seek to do so is because civil 24 proceedings have already been initiated in that regard, 25 quite separate from the civil proceedings to which</p> <p style="text-align: center;">Page 70</p>	<p>1 MR CHRISTIE: I appreciate that, although it might bear 2 possibly on the point that has just been raised by 3 Mr Sherborne, whose client doesn't (inaudible) and who 4 is the claimant in the case that is presently being 5 brought before this court in the civil division. 6 LORD JUSTICE LEVESON: All right. 7 MR CHRISTIE: The reason that we raise it is simply because 8 in your judgment at paragraph 32, you said in the 9 concluding paragraph that you did not anticipate that 10 you would be considering the specific behaviour of the 11 individuals, not least because of the pending police 12 investigation and possible prosecutions. That you did 13 not believe therefore that Mr Rees is likely to fall 14 within rule 5(2)(c). 15 The position is that Mr Hurst, to use the shortform, 16 the "Stakeknife" allegations, which, sir, you may be 17 familiar with, relating to Northern Ireland. He's, as 18 we understand it, since you ruled upon this, been made 19 a core participant in these proceedings in this Inquiry. 20 LORD JUSTICE LEVESON: Yes. 21 MR CHRISTIE: As far as we can see, the only way in which he 22 would become involved is by making the sort of claims 23 that he has made in his pleadings in that case against 24 a number of individuals, including my client, but also 25 including News International. There are five defendants</p> <p style="text-align: center;">Page 72</p>

<p>1 in those proceedings. It is alleged against my client 2 that he has been involved in certain parts of revealing 3 identification of individuals from Northern Ireland. 4 That is, of course, denied. 5 If Mr Hurst was to be giving evidence before you and 6 descending into any detail about what had happened to 7 him, it seemed inevitable to me that he would be going 8 into the detail -- 9 LORD JUSTICE LEVESON: He can descend into detail of what 10 happened to him without necessarily seeking me to 11 adjudicate upon who was responsible. For part one of 12 the Inquiry, the direction is different. The direction 13 is: broadly what's happened? Does that mean there's 14 been a regulatory failure? Should there be a new 15 regulatory regime? 16 MR CHRISTIE: We are quite content with that limitation on 17 it, with the rider that we've indicated, that if we were 18 to be descending into any detail at all, and it seemed 19 to us difficult if Mr Hurst was to be making a statement 20 to the Inquiry, that he would avoid making assertions 21 against us. 22 LORD JUSTICE LEVESON: Well, Mr Christie, we'll have to wait 23 and see. Of course, if your interests are adversely 24 affected in such a way that I think it is at all 25 relevant to the purposes of this Inquiry, then of course</p> <p style="text-align: center;">Page 73</p>	<p>1 Mr Garnham. 2 May I enquire when you've had the chance to look at 3 the judgment of Mr Justice Vos on 18 March, this year. 4 LORD JUSTICE LEVESON: I have, yes. 5 MR JAY: Which touches on some of the issues which concern 6 us. 7 If I may alight just on a couple of points without 8 labouring the matter. He dealt with a public interest 9 immunity objection by the police which he rejected. He 10 gives us there a background chronology, which of course 11 is in the public domain and well-known to your Lordship. 12 The judgment is not paginated, but that starts at 13 paragraph 33. 14 LORD JUSTICE LEVESON: Yes. 15 MR JAY: Sir, I think to link this would be the journal 16 we've been talking about, and the journal is of course 17 Mr Mulcaire's notebook. 18 LORD JUSTICE LEVESON: Yes. 19 MR JAY: What was before Mr Justice Grace in January 2007 20 were 20 counts on the indictment, the first 15 were the 21 conspiracy counts which covered both Mr Mulcaire and 22 Mr Goodman, and they related to the interception of the 23 voicemail messages of three members of the royal 24 household. 25 The evidence was in relation to that that Mr Goodman</p> <p style="text-align: center;">Page 75</p>
