IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

WRITTEN SUBMISSIONS ON BEHALF OF THE MEDIA ON THE LEGAL PRINCIPLES APPLICABLE TO APPLICATIONS FOR RESTRICTION ORDERS

For hearing: 22-23 March 2016

Introduction

1. These written submissions are provided by Guardian News & Media, Associated Newspapers Ltd, the BBC, Independent Print Ltd, ITN, Sky UK and Times Newspapers Ltd ("the Media"). They concern the legal principles affecting the rights of the Media which are relevant to applications for restriction orders under section 19 of the Inquiries Act 2005 ("the 2005 Act").

2. In accordance with the Notice to Core Participants ("CPs") dated 22 February 2016, the Media confine their submissions to the issues of legal principle. When the Inquiry decides whether to make restrictions orders it will have to apply the legal principles to the facts.

3. The Media are in broad agreement with Counsel to the Inquiry ("CTI") on the relevance of public interest immunity ("PII") and the approach to be taken to Articles 2 and 3 ECHR, summarised at [40]-[41] of CTI's Note. As to the first, the Media agree that, save in the most exceptional circumstances, a public authority should produce relevant evidence to the Inquiry rather than withholding it on PII grounds. It should then make an application for a restriction order if this is considered necessary. As to the second, the Media also agree that where a claim based on Articles 2 or 3 is raised, the Inquiry should apply the principles set out in *In re Officer L* [2007] 1 WLR 2135. As to whether these rights are engaged, as stated by Lord Carswell at [20], "*the criterion is and should be one that is not readily satisfied: in other words, the threshold is high*."

4. The remainder of these submissions focus on other issues of particular relevance to the Media, namely:

    a. the application of the principle of open justice / openness and of Article 10 ECHR principles at this Inquiry;

    b. the scope for Article 8 ECHR to be engaged at this Inquiry;

c. the considerations which bear on the force of these competing interests in the context of this Inquiry; and

d. the procedures the Inquiry should operate to ensure that the Media is heard if it wishes to assert open justice / Article 10 principles when the Inquiry is considering restricting the rights of the media to receive and impart information.

Relevant background: the presumption of open proceedings

5. At the outset, the Media express their agreement with the comments made at [18] of the Chairman's Opening Remarks of 28 July 2015, and echoed at [26] of the Note of CTI and [1] of the submissions of the Non-Police, Non-State Core Participants ("NPNSCPs"). A presumption of openness applies to these proceedings. This is so as a matter of general principle. But the presumption is particularly strong given the subject-matter of and background to this Inquiry. Three broad considerations are of importance.

6. First the statutory scheme requires this. The Media would stress the following three features of the scheme:

   a. Section 18(1) of the 2005 Act, which requires the Chairman (subject to any restrictions imposed under section 19) 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 or hear a simultaneous transmission of proceedings at the inquiry*; and to *obtain or view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel*.

   b. Insofar as section 19(3)(b) enables the Minister or Chairman to determine that there should be a departure from this position, s/he is required to consider (amongst other things) *the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern*: section 19(4)(a).

   c. The existence or possibility of such *public concern* is a condition precedent to the holding of an inquiry under the 2005 Act: section 1(1).

   Note that <u>before</u> the 2005 Act both public and judicial concern was expressed about the possibility of judicial inquiries into troubling events being held in private. See especially in relation to the Shipman Inquiry *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292.

7. Secondly both the common law and the Article 10 jurisprudence place great emphasis on the openness of legal proceedings. In the common law context, the principal (though by no means the only) justification for open justice was identified by Lord Toulson at [112] of *Kennedy v Charity Commission* [2015] AC 455 as follows:

> 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.

Lord Toulson (with whom Lords Neuberger, Clarke and Sumption agreed) held that both this principle, and its rationale, applied in the context of "*judicial and quasi-judicial inquiries and hearings*". Its application to such bodies is an answer to the following question put by Lord Toulson: "*[h]ow is an unenlightened public to have confidence that the responsibilities for conducting quasi-judicial inquiries are properly discharged?*": [124].

