INDEPENDENT INQUIRY CHILD SEXUAL ABUSE

INVESTIGATION INTO INSTITUTIONAL RESPONSES TO ALLEGATIONS OF CHILD SEXUAL ABUSE INVOLVING THE LATE LORD JANNER OF BRAUNSTONE Q.C.

SUBMISSIONS OF COUNSEL TO THE INQUIRY AHEAD OF THE PRELIMINARY HEARING ON 20 FEBRUARY 2020

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1. These are the written submissions of Counsel to the Inquiry ("CTI") for the Preliminary Hearing in the above named Investigation ("the Investigation") to be held on 20 February 2020. The late Lord Janner of Braunstone Q.C. is referred to as Lord Janner throughout these submissions.

2. These submissions cover the following areas:

    1. Events since the Preliminary Hearing on 24 September 2019;
    2. The law on anonymity;
    3. The relevance of anonymity to this Investigation;
    4. CTI's submissions absent issues concerning anonymity;
    5. The options available for the future of the Investigation;
    6. Procedural Matters.

3. These submissions will be served in advance of the hearing on all Core Participants in order to allow them to comment on the matters raised. The Chair will consider all submissions made to her in writing and at the hearing before making any determination. The submissions of CTI have no special status. The Chair will accept or reject them as she sees fit.

Events since the Preliminary Hearing on 24 September 2019

4. Following the last Preliminary Hearing on 24 September 2019, the Chair gave a Determination dated 9 October 2019. Among other matters she ordered that the public hearings in this Investigation would be provisionally listed for October 2020 for three weeks and that a preliminary hearing would take place on or by 20 February 2020. The Chair anticipated that the following matters would be addressed at the Preliminary Hearing:

    a. Whether the Investigation should continue.

    b. What the list of issues to be considered at the public hearings should be - in particular, which alleged institutional failings will be examined and which witnesses (or categories of witnesses) should be called.

c. What approach should be taken to findings of fact on the underlying allegations of abuse made against Lord Janner.

d. What approach should be taken to evidence adduced for the purposes of testing the credibility of witnesses, including any complainant witnesses.

e. What procedures should be adopted for the questioning of witnesses.

f. If relevant and appropriate, the question of whether a Panel member should recuse herself from the hearings.

5. The date of the Preliminary Hearing was set in order to allow sufficient time for the Crown Prosecution Service ("CPS") to make a decision on the case referred to them by the Independent Office for Police Conduct ("IOPC") following the conclusion of Operation Nori. On 8 January 2020 the Inquiry was informed of the CPS decision, which was that the individual concerned would not be prosecuted.

6. There has been one further development of significance since the Chair's Determination. In summary, an individual who has made complaints of child sexual abuse against Lord Janner has informed us that s/he wishes to assert his/her full rights to anonymity. This decision will have practical implications for the future conduct of this investigation. Before turning to the relevant facts, it is necessary to set out the law regarding life-long anonymity for complainants of sexual assault.

Anonymity: The Law

<u>The Sexual Offences (Amendment) Act 1992, as amended</u>

7. Section 1(1) of The Sexual Offences (Amendment) Act 1992 ("the 1992 Act") provides as follows (emphasis added):

> *"Where an allegation has been made that an offence to which this Act applies has been committed against a person,* ***no matter relating to that person shall during that person's lifetime be included in any publication*** *if it is likely to lead members of the public to identify that person as the person against whom the offence is alleged to have been committed."*

8. The words in bold were substituted by Youth Justice and Criminal Evidence Act 1999 (c. 23), s. 68(3)(4), Sch. 2 para. 7(2) ("the 1999 Act"). The explanatory notes of that Act state that the amendment was intended "*to ensure that its provisions are similar to those in sections 44, 45 and 46 of the [1999] Act*" [158]. The Explanatory Notes also state that this part of the 1999 Act contains, *"a range of measures designed to help young, disabled, vulnerable or intimidated witnesses give evidence in criminal proceedings*" [9].

9. The previous wording of section 1(1) of the 1992 Act was as follows (emphasis added):

> *"Where an allegation has been made that an offence to which this Act applies has been committed against a person, neither* ***the name nor address, and no still or moving picture****, of that person shall during that person's lifetime—*
>
> > *(a) be published in England and Wales in a written publication available to the public; or*
> >
> > *(b) be included in a relevant programme for reception in England and Wales,*
>
> *if it is likely to lead members of the public to identify that person as the person against whom the offence is alleged to have been committed."*

10. It follows that the amended 1992 Act is phrased in broader terms than the original legislation, extending the restriction from obvious indicators of identity (name, address, image) to any matter that may lead to members of the public being able to identify the complainant. It therefore covers information that could lead to so-called jigsaw identification.

11. The 1999 Act also amended the 1992 Act to include a new provision at section 1(3A) in which a non-exhaustive list is provided of matters that would, in relevant circumstances, be caught by section 1(1). These include the name, address and image of the complainant (cp. the original legislation), as well as other information such as their school or work address.

12. Section 2 of the 1992 Act provides a list of offences to which the Act applies. Section 3 concerns circumstances in which section 1 may be displaced; these relate to criminal proceedings and are not relevant to the Inquiry. Section 4 sets out special rules relating to incest and buggery.

