IN THE MATTER OF THE INDEPENDENT INQUIRY INTO CHILD SEXUAL ABUSE

SUBMISSIONS OF THE BBC, BSKYB AND ITN ON THE ISSUE OF THE BROADCASTING OF THE INQUIRY'S PROCEEDINGS

Introduction

1. These are the submissions of the BBC, BSkyB and ITN ("the Broadcast Media") on the question of the recording and broadcasting of the proceedings of the Independent Inquiry into Child Sexual Abuse ("the Inquiry"), to be considered at the preliminary hearing of 9 March 2016.

2. In relation to general measures to facilitate media attendance at and reporting of the proceedings, the Broadcast Media agree that it would be appropriate for the steps set out at paragraph 4 of the Generic Submissions of Counsel to the Inquiry ("the Generic Submissions") to be taken, in accordance with the obligation to secure public and media access to the Inquiry under section 18(1) of the Inquiries Act 2005 ("the 2005 Act").

Relevant law

Statutory framework

3. Section 18(1) of the 2005 Act provides for a presumption that members of the public (including reporters) will have access to the proceedings of, and evidence taken by, an inquiry. It requires the chairman, subject to any restrictions imposed by a section 19 notice or order, to take such steps as he considers reasonable to secure that members of the public (including reporters) are able to attend the inquiry or to see and hear a simultaneous transmission of its proceedings; and to obtain or view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel.

4. Section 18(2) prohibits the recording or broadcast of proceedings save at the request or with the permission of the chairman. Any such request may not be made, nor permission granted, which would enable a person to see or hear, by means of a recording or broadcast, anything covered by a section 19 notice.

Common law principles

5. In *Kennedy v Information Commissioner* [2015] 1 AC 455, which concerned an inquiry conducted by the Charity Commission under the Charities Act 1993, Lord Toulson held that the common law doctrine of open justice should in general apply to statutory inquiries as it does to the courts: see [121]-[132]. At [124] he observed that:

> …the considerations which underlie the open justice principle in relation to judicial proceedings apply also to those charged by Parliament with responsibility for conducting quasi-judicial inquiries and hearings. How is an unenlightened public to have confidence that the responsibilities for conducting quasi-judicial inquiries are properly discharged?

6. This observation referred back to the various justifications for open justice set out earlier in the judgment of Lord Toulson, in which he endorsed the general proposition that "*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*" ([110]); and went on to provide the following rationale:

> "Society depends on the judges to act as guardians of the rule of law, but who is to guard the guardians and how can the public have confidence in them? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse." [112]

Article 10 ECHR

7. Article 10 ECHR provides as follows:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

8. Article 10 is engaged when the media seek to report court proceedings: *A v Independent News and Media Ltd* [2010] 1 WLR 2262 at [38]-[45].

9. The Article 10 right is one of the essential foundations of a democratic society. Restrictions directed against the media should be particularly closely scrutinised since it has a special place in a democratic society as purveyor of information and public watchdog: *Pentikainen v Finland* (App no 11882/10), judgment of 20 October 2015 (Grand Chamber). This is particularly the case in relation to the administration of justice, which serves the interests of the community at large and requires the co-operation of an enlightened public: *Sunday Times v UK* (1979) 2 EHRR 245 at [65].

10. Accordingly any restriction under Article 10(2) must be convincingly established on the basis of a rigorous assessment of the relevant facts. As the European Court of Human Rights ("ECtHR") held in the *Sunday Times* case it is "*not sufficient that the interference involved belongs to that class of the exceptions listed in Article 10(2) which has been invoked; neither is it sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms: the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it*": [65].

11. In *Jersild v Denmark* (1994) 19 EHRR 1 the ECtHR recognised, at [31], that "*the audiovisual media have often a much more immediate and powerful effect than the print media*" and possess "*means of conveying through images meanings which the print media are not able to impart*". It is not for the ECtHR, nor national courts, "*to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists*".

Submissions

12. The Broadcast Media agree with the view expressed in the Generic Submissions that permission should be granted for recording and broadcasting of the Inquiry's proceedings, save where, in a specific case, compelling reasons exist to the contrary. It is an approach which is consistent with the principles expressed above. In addition it reflects the special importance of public access in the particular context of this Inquiry.

13. The Inquiry is required by paragraph 2 of its Terms of Reference to conduct its work 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*". In her Opening Statement of 9 July 2015 ("the Opening Statement") the Chair stated that she was "*committed to ensuring the Inquiry's work would be conducted as transparently as possible*".

14. The broadcasting of the Inquiry's proceedings would significantly enhance the transparency of, and the public's engagement with, its work. Audiovisual footage of its hearings would have an immediacy and directness lacking in transcripts or journalistic bulletins composed of court reports and sketches. Given the increasing consumption by the public of televised and web-based forms of news media, and the consequent greater demand for visual news content, the reach of the Inquiry is likely to be substantially increased, and maintained, if video of the proceedings is available. The Broadcast Media submit that an increased stimulation of public interest in and awareness of the Inquiry's work by these means is likely to have five important consequences.

15. First, it is likely to promote public understanding of the Inquiry. By observing the Inquiry's hearings directly, the public would gain valuable insight into the evidence which is heard, the testing of that evidence and the working practices of the Inquiry. Second-hand journalistic accounts of the proceedings would not be able to secure the same degree and breadth of understanding.

16. Second, public confidence in the Inquiry is likely to be promoted. As Lord Toulson noted in *Kennedy*, the public scrutiny of judicial or quasi-judicial proceedings increases public trust in such processes. Broadcasting the Inquiry's hearings is the most effective means of maximising such oversight.