8. The European Court of Human Rights ("ECtHR") has also emphasised for many years the importance of the media's right to freedom of expression in relation to the reporting of legal/judicial proceedings. The seminal judgment of the ECtHR in *Sunday Times v UK* (1979) 2 EHRR 245 contains the following passage at [65]:

> As the Court remarked in its *Handyside* judgment, freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population (p. 23, para. 49).
>
> These principles are of particular importance as far as the press is concerned. They are equally applicable to the field of the administration of justice, which serves the interests of the community at large and requires the co-operation of an enlightened public. There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them…

9. Thirdly openness is vital in light of the background to, and purposes of, the present Inquiry. In announcing her intention to establish a public inquiry on 6 March 2014, the Home Secretary referred to serial acts of misconduct committed by the Metropolitan

Police Service ("MPS") in connection with the investigation of the murder of Stephen Lawrence. A common theme in this wrongdoing was the secrecy with which the Special Demonstration Squad had operated and the repeated breaches of disclosure obligations on the part of the MPS in relation to the work of undercover officers. The Home Secretary's statement placed emphasis both on the gravity of the wrongdoing and the need for an inquiry to restore public trust in the police, as follows:

> …the findings I have outlined today are profoundly shocking and will be of grave concern to everyone in the House and beyond…
>
> As I have said, the matters I have announced today are deeply concerning. And more broadly, it is imperative that public trust and confidence in the police is maintained…
>
> In policing as in other areas, the problems of the past have a danger of infecting the present, and can lay traps for the future. Policing stands damaged today. Trust and confidence in the Metropolitan Police, and policing more generally, is vital. A public inquiry, and the other work I have set out, are part of the process of repairing the damage.
>
> Mr Speaker, Stephen Lawrence was murdered over twenty years ago and it is deplorable that his family have had to wait so many years for the truth to emerge. Indeed, it is still emerging.
>
> Understandably many of us thought that the Macpherson Inquiry had answered all the questions surrounding the investigation into Stephen‟s death. But the findings I have set out today are profoundly disturbing.
>
> For the sake of Doreen Lawrence, Neville Lawrence, their family and the British public, we must act now to redress these wrongs. I commend this statement to the House.

10. The background to this Inquiry is a loss of public confidence in the police as a result of abuses of covert powers uncovered in the Ellison Review and other recent investigations and litigation. This makes the presumption of openness in the present proceedings is an especially strong one. In *R (E) v Chairman of the Inquiry into the Death of Azelle Rodney* [2012] EWHC 563 (Admin) at [26] Laws LJ observed (citing the Chairman whose decision was under review) that it was legitimate for that inquiry to place a "*premium on achieving as public an Inquiry as possible, 'so that at the least to counter or neutralise the obvious alternative surmise, namely a sustained 'cover up'*". This sentiment applies here. A strong presumption of openness will help to achieve the aim identified by Lord Toulson in *Kennedy* of "*[l]etting in the light*" as "*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].

11. There are also real procedural benefits in openness. See for example the NPNSCPs' arguments for transparency in the proceedings, namely that police evidence will need to be heard in open session if it is to be (a) properly tested and (b) considered in the light of all relevant evidence. On the second point, the Media agree with the NPNSCPs' contention at [17], [63] and [70] that hearing police evidence in private is likely to limit the Inquiry's capacity to gather evidence from members of the public who have been affected by undercover police activities. Evidence of this nature would clearly be relevant to many areas of the Inquiry's Terms of Reference, but its collection would be impeded both by failures to identify individual officers under consideration and to restrictions on disclosure about their conduct and practices used. The law has in the past recognised the positive advantages of a fully public procedure at inquiries. See for example in *Wagstaff* (above) at p.320B and following.

12. The Media are aware, especially from their experience of reporting criminal proceedings, that publicity can lead to further evidence coming to light. See *R v Legal Aid Board, Ex p Kaim Todner* [1999] QB 966, at 977 per Lord Woolf MR. See also Lord Steyn in *In Re S* [2005] AC 593 at [34] (referring to criminal trials):

> ...it is important to bear in mind that from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer.