<p>1 you will be given the opportunity to deal with it and 2 the rules make it abundantly clear that fairness to you 3 would require me to give you that facility, and I shall. 4 MR CHRISTIE: I'm very grateful for that indication. 5 LORD JUSTICE LEVESON: Thank you. 6 MR CHRISTIE: The macro point is one that probably will fall 7 better into module two, or part two of the first module, 8 namely the police and press, but may I mention this very 9 briefly now, because I think there may have been 10 a misunderstanding with the submission that I made last 11 time -- 12 LORD JUSTICE LEVESON: Your letter deals with that; doesn't 13 it? 14 MR CHRISTIE: It does deal with it and it's about the 15 Criminal Procedure and Investigation Act, which is 16 a macro point. 17 LORD JUSTICE LEVESON: Yes, I've seen the letter and you are 18 entitled to a substantive response and if you haven't 19 had one, you will have to get one. 20 MR CHRISTIE: Very well. Thank you very much. 21 LORD JUSTICE LEVESON: Thank you. 22 Anybody else before I ask Mr Jay? Right, Mr Jay. 23 Submissions by MR JAY 24 MR JAY: Sir, I am always attracted by the search for 25 a practical solution, and I note your interchange with</p> <p style="text-align: center;">Page 74</p>	<p>1 himself, on occasion, accessed the relevant voicemails. 2 Then of particular interest to us, since it may span 3 the breadth of the Inquiry, counts 16 to 20, which 4 covered the five non-royal victims, where Mr Goodman was 5 not on the indictment. 6 The individuals concerned were Mr Taylor, Mr Andrew, 7 Ms Macpherson, two others. 8 Of course, it is of interest to know, if it be the 9 case, who was it within News International who was 10 involved with Mr Mulcaire in relation to those 11 interceptions. The material before Mr Justice Grace was 12 necessarily limited, although his Lordship pointed out 13 in his judgment that there were others involved, and 14 I'll be referring you to that in more detail when I come 15 to open the case in two weeks' time. 16 There is evidence I've seen in the Mulcaire notebook 17 which may provide the answers to those questions. 18 LORD JUSTICE LEVESON: Yes. 19 MR JAY: It's for that reason, when, sir, you referred to 20 the individuals in News International who have been 21 given a code, if we can know the identity of those 22 individuals and then they will be placed in the public 23 domain only with a cypher or code, subject to your view 24 as to what is appropriate. Because you need to know the 25 length and the breadth of this unlawful activity and the</p> <p style="text-align: center;">Page 76</p>

<p>1 more individuals we have within News International --</p> <p>2 LORD JUSTICE LEVESON: Of course, and therefore there's a</p> <p>3 point to be made that they are identified, albeit that</p> <p>4 I make an order that their identification should not</p> <p>5 enter the public domain for any purposes.</p> <p>6 MR JAY: Yes.</p> <p>7 LORD JUSTICE LEVESON: Not that I will then make a finding</p> <p>8 that a particular person, X, Y, Z, did this, that or the</p> <p>9 other, because I won't, but in order to get the picture</p> <p>10 right. So I need not only to know a name, but,</p> <p>11 I accept, broad bands: casual worker, whatever. I'm not</p> <p>12 trying to do it on the hoof.</p> <p>13 MR JAY: Yes. These names have been called "corner names",</p> <p>14 inasmuch as they typically appear on the top left-hand</p> <p>15 corner of the relevant page of the Mulcaire notebook.</p> <p>16 And where they do appear, they don't appear in every</p> <p>17 case; there is a first name only, but it may be possible</p> <p>18 to deduce from the first name what the full name might</p> <p>19 be. It's not, frankly, that difficult an exercise. But</p> <p>20 insofar as this will enter the public domain, subject to</p> <p>21 your final conclusion, there will only be a cypher.</p> <p>22 Certain information is already, however, in the</p> <p>23 public domain. I'm not going to read it out, but may</p> <p>24 I just alight, if I may, on paragraph 43 of</p> <p>25 Mr Justice Vos' judgment.</p> <p style="text-align: center;">Page 77</p>	<p>1 learn that from paragraph 85, from his Lordship's</p> <p>2 conclusion at paragraph 133.