The Leveson Inquiry

culture, practices and ethics of the press

PRACTICAL APPLICATION OF CORE PARTICIPANT STATUS, 9 MAY 2012

Lord Justice Leveson:

1. Full Fact, English PEN, the Media Standards Trust and Index on Censorship (none of whom are core participants in this Inquiry although unsuccessful applications were made by English PEN and Index on Censorship at its commencement) have made a written application for directions regarding the ruling that I made on Friday last week concerning an application by the Government for core participant status. Before giving me the opportunity of dealing with it, the application has been placed in the public domain. In the circumstances, although I believe the answer to be clear and I have not found it necessary to seek the assistance of any core participant, I shall deal with it in public.

2. Let me start by saying something of the way in which the Inquiry has dealt with requests addressed to it. On a very frequent basis, applications or requests of one sort or another are received at the Inquiry both by post and e-mail. In most cases, they can be dealt with administratively either by a lawyer working to the Solicitor to the Inquiry or by another member of the team. When it is necessary, requests are referred to me and my decision is then passed back to the solicitor for onward transmission. None of this is, or need be, in public. Very occasionally, I have felt it necessary to say something more formally in which event I have usually done so at the beginning of a hearing prior to the evidence being called. Examples of my taking this course will be obvious to anyone watching the proceedings or considering the transcript.

3. I do not intend to alter that approach and, before considering this request, wish to underline that the mere fact that it has been published has not caused me to do so. I am not prepared to allow the Inquiry to be diverted from the business of the day simply by the fact of publication of a request. I respond to Full Fact and others, first, because of the respect which I attach to their organisations and, secondly, because they raise issues that are potentially significant not least because the implications and consequences of my ruling have been misunderstood and so misrepresented in certain reports.

4. In a ruling on Friday 4 May, I refused to allow the Government to have core participant status but I did grant such status to certain named Ministers who I determined should collectively be known as government core participants. Although then not stated in the ruling, I also decided under Rule 7 of the Inquiry Rules 2006 that, collectively, they should be represented by the Treasury Solicitor. Three questions have been raised. These concern the position of special advisers within the confidentiality circle, the anonymity of ministerial staff within the confidentiality

circle (which issues are both related to the purpose of the included group) and the question of redaction.

The Confidentiality Circle

5. The first point to make is that core participant status and membership of the confidentiality circle is conferred for the purpose of assisting the Inquiry while, at the same time, ensuring fair treatment for those likely to be affected. What is important is the fact that everyone who is within the confidentiality circle understands the obligation to preserve the confidence of the information being shared and not to reveal that information until it has been published on the Inquiry website: the terms of the undertaking and the order under s. 19 of the Inquiries Act 2005 ('the Act') make that absolutely clear.

6. I expect each core participant (including government core participants) to restrict the confidentiality circle to the minimum number necessary to participate fairly and effectively in the inquiry. This group will usually involve legal advisers and those persons whose assistance is essential to ensure that the core participant can produce accurate and properly researched material for the inquiry. For a newspaper core participant, it might involve the editor and one or more reporter ready to undertake any necessary research. Government Ministers will no doubt need further assistance if only from those able to marshal the documents and to consider whether there is any point that should be advanced through counsel to the Inquiry.

7. In addition, it was also a core part of the reasoning in my ruling last Friday that government Ministers ought not to have to deal with demands for information about evidence emerging from the Inquiry without any prior notice about that evidence. In that regard, I also implicitly recognised that there could be a number of persons who would need to be brought into the confidentiality circle for just this purpose. Indeed, for whatever purpose, given that Ministers have been asked questions both as holders of public office (in which capacity they can be assisted by civil servants including government lawyers) and as senior party leaders (in which capacity civil servants cannot be involved), it should not be surprising if requests for membership of the confidentiality circle are made for both civil servants and special advisers. In any event, whether such persons are civil servants (subject to an obligation to act with political neutrality) or special advisers (not so restricted) does not matter. I repeat that what is critical is that everyone who signs the confidentiality undertaking is absolutely bound by it. Neither is compliance merely a matter for exhortation. Breach of a notice under s. 19 of the Act can be certified to the High Court and the subject of such order by way of enforcement or otherwise as could be made if the matter had arisen in proceedings before the court: see s. 36 of the Act.

8. It has not been the practice of the Inquiry to publish the names of those who have signed the confidentiality undertaking. In some cases, it involves a large number; in others, fewer are involved. It is an administrative matter, albeit an important one, which has been addressed by the Solicitor to the Inquiry and her team. The fact of the undertakings has been made public but to go further and publish the names is, in my view, unnecessary. It would divert resource to do so and would identify all of those who are privy to sensitive information. This may not itself be desirable because to do so might expose them to pressure to reveal confidential information. It is important to appreciate that all who have become core participants have already submitted signed

statements; what matters is that whoever has access to statements before the witnesses give evidence keeps what they read confidential prior to the Inquiry making it public after the witness has given evidence. It must be understood that within days of statements being made available to core participants, the statement is, in fact, adduced in evidence and then published on the Inquiry website.

