

APPLICATION OF RULE 13 OF THE INQUIRY RULES 2006 IN RELATION TO THE METROPOLITAN POLICE SERVICE

Lord Justice Leveson:

1. In my Ruling concerning the application of Rule 13 of the Inquiry Rules 2006 (“the Rules”), I adverted to the touchstone of the inquisitorial process prescribed by the Inquiries Act 2005 (“the 2005 Act”) which is the requirement of fairness to all and, in particular, to s. 17(3) of the Act to that effect. Mr Neil Garnham Q.C. and Ms Christina Michalos for the Metropolitan Police Service ally themselves with a number of the submissions made by other core participants in relation to individual criticism and I do not address either the legal framework or those arguments separately: reference should be made to that Ruling. In addition, however, they make free-standing complaints directed to fairness and the position of the police in this Inquiry in the context of the possibility that I might serve a notice under Rule 13 affecting any police officer. Having regard to the different circumstances in which possible criticisms of the police, as contrasted with journalists (and, in particular, those who could be the subject of police investigation), might arise, I deal with these arguments in this Ruling.

Background

2. Although the central theme of the Inquiry is the conduct of press, the Terms of Reference are far wider. Thus, in relation to the police, the Inquiry touches upon the conduct of the police in a number of ways, as follows:

Part 1

1. To inquire into the culture, practices, and ethics of the press, including: ...
 - b. contacts and the relationship between the press and the police, and the conduct of each;
...
 - d. the extent to which there was a failure to act on previous warnings about media misconduct.

2. To make recommendations: ...
 - d. the future conduct of relations between the police and the press.

Part 2

4. To inquire into the way in which any relevant police force investigated allegations or evidence of unlawful conduct by persons within or connected with News International, the review by the Metropolitan Police of their initial investigation, and the conduct of the prosecuting authorities.
 5. To inquire into the extent to which the police received corrupt payments or other inducements, or were otherwise complicit in such misconduct or in suppressing its proper investigation, and how this was allowed to happen.
 6. To inquire into ... the role, if any, of ...public servants and others in relation to any failure to investigate wrongdoing at News International.
 7. In the light of these inquiries, to consider the implications for the relationships between newspaper organisations and the police, prosecuting authorities, ... and to recommend what actions, if any, should be taken.
3. The primary reason for the Inquiry having being split into two parts revolves around the substantial police investigations primarily (but not exclusively) contained within Operations Weeting, Elveden and Tuleta. Part 1 relates to the culture practices and ethics of the press and has meant that I have been concerned not to prejudice the criminal investigation or any prosecution. As a result, I have not primarily been concerned with who did what to whom ('the mantra'). Generally, I have also sought to protect the names of journalists who are not being investigated but whose conduct is or might be criminal on the basis that if those who have been arrested are not being named, it does not seem fair specifically to name those who might be responsible for less egregious conduct but are not being arrested ('the self denying ordinance').
 4. That is not to say that Part 1 does not involve an analysis of some of the evidence and, indeed, some of the detail which might impact on individual officers: in order to make recommendations as to the future, it is of critical importance, in my judgment, to justify any concerns that I might have by reference to what has, in fact, happened and to a narrative of events. Thus, in relation to the police, the nature of the relationship between editors and

senior police officers, the general issue of hospitality and the approach of, for example, the Department of Public Affairs within the Metropolitan Police to national titles all fall within Part 1: although paragraph 5 of Part 2 refers to inducements, it does so in the context of the extent to which inducements induced misconduct or suppressed proper investigation which is (as the paragraph makes clear) directed to corrupt benefit. Neither can it be argued that Part 1 cannot be so construed because no other individual conduct is being examined: that aspect of Part 1 which is concerned with the relationship between the press and politicians is not reflected in any corresponding factual investigation or review contained within Part 2.