</p> <p>3 So what was under contemplation, although the full</p> <p>4 scale of this is not altogether clear at the moment, is</p> <p>5 that there were at least five other News of the World</p> <p>6 journalists who might have been involved.</p> <p>7 I say "might have been involved" since their mere</p> <p>8 identification as a corner name on Mr Mulcaire's</p> <p>9 notebook page would not provide conclusive proof, it</p> <p>10 would provide an inference, and would be a matter for</p> <p>11 you in due course, in the light of that and other</p> <p>12 evidence, to assess what inferences may appropriately be</p> <p>13 drawn.</p> <p>14 LORD JUSTICE LEVESON: As a matter of generality.</p> <p>15 MR JAY: As a matter of generality, indeed, applying one's</p> <p>16 common sense.</p> <p>17 So what we are seeking by way of a possible</p> <p>18 practical solution to gain insight into the length and</p> <p>19 breadth of this, and indeed by cypher the individuals</p> <p>20 within News of the World who may be inculcated in this</p> <p>21 unlawful activity, is the sort of evidence, the sort of</p> <p>22 material which you discussed, sir, with Mr Garnham.</p> <p>23 LORD JUSTICE LEVESON: Yes.</p> <p>24 MR JAY: It could be provided to the Inquiry team on a full</p> <p>25 basis, as it were, but it would then be provided to the</p> <p style="text-align: center;">Page 79</p>
<p>1 LORD JUSTICE LEVESON: Yes.</p> <p>2 MR JAY: There's reference there to an individual within</p> <p>3 News International.</p> <p>4 LORD JUSTICE LEVESON: Yes.</p> <p>5 MR JAY: I don't want to be too coy about it. This judgment</p> <p>6 is a publicly available judgment and if you rule that</p> <p>7 I can read it out, I will provide it, but on the other</p> <p>8 hand I don't want to appear to be sensationalist in any</p> <p>9 way.</p> <p>10 LORD JUSTICE LEVESON: But there are names in the public</p> <p>11 domain, there's no question.</p> <p>12 MR JAY: There are other names as well, as Mr Justice Vos</p> <p>13 points out, a little bit later on in his judgment.</p> <p>14 Paragraph 81 --</p> <p>15 LORD JUSTICE LEVESON: Yes. I've seen that, but it may be,</p> <p>16 and this is something which will obviously have to be</p> <p>17 considered, that what is the rule for good reason in</p> <p>18 relation to some actually should apply to all, whether</p> <p>19 or not their names have previously entered the public</p> <p>20 domain.</p> <p>21 MR JAY: Yes, sir, that may be right.</p> <p>22 What Mr Justice Vos did was he made an order, as he</p> <p>23 said, in order to protect the integrity of the police</p> <p>24 investigation and privacy rights, that the hitherto</p> <p>25 unrevealed names of suspects would be cyphered. We</p> <p style="text-align: center;">Page 78</p>	<p>1 world at large on a cypher basis, and indeed can be</p> <p>2 probably quite shortly analysed and then synthesised by</p> <p>3 me in my opening submissions so that you have the</p> <p>4 picture in a nutshell.</p> <p>5 I wish to emphasise to you strongly that in part one</p> <p>6 of the Inquiry we're not just looking at phone hacking.</p> <p>7 LORD JUSTICE LEVESON: No, I agree.</p> <p>8 MR JAY: The danger is, because it was the trigger for the</p> <p>9 setting up of this Inquiry, that we focus on that to the</p> <p>10 exclusion of all else. What we are concerned with is</p> <p>11 the culture and practice and the ethics of the press.</p> <p>12 We are looking at the full range and the good, the bad</p> <p>13 and the ugly. It would be wrong just to look at the</p> <p>14 alleged bad practices of the press; that would be</p> <p>15 one-sided and inappropriate.</p> <p>16 There are, having read the substantial body of press</p> <p>17 evidence, numerous witnesses who say, "Our culture, our</p> <p>18 practice and our ethics are good", and that evidence</p> <p>19 will be presented to you and you will have to consider</p> <p>20 it. But, on the other hand, there is other evidence to</p> <p>21 suggest that culture, practices and ethics are not so</p> <p>22 good, and we're not just looking at phone hacking, we're</p> <p>23 looking at a range of activities.</p> <p>24 LORD JUSTICE LEVESON: Yes, and it's likely to be different</p> <p>25 across different areas of work.</p> <p style="text-align: center;">Page 80</p>