13. Section 5(1) makes it an offence to contravene section 1. Section 5(2) and (3) provide for a defence that an adult complainant *"had given written consent to the appearance of matter of that description"* (save in circumstances where there had been unreasonable interference with the peace and comfort of the person giving consent). Later subsections provide other defences concerning knowledge, which are not relevant to these submissions. Section 5 also makes it a requirement that the Attorney General agree to any prosecution under the Act.

14. Section 6 provides definitions, including the following:

> *" 'publication' includes any speech, writing, relevant programme or other communication in whatever form, which is addressed to the public at large or any section of the public (and for this purpose every relevant programme shall*

be taken to be so addressed), but does not include an indictment or other document prepared for use in particular legal proceedings"

15. This definition was amended by the 1999 Act. The previous version referred to a *"written publication"* and stated that this *"includes a film, a sound track and any other record in permanent form but does not include an indictment or other document prepared for use in particular legal proceedings."* Again, it is notable that the amended version expands the scope of the Act.

Interpretation of the Act

16. **The Act applies to all of those involved in the Inquiry's work**, including the Chair and Panel, Inquiry staff, witnesses giving evidence, those making submissions at public hearings, those asking questions of witnesses, and those reporting on the hearings. The protections offered by section 37 of the Inquiries Act 2005 ("the 2005 Act") do not extend to the matters contained in the 1992 Act.[1] It follows that any breach by a member of the Inquiry staff, or any witness, lawyer or reporter at the public hearings, could result in criminal proceedings. In *R (Press Association) v Cambridge Crown Court* [2012] EWCA Crim 2434, [16], Lord Judge CJ emphasised that it was the responsibility of anyone making a publication to obey the Act: *"They do so ... not because they are enjoined to do so by judicial order, but because that is a statutory requirement."* See also *R v Teesside Crown Court, ex parte Gazette Media* [2005] EWCA Crim 1983.

17. **The Act is very broadly drawn**: It makes it a criminal offence to *"publish"* any *"matter"* that is *"likely"* to lead members of the public to identify a complainant of child sexual abuse. It prohibits publication of anything that could give rise to a real risk of jigsaw identification of a complainant or victim of sexual abuse. *"Publication"* would include anything contained in a document published on the Inquiry's website, or anything said by anyone in the Inquiry's hearings. The courts have interpreted the Act broadly. See, among other authorities: the guidance on "Reporting Restrictions in Criminal Courts" [3.2] published by the Judicial College and others [Revised May 2016],[2] which was endorsed as accurate by the Court of Appeal in *R v Beale* [2017] EWCA 1012 (Crim), (Sharp LJ) [9]; *R (Press Association) v Cambridge Crown Court*, [9] and [16] (Lord Judge CJ); *Attorney General v BBC* [2001] EWHC Admin 1202, [29] (Auld LJ); *O'Riordan v DPP* [2005] EWHC 1240 (Admin) [29].

18. **The Act is absolute**. Unlike other legislation or rules of law there is no balancing exercise to be conducted between the public interest in putting information into the public domain and the interests of those who want it to remain private. An individual either breaches the Act, or does not. See, in particular, *Attorney General v BBC* [29] and *O'Riordan v DPP*.

[1] See Explanatory Notes 5 and 89 to the 2005 Act, which confirm that the protection offered to the Chair, Panel, Inquiry Staff, CTI and the Solicitor to the Inquiry apply only to civil proceedings.
[2] https://www.judiciary.uk/publications/reporting-restrictions-in-the-criminal-courts-2/

19. **The Act applies notwithstanding past press/public reporting**: Unless the complainant has provided written consent, s/he is entitled to protection under the Act even if his/her name is easily identifiable through previous press (or other) reports: see *O'Riordan v DPP* [15].[3]

The Chair's Restriction Order dated 18 September 2019

20. Following submissions, the Chair made a Restriction Order in this Investigation that is intended to mirror the 1992 Act. The reasons for the order are set out within it and were not contentious.

Anonymity: Relevance to this Investigation

21. In their written submissions for the preliminary hearing on 24 September 2019, CTI made the following observation [§36.5]:

> *"Following the determination of the list of issues for the hearings, consideration will need to be given to what, if any, waivers of anonymity the Inquiry will require from relevant complainants. As is discussed in CTI's Submissions on the Proposed Restriction Order, the Inquiry is bound by the Sexual Offences (Amendment) Act 1992 and other relevant legal obligations. There may be a substantial risk that the public hearings could allow for jigsaw identification of some complainants given material that is already in the public domain. The Inquiry, the relevant complainants and their legal advisors will need to consider how best to handle this difficult and sensitive matter. It will not be possible to hold the hearings unless a resolution can be found that is lawful, fair and acceptable to the individuals concerned."*

22. Brian Altman Q.C. also raised this issue orally at the hearing [Transcript of the Preliminary Hearing on 24 September 2019, pp.26-27]:

> *"We also note a further issue. In any public hearings, it is likely that evidence will be heard that could allow a witness or core participant to be identified as someone who is said to have been subjected to child sexual abuse. This is because the evidence at the hearings, when combined with material already in the public domain, will allow for what is known as "jigsaw identification". The individuals involved must consider whether they are willing to put themselves in that position and whether they are willing to waive or limit their statutory right to anonymity. This will be a very difficult decision for them. The*

[3] An alternative view has been put forward in a ruling by Impress in *A Person v Byline* (Case ref. 0148/2018): see in particular [6.2]. However, that ruling is poorly reasoned. It does not engage with the wording of the legislation and the High Court authority of *O'Riordan* was not cited. CTI place no reliance on this ruling. The ruling may be accessed at: https://www.impress.press/downloads/file/148-2018-a-person-and-byline-final-adjudication.pdf

inquiry cannot, in our submission, proceed unless a resolution can be found that is lawful, fair and acceptable to the individuals concerned. This is not an issue for today, but, again, we raise it for future consideration. We hope to take the matter forward in discussions with the legal representatives of core participants."

