The Leveson Inquiry

culture, practices and ethics of the press

ANONYMOUS EVIDENCE

Lord Justice Leveson:

1. On 9 November 2011, I ruled that I would accept evidence provided anonymously. Such evidence can take three forms. First, it can involve individuals who have approached the Inquiry anxious to assist but only on condition that they remain anonymous. Secondly, it can relate to others who, specifically for the purposes of the Inquiry, are prepared to provide evidence to third parties (such as the NUJ) who will then make a statement incorporating the evidence in the form of hearsay but without attributing it save only for validating the credentials of the witness as a journalist. Third, it can come from witnesses such as Mr Nick Davies. This last mentioned material has not specifically been prepared for the Inquiry but, in his case, is recounted in his book *Flat Earth News*, parts of which he has exhibited to his statement. A draft protocol covering the first of these forms of evidence was circulated to core participants and, over the ensuing two weeks, a number of submissions have been received about it. I am grateful for them all.

2. A number of submissions seek to raise issues of principle and invite me to reconsider my ruling of 9 November: I am not prepared to do so. The underlying circumstances arising in this case are different from those in cases such as *R v. Lord Saville of Newdigate ex parte A* [2000] 1 WLR 1855, *Bennett v. A & others* [2004] EWCA 1439 and the more recent *re Officer L* [2007] 1 WLR 2135. Those involved in these inquiries knew the names of the witnesses who would give direct evidence that might impact specifically on them. In this case, nobody would know the identity of the anonymous witnesses (or indeed the identity of those who were sources for the NUJ or Mr Davies); that is not dissimilar from the situation that arises when journalists print stories based on sources which they refuse to identify and, as I have recognised, limited or very limited weight could be attached to such evidence as a result. It is not suggested that I should not receive hearsay evidence and, in one sense, the evidence provided directly to the Inquiry is of greater value because a witness will speak to it and can be probed, albeit only generally, on issues such as credibility.

3. I recognise that if I were intending to make findings of fact against individuals or specific newspapers or organisations based on this evidence, fairness could well require disclosure of the names of those giving evidence so as to permit a full investigation (although I anticipate that hearsay evidence would still be admissible). But as has previously been made clear, and as I further address below, any anonymous evidence received by the Inquiry will be

redacted in such a manner that specific titles will not be identified. In any event, for the purposes of Part 1 of this Inquiry, I am looking only at the culture practices and ethics of the press in general. Although I am likely to follow certain specific stories for evidence of culture and practices (such as, for example, relate to the publication of the diary of Dr Kate McCann), any findings I might make will be limited to the extent necessary to delineate the overall picture, and in this regard I should make it clear that the evidence the Inquiry will be receiving is far from being only of a critical nature.

4. Before turning to the protocol, I ought to add one further observation. Mr Jonathan Caplan Q.C. (for Associated Newspapers Ltd referred to as 'ANL') submits that his clients' willingness to provide the Inquiry with an undertaking should be sufficient to protect the witnesses. It is suggested that the following be posted on the Inquiry website:

> "ANL is committed to assisting the Leveson Inquiry as fully as it can as a Core participant having regard to the importance of its Terms of Reference. In order to assist Lord Justice Leveson in his task ANL gives the following undertaking to all employees who wish to give evidence to his Inquiry:
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> (i) Subject to the limitations set out below, nothing which any employee of ANL provides to the Leveson Inquiry by way of evidence, whether orally or in writing, will be used in subsequent disciplinary proceedings against that employee or against any other employee of ANL;
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> (ii) This undertaking is subject to the following limitations. Firstly, that it does not apply in relation to an allegation of misconduct which is so serious that it would justify dismissal for gross misconduct. Such evidence may be used in any disciplinary proceedings for gross misconduct. Secondly, it does not apply to anyone who is charged under s. 35 of the Inquiries Act 2005 in connection with this Inquiry or under any other provision for deliberately misleading the Inquiry."

5. It is, of course, open to ANL (or any other newspaper) to publish this undertaking to their staff and I am happy that they should but, with great respect, it seems to me to miss the point. First, the position of ANL is entirely to deny that any illegal or unethical practices are condoned at their titles. For the converse to be asserted as accurate by a journalist, it might be suggested that such a claim either involved gross misconduct or itself constituted gross misconduct. Secondly, and more important, the concern expressed by journalists (and I make it clear that I have absolutely no idea whether any

journalist who has approached the Inquiry is employed by ANL and I make no suggestion to that effect) is not limited to dismissal or disciplinary proceedings but understandably extends to career prospects generally in what is, after all, a very difficult economic environment.

6. As I have repeatedly made clear, the press performs a vital role in our society and the overwhelming majority of the work carried out by journalists is undertaken in accordance with the highest ethical standards and entirely in the public interest. The Inquiry, however, must be seen to be doing all that it can to hear the other side of the story and to ensure that it is not covered up. I fully understand the reputational concerns that have been expressed by ANL and others and I am conscious of the need to ensure, to such extent as is possible, that the investigation of customs, practices and ethics is general. As I have said, some stories that have been the subject of specific comment will require specific consideration to determine the extent to which they show light on custom or practice but, in those very few cases, I will be pleased to provide every opportunity for contradictory or explanatory evidence to be provided.

7. Turning to the draft protocol, the first point taken concerns the mandatory requirement set out in r. 9(1) of the Inquiry Rules 2006 which mandates the panel to send a written request for a witness statement to any person from whom the Inquiry proposes to take evidence and suggests that inviting the submission of a witness statement from persons who believe that they have relevant evidence but need to provide that evidence anonymously fails to comply with that rule. In fact, at this stage, I have not decided to take evidence from such a person and I do not believe that this provision prevents me from receiving evidence voluntarily submitted (as I have sought from the public generally). For the avoidance of doubt, however, I am content that a summary of the evidence that would be available will be sufficient to allow a decision to be made whether to pursue further the possibility of calling the proposed witness. A consequential amendment to the second paragraph (formally to request a statement if one has not been provided) follows.