<p>1 MR JAY: Yes.</p> <p>2 LORD JUSTICE LEVESON: In the sense that in real life, not</p> <p>3 everybody is black and evil or wrong, and not everybody</p> <p>4 is white.</p> <p>5 MR JAY: Yes.</p> <p>6 LORD JUSTICE LEVESON: There's a grey.</p> <p>7 MR JAY: Yes. It may be that there is a lot of grey here.</p> <p>8 But we are focusing primarily on methods which are</p> <p>9 either illegal, but that applies to few of the methods</p> <p>10 under consideration, but certainly phone hacking is</p> <p>11 plainly legal, or unethical or sailing close to the wind</p> <p>12 and/or in breach of the code, and there are a range of</p> <p>13 activities which fall under those rubrics which you will</p> <p>14 be asked to consider, and in respect of which there is</p> <p>15 no ongoing police investigations and you will hear</p> <p>16 general evidence about.</p> <p>17 LORD JUSTICE LEVESON: Yes. I ought to make it clear when</p> <p>18 I mean everything is black and everything is white in</p> <p>19 one organisation.</p> <p>20 MR JAY: Yes.</p> <p>21 You have been told that there may be other evidence</p> <p>22 out there. I'm not going to refer to that other</p> <p>23 evidence. It was touched on in Mr Garnham's 26 October</p> <p>24 submissions. I make no submissions about it, but</p> <p>25 whether it really is necessary for that evidence to be</p> <p style="text-align: center;">Page 81</p>	<p>1 LORD JUSTICE LEVESON: Some may be, sometimes they may be,</p> <p>2 sometimes they may not be. That's the problem, isn't</p> <p>3 it?</p> <p>4 MR JAY: Yes.</p> <p>5 LORD JUSTICE LEVESON: The great tension between the role</p> <p>6 that investigative journalists legitimately play in the</p> <p>7 public interest and trying to create a line between that</p> <p>8 and going beyond that which is obviously legal, but</p> <p>9 beyond that which exceeds the bounds of appropriate</p> <p>10 journalistic activity.</p> <p>11 MR JAY: Yes. I'm deeply conscious of that issue in</p> <p>12 particular, and it's going to be set out in some detail</p> <p>13 in my opening submissions to the Inquiry, which now will</p> <p>14 be given in exactly 14 days' time, but unless you have</p> <p>15 any questions of me now, there's nothing more I want to</p> <p>16 say --</p> <p>17 LORD JUSTICE LEVESON: No. Thank you very much. Thank you</p> <p>18 for the note that you prepared and, indeed, all counsel</p> <p>19 for the notes they prepared, because it has allowed this</p> <p>20 analysis to proceed much more quickly.</p> <p>21 Mr Garnham, this started as your application, so I'm</p> <p>22 prepared to give you a final word if there's anything</p> <p>23 you want to say.</p> <p>24 MR GARNHAM: There's nothing I want to say on that, sir,</p> <p>25 although I want to address you on the question of</p> <p style="text-align: center;">Page 83</p>
<p>1 considered is going to be a matter for you in the light</p> <p>2 of the ongoing police investigation.</p> <p>3 The critical evidence on the phone hacking issue may</p> <p>4 well all be contained in the Mulcaire journal and the</p> <p>5 inferences which may properly be --</p> <p>6 LORD JUSTICE LEVESON: Well, and the Operation Motorman.</p> <p>7 MR JAY: Yes, that's a separate -- yes. To be absolutely</p> <p>8 clear, that is going to be considered in some detail,</p> <p>9 since we have a mass of evidence from Mr Thomas, who has</p> <p>10 greatly assisted the Inquiry, and possibly evidence from</p> <p>11 one other witness. So we'll be looking at that at an</p> <p>12 early stage, since chronologically it probably pre-dates</p> <p>13 the phone hacking, but some aspects of phone</p> <p>14 interception, of course, are quite old. One has in mind</p> <p>15 the interception of the Prince of Wales' phone, which</p> <p>16 took place in 1989, and which is fully in the public</p> <p>17 domain, and which is a criminal offence under the 1985</p> <p>18 Act.