5. In that regard, I have made it clear that that the breadth of the Inquiry was such that I would have to be extremely focused in relation to the areas on which it would be necessary to hear oral evidence and that I would limit the approach to the essential (transcript, 6 September 2011, am, page 4 line 24). I have also said that Part 1 is limited as a consequence of the ongoing prosecution. The context (namely the extent to which I would be investigating the conduct of identified journalists who are the subject of investigation and may be prosecuted) is important, as is clear from my comment on 26 October 2011 upon which Mr Garnham now relies. I then said (transcript, am, page 43 line 16):

“[I]t is the overarching position I am seeking to reach for the purposes of this part of the inquiry, in order to provide a factual - a sound foundation to consider the other parts of my terms of reference. I would prefer not to get bogged down, if I can avoid it, in detail which is highly relevant to part 2, and is obviously that which the police and the CPS are focused upon; if I can avoid the detail, because I've got a sufficient substratum of fact, a narrative as I've called it, then I would be keen to do so because I don't want to interfere more than is absolutely necessary with an investigation or any possible prosecution, if there is to be one, and I certainly don't want to prejudice either of those.”

6. Some of the concerns that led to the conduct of the police being included within the ambit of the Inquiry undeniably include the investigation prompted by the complaint from the Royal household which led to Operation Caryatid and the arrest of Glen Mulcaire and Clive Goodman, the prosecution restricted to those two individuals, the way in which the material seized from Glen Mulcaire was dealt with along with the failure to notify those in respect of whom it is asserted there was material to suggest that their mobile phone communications had been intercepted, and the subsequent reviews of that investigation following articles in *The Guardian* in 8 July 2009 and the *New York Times* on 1 September 2010. Put bluntly, it has been suggested that the way in which this investigation and the reviews were conducted and

managed leads to the conclusion that it was affected by the relationship between the Metropolitan Police and News International.

7. The matter was put by Robert Jay QC when providing a short opening to Module 2 (the press and the police) in these terms:

“Public concern hereabouts may be expressed in just one sentence. The relationship between the Police and the media, and News International in particular, was at best inappropriately close and if not actually corrupt, very close to it; furthermore, the nature of this relationship may explain why the Police did not properly investigate phone-hacking in 2006 and subsequently in 2009 and 2010, preferring to finesse the issue on those later occasions by less than frank public statements.

Module 2 will investigate this core issue in appropriate detail, subject to the constraints I have already mentioned. The key police witnesses will be called, as will the former and present Director of Public Prosecutions. A mass of relevant material has been disclosed by the M.P.S. in judicial review proceedings brought by Lord Prescott and others, and obtained by the Inquiry. This throws light on the MPS' contemporary thinking and decision-making in relation to the original Goodman/Mulcaire prosecution and its aftermath. But the phone-hacking issue is really only of interest to this Part of your Inquiry to the extent that it may throw light on the bigger picture. In making that point it is of course necessary to outline what that bigger picture might look like as well as its key features. Here, as always, I should not be interpreted as prejudging the issue or suggesting even tentative conclusions. I am simply throwing ideas out for further consideration.”

8. That 'mass of material' included not only documentation but also a number of detailed statements from a number of the police officers concerned with the original investigation. As far as I understood the matter, these dealt fully with the way in which the investigation developed, the policy decisions that were taken, the legal advice that was sought, the way in which the circumstances in 2006 (in particular the terrorism threat) might have impacted on some of the decisions that were and the implementation of the policy.
9. Mr Garnham argues that all individual criticism of any sort is outside Part 1 and inconsistent with the Terms of Reference, the remit of Part 1 insofar as it

affects the Metropolitan Police Service being an improper influence exercised by the press on the police rather than the responsibility of police officers for individual decisions. He submits that my previous statements and rulings have indicated that I will not explore issues of individual responsibility so that to change my approach would be unfair. I will deal with these arguments in turn.

