IN THE MATTER OF THE INDEPENDENT INQUIRY INTO CHILD SEXUAL ABUSE

GENERIC SUBMISSIONS BY COUNSEL TO THE INQUIRY ON THE QUESTION OF BROADCASTING PROCEEDINGS

INTRODUCTION

1. In her Opening Statement of 9 July 2015, the Chair of the Independent Inquiry into Child Sexual Abuse ('the Inquiry') indicated that the Inquiry would invite representations from all core participants in relation to media coverage of public hearings. She also noted that, when considering the rules applicable to media coverage of public hearings, particular attention would need to be paid to ensuring that victims and survivors of child sexual abuse are able to testify under conditions in which they feel safe.

2. Since the Chair's Opening Statement, the Inquiry has announced 13 separate investigations which are likely to result in public hearings. Those investigations engage a wide variety of individuals and institutions and cover a range of issues of public importance. They include investigations into children's homes; local authorities; custodial institutions; schools; prosecuting authorities; religious institutions and others. Because of the wide variety of interested parties in each investigation, core participants are to be designated in relation to each investigation rather than in relation to the Inquiry as a whole.

3. In advance of the Inquiry's first set of preliminary hearings, Counsel to the Inquiry make these submissions to assist the Chair when determining the rules applicable to media coverage of the Inquiry's public hearings. A separate decision will be required in relation to each investigation- considerations in each case may be different and the Core Participants will be designated only in relation to individual investigations. The result may be that the Inquiry adopts a different approach to media coverage in relation to public hearings in different investigations.

4. There are a range of measures to facilitate media coverage of the Inquiry's proceedings that are unlikely to be contentious in any particular investigation. Subject to submissions from the media or core participants in any individual investigation, we submit that it would be appropriate for the Inquiry to adopt a general approach which (in relation to all evidence that is not subject to a restriction order) includes:

    a. providing designated media seating in the hearing room and - if necessary – in an overflow annex showing live video of proceedings;

    b. granting permission to use live text-based communications from the Inquiry room;

    c. providing live transcription of proceedings visible within the Inquiry room; and

    d. posting all transcripts and evidence to the Inquiry website.

5. In addition to those measures, the Inquiry will need to consider whether to allow the broadcast and/or livestreaming of Inquiry proceedings. This is an issue upon which views may differ. Counsel to the Inquiry do not, at this stage, take any position on whether proceedings should or should not be broadcast and/or livestreamed; instead, we set out the key factors that will need to be considered by the Chair after receiving submissions from media representatives and core participants in any individual investigation.

6. For the purposes of these submissions, 'broadcasting' means broadcasting by traditional broadcast media, either live, or in delayed clips; 'livestreaming' means the streaming of proceedings on internet web sites.

DISCUSSION

Legal Framework

7. The Inquiries Act 2005 establishes public access to an inquiry as a central principle. Section 18(1) provides:

"Subject to any restrictions imposed by a notice or order under section 19, the chairman must take such steps as he considers reasonable to secure that members of the public (including reporters) are able-
(a) to attend the inquiry or to see and hear a simultaneous transmission of proceedings at the inquiry;
(b) to obtain or to view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel."

8. Although the broadcast and/or livestream of an Inquiry clearly serves the principle of public access, the Act does not establish any presumption in favour of broadcasting or livestreaming proceedings. Indeed, section 18(2) provides:

"No recording or broadcast of proceedings at an inquiry may be made except—
(a) at the request of the chairman, or
(b) with the permission of the chairman and in accordance with any terms on which permission is given.
Any such request or permission must be framed so as not to enable a person to see or hear by means of a recording or broadcast anything that he is prohibited by a notice under section 19 from seeing or hearing."

Past practice

9. As a matter of practice, Chairs of previous public inquiries have adopted a range of approaches to the broadcast and livestreaming of proceedings. No broadcasting of general proceedings was permitted in the Hutton, Baha Mousa, Al Sweady, and Mid Staffordshire Inquiries. Some live evidence was broadcast in the Chilcot Inquiry.[1] The entirety of the Leveson Inquiry was livestreamed.