</p> <p>19 So, in the old biblical proverb, there's nothing new</p> <p>20 under the sun. All we see is manifestations, as</p> <p>21 technology advances, of people using different and</p> <p>22 sometimes more sophisticated means of subterfuge, but</p> <p>23 the ultimate issue is the subterfuge and unlawful or</p> <p>24 unethical means to achieve what some people say are</p> <p>25 unlawful or unethical ends.</p> <p style="text-align: center;">Page 82</p>	<p>1 anonymous evidence.</p> <p>2 LORD JUSTICE LEVESON: We'll deal with that slightly</p> <p>3 differently. I'm very conscious that I didn't give the</p> <p>4 shorthand writer a break. (Pause)</p> <p>5 The other topic that I raised was the question of</p> <p>6 anonymous evidence that might be provided from a number</p> <p>7 of persons who have written to the Inquiry on that</p> <p>8 basis.</p> <p>9 Since then, as I have indicated, I shall be making</p> <p>10 the National Union of Journalists a core participant,</p> <p>11 and it may very well be the journalists will feel able</p> <p>12 to communicate with their union, or with the national</p> <p>13 union in any event, and it may be that evidence will be</p> <p>14 forthcoming which will be based upon sources which</p> <p>15 a journalist is unprepared to identify, so it comes back</p> <p>16 the other way, quite apart from those who come directly</p> <p>17 to the Inquiry.</p> <p>18 If anybody wants to make any submissions, I think,</p> <p>19 Mr Jay, you'd probably better start on this topic, if</p> <p>20 there's anything you want to say in addition to that</p> <p>21 which you've already said.</p> <p>22 Submissions by MR JAY</p> <p>23 MR JAY: Sir, I can assist to this extent. I'm grateful to</p> <p>24 Mr Caplan for providing us, and by extension you, with</p> <p>25 a draft anonymity protocol.</p> <p style="text-align: center;">Page 84</p>

<p>1 LORD JUSTICE LEVESON: So am I, yes.</p> <p>2 MR JAY: We were giving thought internally to this this</p> <p>3 morning, and would like to take it forward in a number</p> <p>4 of respects. We would expect within the next 48 hours</p> <p>5 or so to come up with a second draft, which we would</p> <p>6 circulate for comment.</p> <p>7 The draft we see is drawn in the main from the</p> <p>8 Al-Sweady protocol. In that case, it's right to say</p> <p>9 that the witnesses who might be seeking anonymity had</p> <p>10 already been identified. They were likely to be</p> <p>11 military witnesses, and they had legal representation.</p> <p>12 The anonymous witnesses who may be coming forward to</p> <p>13 this Inquiry, have not been identified in advance, and</p> <p>14 some of them may well not have legal representation, and</p> <p>15 therefore consideration has to be given as to what is</p> <p>16 quite a subtle approach here, namely an open submission</p> <p>17 and a closed submission, whether that's going to work in</p> <p>18 this sort of situation.</p> <p>19 One can see that if the witness has the support of</p> <p>20 the NUJ, then these problems may well disappear, but if</p> <p>21 the witness is entirely unsupported, then the problems</p> <p>22 are going to exist.</p> <p>23 LORD JUSTICE LEVESON: It would be right, wouldn't it,</p> <p>24 Mr Jay, to say that if a witness was prepared to give</p> <p>25 evidence to the Inquiry but only under conditions of</p> <p style="text-align: center;">Page 85</p>	<p>1 approached the Inquiry must know that their identity</p> <p>2 will not enter the public domain without their consent.</p> <p>3 MR JAY: Yes.</p> <p>4 LORD JUSTICE LEVESON: Of course, if I rule against the</p> <p>5 application, then the whole thing might just fall to one</p> <p>6 side.</p> <p>7 MR JAY: Yes.</p> <p>8 LORD JUSTICE LEVESON: Yes.</p> <p>9 MR JAY: Those are our present thoughts on the protocol, and</p> <p>10 as I've indicated, we'll take that forward as quickly as</p> <p>11 we can.</p> <p>12 Insofar as there are objections in principle to this</p> <p>13 whole proposal, may I deal with those after those</p> <p>14 objections?</p> <p>15 LORD JUSTICE LEVESON: Yes, certainly, certainly.</p> <p>16 Right, Mr Garnham, do you want to say anything about</p> <p>17 this?</p> <p style="text-align: center;">Submissions by MR GARNHAM</p> <p>19 MR GARNHAM: Yes, if I may, sir. First of all, the devising</p> <p>20 of a protocol. I will say only this, that as Mr Jay</p> <p>21 rightly says, Mr Caplan suggests that the protocol come</p> <p>22 appears to come from the Al-Sweady public inquiry.</p> <p>23 There are other models, and the Al-Sweady public</p> <p>24 inquiry's model is a somewhat legalistic one, and</p> <p>25 without wanting to give evidence, having been involved</p> <p style="text-align: center;">Page 87</p>