The Terms of Reference

10. Mr Garnham accepts that the Terms of Reference, directed to the culture, practices and ethics of the press, include an examination of the contacts and relationship between the press and the police so that it is “self-evident” that the intention of Part 1 is that the Inquiry would examine “the closeness or otherwise of the relationship between press and police so as to expose the influence that one might have upon the other”. He goes on, however, to submit that the context that the examination of the conduct of the police is to be “an examination of the conduct of the police in relation to the media, rather than a forensic examination of the competence of police investigations, which is expressly the subject of review in part 2”.
11. There is no doubt that para. 4 of Part 2 of the Inquiry visualises an investigation into the original investigation by the Metropolitan Police, the subsequent reviews of that investigation and the conduct of the Crown Prosecution Service. Thus, I recognise that its language is more specific than that contained within para. 1 which concerns the relationship between the press and the police, the conduct of each and the extent to which there was a failure to act on previous warnings about media misconduct. The specificity of language in Part 2 does not, however, mean that aspects are not to be included within the generality of Part 1. Given that I am required to make recommendations about the future conduct of relations between the police and the press, I must consider and address how that relationship has been conducted in the past and, in particular, whether it has led to a willingness not to act even though media misconduct has been the subject of a warning (in which category the articles in *The Guardian* and the *New York Times* must be included). That means that the way in which the police conducted themselves in connection with their inquiries and reviews must provide evidence of the influence (positive, negative or entirely neutral) that the press have had on the police. Nobody has ever suggested that either Operation Caryatid or any of the subsequent reviews is irrelevant to Part 1; in any event, when considering the relationship and possible influence or influences, I consider the picture presented by a consideration of all these events to be highly material. In other words, an examination of the conduct of the police in relation to the alleged criminality of the press necessarily involves (at a high level) an examination of the police investigations.
12. In the context of the police, how does Part 1 of the Inquiry therefore interact with Part 2? In my judgment, the answer is comparatively straightforward but I must emphasise that the explanation for the answer proceeds on an

entirely hypothetical basis which is deliberately cast at one end of the spectrum and no inference as to my state of mind on the actual facts which should be drawn from it. Thus, if there were evidence that caused me to conclude that the influence of the press was such that the police may have been less willing to undertake a full or proper investigation than was merited by the allegations and the evidence, depending on its cogency, it could follow that I might be concerned about the possibility of an attempt to pervert the course of justice or misconduct in public office. It would then follow that my concern would be about the integrity of the investigation and, potentially, individual officers. In those circumstances, all that I could do would be to set out the basis for that concern in Part 1, making recommendations to ensure that this type of risk could be avoided in the future. I would then be able to go no further pending a decision whether, as a consequence, a police investigation ought to be undertaken. To reach any conclusion would be to pre-empt and prejudice a potential criminal investigation and those affected would be in exactly the same position as journalists who could be the subject of investigation and prosecution whom I am not prepared to name and have made the subject of the self denying ordinance. That would have to wait for Part 2: indeed, aspects of Part 2 are specifically drafted on the basis that there may be cause for concern that there may have been misconduct in public office.

13. Now take the alternative hypothesis. I find no evidence to justify the conclusion that the integrity of any investigation was impaired because of undue influence from the press; put another way, there is no basis for concluding that anyone has a case to answer in connection with the allegation of misconduct in public office or any other offence. In those circumstances, it seems to me that the sooner that this is made clear the better. But if I were to reach that view, it would be equally critical to deal with the reasons for the allegation in the first place, and to examine the proposition that what might appear to have been erroneous decisions were, in fact, appropriate and sensible or, alternatively, errors of judgement rather than evidence or manifestations of the more troubling influences I have referred to above. The questions are obvious. If not because of the influence of the press, why did the police not go further with Operation Caryatid or investigate the Mulcaire notebook in more detail (particularly as a number of officers were concerned that it more than justified further examination)? Why was it that the articles in *The Guardian* and the *New York Times* were so quickly dismissed without further investigation being undertaken? In my judgment, answering those questions would be a critical part of the exercise both to assuage the legitimate public concern that caused the conduct of the police to be included in the Inquiry in the first place but also to justify any conclusions that I reach as to future conduct of the relationship between press and police.
14. Assuming my analysis to be correct, how are those questions to be answered? In some cases, the explanations may be entirely commendable in which case there is neither explicit nor significant criticism of anybody. But it

may be that some of the explanations, while understandable to a greater or lesser extent, could reveal errors of judgment or approach which implicitly affect one or more police officers. One example, which is not contentious, will suffice. Former Assistant Commissioner Yates has himself recognised that some of his decisions (and, in particular, the speed of his decisions) following the *Guardian* article were poor. If I were to conclude that I agreed with him, before I could publish that conclusion, he would have to have been sent a notice under Rule 13. I consider that to argue that the Terms of Reference forbid me from doing so runs entirely counter to the proper approach that the Inquiry should adopt and is not in the interests of anyone.