10. In the Litvinenko Inquiry, Sir Robert Owen considered the question of livestreaming in detail in his ruling of 7 November 2014. He said as follows:

5. As Lord Toulson JSC observed in giving his judgment in Kennedy v Information Commissioner (SC(E)) [2014] 2 WLR 808, a judgment with which Lord Neuberger and Lord Clarke agreed,

> *"110. It has long been recognised that judicial processes should be open to public scrutiny unless and to the extent that there are valid countervailing reasons. This is the open justice principle. The reasons for it have been stated on many occasions. Letting in the light is the best way of keeping those responsible for exercising the judicial power of the state up to the mark and for maintaining public confidence: Scott v Scott [1913] AC 417; R (Guardian News and Media Ltd) v City of Westminster Magistrates Court (Article 19 intervening) [2013] QB 618."*

At paragraph 121 he posed the question of whether the principle of openness as a general matter should be held to apply to statutory inquiries, a question that he answered in the affirmative; and as Mr Bailin submitted, the provisions contained in section 18 of the Act give rise to a strong presumption in favour of maximising public access to an inquiry initiated under its provisions.

[1] Whilst the Hutton and Chilcot Inquiries were non-statutory, and therefore not subject to section 18(1)(a) of the 2005 Act, the essential open justice principles are the same.

6. Live video streaming of proceedings is unquestionably the means by which to secure the widest public access to the proceedings. It is to be noted that arrangements were made for live-streaming of proceedings in the open part of the Iraq (Chilcott) Inquiry and in the Leveson Inquiry. At paragraphs 1-26/8 of his report, "An Inquiry into the Culture, Practices and Ethics of the Press", Leveson LJ addressed the question of the extent to which it would be appropriate to allow cameras into the Inquiry room to record the evidence and thereafter to stream it live over the Inquiry website. He acknowledged the significant public interest in "...what the inquiry was doing and seeking to achieve along with the very real importance in ensuring that the evidence was available to see in a form that was unmediated by press or other reporting." But it is important to bear in mind that, as Leveson LJ pointed out at paragraph 1-26, "...all who gave oral evidence were volunteers and understood that their evidence would be streamed on the website and available to be seen in the future", a point to which I shall return.

7. Whilst the subject matter of this inquiry is of a very different nature to that of the Leveson Inquiry, there is considerable public interest and concern as to the circumstances in which Alexander Litvinenko died. I consider that the live- streaming of the evidence on the Inquiry website would make an important contribution to the establishment and maintenance of public confidence, both domestic and international, in the Inquiry, objectives of the highest importance given the nature of the issues to which it gives rise.

8. I therefore approach Mr Bailin's request on the premise that I should permit the live-streaming of proceedings via the Inquiry website unless there are compelling arguments to the contrary."

11. Notwithstanding this premise, Sir Robert Owen ruled against livestreaming and broadcasting of witness evidence in the Litvinenko Inquiry (though he permitted the broadcast of opening and closing submissions). He was persuaded that, in the particular circumstances of that inquiry, the public interest in livestreaming was outweighed by the serious risk that livestreaming would discourage some witnesses from cooperating with the Inquiry, or would inhibit witnesses from giving a full account of all matters within their knowledge.

SUBMISSIONS

The competing considerations

12. We commend the statement of principle adopted by Sir Robert Owen in paragraph 8 of his ruling and submit that, in the absence of compelling arguments to the contrary, broadcasting and/or livestreaming should be permitted in this Inquiry. We consider that to be a point of general principle, but also submit that there are reasons why it is the correct approach in the specific context of this Inquiry.

13. The public interest in this Inquiry demands that it receives the widest publicity possible. The need for transparency in the investigation of institutional failures to

protect children from sexual abuse weighs strongly in favour of ensuring that the evidence and findings of this Inquiry are given wide exposure. A decision to allow the broadcasting and/or live streaming of the Inquiry would serve that end.

14. Further, the Inquiry has taken a decision to hold a substantial part of the Inquiry in private. A restriction order has been made to prohibit public access to, and reporting of, the personal accounts of sexual abuse given to the Inquiry's Truth Project. That restriction order is unquestionably justified, but it may be thought to heighten the need to ensure that the rest of the Inquiry is conducted as transparently and publicly as possible.

15. Nonetheless, despite the strong arguments in favour of permitting broadcasting and/or livestreaming of proceedings, there may be compelling reasons to refuse to allow, or to restrict, broadcasting and/or livestreaming in the Inquiry. We highlight what we consider to be four key considerations below.