23. The overwhelming majority of the complainants relevant to this and all of the Inquiry's other investigations have elected to maintain their anonymity, as is their absolute right. The relatively small number of exceptions are listed in an Annex to the Chair's General Restriction Order dated 23 March 2018. That position has not changed since the last hearing.

24. The complainants have a legal right to anonymity under the 1992 Act. It was Parliament's intention that those who were subjected to or made complaints of sexual abuse should be entitled to life-long anonymity unless they voluntarily chose to waive that anonymity.[4] The Act was intended to create an environment in which it was less arduous for victims and complainants to report sexual abuse and to provide protection for them thereafter. It is a position that is now well-established after more than a quarter of a century on the statute books. The complainants in this Investigation are fully entitled to exercise their rights to such anonymity.

25. The complainants should not be criticised in any way for making their decisions, nor should any inference be drawn from them. The Inquiry understands that the complainants maintain the allegations they have made against Lord Janner. Individuals may have many reasons for exercising their lawful right to anonymity - fear of intrusion or a wish for privacy, a preference for not informing or involving children or relatives, worries about physical or mental health, professional concerns, or a simple desire to continue living a life rebuilt. Neither the law nor the Inquiry require complainants to explain or justify their reasons: it is a matter for them, their families and their loved ones. The decision that the complainants have taken should be respected.

26. The decisions of the complainants in this Investigation will inevitably have consequences for how the Investigation can proceed. That matter was foreshadowed in CTI's submissions at the previous hearing, cited above. See also the analysis above of the breadth of the 1992 Act and the Chair's Restriction Order dated 18 September 2019.

27. In the particular circumstances relating to one complainant, his/her decision to exercise his/her lawful right to anonymity means that extensive redactions will have to be made to evidence that is to be placed into the public domain. The complainant was an individual who was identified as an alleged victim of child sexual abuse allegedly committed by Lord Janner. The allegations concerning the complainant

[4] The 1992 Act also provides for other circumstances in which complainants or victims lose the protection of the Act, but none is relevant to this Inquiry.

were considered by various organisations, including Leicestershire Police, Leicestershire County Council, the Crown Prosecution Service and various other national and local bodies. The allegations were examined, or arguably should have been examined, at various points in time since they were made. As a result, they occupy a central role in the evidence that is relevant to this Investigation. That is so both in their own right - did institutions fail to respond appropriately to these particular allegations? - and in respect of the context that they provide to other allegations made against Lord Janner - in particular, the question of whether institutions failed to respond adequately to the accumulation of allegations over a number of years from a number of different sources.

28. Even this limited detail about the complainant and the allegations goes further than what could ordinarily be said in public consistent with the prohibitions in the 1992 Act and the Chair's Restriction Order. For the avoidance of doubt, the complainant and his/her legal advisors have had prior notice of these comments and the complainant has consented to this information being given in public. Nothing more can be said in public about this matter.

29. This was a decision that was originally communicated to the Inquiry in November 2019, and has since been reiterated. The complainant in question has received independent legal advice.

CTI's submissions absent issues concerning anonymity

30. In order to examine the effects of that decision on the course of the Inquiry, it is helpful first to examine what submissions CTI would have made but for this development.

31. As core participants will be aware, CTI have previously submitted that this Investigation should primarily be concerned with the way in which Leicestershire Police and the CPS responded to allegations of child sexual abuse concerning Lord Janner that were made known to them during three police investigations: Operation Intern (1989-1991), Operation Magnolia (2000-2002) and Operation Dauntless (2006-2007). While other institutions, particularly Leicestershire County Council, are also of relevance to the Investigation, it was the responses of the police and the CPS that should, on CTI's analysis, be the principal focus of the Inquiry's work for the following reasons.

    a. The allegations made were of a criminal nature. The primary responsibility for investigating them lay with the police and CPS.

    b. The response of other institutions to these and other allegations was informed by the outcome of the police investigation and prosecutorial decisions. It would not be feasible or fair to consider those other institutions without that context.

c. The main element of public concern over the way in which the allegations made against Lord Janner were handled lay in the response of the police and CPS. The central question was whether Lord Janner was given preferential treatment in the criminal investigation, and if so, why?

d. It is not in dispute that the police and CPS were made aware of a number of allegations during those operations. The continued existence of documentary evidence allows for the actions taken and those not taken by identifiable individuals to be investigated.

e. Considerable work has been done by previous investigations that could be used by this Investigation, thereby complying with the provision in the Inquiry's Terms of Reference to: *"Consider all the information which is available from the various published and unpublished reviews, court cases, and investigations which have so far concluded"*.

f. However, there remain areas in which this Investigation could contribute further. In particular, it would allow for the evidence compiled by previous investigations to be aired and tested in public for the first time. Witnesses could be called to give evidence on the matters in question, including those who dispute the findings of previous investigations. The Chair and Panel would be in a position to draw together the evidence adduced and publish a report setting out both their findings and the reasons for them.