8. A second concern about the decision whether the application for anonymity (or other protective measures) should be taken forward relates to my position. It is suggested that *prima facie* relevance should be decided by counsel, presumably so that I do not see potentially prejudicial material which I then deem should not be adduced. Further, it also appears be suggested that the phrase 'Inquiry team' is too wide. I do not agree with either of these submissions. I will, of course, be assisted by the solicitor to the Inquiry and by counsel (and have no doubt that I would not be troubled to consider an application in relation to evidence that unarguably was of no value), but I am not prepared to use the protocol to mark out the responsibilities of different members of the team and, in any event, the ultimate arbiter of all aspects of this Inquiry has to be me. In that regard, the exercise is no different from that which I have had to consider in different jurisdictions when deciding the admissibility of evidence or the existence of

public interest immunity: I will have no difficulty putting out of my mind that which is not adduced in evidence (in the same way that I will not be affected by what was asserted at the seminars but which is unsupported by evidence).

9. It is next submitted that paragraph 4 of the protocol (which concerns the process for applications for anonymity) should be drawn so that closed submissions are limited to identity or other information that would identity. In my judgment, that formulation is too narrow for it would not permit me to understand any particular reason for the specific application. Suffice to say, however, that I entirely endorse what lies behind the point: only material which cannot be included in the open submission without defeating the purpose of the application should be included in the closed submission and I will ensure that this provision is brought to the attention of those that seek to make this application.

10. Turning to paragraph 6 of the protocol, it is submitted that the statement should only be withheld from circulation for the purpose of core participants making representations upon its admissibility if there is a compelling reason to do so. That was, in fact, the intention behind the provision but I am content for the draft to be amended to put this beyond doubt.

11. Paragraph 9 concerns the redaction of the identity of the company or title about which the anonymous witness gives evidence. Reflecting my ruling, the *News of the World* is excluded from this redaction and I agree that the protocol should be amended accordingly. It should similarly be extended to all cases (and not merely employees or former employees). News International also argue that given that any evidence identifying the *News of the World* impacts on it (but not others) and could also potentially affect the investigation being conducted by the Metropolitan Police, preliminary access should be given to it (and the police) so that representations can be made. There is no doubt that I and the Inquiry team are well aware of the need to take especial care in this area and it may be necessary, in a particular case, for inquiries to be made about potential risks so that a decision to put the material in front of the Inquiry at all is made in the light of all the circumstances but I am not prepared to bind myself to that course. All material is received by core participants subject to a confidentiality undertaking which I have no doubt will be scrupulously observed and I am not prepared to take any course which might give rise to the suggestion of my receiving 'secret' representations.

12. It is also suggested that where titles are redacted in the evidence of an anonymous witness, they are ciphered so that the number and extent of any alleged practice is at least visible. I can see the advantages of such an approach but I am equally concerned about the risks of jigsaw identification. Suffice to say, I prefer to keep this possibility under review depending upon the extent to which I receive information. One possibility is that, at the end of the evidence, a statement will be adduced to the effect that the anonymous evidence covered *x* different titles.

13. Three further points have been made on the protocol generally. First, it is suggested that the protocol refers to the duty to act fairly contained within s. 17 of the Inquiries Act 2005. I see no purpose in that: at all times, I am under that duty and no purpose is to be served by including it within one protocol but not others. Secondly, it is argued that I should spell out the principles to be applied when considering a specific application for anonymity. In that regard, I have already made it clear that any such application will be subject to intense scrutiny: I do not consider it necessary to go further. In the event of an application, core participants will be at liberty to draw my attention to such authority as they feel appropriate and to make detailed submissions as to the way in which the general principles of law should be applied. Any decision in this area is bound to be fact sensitive and to lay down principles would be to invite challenge on a theoretical basis that would hardly advance the way in which the Inquiry could be conducted.

14. The last point relates to the understandable concern that if a witness gives evidence suggesting impropriety in a particular title, that title would wish to be informed so as to conduct internal investigations and, potentially, either deal with the criticism or provide the Inquiry with material which might undermine the credibility of the witness or the criticisms. Undertakings are offered to keep the information confidential to the most senior legal executive within the title and external counsel. The latter problem is the fundamental issue surrounding any anonymous evidence (and, indeed, hearsay evidence generally) but it is, I am afraid, an inevitable consequence of it. That is why the weight that can be given to such evidence is potentially so limited. Further, the solution is unlikely to satisfy the proposed witness. All that I can say is that should I receive such evidence, I will have the highest regard for these concerns and I shall always be prepared to look at individual cases to see if some way forward can be found that meets the requirements of all. Suffice to say, I am not prepared to commit to adopting the course that is here suggested.

15. I add one footnote to this ruling. Mr Caplan, on behalf of ANL, was anxious to see the protocol in its final form before deciding whether to challenge my ruling of 9 November and was conscious that the time for doing so expired on 23 November. Over the last two weeks, I have twice been prepared to provide an *ex tempore* judgment on the arguments that had been advanced; on each occasion, a further submission from a different core participant was then received which I had to consider. I do not complain because I am very conscious of the very real pressure that everyone is working under but, in future, I will provide a deadline for submissions (which I will discuss) but I will then decline to consider submissions that do not meet that deadline. As for this protocol, the final version is attached to this ruling.

28 November 2011