16. First, most - if not all - witnesses who are victims or survivors of child sexual abuse will have a statutory right to anonymity by virtue of section 1 of the Sexual Offences (Amendment) Act 1992. That statutory right makes it an offence for any still or moving picture of that person to be shown on any programme for reception in England and Wales if it is likely to lead members of the public to identify that person as a person against whom a sexual offence is alleged to have been committed. Consequently, any decision to allow broadcasting and/or livestreaming of proceedings will need to take this into account, and devise methods to preserve anonymity.

17. Secondly, in relation to all victims and survivor witnesses, including those who are willing to waive their right to anonymity, the broadcasting and/or livestreaming of proceedings may have a chilling effect on their willingness to give evidence. Even in the absence of broadcasting and/or live-streaming, those witnesses may find the experience of giving evidence to a public inquiry stressful and difficult. The knowledge that their evidence will be broadcast to the world may add to the stress

and anxiety experienced in unquantifiable ways and it may discourage their voluntary attendance. In circumstances where the Chair has announced that she will not compel the attendance of any victim or survivor witness, their absence could have a very damaging impact on the Inquiry's ability to fulfil its terms of reference.

18. Thirdly, all witnesses, including victims and survivors of abuse, whistleblowers, institutional representatives, and perpetrators of sexual offences may feel inhibited by the knowledge that their evidence is being livestreamed or broadcast; they may be less inclined to speak frankly and with candour and may be more defensive than they otherwise would. This too could have a detrimental impact on the Inquiry's ability to fulfil its terms of reference.

19. Fourthly, there is a risk that some witnesses may use the opportunity provided by the live broadcast of proceedings to make public allegations of criminal conduct against individuals who are not involved in the Inquiry process, have no advance warning of the allegations, and no legal recourse for defamation.[2] Given the subject matter of this Inquiry, that risk cannot be discounted as remote.

20. In our submission, none of these concerns are insurmountable individually. It is possible to devise measures to mitigate each risk, including:

    a. Providing special protective measures within the hearing room, so that a witness is able to give evidence from behind a screen.

    b. Providing special broadcasting measures, so that:
        i. the camera in the hearing room is prohibited from filming a designated witness but instead faces the Panel or legal representatives;

[2] By section 37(3) of the Inquiries Act 2005, any statement made in proceedings of a public inquiry are covered by absolute privilege for the purposes of defamation.

ii. the video feed is switched off for the duration of a designated witness's evidence but the audio feed continues;
iii. the video and audio feed is turned off for the duration of a designated witness's evidence.

c. Introducing a delay in the transmission of any broadcast to i) ease the perceived pressure on a witness that may be felt as a result of truly 'live broadcast' and ii) allow the Chair to restrict the broadcast of any inappropriate material.

21. While none of these measures may be seen as fundamentally objectionable, the Chair will need to consider, having heard submissions, whether their cumulative effect might render broadcasting and/or livestreaming of proceedings unworkable or undesirable. For example, although the Leveson Inquiry provides a precedent for switching off the audio and video feed during the evidence of an anonymous witness, this measure was only used once in the Leveson Inquiry for a single witness (witness HJK). If its use was more frequent in this Inquiry, or if it became a default measure for all victim and survivor witnesses, and/or for whistleblowers, it may undermine the purpose of broadcasting by presenting to the public an unrepresentative picture of the evidence received. The Chair will also need to consider the statutory requirement to avoid unnecessary cost: for example, the technology required to introduce a 5 minute delay in livestreaming is expensive and, if such a delay is considered necessary, the Chair will need to consider whether the cost is proportionate to the aim.

CONCLUSION

22. As set out above, the Chair will need to hear, in preliminary hearings relating to each investigation, submissions on the rules applicable to media coverage of the Inquiry's public hearings. Those submissions will need to address the proposed measures set out in paragraph 4 above as well as the question of livestreaming and/or broadcasting of proceedings. Media representatives and core participants making submissions in favour of, or in opposition to, the broadcast and/or

livestreaming of proceedings should also be asked to make submissions on whether a range of measures might mitigate any concerns identified and, if so, whether the cumulative effect of those measures might render broadcasting and/or livestreaming undesirable. Some of those measures are set out in paragraph 19 above but they are by no means exhaustive.

23. For the purposes of the first hearing in the present investigation Counsel to the Inquiry submits that individual assessments will be necessary for each complainant, and any other witness to be called, in order to inform the exercise of the Chair's discretion. It is likely to take some time for each witness to be seen; on the other hand, the issue will need to be resolved well in advance of the start of the substantive hearing. It is therefore suggested that the matter is listed for a determination with the benefit of informed submissions at a further preliminary hearing.

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