g. Such a process would contribute to public understanding in the manner envisaged by Lord Bingham (albeit in very different circumstances) in *R v Secretary of State for the Home Department, ex parte Amin* [2003] UKHL 51, [31]: *"The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicions of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that [lessons are learned]."*

h. The Investigation would also assist the Chair and Panel in their wider work, thereby contributing to the Final Report. It would allow for an effective and thorough investigation of the way in which the police and CPS dealt with allegations of child sexual abuse involving a person of public prominence. As such, it may also inform recommendations on how such cases should be handled in the future. While the Inquiry has heard some evidence on such matters in other investigations, this investigation would both add to the Inquiry's knowledge and provide for points of comparison.

i. In short, the Investigation would make a material contribution to fulfilling the Inquiry's Terms of Reference by considering the extent to which (if at all) State and non-State institutions had failed in their duty of care to protect

children from sexual abuse and exploitation, and to allow for analysis and learning that would result in best practice being identified and (if appropriate) recommendations being made.

32. For those reasons, CTI would have submitted that the Investigation should continue, notwithstanding the considerable work done during previous investigations. The importance of adducing and testing evidence publicly, and then producing a public report in which the Chair and Panel gave reasoned conclusions, would have been central to this submission.

33. In terms of the detailed scope of the public hearings, CTI would have submitted that the majority of the timetable be given over to calling witnesses from Leicestershire Police and the CPS, broadly in chronological order to examine the decisions that were made during Operations Intern, Dauntless and Magnolia. CTI would also have proposed adducing evidence about the way in which Leicestershire County Council dealt with the allegations of which they were made aware, and the approach of the Kirkwood Inquiry to Lord Janner when he was called as a witness. CTI would also have proposed examining the response of the Labour Party to the allegations made, and the consideration (if any) given to those allegations during the process that led to Lord Janner's ennoblement in 1997.

34. CTI would have submitted that the boundaries of the public hearings should also be shaped by consideration of the following matters.

    a. This Chair and Panel cannot, in law, determine whether or not Lord Janner was guilty of criminal offences or was liable for sexual assaults in civil law: section 2(1) of the 2005 Act. The Investigation should not be structured to seek such a determination.

    b. Nor should it be designed to replicate or replace now withdrawn criminal or civil legal proceedings. The Inquiry has a separate and distinct role, as set out in its Terms of Reference. That role requires it to consider <u>institutional</u> failings, not to seek to establish the truth of individual allegations of child sexual abuse.

    c. The public hearings should be focused on investigating matters that give rise to concern that there may have been institutional failings to protect children from sexual abuse and exploitation. Having sought and obtained disclosure from relevant institutions, and having posed questions to complainant core participants about their experiences, CTI did not consider that there was such evidence of institutional failings in respect of: central government departments and agencies (with the possible exception of the Cabinet Office in regard to the ennoblement of Lord Janner); Leicestershire Police in respect of Operation Enamel; the CPS in respect of prosecutorial decisions taken in and around 2014; and the Holiday Inn group of hotels. In light of the matters

relating to anonymity (on which, see below), submissions on these points are not developed further here.

d. The focus of the public hearings should be on matters that can be investigated effectively at this point in time. There are several instances in which complainants have said that they made allegations of abuse against Lord Janner to relevant authorities, but where there is no contemporaneous documentary evidence and little in the way of investigative leads to follow. No inferences can or should be drawn from this - the lack of documentary evidence may reflect the absence of an allegation, or it may be consistent with the complainants' evidence that their allegations were wrongly dismissed by those who should have taken them seriously. Nor would it be realistic to expect complainants to recall precise details of when and to whom they made complaints at a distance of many decades, particularly given the circumstances in which it is said the allegations were made. The Inquiry must however use its resources proportionately and must be realistic about what can and cannot be usefully investigated. It must also reflect on what will ultimately assist the Chair and Panel in fulfilling the Inquiry's Terms of Reference. Not all allegations of institutional failings can be examined and the Inquiry must therefore be selective about which should be explored in public hearings.

35. On findings of fact, CTI's submission would have been to the same broad effect as those made by CTI at the Preliminary Hearing in the Westminster Investigation on 31 January 2018 (p.28):

> *"First, we submit that it will be neither necessary nor proportionate for this investigation to involve itself in attempting to investigate, far less in attempting to make findings, as to whether individual allegations of child sexual abuse are true or false. In general terms, at least, those are matters for the police and for the courts. Moreover, the focus of this investigation, and indeed of the inquiry more generally, is on the conduct of institutions, not that of individuals. And we submit that questions as to possible institutional failings in this field can, generally speaking, be perfectly properly investigated without undertaking the time-consuming and resource-intensive process of making findings on the underlying allegations. To be clear, therefore, we do not anticipate that this investigation will be making any findings as to whether, for example, high-profile politicians ... did or did not commit acts of child sexual abuse of which they have been accused. Our focus, rather, will be on the way in which ... institutions dealt with and responded to allegations of this nature."*

36. That approach was followed with success in the Westminster Investigation and CTI submit that it is applicable to the present Investigation as well. CTI would have invited the Chair to keep the matter under review during the course of the hearing in the unlikely event that circumstances arose whereby it became necessary to make a

ruling on the underlying truth or otherwise of an allegation in order to examine the institutional response to that allegation.