<p>1 anonymity, it would probably be wrong to allow the</p> <p>2 identification of the particular journal about which the</p> <p>3 witness was then speaking. So if we then went back to</p> <p>4 cyphers, in order to say, well, they're different rather</p> <p>5 than the same, it would go to general practice, ethics,</p> <p>6 culture, but without in any sense giving rise to</p> <p>7 material which then the relevant newspaper would feel</p> <p>8 obliged to deal with, and in fairness, may be required</p> <p>9 to deal with, may be entitled to deal with, which would</p> <p>10 give rise to questions about identification and the rest</p> <p>11 of it.</p> <p>12 MR JAY: Yes. Sir, the other matter --</p> <p>13 LORD JUSTICE LEVESON: I raise that as a question so that</p> <p>14 everybody can hear it and think about it.</p> <p>15 MR JAY: Yes. The other matter which may be -- may need to</p> <p>16 be made explicit in the protocol should be to reflect</p> <p>17 what you said last Wednesday, namely: if at the end of</p> <p>18 the day you were to rule that the evidence could not be</p> <p>19 given anonymously, then the identity of the witness, or</p> <p>20 putative witness, must nonetheless be respected and that</p> <p>21 it would not enter the public domain, nor would we then</p> <p>22 serve a Section 21 notice on that witness to force him</p> <p>23 or her giving evidence on what, ex hypothesi now, would</p> <p>24 be an open basis.</p> <p>25 LORD JUSTICE LEVESON: Yes. In other words, somebody who</p> <p style="text-align: center;">Page 86</p>	<p>1 in that inquiry, it does result in a rather prolonged</p> <p>2 procedure.</p> <p>3 LORD JUSTICE LEVESON: Anything that isn't overly legal will</p> <p>4 only be advantageous, provided it is sufficiently</p> <p>5 clear --</p> <p>6 MR GARNHAM: Yes. An alternative method was used, for</p> <p>7 example, in the Baha Mousa Inquiry, which, despite</p> <p>8 a huge number of such applications, worked extremely</p> <p>9 efficiently, and all I was going to say in that regard</p> <p>10 is that we would be happy to correspond with Mr Jay</p> <p>11 about the devising of a suitable formula.</p> <p>12 LORD JUSTICE LEVESON: Thank you.</p> <p>13 MR GARNHAM: The second point I wanted to make, though, sir,</p> <p>14 is rather more fundamental and it's anticipated in our</p> <p>15 written submissions. We are concerned, sir, about the</p> <p>16 possibility of your being in receipt of either secret or</p> <p>17 anonymous evidence, and so I am clear, I'll define those</p> <p>18 terms if I may. First, "secret" being material that you</p> <p>19 receive, which is not just anonymous in the sense that</p> <p>20 its author is unidentified, but which the existence of</p> <p>21 which is not revealed to core participants. "anonymous"</p> <p>22 is self-evident; it's material you have received without</p> <p>23 knowing the author.</p> <p>24 Sir, our concern is fair trial concerns. If it is</p> <p>25 made public, as contemplated by you but not decided by</p> <p style="text-align: center;">Page 88</p>

