

IN THE UNDERCOVER POLICING INQUIRY

NOTE OF SEVEN MEDIA ORGANISATIONS FOR DIRECTIONS HEARING ON 26th JANUARY 2021

1. This note is provided on behalf of Times Newspapers Ltd, Guardian News and Media Limited, Associated Newspapers, the British Broadcasting Corporation, Telegraph Media Group, Independent Television News, and PA Media (“the media organisations”). It responds to the questions set out in the Inquiry’s note of 7th December 2020.
2. In summary, the starting point in this Inquiry should be openness. The public should be facilitated to follow the evidence hearings and the media should be facilitated to report the evidence hearings. The hearings in November 2020 failed to meet that objective. The media organisations therefore set out, below, three suggested improvements to the manner in which evidence is presented during the Tranche 1 Phase 2 evidence hearings in Spring 2021.

A. The Importance of Openness

3. The starting point should be openness. This is not only consistent with the statutory scheme,¹ but it also reflects the common law principle of open justice;² a constitutional principle that stretches back to the fall of the Stuart dynasty.³ *“Its significance has if anything increased in an age which attaches growing importance to the public accountability of public officers and institutions and to the availability of information about the performance of their functions.”*⁴ The need for openness and transparency is heightened by the fact that the matters in issue in this Inquiry are of the utmost public interest.
4. This is a public inquiry and the public must be able to follow the evidence that is given in this inquiry. There are difficulties in the public obtaining access to Court

¹ The existence of public concern is a pre-condition for the holding of an inquiry: s.1(1) Inquiries Act 2005. There is a duty on the chairman to permit the public to attend the inquiry: s.18(1). Section 19(4)(a) requires the chairman to consider *“the extent to which any restriction on attendance, disclosure or publication might inhibit the public concern”*.

² As set out by counsel to the Inquiry in their note on restriction orders: *“General Principles and Procedure for Applications”*, 22nd January 2020, §§112-120

³ *Re BBC* [2015] AC 588, per Lord Reed, at 600C-G.

⁴ *Khuja v Times Newspapers Ltd* [2017] 3 WLR 35, per Lord Sumption, at §13.

proceedings, even where a live feed of the proceedings is provided. Realistically, the public will obtain access to the evidence in this inquiry through the media, who will digest and report the proceedings to the public. The media are “*the eyes and ears of the general public*”.⁵ In order for the media to play this role, and for openness to be a reality, the media must be permitted live access to the evidence in this Inquiry.

5. The presumption should be that evidence should be presented in as much detail as possible to the public and to the media. This is consistent with the Inquiry’s terms of reference, the requirements of openness in s.18(1) Inquiries Act 2005, and the widespread concern that led to the establishment of the Inquiry. The former Chair’s “*Restriction Orders: Legal Principles and Approach Ruling*” is also clear, at §§82-29, that the starting point in the Inquiry should be openness.

B. The November 2020 hearings

6. Regrettably, the conduct of the November 2020 hearings fell short of the goal of ensuring openness in this Inquiry. The problems have been set out in previous correspondence,⁶ in articles written by core participants,⁷ and in live tweets sent by journalists during the hearings.⁸
7. Given the ongoing public health emergency and the limited space available in hearing rooms, journalists have been unable to regularly access the Court hearings in person. They were therefore unable to see the body language and reactions of witnesses, the Chair, and advocates during hearings, thus leading to a loss of detail and colour in court reports. They were also unable to instantaneously check issues with lawyers in court, thus making it harder to access documents and clarify points of detail.
8. The only provision was a live text streaming service. Initially, it was essentially unusable for professional journalists. It did not contain sound or a video link to the hearing, so journalists could not see or hear what was happening in the Court room.

⁵ *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, at 183.

⁶ See, for example, the email from Zoe Norden to the Inquiry on 13th November 2020.

⁷ See, for example, Lisa Jones, “*As a victim of undercover police spying, this inquiry has left me bruised, but buoyed*”, *The Guardian*, 25th November 2020: “*After three weeks of following the socially distanced inquiry online, I am feeling battered and bruised ... there are problems with how evidence has been gathered and processed, and it’s almost impossible to follow live proceedings with only a video of the written transcript being streamed online. The police are obstructive, avoiding scrutiny as much as they can. We almost certainly won’t get the full truth this way.*”

⁸ See, for example, Dominic Casciani of BBC News, 11th November 2020: <https://twitter.com/BBCDomC/status/1326478268682235905?s=20>

This meant that journalists simply could not report how witnesses were giving evidence, what their demeanour was, or other human details that are important to contemporaneous reporting.⁹ The words appeared by a fast-scrolling video feed that could not be paused or rewound. Thus, if a journalist could not scroll back to check what had been said. A journalist who sought to note down what had just been said would then miss the next section of the scrolling text feed. The complete transcript itself was not posted until later in the evening, after the deadlines for daily reporting had passed.