15. Mr Garnham seeks to make good his submission by reference to the following observations made by Mr Jay in opening the Module (see 27 February 2012, p.m. pages 6-7, the emphasis being Mr Garnham's):

i) "By your Terms of Reference, you are inquiring into the culture, practices and ethics of the Press including "contacts and the relationship between the Press and the Police, and the conduct of each". So, pausing there, the conduct of the Police falls under your scrutiny, but only to the extent that it meshes with the Police's relationship with the Press, not more generally."

ii) "The Terms of Reference further enjoin you to consider making recommendations regarding "the future conduct of relations between the Police and the Press". So, pausing there, and thinking to the future, the primary focus of the evidence-gathering exercise will be directed to the recommendations you might be minded to make in your report, rather than criticising past conduct for its own sake."

iii) "The principal objective here is not to reach findings as to 'who did what to whom'. What you said in relation to Module 1 equally applies to Module 2 because the constraints on you are broadly speaking the same. That is, the necessity for fine detail is not required by Part 1 of the Inquiry as opposed to Part 2, and in any event the ongoing Police investigation renders any close, forensic examination of evidence which also forms the subject-matter of that investigation undesirable."

iv) "The phone-hacking issue is really only of interest to this Part of your Inquiry to the extent that it may throw light on the bigger picture. In making that point it is of course necessary to outline what that bigger picture might look like as well as its key features."

16. Although I am not bound by these observations, I do not consider any of them inconsistent with the above analysis. It is, indeed, the relationship of the police with the press that I am considering and the recommendations that I am minded to make. I repeat that if I were to conclude that the way in which Operation Caryatid was dealt with did not evidence police impropriety

at the behest of the press so that my recommendations were formulated with that in mind, I would have to explain that conclusion and, in so doing, the possibility of some criticism short of impropriety must, in my judgment, be addressed. Further, I remain of the view that my principal objective is not to reach findings about who did what to whom or to go into fine detail. Making soundly based recommendations justified and explained by my view of the evidence is, however, very much within the territory of Part 1; potential criticism (if such there be) is, in my view, a necessary consequence of that. Finally, it will be clear from what I have said that the way in which the police dealt with Operation Caryatid does throw light on the bigger picture: it is, at the very least, one of the primary reasons for the Inquiry being given the Terms of Reference that it has.

17. Mr Garnham then refers to my own comments, emphasising the generality of my approach and the lack of intention to criticise specific decisions. These comments (again with Mr Garnham's emphasis) were addressed to counsel for Surrey Police when dealing with its application to become a core participant (31 October 2011, a.m., page 2 line 19 and page 4 line 23):

"I have no doubt that a police officer may very well feel it appropriate to give some evidence, but I would have thought that that was likely to be the limit of the extent to which I would want to go down that route, merely to identify the issue rather than to try and resolve it. Still less to embark upon anything that would be at this stage critical of the decisions made by the police during the course of that investigation.

. . . I'm not saying that I wouldn't like to know the answer to the question. Namely: was consideration given to an investigation [in relation to Milly Dowler's phone], and, if so, how that spun out? That may be part of the general narrative, but I will not be going into the detail, I do not apprehend, and I'll ask Mr Jay whether I've understood my own responsibilities accurately. That's why I wanted it done in public, because to do so would take me down a road which would take too long and be insufficiently productive to the ultimate issue that I have to address, which is the recommendations that part one requires me to make."

18. Context, in this regard, is everything. It is not disputed that *News of the World* accessed the messages on Milly Dowler's mobile phone and it appears that this fact was apparent to the police at the time. A search was then underway for a missing girl which later became a murder investigation. Whatever the reason for not then pursuing those who were responsible (as to which Assistant Chief Constable Kirkby gave evidence that an investigation was under way), there is no suggestion of other contact between the Surrey

Police and the press so as to generate a pattern from which an inference could be drawn as to the culture, practices and ethics of the press which adds to the inference that might be drawn from the other evidence relating to the *News of the World*. This single incident, although highly significant and important, gives rise to fact specific issues very different from the wider picture apparent from the investigation which started with a single incident (involving the Royal household) but, with the Mulcaire documents, grew into something of an entirely different order. It was this which formed the focus of a dedicated police investigation for months, revisited as allegations were made over many years. I reject the parallel that Mr Garnham seeks to draw.

