
JOINT SUBMISSIONS TO THE LEVESON INQUIRY

ON BEHALF OF

THE CROWN PROSECUTION SERVICE

AND

THE METROPOLITAN POLICE SERVICE

26th October 2011

1. These submissions have been drafted with a view to the fact that it may be considered appropriate to make them public.
2. As is widely known, the Metropolitan Police Service (MPS) is conducting a number of investigations into so-called phone hacking. Those investigations have not been completed, and there are a number of suspects in relation to whom charging decisions have not yet been made. The Crown Prosecution Service (CPS) is engaged in providing early advice and investigative guidance to the MPS; both agree that relations between us are cordial and cooperative.

3. It is inevitable that this Inquiry will touch on areas which may have a close connection with the criminal investigation and thus an impact on any subsequent trial, were one to take place. The CPS and the MPS wish to give as much assistance as possible.

4. That being said, we are understandably anxious that nothing should be said or done which might jeopardise either the investigation or trial. We know that the Inquiry shares our anxieties and are grateful for the public reassurance that has been given that it is not Lord Justice Leveson's intention that Part I should affect potential criminal proceedings, save in the most tangential sense.

5. We have had a number of useful meetings with those conducting the Inquiry, including one with counsel, who were most helpful in giving us advance indication of the way that the Inquiry envisaged deploying some of the material in its possession. In the discussion which took place, it became plain that there might be implications for the criminal proceedings which might not initially be apparent.

6. These submissions are intended to express such concerns as the CPS and the MPS have. We hope too that they will give assistance to the Inquiry as to how it might best balance its proper aspiration that Part I should be thorough, without inadvertently achieving that which we know it seeks to avoid, namely making it more difficult for a criminal trial to take place.

7. The investigation is being conducted by the MPS in a rigorous, efficient and robust fashion. Suspects are still being identified, searches are taking place and material is being evaluated on an ongoing basis. It is our joint view that the officers must be free to make decisions without fear that material they have discovered will be put into the public domain or disclosed to suspects before they deem it to be operationally necessary or desirable to do so.

8. Of equal importance is the question of the fairness of any criminal trial, were one to take place. In particular, the Crown should not be put in a position where an otherwise credible prosecution might be stopped by the court on the basis that the defendant cannot have a fair trial.

9. We therefore as a general proposition urge the Inquiry not to rehearse any evidence during Part I that is likely to prove central to any criminal proceedings.

10. This includes, but is not limited to, any investigation as to which individuals were aware of possible criminal activity, and where they sit (or sat) within the hierarchy of any named newspaper. It is our view that these questions may be critical to any prosecution, and would involve the Inquiry engaging in a determination which would properly be within the province of a jury.

11. There would in addition inevitably be intense public speculation which the Inquiry could not prevent.

12. The Inquiry should be mindful too of the duty on police and prosecution to seek out and then consider, for disclosure purposes, material which may be relevant to the criminal investigation. Anything said to or by the Inquiry during Part I as to such central issues may be discloseable.

13. Against the background of these general observations, these are our substantive submissions.

Use of documents

14. We are aware the Inquiry is presently in possession of a number of documents the content of which is not in the public domain. There is every possibility that such documents may form the evidence in any criminal trial. We urge upon the Inquiry that it should not during Part I make public any significant document which has not already been widely reported.

15. Our reasons are these.

16. Documents may appear to carry a clear meaning, which upon further investigation can turn out to be neither true nor fair. If they are put into the public domain out of context and without the benefit of a thorough investigation, there is not merely a danger but an inevitability that conclusions will be (publicly) drawn which may in due course turn out to be misleading and, worse, unfair to those involved.

17. In the case of specific examples which were discussed at a meeting with counsel for the Inquiry, MPS officers were able to explain to counsel that what appeared to be self-evident conclusions to be drawn from the wording used were - when seen in the light of the wider investigation - in fact possibly inaccurate, and certainly prejudicial to the people concerned.

18. It should be appreciated that the MPS are still searching for, and acquiring, new evidence on an ongoing basis.

19. Officers of the MPS may wish to ask suspects about documents in interview. It would not be in the interests of justice were this material to have been publicly discussed and analysed before such interviews take place.

20. If it is thought to be helpful, both the CPS and the MPS are prepared to give an opinion to the Inquiry in advance, if necessary on a document by document basis. We would invite the Inquiry to conclude that this is the safest course as, relying on the observations in para 15 above, the significance of a particular document may not be apparent when it is considered out of context.

Questioning of suspects.