9. On or around 11th November 2020, the Inquiry changed how the live text feed was provided, moving to YouTube with the function to pause and rewind the live feed. The media organisations welcomed this development, and wish for it to continue. However, it still did not address the fundamental problems that arose from not being able to hear what the witnesses were saying. By way of example, on 12th November 2020, a BBC journalist who attended the Inquiry in person heard an officer giving evidence about targeting political groups because they were “*anti-establishment*”. He believed that it was fundamentally important that he was able to hear the officer’s voice and judge his demeanour as it made the evidence feel more urgent and had a greater impact than simply reading it on screen. Having access to transcripts of the evidence may assist in understanding what the witnesses have said, but it does very little to enable journalists to convey to the public how the words were spoken.
10. There were also other obstacles to effective press access. Witnesses’ statements were not published until shortly before the witness began their oral evidence. The materials relating to that witness were not published until after they had finished giving evidence. Thus, journalists could not follow questions where witnesses were asked to cross-refer to other forms of evidence. On 13th November 2020, the Inquiry committed to providing materials associated with a particular witness shortly ahead of the witness giving oral evidence. Nevertheless, this still made it difficult for a journalist to understand what document was being referred to, particularly where advocates and witnesses jumped between different documents.
11. The result was that, far from the Inquiry achieving its aim of openness, the proceedings were difficult (if not impossible on occasion) to follow. Journalists were

⁹ As one journalist commented on the evidence of a key witness in a recent libel claim, “*in terms of whether Mr Depp is flustered or calm or tired or bored or angry, I don’t know ... I’m sitting in a different room ... watching things on a terrible videolink*”:
<https://twitter.com/nickwallis/status/1280906509766078465?s=20>

unable to fully report the proceedings and the public was therefore less well-informed. Creative approaches from other core participants (such as having actors reading out the live transcript) and the provision of transcripts of the hearings after the event did not answer these concerns.

C. Suggested improvements

12. The COVID-19 pandemic poses new challenges to the Inquiry and has made it more difficult for journalists to access all forms of legal proceedings. Nevertheless, it also underlines the need for Courts and inquiries to be pro-active so as to ensure press access. The media organisations respectfully invite the Inquiry to maintain the provision of a live text feed (which can be paused and rewound). In addition, they make the following three suggestions, which have been influenced by their experience of reporting other inquiries during the pandemic.
13. **First**, there is a genuine benefit to the media being able to see legal proceedings. The Inquiry is respectfully invited to provide journalists with a means of accessing a live video feed of the evidence hearings. Even before the COVID-19 pandemic, live-streaming of witness evidence was the norm in public inquiries (such as the Leveson inquiry), even where there is contested evidence from state agents (the Grenfell inquiry) and sensitive, anonymous evidence (the Independent Inquiry into Child Sexual Abuse). Where legal proceedings have proceeded during the pandemic, virtual hearings have become commonplace. By way of example, the Manchester Arena Inquest has set up its own YouTube site, on which evidence hearings have been published and remain accessible after the hearing has finished.¹⁰ Live video feeds have also been made available to the media in the Supreme Court, the Court of Appeal, the Family Court,¹¹ the Administrative Court, and in planning inquiries and hearings. Such hearings are expected to be the norm, as the Lord Chief Justice has suggested.¹² The media can access all of these live streams, even though these hearings can and frequently do involve sensitive matters and anonymous witnesses.
14. The Inquiry has not taken this approach, choosing instead to make a live stream only accessible in one of its own rooms where only a limited number of people can be accommodated. This poses obvious problems, particularly during a “lockdown”. A journalist who chooses not to take the risk of travelling to London, who is required to

¹⁰ <https://www.youtube.com/channel/UCdWYYDnEbLUOyFsCaVhqlxw>

¹¹ <https://www.judiciary.uk/wp-content/uploads/2021/01/Road-Ahead-2021.pdf>

¹² <https://www.judiciary.uk/announcements/message-from-the-lord-chief-justice-latest-covid-19-restrictions/>

“*shield*” or self-isolate, or who is unwell cannot access the live video stream. These problems could be addressed by permitting access to a secure livestream to accredited media representatives, on application if necessary.

15. **Second**, even if a video link cannot be provided, the Inquiry is respectfully invited to provide an audio link, on which the voices of witnesses and advocates could be heard. Having access to transcripts of the evidence may assist in understanding what words the witnesses have said, but it does very little to enable journalists to convey to the public how the words were spoken. Open justice strongly supports allowing the media access to primary sources of relevant information. If there is an individual concern on the part of an individual officer as regards the provision of such recordings to the media, this could be addressed by the use of technology.
16. **Third**, the Inquiry is respectfully invited to provide journalists with the key documents relating to individual witnesses in such a way as to ensure that journalist can understand what is being referred to and when. The *youtube* link could show the relevant document at the time it is being referred to a witness. If journalists can see the document being referred to, at the same time as the live text feed it would help give the detail and necessary context to the evidence. Another alternative would be to provide journalists with access to the hearing bundle in full in advance of the hearings, so as to enable journalist to read into the material and understand the relevant cross references. This would allow journalists to understand what the documents are and how they relate to the developing oral evidence.

D. Conclusion

17. So as to ensure accountability and accessibility in practice, it is vital that justice is seen to be done in this Inquiry by as many people as possible. The Inquiry is respectfully invited to ensure that its hearings are as open and accessible as possible to the media.

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8th January 2021