Unfairness

19. As I understand it, Mr Garnham argues that to issue Rule 13 letters addressed to any police officer (including former Assistant Commissioner Yates notwithstanding his own expressed view) would be unfair for a number of reasons. First, such witnesses might have applied for core participant status, or sought independent legal advice. Second, the witnesses were asked to give evidence late in the day. Third, the statements used were those prepared for the judicial review proceedings and did not follow notices under s. 21 of the 2005 Act. Third, additional questions might have been suggested under Rule 10 of the Rules, or the attendance of other witnesses, such as Louis Mably and Carmen Dowd sought. Finally, no warning was given that police conduct was under consideration.
20. Although I recognise the concern which lies behind these submissions, I do not find them persuasive. Although at one stage Assistant Commissioner Yates was minded to apply for core participant status, in the event, he did not and he was right not to do so. There is no conflict between the interests of individual police officers and the Metropolitan Police and I have no doubt that had anything transpired about which Mr Garnham was concerned (whether for the police generally or for individual officers) he would have said so. In the light of the other decisions I have made, I consider it almost inconceivable that I would have taken a different view as to core participant status. Further, the procedure has throughout catered for the possibility that I would need to focus on individual decision-making and behaviour and the same procedure has been adopted in relation to the police as it has for everyone else. In that regard, although Mr Garnham expresses concern that there was no warning that the conduct of the police might be considered, his question to Mr Perry as to the conscientiousness of the officers involved in the investigation (3 April 2012 a.m. page 46 line 13) "out of fairness to everybody" clearly visualised that the point was relevant and, thus, that the contrary was, at the very least, in play.
21. As to the mechanism for obtaining evidence, I recognise that statements prepared for the judicial review were used and that a notice under s. 21 was not given: in the light of what was available, it simply was not necessary to go further and I understand that it was made clear that the bundle prepared for

judicial review proceedings would be used with a copy of the index annotated so that the relevant witnesses would have the opportunity of considering the documents to which reference would be made. No objection was made to that procedure. Although it is submitted that the statements were not comprehensive (and I recognise that this point was made at the time), as far as I am concerned, in relation to the decisions which I am considering, I do not know what else they might have contained that would have assisted and Mr Garnham does not tell me.

22. Turning to further witnesses, I have been careful to ensure that all relevant evidence on matters that cause me concern has been deployed; as far as I can tell, Mr Mably would not add to what Mr David Perry Q.C. said and Ms Dowd would not add to the analysis of Lord MacDonald and Mr Perry. I fully understand the legal ramifications of the advice that was being sought and given and the reliance that the police were entitled to place upon it. Even if requests had been made to call them, reasons to do so would have been essential. Again, none has been suggested.
23. Quite apart from the foregoing, there are two other reasons that these concerns do not generate the complaint of unfairness. First, it is open to Mr Garnham to ask to recall witnesses or to suggest that other witnesses be called even at this stage: if statements are provided to the Inquiry, they will be considered on their merits and in the light of all the circumstances. Secondly, the procedure set out in Rule 13 of the 2006 Rules is specifically designed to meet issues such as these. In particular, Rule 13(3)(b) requires me to allow a recipient of the letter a reasonable opportunity to respond. If that response requests the further opportunity to give evidence, or to allow further evidence to be called, I would, in any event, consider such an application with care: my duty of fairness both at common law and under s. 17 of the 2005 Act requires no less. That duty equally encompasses the submissions which Mr Garnham makes under the European Convention, as to which particularly apposite are the observations of Toulson LJ in relation to a challenge to my decision as to the propriety of calling anonymous evidence: see *R. v Leveson ex parte Associated Newspapers Ltd* [2012] EWHC 57 (Admin) at para. 36:

“As to the European Convention, some of the factors relevant to conducting the Inquiry fairly are also the subject of articles of the Convention, particularly articles 8 and 10, but they do not add anything to his statutory duty. Applying those articles involves the self same exercise of acting fairly towards the different groups to which I have referred.”

24. In conclusion, I do not accept Mr Garnham’s submission that all individual criticism is outside the terms of Part 1 of the Inquiry or that it is not open to me, in appropriate circumstances of the type that I have sought to outline, to consider potential criticism of a police officer and, as a result, to issue a

notice under Rule 13 of the Inquiry Rules 2006 accordingly. As with my first and general Ruling in relation to this rule, this Ruling represents my decision as to the appropriate approach to the preparation of my Report. By s. 38(1)(b) of the 2005 Act, an application for judicial review must be brought within 14 days unless that time limit is extended by the court.

4 May 2012