37. CTI would have submitted that the credibility of the complainants would only have been relevant in certain limited and tightly defined circumstances. This issue is closely linked to that of findings of fact. If (as above) the Inquiry is not seeking to make findings of fact on the underlying allegations, then the circumstances in which it will be necessary or appropriate to consider issues of credibility will be very limited. If an individual who was responsible for making decisions on how to respond to allegations of abuse (for example, a police officer or a CPS lawyer) was aware of a matter going to the credibility of a complainant, and if that matter was material to the individual's decisions on how to respond to the allegation, then it would be relevant evidence. Care would need to be taken about how and in what detail that evidence was adduced in public, but it would be unfair and wrong to exclude such evidence from the public hearings.

38. However, it would also be unfair and wrong to adduce evidence about the credibility of complainants for the improper purpose of attacking those complainants in public. CTI can see no basis for adducing evidence of, for example, mental health history or criminal conduct or convictions other than in the specific circumstances set out above. The public hearings should not be used as a forum for a proxy defence of Lord Janner any more than it should be used as a place for a proxy prosecution.

39. On the procedures for questioning witnesses, CTI would have submitted that there was no good reason for departing from the established practice of the Inquiry, namely that questions would be put by CTI, informed by submissions made by core participants as to possible lines of enquiry to pursue, and subject to any applications under section 10(4) and (5) of the 2005 Act. For the avoidance of doubt, CTI's view is that the Chair has no power under the 2005 Act to allow questions from an unrepresented core participant, even where that core participant is legally qualified: see the reference to the role of the recognised legal representative in section 10(4) and (5), and the absence of a provision equivalent to section 11(2) allowing an unrepresented core participant to undertake a function otherwise reserved to a recognised legal representative.

40. On recusal, CTI make the following submissions of general relevance:

    a. The Chair has no power to dismiss a panel member. Only the relevant Minister has a power under the 2005 Act to appoint or terminate the appointment of a panel member: see sections 4, 7-10, and 12, and in particular section 12(3) of the 2005 Act.

    b. A panel member may, however, resign by giving notice to the relevant Minister: section 12(2) of the 2005 Act.

c. In appointing panel members, the Minister must have regard to the need to ensure that the inquiry panel (considered as a whole) has the necessary expertise to undertake the inquiry, and to the need for balance (considered against the background of the terms of reference) in the composition of the panel: section 8(1) of the 2005 Act. The Minister must not appoint a person as a panel member if it appears to the Minister that the person has either a direct interest in the matters to which the inquiry relates, or a close associated with an interested party, unless, despite the person's interest of association, his/her/their appointment could not reasonably be regarded as affecting the impartiality of the inquiry panel: section 9(1) of the 2005 Act.

d. Panel members prior to and during the course of their appointment must notify the Minister of any matters that, having regard to section 9(1) of the 2005 Act, could affect their eligibility for appointment: section 9(2) and (3) of the 2005 Act.

e. The Chair and Panel Members have written letters declaring any relevant interests to the Home Secretary. These are published on the Inquiry's website.

f. Ms Dru Sharpling CBE[5] and the then Home Secretary[6] exchanged correspondence in 2017 on matters relating to this Investigation. It was the Home Secretary's view that *"none of the information which you have provided could be said to affect the impartiality of the Panel. I am confident that the Panel can continue to act independently and impartially with you as a member."* The Home Secretary also noted that Ms Sharpling's experience helped to provide the Inquiry with necessary expertise and balance to undertake its role. This correspondence is published on the Inquiry's website.

g. CTI are unaware of any material change in the position since this exchange of correspondence. If any core participants consider that there has been such a change then they are invited to consider raising the matter with the Home Secretary. Alternatively, should they feel it necessary to make submissions during the Inquiry's proceedings, CTI consider that the most appropriate time would be following the Chair's decisions on whether the Investigation should continue and, if it does, on the detailed scope of the public hearings. Those decisions will provide the necessary context for any further submissions.

The options available for the future of the Investigation

[5] See: https://www.iicsa.org.uk/key-documents/1361/view/copy-2017-03-01-letter-from-dru-sharpling-to-home-secretary-re-further-declaration-interest.pdf

[6] See: https://www.iicsa.org.uk/key-documents/1362/view/copy-2017-03-20-letter-from-home-secretary-to-dru-sharpling-re-further-declaration-interest.pdf

41. The effect of the position on anonymity, as set out above, is that it will not be possible to hold public hearings on all matters of relevance to this Investigation. In particular, considerable amounts of evidence about the response of Leicestershire Police, Leicestershire County Council and the Crown Prosecution Service to allegations made against Lord Janner cannot be adduced in public. Nor would it be possible to examine fairly and fully the response of other organisations in public hearings.

42. CTI have attempted to include as much information as possible in these open submissions. However, it is not possible to go beyond the broad statement made above because of the provisions of the 1992 Act. More details are provided to core participants in closed submissions (i.e. submissions written by CTI that are provided to the Chair and Panel and core participants but not to the public, and which are subject to confidentiality undertakings).

43. In broad terms, the Chair is left with three unpalatable options:

    a. To continue the Investigation in the manner suggested by CTI earlier in these submissions, but to do so in the knowledge that much of it will need to be heard in closed session under section 19 of the 2005 Act.

    b. To continue the Investigation, but with the focus on those matters that can be heard in public.

    c. To discontinue the Investigation.

44. CTI consider each of these options in turn. None is attractive. The Chair, as a result of matters outside her and the Inquiry's control, is left in the position of having to decide which (if any) to pursue.