<p>1 you last Wednesday, that you are willing to receive 2 evidence of either secret or anonymous type, which may 3 be exculpatory of particular individuals, then there may 4 arise a real danger. At subsequent criminal 5 proceedings, it might be said by a defendant, "There is 6 or there might be material in existence which would help 7 me in my defence, which is held by the state in the form 8 of this Inquiry, which I cannot get my hands on or know 9 what it means, and I ought to be able to, if I am to 10 have any prospect of the a fair trial." 11 We say that in consequence, sir, you should consider 12 indicating that if there is exculpatory material 13 received by you, particularly if it's received by you on 14 a secret basis, it will be disclosed to the prosecution. 15 LORD JUSTICE LEVESON: I have to think about that, because 16 what I absolutely don't want to do is to encourage lots 17 and lots of people to think this is a wonderful way to 18 generate some exculpatory material, by arranging all 19 sorts of people to say anonymous things to generate 20 stuff that I have to then pass to you on the basis you 21 have to disclose it and so -- 22 MR GARNHAM: The circle is complete. 23 LORD JUSTICE LEVESON: -- complete the circle. I have 24 sufficient experience of the criminal law to understand 25 the risks.</p> <p style="text-align: center;">Page 89</p>	<p>1 issue, as I'm sure do you and everybody else, because 2 a public inquiry, of course, is a public event, and as 3 far as possible everybody wants to know what evidence is 4 given to you. 5 If it is strictly necessary, of course, to derogate 6 from that general principle, and no less restrictive 7 option is available, then of course in those 8 circumstances, a procedure has to be devised. 9 Sir, the matters obviously that concern us are 10 certainly that if evidence is given, critical of a party 11 or by a journalist or a third party, that there should 12 be an opportunity to challenge that evidence and to put 13 the other side. Otherwise, of course, the risk is 14 obvious, that it will be given unchallenged and there 15 will be a question as to what weight, if any, can be 16 given to it. Therefore, one does need to divide 17 a procedure which will allow, so far as possible, core 18 participants to make representations to you in relation 19 to each individual application, and that's what we have 20 sought to do in the protocol which we have devised. 21 LORD JUSTICE LEVESON: Yes. Thank you very much indeed. 22 Mr Rhodri Davies, do you want to say anything on 23 this topic? 24 MR DAVIES: No, I don't, sir. 25 LORD JUSTICE LEVESON: Thank you. Where am I going?</p> <p style="text-align: center;">Page 91</p>
<p>1 MR GARNHAM: Absolutely, and we appreciate that as well, but 2 it wouldn't be right for us not to make the submission 3 that you're indicating a mechanism by which secret 4 material can be generated, without pointing out the 5 obvious fair trial difficulties. 6 LORD JUSTICE LEVESON: But my only interest would be to 7 receive information about the culture, practice and 8 ethics of the press. I would not be asking, 9 necessarily, for the sort of material that might be at 10 all relevant to specific exculpatory -- 11 MR GARNHAM: Right. 12 LORD JUSTICE LEVESON: But I understand the point. 13 MR GARNHAM: If that were made public, that goes some way to 14 the concern we have. 15 LORD JUSTICE LEVESON: Okay. Mr Caplan, thank you very 16 much. I'm not prepared to allow anyone anybody to 17 criticise you for doing the work on a protocol, because 18 you did it. 19 MR CAPLAN: Thank you. 20 LORD JUSTICE LEVESON: It might not be the right model, but 21 you did it. Thank you. 22 Submissions by MR CAPLAN 23 MR CAPLAN: Thank you very much. 24 Sir, very briefly, we've obviously set out our 25 submissions on this and we do see it as an important</p> <p style="text-align: center;">Page 90</p>	<p>1 MR CHAWLA: Just this, and I'm sorry to be an irritation, 2 but the protocol ought not to be limited just to core 3 participants, if the allegations are made against those 4 who are not core participants. 5 LORD JUSTICE LEVESON: Well, yes, but, Mr Chawla, we've done 6 this. The fact is that if any allegation is made that 7 touches upon any individual, the rules require me to 8 allow the representative of that individual to put 9 questions to the counsel to the Inquiry to ask or to ask 10 me whether they can ask questions, so I understand the 11 point. Thank you. 12 Ms Decoulos, what's the interest that you have on 13 this issue? 14 MS DECOULOS: It's not on this particular issue, but I don't 15 want you to close before I have an opportunity to say 16 something, because it's getting close to lunch. 17 LORD JUSTICE LEVESON: But I think I'll be back after lunch. 18 MS DECOULOS: Oh, thank you. 19 LORD JUSTICE LEVESON: I may not be; we'll see in a moment. 20 Mr Sherborne? 21 MR SHERBORNE: I have no observations. 22 LORD JUSTICE LEVESON: Thank you very much. Anybody else? 23 All right. What's the point you want to make, 24 Ms Decoulos. 25 MS DECOULOS: As you know, I applied to become a core</p> <p style="text-align: center;">Page 92</p>