As Lord Rodger (speaking for the Supreme Court) observed in *In re Guardian News and Media* [2010] 2 AC 697 at [63], the form in which proceedings are conveyed (and particularly the identification of the protagonists) has a significant impact on their reception by the public:

> What's in a name? "A lot", the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. Writing stories which capture the attention of readers is a matter of reporting technique, and the European court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed: *News Verlags GmbH & Co KG v Austria* 31 EHRR 246, 256, para 39, quoted at para 35 above. More succinctly, Lord Hoffmann observed in *Campbell v MGN Ltd* [2004] 2 AC 457, 474, para 59, "judges are not newspaper editors". See also Lord Hope of Craighead in *In re British Broadcasting Corpn* [2010] 1 AC 145, para 25. This is not just a matter of deference to editorial independence. The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help

> them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.

Application of principle of open justice / openness and Article 10 ECHR

Open justice

13. The statements of principle of Lord Toulson in *Kennedy*, cited above, relating to the application of open justice to the proceedings of an inquiry fall properly to be considered as part of the Inquiry's obligation, in accordance with section 19(4)(a) of the 2005 Act, to consider the "*extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern*". As the citations set out above attest, the loss of public and media oversight of the proceedings consequent on any such restriction are liable generally to diminish the public confidence which would otherwise be promoted by open and transparent proceedings. As such, compelling reasons will need to be provided to justify such a step.

14. Although expressing himself in terms of a "*common law presumption in favour of openness*" rather than applying the open justice principle to inquiry proceedings, Lord Mance at [49] of *Kennedy* endorsed a presumption of openness "*in the public interest, except so far as the public interest in disclosure is demonstrably outweighed by any countervailing arguments*". It is of relevance to the present Inquiry that, in assessing the range of considerations which might govern the conditions in which an inquiry is held, Lord Mance stated that: "*At one end of the spectrum are inquiries aimed at establishing the truth and maintaining or restoring public confidence on matters of great public importance, factors militating in favour of a public inquiry*".

Article 10 ECHR

15. At [V.20] of their submissions, the MPS rely on the judgment in *Kennedy* in support of a contention that the proceedings of the Inquiry give rise to no Article 10 rights which might be placed in the balance against the Article 8 rights of potential witnesses. This is incorrect. The Article 10 rights of the media, and indeed the public, are engaged by any application (or decision made of the Inquiry's own motion) to deny them access to evidence and documentation considered by the Inquiry.

16. In *A v Independent News and Media* [2010] 1 WLR 2262 the Court of Appeal considered the application of Article 10 in circumstances where a journalist had sought permission to attend proceedings of the Court of Protection. Notably, by rules 90(1), 92(1) and 93(1) of the Court of Protection Rules, the general rule was that such hearings were to be held in private and a public hearing could be ordered only where there was "*good reason*" for such an order. In contrast to the regime provided for by the 2005 Act, therefore, the default position was exclusion of the public.

17. At first instance, Hedley J had held that Article 10 only applied once an applicant had established that such "*good reason*" existed, at which point the Court was required to balance the relevant Article 8 and 10 rights. The Court of Appeal rejected this reasoning, holding at [38] that Article 10 was engaged "*at the time that the instant application was made by the media*". This approach was implicit in the reasoning of the Divisional Court, some years earlier, in relation to a proposal to hold an inquiry into Harold Shipman's murders in private. See *Wagstaff* (above) at pp.316E – 319F where the court found that the media's reporting rights (and those of the families of the deceased to receive information through the media) were engaged.

18. The argument for the application of Article 10 is even stronger where, as here, the default position is that the public is entitled to attend the proceedings, and to access the documentation, of the Inquiry. In considering whether to depart from the presumption of access, and thereby to interfere with journalists' ability to report on its proceedings, the Inquiry is required to take into account the Article 10 rights of the media and the public.

19. By contrast, the conclusion of the majority in *Kennedy* that Article 10 did not apply related not to the question of whether the public should be excluded from the proceedings of the Charity Commission inquiry. Rather, Article 10 was held not to give rise to a right to obtain from the Commission, pursuant to the Freedom of Information Act 2000, certain documents associated with the inquiry, which had not itself been held in public.