Closed Hearings

45. By "closed hearings" we mean hearings from which the public are excluded and which are covered by a prohibition on those present at the hearing (e.g. core participants, witnesses and any others who have been invited by the Chair to attend) from disclosing or publishing anything about what has taken place at the hearing without the permission of the Chair. The hearings would not be live-streamed and the transcript would not be published.

46. Section 19 of the 2005 Act provides the Chair with the power to restrict both public access to and reporting of parts of the Inquiry. She can make such an order if such restrictions are required by law, or if she considers them 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."* Those matters are [section 19(4)]:

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;[7]

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).

47. The Chair has a broad discretion on the exercise of her powers under section 19, subject to the duties to act with fairness and with regard to the need to avoid any unnecessary cost: section 17(3).

48. In *R (Associated Newspapers) v The Rt Hon Lord Justice Leveson (as Chairman of the Leveson Inquiry*) [2012] EWHC 57 (Admin), the High Court (Toulson LJ, with whom Sweeney J and Sharp J agreed) held that on questions concerning the best interests of the Inquiry, *"a court ought not to hold that the Chairman was wrong unless his decision was incapable of rational justification (or in lawyer's language, 'Wednesbury unreasonable')."* However, where a decision is challenged on the basis that the procedure proposed would be unfair, *"it is ultimately for the court to decide whether it would be unjust, but in doing so the court must recognise that the Chairman is in a far better position to assess and balance the degree of prejudice which may be caused to different parties because of his infinitely greater knowledge of the details and his feel for where justice lies"* [47].

49. In our submission, there are several advantages to proceeding by way of closed hearings, the most important of which is that it would allow the Inquiry to examine fully, fairly and effectively the role of Leicestershire Police and the CPS in responding to the allegations made against Lord Janner. For the reasons given above, CTI consider such an examination to be central to this Investigation. This would also allow for evidence to be adduced about other institutions, some of which (albeit a relatively small portion) could, in theory, be heard in public.

50. Such an Investigation would go some way to meeting the legitimate interest of core participants, in particular complainant core participants, in having these matters examined forensically. While it would clearly be preferable to have the hearings in

[7] *"Harm and damage"* includes (but is not limited to) death or injury, damage to national security and international relations, damage to the economic interests of the UK or any part of the UK, and damage caused by disclosure of commercially sensitive information: see section 19(5) of the 2005 Act.

public, if that is not a legally viable option then closed hearings are the alternative provided for by the 2005 Act.

51. Further, although the Chair and Panel would not be able to publish a full report on the matters raised in the hearings (on which, see below), their conclusions from this Investigation would inform their understanding and approach in their Final Report. Those conclusions may support or qualify the Chair and Panel's findings in other investigations into related issues. The use of closed hearings would thereby be conducive to the Inquiry fulfilling its terms of reference. More contentious, in light of the points made below, is whether such hearing would be in the public interest.

52. There are many disadvantages in proceeding by way of closed hearings.

    a. First, and foremost, the principle of open justice is longstanding and central to the constitutional arrangements of this country: see - among many other authorities - *Scott v Scott* [1913] AC 417 (HL), in which the Earl of Halsbury refers back to a treatise dating to 1730 (p.441), and *Al-Rawi v The Security Service and ors* [2011] UKSC 34, [2012] 1 AC 531. While the 2005 Act contains provisions allowing for closed hearings, it is universally accepted that they should be used sparingly given the importance of a public inquiry taking place in public.

    b. Closed hearings in the present Investigation would, with some understatement, *"inhibit the allaying of public concern"*, a matter to which the Chair must have regard under section 19(4)(a) of the 2005 Act when assessing where the public interest lies. There would be considerable and justifiable unease about such a substantial and central element of the hearings taking place without public access.

    c. The lack of public hearings would substantially undermine the rationale for continuing the investigation. As is set out above, the principal arguments for pursuing the Investigation notwithstanding the work previously undertaken in private by other investigations was to ensure that evidence could be heard and tested publicly.

    d. The Chair and Panel would not be able to produce a substantial public report at the conclusion of the hearings. As a result, the outcome of this work would be read by only core participants, the relevant Minister and (if allowed) others granted access to the report subject to restrictions on onward disclosure. It is unlikely the public would be aware of anything other than the headline conclusions of the Investigation.

    e. Even were such headlines to be made public, they would do little to assist in public understanding. The Chair and Panel would not be able to give reasons or nuance to any conclusion that Lord Janner had or had not been given preferential treatment. Were the Chair and Panel to disagree with the

conclusions of other investigations, there could be no public explanation for that disagreement. This would be unsatisfactory.

f. There would also be a question of fairness to witnesses should such headlines be made public. If the finding were to be that Lord Janner received some preferential treatment, this would cast a cloud over all individuals involved in the criminal investigation and prosecutorial decisions. It may not be possible to identify, still less to explain, which individuals or institutions the Chair and Panel considered to be culpable and which they did not. Similarly, if the Chair and Panel were to conclude, without further explanation, that there were no institutional failings, non-core participant complainants may feel that their evidence had been rejected or dismissed without public explanation.

g. The Chair and Panel would also be prevented from publishing their closed findings in this Investigation in their Final Report. The Investigation would therefore be limited in the extent to which it could assist in fulfilling the Terms of Reference. As is discussed above, the Chair and Panel's approach in their Final Report could be informed by the conclusions reached in this Investigation, but it would be difficult to express how and why this Investigation has influenced their thinking.

h. Closed hearings present at least a tension with the provision in the Inquiry's Terms of Reference that its work must be conducted *"in as transparent a manner as possible, consistent with the effective investigation of the matters falling within the terms of reference, and having regard to all the relevant duties of confidentiality."*

i. The central question for this Investigation, and the principal cause of public concern that gave rise to it, was whether Lord Janner was given preferential treatment during criminal investigations as a result of his position of public prominence. If the Inquiry cannot publicly call evidence and produce a reasoned public report addressing that question then there is a strong argument that the substantial financial and emotional costs of a closed hearing are simply not proportionate to the result that can be realistically achieved.