Redaction

9. The concern expressed in relation to redaction is that, in addition to the privilege of seeing evidence in advance, government core participants have the ability to suggest redactions before that material is placed into the public domain with the result that, where there is discretion to hide things from the public, there will be "worries about abuse among the public". It is submitted that the twin track procedure for redaction should be modified to require the publication of schedules in the public domain seeking to justify redaction whether or not the proposed redactions are agreed. It is said that this would create an incentive for the government core participants to adopt a measured approach to requests. No such concern has been expressed in relation to other core participants.

10. This submission fundamentally misunderstands s. 19 of the 2005 Act. This provision describes the circumstances in which material may be restricted (or redacted) in these terms:

> "(1) Restrictions may, in accordance with this section, be imposed on —
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> (a) attendance at an inquiry, or at any particular part of an inquiry;
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> (b) disclosure or publication of any evidence or documents given, produced or provided to an inquiry.
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> (2) Restrictions may be imposed in either or both of the following ways —
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> (a) by being specified in a notice (a "restriction notice") given by the Minister to the chairman at any time before the end of the inquiry;
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> (b) by being specified in an order (a "restriction order") made by the chairman during the course of the inquiry.
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> (3) A restriction notice or restriction order must specify only such restrictions —
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> (a) as are required by any statutory provision, enforceable Community obligation or rule of law, or
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> (b) as the Minister or chairman considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest, having regard in particular to the matters mentioned in subsection (4).

(4) Those matters are —

(a) the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern;

(b) any risk of harm or damage that could be avoided or reduced by any such restriction;

(c) any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given, to the inquiry;

(d) the extent to which not imposing any particular restriction would be likely —

(i) to cause delay or to impair the efficiency or effectiveness of the inquiry, or

(ii) otherwise to result in additional cost (whether to public funds or to witnesses or others).

(5) In subsection (4)(b) "harm or damage" includes in particular —

(a) death or injury;

(b) damage to national security or international relations;

(c) damage to the economic interests of the United Kingdom or of any part of the United Kingdom;

(d) damage caused by disclosure of commercially sensitive information."

11. The only grounds for redaction are those set out in s.19 of the Act or irrelevance. Although s.19(4) is not determinative but only exemplifies the potential grounds, for the purposes of this Inquiry, the term 'harm or damage' has only narrow ramifications. Where there are redactions, they are generally visible on the page for all to see or, alternatively, it is apparent where they have been made. The situations so far experienced revolve around personal details (such as signatures, private addresses and information such as telephone numbers); the identity (where it is material) of those who are under investigation by the police or who come within the umbrella which I have referred to as the self denying ordinance; details which can properly be described as commercially confidential; and, on occasion, material that is truly irrelevant to the Inquiry. Nobody has sought to challenge decisions made by the team as to redaction and, although I would be entirely prepared to do so, I do not believe that I have had formally to rule on any dispute. On occasion, redactions have preceded disclosure to core participants where the position is obvious and clear; in any event, however, I have no doubt that core participants (such as *The Guardian* as well as other press interests) who will see un-redacted or partially redacted material will be particularly sensitive in relation to attempts to redact which stray outside the

limits of what has been done to date or cause any concern: to follow the quotation from Baroness Onora O'Neill, other core participants will actively inquire and will not blindly accept. If the Minister himself seeks to provide a restriction notice, that itself will be a subject for discussion within the Inquiry.

12. Quite apart from the submissions that might be made by other core participants, there is the principled and strictly impartial approach for the redaction of documents submitted to the Inquiry which is in place in relation to evidence supplied by government core participants as it has been in relation to others. That procedure is wholly controlled by the Inquiry and taken very seriously. A protocol for the process was published by the Inquiry at the outset. I repeat that redactions (if any) sought by government will be approached in the same way as redactions sought by other core participants. The practices adopted by the Inquiry have worked well with other core participants thus far and I see no reason to take a different approach in relation to government core participants.

13. Furthermore, it would be unreasonably burdensome on this fast moving inquiry to make public, as we progress, workings of the redaction exercise conducted by the Inquiry itself. It would, more importantly, give rise to a heightened risk of material which rightly deserved redaction being inadvertently disclosed into the public domain. I am, however, happy to add that if I became concerned that any core participant was trying to abuse the process to hide matters that were merely embarrassing rather than properly deserving redaction, I would consider making public information about that particular attempt. I do not anticipate that such circumstances will arise and continue to expect all core participants to seek redactions only where they are justified in accordance with the test set out in the legislation and which I have sought to explain.

14. I do not doubt the good faith of those who have raised these issues although, in the light of the way that I have tried to conduct this Inquiry throughout, I am somewhat concerned that it is thought that I might be a party to reducing its transparency. Suffice to say, I will not – and I would be surprised if I were asked to be.

9 May 2012