21. We invite the Inquiry not to take evidence during Part I from anyone who is a suspect¹ in the criminal investigation. By “evidence” we mean too the showing of a document to a suspect and inviting him or her to comment upon it.

22. It is our view that to do so would achieve nothing, as it is all but inevitable that anyone who is being considered for prosecution would decline to answer questions before a charging decision was made and could not be compelled to do so.

23. It may then be asked where the harm would lie?

¹ The Inquiry has agreed to make a list of witnesses available to the MPS who could then privately indicate whether anyone on it is a suspect

24. It is inevitable that were any suspect to refuse to answer questions there would be intense public speculation about this which the Inquiry would be powerless to prevent. At a trial, there are considered and developed safeguards, supervised by a judge, which are designed to make sure that before a jury draws any sort of inference adverse to the defendant it is fair to do so.

25. The suspects would have no such protection. It is not hard to envisage that at any future trial they might argue that they had been placed in an impossible position, that is to say, having either to waive their privilege against self-incrimination and rehearse their defence (in ignorance of the case against them or of the disclosure to which they would be entitled at trial), or face being criticised in the Press for remaining silent in the face of what might seem to be compelling evidence.

26. There remains too a small but not inconsequential risk that an unscrupulous suspect might use the opportunity provided by the Inquiry in effect to derail a future prosecution.

Previously unseen evidence

27. Counsel to the Inquiry raised with us the question of what should be done if an individual or body provided evidence about which the MPS did not already know. This only arises because part of the Inquiry will take place before the institution of any criminal proceedings.

28. Relevant material is likely either to be inculpatory, in which case we would suggest that it is proper that the MPS should be permitted to assess it in the context of the wider investigation, or exculpatory, in which case it is likely to fall to be disclosed to the defence at trial. Sometimes the effect of material may not be clear to those who are not seized of the wider context (for example, material which implicates one suspect might of necessity therefore exonerate another).

29. It is our joint view that the safest course would be for all new material to be provided to the MPS so that it can receive proper consideration.

Proposed way forward

30. We understand that the Inquiry may want to establish a basic factual platform to enable it properly to examine the issues which arise under Part I. Given the above this may be difficult to achieve; however we are happy to provide such assistance as we can to the Inquiry and it may be possible, for example, to agree a schedule of uncontroversial facts, time lines and the use of some documents (where such use would not undermine the criminal investigation or prosecution).

31. In addition to the above, and in order further to assist the Inquiry, the MPS and the CPS make the following proposals as to provision and use of documentation for the purposes of the Inquiry.

32. These proposals relate to documents disclosed to the Inquiry by the MPS (or, should there be any, by the CPS) whether in accordance with the following paragraphs or otherwise. They also relate to documents obtained by the Inquiry from elsewhere that might, on a reasonable assessment, be relevant to the MPS' investigation.

33. First, the MPS and the CPS will prepare an overview document, setting out a narrative of the events of interest to the Inquiry. If required to do so, pursuant to a Notice under section 21 of the 2005 Act, the MPS will disclose that document to the Inquiry.

34. Second, the MPS and CPS will refer in that overview document to the relevant documents to which they have access which support the analysis it contains. If ordered to do so, the MPS will disclose those documents to the Inquiry.

35. Third, the Inquiry will indicate to the MPS, on a confidential basis, the material which it proposes to disclose to other Core Participants or make public, in advance of doing so, whether that material has been disclosed by the MPS or by any other party. This would include the whole or any part of the overview document. The MPS will identify an officer or officers to whom such indications should be directed who will be able promptly to indicate the MPS' stance on those documents.

36. Fourth, the Inquiry will give the MPS and the CPS the opportunity to make submissions to the Chairman on the Inquiry's proposals

to disclose or make public such material. Where the MPS and CPS resist the Inquiry's proposals they will do so by inviting the Chairman to make a Restriction Order pursuant to section 19 of the Act. Those submissions will be heard in closed session in the first instance so that the MPS/CPS can explain by reference to the particular documents the nature of their objection. So far as is consistent with the purpose of the exercise, an open session may follow to give others the chance to be heard.

37. Fifth, the Chairman will then give a ruling on the propriety of the Inquiry disclosing the material or using it in public session, as to any steps that may need to be taken in respect of it to preserve the integrity of the investigation or any future prosecution, and as to any appropriate Restriction Order.

38. Sixth, in the unlikely event that the CPS or MPS wish to challenge the Chairman's ruling, they will give notice of their intention to do so promptly and in any event within 14 days in accordance with Section 38 of the Act.

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