17. Third, broadcasting of the proceedings would send a strong signal that openness and accountability are core priorities for the Inquiry. The establishment of the Inquiry came against the background of a widespread appreciation that, as the Chair noted at paragraph 11 of her Opening Statement, "*[t]oo many individuals and institutions have been sheltered from accountability through patterns of indifference or obstruction*." Enhancing public access to the Inquiry's work by broadcasting its hearings would emphasise the Inquiry's aim to expose, and address, these patterns of non-accountability.

18. Fourth, the broadcasting of hearings may in itself contribute to broader changes in the way child sexual abuse is understood and discussed. The direct communication of the evidence taken by the Inquiry may tend to encourage a culture in which there is greater willingness to raise and address these issues in public, rather than seeking to hide them from view.

19. Fifth, the evidence-gathering task of the Inquiry is, in turn, likely to be assisted by increased public knowledge of, and confidence in, its work. In her Opening Statement and Statement of 27 November 2015, the Chair placed significant emphasis on the Inquiry's calls for evidence from victims and survivors, whistleblowers and others with information about institutional failings. Such evidence was sought for the purposes both of the Truth Project and the Public Hearings Project: see the Opening Statement at [20], [30]-[37], [65] and [91] and the Statement of 27 November 2015 at [29]. As described at [57]-[75] of the Opening Statement, the Inquiry's aim to maximise public engagement with its work is supported by its establishment of the Victims and Survivors' Consultative Panel, the Inquiry's website, its helpline, and the public information campaign and outreach initiative due to be mounted. The stimulation of public awareness and understanding of the Inquiry's work through broadcasting would bolster these efforts. It is likely to encourage potential witnesses to come forward and provide evidence.

20. At [15]-[19] of the Generic Submissions, Counsel to the Inquiry identify various grounds potentially militating against the broadcasting of proceedings or necessitating the grant of special measures to witnesses. These grounds are based on: (a) the statutory prohibition on reports which name or tend to identify complainants of certain sexual offences; (b) the potential deterrent effect of broadcasting on the voluntary provision of evidence; (c) the potential inhibitions felt by witnesses whose evidence is broadcast; and (d) the possibility that witnesses may use broadcasts to make public allegations of criminal conduct against third parties.

21. As to the first two points, the Broadcast Media agree that careful thought will need to be given, in advance of relevant hearings, to how any broadcasting arrangements, and other special measures, ensure that there is no breach of the obligations under section 1 of the Sexual Offences (Amendment) Act 1992. Insofar as the Inquiry considers such issues in individual cases, the Broadcast Media would seek to make submissions which draw on the substantial

experience of their journalists in reporting on cases of alleged sexual offences. This experience extends to the use of contemporaneous text-based reporting from the courtroom, now permitted by the Practice Guidance issued by Lord Judge CJ on 14 November 2011 on the use of live text-based forms of communication (including Twitter) from court for the purposes of fair and accurate reporting.

22. Moreover each of these broadcasters has significant recent experience of broadcasting judicial proceedings. Supreme Court hearings (which are not subject to the prohibition on courtroom filming contained in section 41 of the Criminal Justice Act 1925) have, since the establishment of the Court in 2009, been filmed and made available to broadcasters. Since 2011 BSkyB has streamed the footage live on the Sky News website (content which is also streamed on the Supreme Court website). Further, by section 32 of the Crime and Courts Act 2013 and the Court of Appeal (Recording and Broadcasting) Order 2013, certain proceedings of the Court of Appeal may now be broadcast.

23. As to the further concerns referred to by Counsel to the Inquiry, the Broadcast Media agree that these will need to be considered on a case-by-case basis. The potential difficulties should not, however, be overstated.

24. First, most of the potential witnesses for the Inquiry are likely to be compellable, a power which the Chair has said, in her Opening Statement, she will not hesitate to exercise where necessary, save in respect of victims and survivors. This is in contrast to the position which applied in the Litvinenko Inquiry, in relation to which several important witnesses were located outside of the jurisdiction, a point which underpinned in part the refusal of Sir Robert Owen to permit the broadcasting of evidence: see the Ruling of 7 November 2014 at [15] and the Ruling of 26 November 2014 at [3]-[5].

25. Second, the ongoing Australian Royal Commission into Institutional Responses to Child Sexual Abuse has streamed, and continues to stream, its public hearings live on its website. At page 87 of Volume 1 of its Interim Report (June 2014), the Commission states that it has "*tried to make our activities transparent by putting information about our work on our website, streaming hearings live and engaging with the media*", while noting that "*at times we must restrict public access to information that is confidential or sensitive*".

26. Third, it is increasingly common in this jurisdiction for formal evidence of the kind which will be taken by the Inquiry to be televised and/or livestreamed. Both

the Chilcot and Leveson Inquiries livestreamed the evidence which they heard in public. The hearing of evidence before the parliamentary Select Committees is regularly livestreamed on the parliamentlive.tv website, and made available to broadcasters.

27. Fourth, as set out above, UK broadcasters have developed a growing expertise on the practical issues that may arise from the broadcasting of courtroom proceedings. That experience can inform any special measures or arrangements which are considered and ordered in advance of particular hearings.

Conclusion

28. For these reasons the Broadcast Media agree with the proposals set out in the Generic Submissions, namely that:

    a. Measures to facilitate media attendance and reporting, as set out at paragraph 4 of the Generic Submissions, should be adopted.

    b. The Chair should permit recording or broadcasting of the proceedings unless there are compelling reasons to the contrary.

    c. The question as to whether any such compelling reasons exist in relation to particular hearings should be considered on a case-by-case basis. Insofar as concerns are raised in relation to particular witnesses, these should be assessed on the basis of information provided to the Broadcast Media in advance. Consideration should be given to alternative special measures which may be adopted instead of the suspension of broadcasting.

BEN SILVERSTONE

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7 March 2016