<p>1 participant and you denied me, so I felt that was very 2 unfair, considering I'm not a phone hacking victim, but 3 as Mr Jay just emphasised a few moments ago, this 4 Inquiry is also about the standards, practices and 5 ethics of the press, which (inaudible), so unfortunately 6 I felt I had to put in an application for judicial 7 review, which I think you might be aware of, and I'm 8 very concerned that my application will not be 9 determined before this Inquiry commences, and I think 10 that's unfair -- 11 LORD JUSTICE LEVESON: Ms Descoulos, that's a concern you 12 should express to the Administrative Court. There's 13 nothing that I can do about it. I have no intention of 14 delaying the conduct of this Inquiry. You're entitled 15 judicially to review my decisions, that's absolutely 16 within your right, but concerns about the timetable, 17 therefore, should go to the Administrative Court. 18 MS DECOULOS: Thank you. Can I just say one other thing 19 that Mr Caplan raised about the documents being made 20 public? I'm concerned that there have been four core 21 participants added since I asked to be a core 22 participant and the judgment for those have not been 23 made public, as my own has not been made public, and I'd 24 be grateful to know when they will be made public. 25 LORD JUSTICE LEVESON: Yours, there's no reason why the</p> <p style="text-align: center;">Page 93</p>	<p>1 correction or balance. So I just wanted to emphasise 2 that if you did want to make any submissions in that 3 regard, because a fair number of your clients were 4 certainly present at most, if not all, of those events, 5 then I would, of course, be very happy to receive them. 6 MR CAPLAN: Thank you very much. 7 LORD JUSTICE LEVESON: Anything else? Thank you very much 8 indeed. 9 (12.58 pm) 10 (The hearing concluded)</p> <p style="text-align: center;">Page 95</p>
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<p>1 judgment that I gave in public, in the presence of 2 everybody who was here, should not be made public. If 3 it's not gone on the web, there's no reason why it 4 shouldn't. Equally, actually, there's no reason why it 5 should. It was transcribed and I have seen it, as I'm 6 sure you have, so there's no secret about it. 7 As regards the other applications, I will give 8 a judgment, which I shall hand down tomorrow. The 9 reason I am not doing it now is because I am going to 10 reflect just a little bit further on the application in 11 relation to the Surrey Police, but I have identified 12 what I've said about the others already, but I will give 13 a judgment. Thank you. 14 Is there anybody else who has any other issue? 15 I have one other thing to raise. 16 Right, Mr Caplan, there's one other matter that 17 I wanted to raise with you. 18 MR CAPLAN: Yes. 19 LORD JUSTICE LEVESON: When we last met, you were making 20 submissions about, among other things, the lectures or 21 briefings, and the seminars, and I made it abundantly 22 clear how I saw them going, but I said that I will be 23 very pleased to receive any submissions that anybody 24 wanted to make, if it was felt that what had happened in 25 relation to the briefings had been wrong or needed</p> <p style="text-align: center;">Page 94</p>	<p>1 2 3 Submissions by MR BEGGS3 4 Submissions by MR JAY16 5 Submissions by MR GARNHAM20 6 Submissions by MR CAPLAN43 7 Submissions by MR DAVIES48 8 Submissions by MR CHAWLA58 9 Submissions by MR SHERBORNE65 10 Submissions by MR CHRISTIE69 11 Submissions by MR JAY74 12 Submissions by MR JAY84 13 Submissions by MR GARNHAM87 14 Submissions by MR CAPLAN90 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;">Page 96</p>
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