53. It is for the reasons given in the previous paragraph that CTI do not submit the Investigation should proceed in this way. It is a course that is, in CTI's submission, open to the Chair in law on the basis that it would be *"conducive to the inquiry fulfilling its terms of reference."* CTI acknowledge that there are some advantages to closed hearings, in particular in allowing core participants to see and participate in a forensic examination of the central issues with which this Investigation is concerned. However, the arguments against closed hearings are, in CTI's submissions, compelling. This is a public inquiry, established to serve the public interest through public hearings. The value of this Investigation lay predominantly in a public examination of institutional responses to the allegations concerning Lord Janner, in

order to inform public understanding. To paraphrase Lord Bingham in *Amin*, the purpose would have been to bring the full facts to light, to expose culpable and discreditable conduct to public notice, or to allay suspicions of deliberate wrongdoing. That purpose cannot be achieved through an investigation conducted very largely by means of closed hearings.

An Investigation re-focused on matters that can be dealt with in public

54. The **second** option is to place greater emphasis on those matters that can be heard in public, at the expense of time spent considering matters that cannot. For example it may be possible to consider parts of Leicestershire County Council's response to allegations made against Lord Janner, and/or some parts of other investigations. Further details and examples are considered in closed submissions. Where necessary, some evidence could be heard in closed session to provide relevant context.

55. The advantages of this option are that it would allow for a greater proportion of public hearings and may allow for some public conclusions on some aspects of institutional responses to relevant allegations.

56. Again, there are many disadvantages.

    a. The principal problem remains that such an approach would not allow for sufficient public consideration of the central issues in the investigation, in particular the response of the police and CPS to what were plainly criminal allegations.

    b. As a result, there is a real risk that the public hearings and the published report will give undue emphasis to more peripheral matters and may create a distortion of the public record. This argument will be developed in closed submissions. To give an example drawn from another case: the inquests into the Hillsborough disaster were re-opened in large part because of additional evidence that emerged suggesting that some of those who died may have survived had they received more timely and effective medical treatment: see *Attorney General v HM Coroner of South Yorkshire (West) and another* [2012] EWHC 3783 (Admin). The fresh inquests did not, however, hear evidence only about the response of the emergency services to the crush. To have done so would have risked distorting the public record by focusing on the response rather than the cause of the disaster.

    c. A particular concern in this Investigation would be that the public hearings would focus only on more recent allegations of institutional failings, many of which are unsupported by contemporary documentation and where witnesses cannot be identified. In many cases there would be insufficient investigative leads to allow for an effective investigation at this point in time.

d. There would be a real risk of unfairness to individuals and institutions whose responses to the allegations were influenced by decisions taken in the criminal investigation. Such individuals must be allowed to make reference to that investigation, but may only be able to do so in closed hearings. This may result in criticisms being made in public and answered and determined in private. This would be at best unsatisfactory, at worst unjust.

e. The hearings are likely to give rise to a paradox whereby the more forensic and complete the Investigation became, the more evidence would have to be heard and resolved in closed hearings. In addition to the risk of unfairness, this would also frustrate public understanding of the issues involved. It would be extremely difficult for those following the open hearings to make sense of them in the absence of the closed material.

f. The Chair and Panel will be mindful of the wider work of the Inquiry and will need to ask whether anything worthwhile would be added to it by such a re-focused investigation, particularly when considerable work has already been done on failures by local authorities to protect children in residential care.

57. CTI submit this approach should not be adopted for the reasons given in the previous paragraph. At best, the public hearings would be incomplete and difficult to follow. At worst, and it is submitted that this is the more likely outcome, they would distort the public record by focusing on peripheral matters while leaving the issues at the heart of this Investigation unexamined (at least in public). There are real risks that the extent to which the closed hearings would be necessary would render the open sessions incomprehensible to the public and potentially unfair to witnesses and core participants. CTI cannot see how this approach could be made to work in a way that would be practical, fair and effective.

58. As an alternative, CTI have considered whether an Investigation could be undertaken into themes arising from the investigations into Lord Janner, but without going into the detail of the evidence in this case - for example by considering generically how the police and CPS investigated allegations against people of public prominence both historically and at the present time, or on how local authorities deal with allegations that do not give rise to prosecutions. CTI submit that this would not be an appropriate course. The Chair and Panel have already heard considerable evidence on these and related matters in other investigations. The most valuable evidence has emerged from forensic consideration of case studies and a more thematic approach would risk descending into vague platitudes. Such an approach would also require a wholesale revision of the scope of this Investigation and would not allow for an answer to the central question whether Lord Janner was given preferential treatment, and if so why.