20. In reaching that view the majority did not cast doubt on the correctness of *A v Independent News and Media* on the issue decided by the Court of Appeal. *A v Independent News and Media* was cited in argument and referred to in the dissenting judgments of Lord Wilson and Lord Carnwath. Indeed in *Sugar v BBC* [2012] 1 WLR 439, in which the appellant had advanced a similar argument to Mr Kennedy's, based on Article 10, in order to obtain disclosure of a report from the BBC, Lord Brown had

distinguished, rather than doubted, *A v Independent News and Media*, in rejecting that submission: [96]. In *Kennedy*, Lord Mance endorsed the approach of Lord Brown in *Sugar*.

Restrictions on Article 10 rights

21. It follows that in determining an application for a restriction order, the Inquiry is required to place in the scales the harm caused to the Article 10 rights of the media and the public by the grant of such an order. In doing so, particular account should be taken of the high public interest of the subject-matter of the Inquiry and the important debates of general interest to which reporting would contribute: see *Axel Springer AG v Germany* (2012) 32 BHRC 493 (Grand Chamber) at [90].

22. The significance of these debates derives not only from the essential role of the media in reporting on the administration of justice (see paragraphs 7-8 above). It stems also from the recognition in the domestic and Strasbourg authorities of the particular force of Article 10 (and open justice) rights in reporting on misconduct by state bodies. As Lord Judge CJ commented in *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] 3 WLR 554:

> 38… In reality very few citizens can scrutinise the judicial process: that scrutiny is performed by the media, whether newspapers or television, acting on behalf of the body of citizens. Without the commitment of an independent media the operation of the principle of open justice would be irremediably diminished.
>
> 39. There is however a distinct aspect of the principle which goes beyond proper scrutiny of the processes of the courts and the judiciary. The principle has a wider resonance, which reflects the distinctive contribution made by the open administration of justice to what President Roosevelt described in 1941 as the "…first freedom, freedom of speech and expression". In litigation, particularly litigation between the executive and any of its manifestations and the citizen, the principle of open justice represents an element of democratic accountability, and the vigorous manifestation of the principle of freedom of expression. Ultimately it supports the rule of law itself. Where the court is satisfied that the executive has misconducted itself, or acted so as to facilitate misconduct by others, all these strands, democratic accountability, freedom of expression, and the rule of law are closely engaged.
>
> 40. Expressed in this way, the principle of open justice encompasses the entitlement of the media to impart and the public to receive information in accordance with article 10 of the European Convention of Human Rights…

23. This statement of principle echoes the restrictive approach of the Strasbourg Court to limitations on Article 10(1) rights where the expression is concerned with public interest issues: see *Hrico v Slovakia* (2005) 41 EHRR 18 at [40(g)] ("*[t]here is little scope under*

art 10(2) of the Convention for restrictions on political speech or on debate on questions of public interest"). In *Voskuil v Netherlands* [2008] EMLR 465, in which the detention of a journalist for refusing to disclose a source for an article concerned with police misconduct was held to breach Article 10, the ECtHR observed that "*in a democratic state governed by the rule of law the use of improper methods by public authority is precisely the kind of issue about which the public have the right to be informed*". In *Thorgeirson v Iceland* (App No 13778/88), 25.06.92, the ECtHR noted at [67] that articles about alleged police brutality "*bore, as was not in fact disputed, on a matter of serious public concern*", noting at [64] that "*there is no warrant in the [Court's] case-law for distinguishing, in the manner suggested by the Government, between political discussion and discussion of other matters of public concern*". See also the following account of Lord Steyn in *R v SSHD, ex p Simms and O'Brien* [2000] 2 AC 115, 126F-G:

> The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country…

24. It follows that strong protection should be accorded to the Article 10 rights of the media to report on the Inquiry proceedings. This will have three consequences of general relevance to the Inquiry.

25. First, it will entail that the media should be granted the opportunity to make informed submissions in hearings in which the possibility of a restriction order is considered. This is discussed further at 37-38 below.

26. Second, it will mean that any restriction on Article 10 will have to be convincingly established on the basis of a factual assessment in each case, as opposed to by the use of general rules or principles. As the ECtHR held in the *Sunday Times* case at [65], 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*". In accordance with this analysis the Inquiry should refrain from adopting a generic approach to particular types of hearing – for example, those concerned with evidence for which a "neither confirm nor

deny" ("NCND") stance is adopted – and instead assess the competing interests on an individual and fact-specific basis.

27. Third, in considering any application for a restriction order, the Inquiry will need to have regard to the effect that any such order will have not only on the substance of the ideas and information communicated, but also the form in which they are conveyed. This is consistent with the synthesis of the Article 10 case-law discussed by Lord Rodger in the *Guardian* case, cited at paragraph 12 above. Therefore, restrictions which impact upon the form in which the proceedings are presented by the media (for instance, through the use of screening or anonymity) will need to be justified as the minimum possible restriction on Article 10(1) rights, just as much as closed hearings will.

Application of A8 ECHR

28. At paragraph V.10 of their submissions the MPS contend that "*[i]t is likely that any disclosures pertaining to an individual undercover officer will be of a sufficient level of seriousness to interfere with his or her Art8 rights, and that of his or her family*". This is said to be on the basis that "*a person's professional life and therefore his source of income, is plainly capable of falling within the scope of Art8*" and the revelation of a former UCO's identity may "*affect his ability to pursue a particular occupation*": paragraph V.11.

29. The Media do not accept that there will necessarily be an interference with the Article 8 rights of an undercover officer, or a relative of his, as a result of "*any disclosures*" relating to that officer in the course of the Inquiry. The right to respect for a private and family life is not engaged merely by a disclosure of details relating to an individual's professional life, particularly where the information relates to that individual's work as a public servant such as a police officer. Nor does an impact on an individual's ability to pursue a particular occupation suffice for these purposes.

30. The most recent domestic analysis of the principles governing the circumstances in which journalism about a person's professional life, particularly where s/he is a public servant, will fall within the scope of Article 8, appears in *Yeo v Times Newspapers Ltd* [2015] EWHC 3375 (QB). At [143]-[144] Warby J identified three relevant criteria: (a) whether the activity about which information is disclosed is of such a nature as to fall within the scope of "private life", so that Article 8 is "engaged"; (b) the status of the individual concerned; and (c) whether the publication undermines "personal integrity" as distinct from merely harming reputation. As to (c), Warby J glossed the phrase "personal integrity" as having "*connotations of 'wholeness'*": a substantial assault on a

person's honesty would not undermine his/her personal integrity, save where it had "*'an inevitable direct effect' on private life which is quite severe, such as ostracisation from a section of society*".

31. Against that background Warby J held that the Article 8 rights of the claimant, Mr Yeo, were not engaged by the publication of defamatory articles about his expression of willingness, during a private meeting with two journalists posing as lobbyists, to provide (among other things) access to Ministers to a paying client. He had been a serving MP and the relevant information related exclusively to his conduct in that role. He was a robust individual and although he had suffered considerable stress and anxiety as a result of publication there was, on the evidence, no interference of any seriousness with his with his family or home life, or with his relationships within the community.

32. Adopting this analysis, the Media submit that in any application for a restriction order based on the Article 8 rights of an undercover officer, the Inquiry should have particular regard to the officer's professional status as public servant. It should also consider whether disclosure of the information which is sought to be withheld would in fact undermine his personal integrity or give rise to an inevitable direct and serious effect on his private life (such as ostracism from his community). Evidence will be required to prove these matters. Absent those factors, it will not be appropriate to impose a restriction order on Article 8 grounds, since the right would not apply at all. Even if Article 8 rights were to arise, they would need to carry significant force in order to outweigh the manifest importance of the Article 10 rights to which reporting of the Inquiry's proceedings gives rise.

"Neither Confirm Nor Deny"

33. The Media do not propose at this stage to provide detailed submissions on the application of the "neither confirm nor deny" ("NCND") stance relied on in the submissions of the MPS and National Crime Agency, but reserve the right to do so in the light of individual applications. At this stage they highlight certain key points which arise at the level of general principle.

34. As stressed in the authorities cited by CTI at [94]-[116] of their submissions, NCND is not a rule of law nor a legal principle. Since its application involves the use of a sub-set of public interest immunity, it is justified only if any public interest it serves can be achieved by its use, and by no measure less restrictive of other rights (including the principle of open justice and Article 10 ECHR). Its acceptance by the court can only proceed on the basis of a rigorous assessment of the individual facts, rather than by the application of a blanket rule.