<u>Discontinuing the Investigation</u>

59. While CTI do not see any positive advantages in discontinuation, an argument can be made that sufficient investigations into matters relating to the allegations concerning Lord Janner have now taken place. The Investigation by this Inquiry was commenced at a time when it appeared that Lord Janner would not face trial, notwithstanding the conclusion of the DPP that the evidential test had been met in respect of nine (later 12) separate complainants. Since that time Sir Richard Henriques and the IOPC have undertaken extensive investigation of the police and CPS response. The report of the former has been published, and the CPS and Leicestershire Police have accepted the criticisms contained within it (although individual police officers and prosecutors have not). The report of Operation Nori has not been published but has been provided to core participants. It is a substantial piece of work that draws on the extant contemporaneous documents and interviews conducted with most or all of the relevant living witnesses. For the reasons given above, CTI considered that public hearings and a public report from this Inquiry could add to the investigations already conducted, but it is acknowledged that considerable work has already been done.

60. The IOPC investigation has not led to any criminal prosecutions. While disciplinary proceedings may have been commenced had some of the officers involved still be serving, the Decision Maker concluded that others would have had no case to answer. The Henriques Report is critical of various decisions, actions and omissions. These investigations, it may be felt, have gone some way to informing public discourse and allaying concerns.

61. There are, however, very obvious disadvantages to discontinuing the Investigation. Such a step would prove a bitter disappointment for the complainant core participants, many of whom may see it as a further failure to deal appropriately with their allegations. It would also leave the central question of public interest - whether Lord Janner was given preferential treatment, and if so why - unexplored in a public forum and unanswered in a public report.

Conclusion

62. CTI have spent extensive time proposing and testing options for this Investigation, seeking to identify a proposal based on the following propositions and outcomes:

    a. Lawful hearings allowing for a lawful report that would respect the decisions made on anonymity by the complainants.

    b. A meaningful contribution to fulfilling the Inquiry's Terms of Reference, respecting the fact that the Inquiry is examining institutions rather than individual allegations of child sexual abuse.

    c. Effective consideration of the central relevant issues, in particular the response of the police and CPS to the allegations made.

d. Sufficient public element to allow for the matters set out by Lord Bingham in *Amin* to be achieved.

e. Fairness to all witnesses and core participants, including in the public hearings and in the published report.

f. Respect for the legitimate interests of all core participants, including complainant core participants, who have participated in this Investigation.

g. A realistic assessment of what can be investigated and examined at this point in time given the documentary and other evidence available to the Inquiry.

h. A practical and proportionate model for how the hearings would work within the parameters of the Inquiry's wider timetable.

63. If CTI considered that these outcomes could be achieved in a fair and satisfactory way by any approach open to the Chair then we would have no hesitation in submitting that this course should be pursued. With regret, and despite extensive consideration of all apparent options, CTI have not identified any way of achieving that result. CTI await the submissions of core participants to see if they are able to identify a proportionate, effective and lawful alternative that is capable of being implemented within the constraints imposed by the 1992 and 2005 Acts.

Procedural matters

64. CTI have sought to include as much material as possible within these open submissions. Core participants are invited to adopt a similar approach.

65. Nonetheless, there is a need to supplement these submissions with closed submission that are provided (at this stage at least) only to the Chair and Panel and core participants. The closed submissions are subject to the strict terms of the confidentiality undertaking. All core participants and members of the media are reminded of the criminal sanctions that may result from breaching the 1992 Act, and of the terms of the Chair's Restriction Order of 18 September 2019.

66. CTI consider that it is very likely that there will be a need for a closed session of the public hearings on 20 February 2020, pursuant to section 19 of the 2005 Act. CTI will review this issue once core participants have filed their written submissions.

67. Core participants are invited to make submissions on the following matters:

a. Whether they agree that it may be necessary to make provisions for a closed session of the preliminary hearing.

b. If it is, whether attendance should be restricted to Inquiry staff, core participants and their recognised legal representatives, or whether some accredited members of the media may also attend.

c. If media representatives are to attend, whether a restriction order should be made to prohibit all reporting of the closed hearing, or whether it is sufficient to rely on the Chair's existing Restriction Orders of 23 March 2018 and 18 September 2019, and the provisions of the 1992 Act.

68. It is CTI's provisional submission that at least some accredited members of the media should be allowed to attend the closed session of the preliminary hearing for the following reasons:

a. The starting point for any such hearing should be that the principles of open justice apply (see authorities cited above). The media should not be excluded unless there are compelling reasons to take such a step.

b. The presence of the media would allow for more informed reporting of the preliminary hearing as a whole. Although the media would be prohibited from reporting on some or all of the closed session, they would gain a greater understanding of the issues involved by hearing the submissions that took place in closed session. This would both inform their own reporting and allow them to identify any erroneous or misleading claims made by others.

c. The presence of the media at the hearing would not violate the 1992 Act or the Chair's restriction orders. The usual legal reasons for excluding the media from inquiry hearings - matters of national security and risks associated with articles 2 and 3 of the European Convention on Human Rights - do not seem to apply (although CTI await submissions of others on the latter point).

d. The members of the media who attend will be bound both by the 1992 Act and by the Chair's existing restriction orders. If necessary, a further restriction order could be made under section 19 of the 2005 Act to provide additional protection. The representatives of the media, and the organisations that they represent, will be aware of their personal legal obligations, including the criminal sanctions that could result from non-compliance.

69. CTI's submission is provisional and will be re-considered in light of the submissions made by others.

Brian Altman Q.C.
Andrew O'Connor Q.C.
Matthew Hill
Marlene Cayoun

17 January 2020