35. In their submissions, the MPS contend that, in deciding whether to grant a restriction order, the Inquiry should take account of the proposition that "*official confirmation is materially and significantly different from any other form of disclosure (for example by media, or by self-disclosure) and has significant impact in law*": [IV.3]. This argument may fall to be considered in the light of individual facts in due course. However at the level of principle the reasoning of the ECtHR in *Observer and Guardian v UK* (1991) 14 EHRR 153 is likely to be relevant. In that case, the continuation of an interim injunction restraining publication in England of extracts of the *Spycatcher* book about the conduct of the Security Services was held to constitute a breach of Article 10, once the book itself had been published in the US. Before the ECtHR, the UK advanced a number of aims said to justify the continuation of the interim injunction, namely "*preserving confidence in that Service on the part of third parties; making it clear that the unauthorised publication of memoirs by its former members would not be countenanced; and deterring others who might be tempted to follow in Mr Wright's footsteps*". These were insufficient to justify the continued interference with the applicants' Article 10 rights since "*continuation of the restrictions after July 1987 prevented newspapers from exercising their right and duty to purvey information, already available, on a matter of legitimate public concern*": [69].

36. There are, as the NPNSCPs point out, several examples of undercover officers whose identities as such have been revealed publicly, although official confirmation has not been forthcoming in certain cases. The effect of a restriction order in relation to those individuals would be to prevent the media from reporting, in the context of the Inquiry, on information which had already entered the public domain and on the basis of which important questions of public interest have arisen (and which the Inquiry would doubtless be investigating). Having regard to the reasoning in the *Spycatcher* case and the analysis in *A v Independent News and Media* at [38], the Media submit that such an order would, in the absence of some further good reason to the contrary, be likely to breach Article 10.

Procedure

37. In accordance with the legal principles set out above, the Media invite the Inquiry to adopt, at this stage, a general practice by which they are given the opportunity to make informed submissions in relation to any application for a restriction order, or any other measure which derogates from open justice or restricts the Media's rights under Article 10(1)). Although the Media are not CPs in the Inquiry, such a course is required both as a matter of fairness to the Media and in accordance with their rights, and their role

as "*public watchdog*", under Article 10. It is also consistent with their right to an effective remedy for any breach of a Convention right under Article 13 ECHR. As held by the Supreme Court in *A v BBC* [2015] AC 588 at [67], Lord Reed JSC (with whom Baroness Hale, Lord Wilson, Lord Hughes and Lord Hodge JJSC agreed) fairness requires that the media be heard in relation to orders which affect their Article 10 rights, in particular in relation to reporting of judicial proceedings. Although in the circumstances of that case, which concerned reporting restrictions orders, it was held sufficient for the media to be notified shortly after the grant of the order, such delay would plainly not be appropriate in relation to a restriction order relating to evidence which had been heard by the time the media was notified. The same outcome is also required by the Strasbourg jurisprudence: *Mackay v UK* (2010) 53 EHRR 671.

38. It is of particular importance in this context that the Media should be informed of applications of which they would (notwithstanding the presence of their journalists at the Inquiry) otherwise be ignorant. Whereas a journalist in attendance will necessarily be aware that a particular witness has been anonymised or his/her evidence screened, or that a document on the Inquiry website has been redacted, the media may have no means of learning about private applications which relate to matters wholly kept from public view. In all cases, the Media should be given advance notice of the application and be provided with any evidence and submissions filed in support and by other CPs. To the extent that such evidence and/or submissions are said to be confidential, they should, if necessary, be provided to the Media's representatives subject to undertakings of confidentiality. Given the Media's strong interest in the open justice principles and Article 10 rights associated with the conduct of the Inquiry, such a procedure is likely to be consistent with the requirements of Rule 12 of the Inquiry Rules 2006. Precedent exists for the media's representatives to be granted access to sensitive information subject to undertakings, including in the national security context: see, for instance, *Guardian News and Media v R* [2015] 1 Cr App Rep 36 at [4] and *Guardian News and Media v Incedal* [2016] EWCA Crim 11 at [33] and [71].

GAVIN MILLAR QC

BEN SILVERSTONE

Matrix Chambers

14 March 2016