INDEPENDENT INQUIRY
CHILD SEXUAL ABUSE

NOTICE OF DETERMINATION

RESTRICTION ORDER APPLICATION

Introductory

1. In December 2018, the Security Service, MI5, applied for a restriction order in the Inquiry's Westminster investigation. As will become apparent, the ambit of the application has diminished considerably in the course of its consideration by the Inquiry.

2. The application as made sought to withhold from OPEN disclosure certain words and passages that are contained in a draft witness statement that has been prepared by MI5 for the purposes of this investigation, and in its documentary exhibits. The application also covered words and passages in some of the documents that have been disclosed to the Inquiry by other government bodies.

3. The effect of the restriction order, if granted, would be (a) that the words and passages would be redacted from the OPEN versions of the documents disclosed to core participants and used at the investigation's OPEN hearings; and (b) that if it is necessary to consider the words and passages during the substantive hearings, such hearings will have to take place in CLOSED, from which the public and the core participants (other than HMG) would be excluded.

4. The text that the application sought to redact from the witness statement and from the documents falls into various categories, to which I shall return below.

5. The basis of the restriction order application is that disclosure of the material that it covers would cause harm to national security. The principle of 'Neither Confirm Nor Deny' ('NCND') was one of the grounds relied upon.

6. The restriction order application initially received by the Inquiry was dated 7 December 2018. Contrary to the Inquiry's Protocol on Applications for Restriction

Orders, the application did not include an OPEN section that provided *"as much detail about the application and the grounds on which it is made as is possible without defeating the purpose of the application."* In fact, at that stage none of the supporting grounds that were contained in an MI5 Damage Assessment were provided in an OPEN form.

7. At the request of the Inquiry, MI5 prepared a further OPEN version of the application. This version, dated 18 December 2018, contained both an OPEN application notice and (at Annex A) an OPEN version of the MI5 Damage Assessment addressing NCND issues. I am still not satisfied that the 18 December documents contain all the detail about the application that could be given in OPEN. In order to avoid delay I have provided a certain degree of further information in this Determination.

8. I have considered the application with care, and I have also received advice in relation to it from Counsel to the Inquiry. The approach that I have taken to the legal principles engaged by this application reflects the advice that I have received. I have decided that I can determine this application without the need to hear oral submissions at a hearing. This Determination sets out the ruling that I am currently minded to make on the application. It is accordingly provisional.

9. In late December 2018 I gave MI5 an indication of my provisional views on the application. I indicated that, with regard to the first part of the application, I was minded to rule that the public interest in the disclosure of the material in question outweighed the harm that it was said such disclosure would cause by reference to the NCND principle. MI5 reconsidered the first part of its application following this indication and decided not to seek to maintain NCND having regard to this assessment. Part one of the application accordingly is no longer pursued by MI5.

10. I also indicated that the text covered by the third and fourth parts of the application was irrelevant and could be redacted on that basis. Having considered this

indication, MI5 decided that it no longer wished to pursue the third and fourth parts of the application.

11. At my request, further discussions subsequently took place between MI5 and the Inquiry legal team with regard to the passages in documents that constitute the second part of the application, with the consequence that some of the proposed redactions have now been withdrawn and I am also now satisfied that the remaining passages can be redacted on grounds of irrelevance. On that basis, the second part of the application is now also not pursued.

12. This Determination describes briefly the parts of the application that have now fallen away and addresses the only part of the application that is still pursued - part five.

13. On 28 January 2019 the Solicitor to the Inquiry circulated to core participants a provisional version of this Determination, together with the application notice and the redacted exhibit to the MI5 witness statement. Core participants were invited to provide written submissions. In the event, only two responses were received, both of which indicated that they had no substantive submissions to make.

14. This is now my final Determination on the application. There is a short CLOSED annex.

The application

15. As I have indicated, the application as made sought the redaction of certain categories of text from a witness statement that has been filed by an MI5 witness, and also from documents exhibited to that statement as well as from some of the documents that have been disclosed to the Inquiry by other government bodies.

16. There were, in fact, five parts to the application.

17. The first part, to which I referred above, sought the redaction from the MI5 witness statement of the names of five politicians and a civil servant against whom historic allegations of child sexual abuse appear in documents held by MI5.

18. The other parts of the application were not set out clearly in the 18 December OPEN documents. However, in summary:

    a. The second part sought the redaction of passages of documents disclosed to the Inquiry by other government bodies where linked to MI5; the basis of the application was the asserted need to uphold the NCND principle.
    b. The third part sought the redaction of MI5 file references on documents disclosed by MI5 and by other government bodies.
    c. The fourth part sought the redaction of MI5 staff names other than the names of the most senior staff that are already in the public domain.
    d. The fifth part sought the redaction of text from MI5's Child and Vulnerable Adult Protection Policy, which is exhibited to the statement of the MI5 witness. There is little that can be said in OPEN about this part of the application other than that it is made for operational reasons.

19. For the reasons set out above, it is only part five of the application that is still pursued.

The legal framework and context

20. The application is made under section 19 of the Inquiries Act 2005 ('the 2005 Act'), and the notice refers in particular to section 19(3)(b), section 19(4)(b) and section 19(5).

21. The proper starting point is section 18 of the 2005 Act, which creates a presumption that inquiry proceedings will be conducted openly. Section 18(1) provides that, subject to any restrictions imposed pursuant to 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 panel."

22. I have powers under section 19 of the 2005 Act to make orders restricting the openness of proceedings. The relevant provisions of section 19 are as follows.

"19 Restrictions on public access
(1) Restrictions may, in accordance with this section, be imposed on -
(a) attendance at an inquiry, or at any particular part of an inquiry;
(b) disclosure or publication of any evidence or documents given, produced or provided to an inquiry
(2) Restrictions may be imposed in either or both of the following ways -
(a) …
(b) by being specified in an order ('a restriction order') made by the chairman during the course of the inquiry.
(3) A … restriction order must specify only such restrictions -
(a) …
(b) as the … chairman considers 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).
(4) Those matters are:
(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 by any such restriction;
(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).
(5) In subsection (4)(b) 'harm or damage' includes in particular:
(a) death or injury;
(b) damage to national security or international relations;
(c) damage to the economic interests of the United Kingdom or of any part of the United Kingdom;

(d) damage caused by disclosure of commercially sensitive information.

23. The central point that I take from these provisions is that in determining this application I am required to strike a balance. On the one hand I must consider any damage that might be caused (here, it is said, damage to national security) by the disclosure of the material. That is clear from subsections 19(4)(b) and 19(5)(b). If I conclude that disclosure would cause such damage, that would militate in favour of granting the application. However, that is not the end of the story. Other provisions require me to consider factors that may militate against making a restriction order, and to strike a balance between the two. Of most relevance here is subsection 19(4)(a), which requires me to consider the extent to which granting the restriction order *"might inhibit the allaying of public concern"*.

24. The correct approach to the making of restriction orders under section 19 of the 2005 Act is the subject of a lengthy and authoritative ruling (dated 3 May 2016) given by Sir Christopher Pitchford in the Undercover Policing Inquiry. Although of course the subject matter of Sir Christopher's inquiry, and therefore some of the particular matters under consideration, was different to this inquiry, there is much in the ruling that is of general application. I note in particular Sir Christopher's conclusion (summarised at paragraph A.2(1) of Part 6 of the ruling) that the concept of allaying public concern under subsection 19(4)(a) of the 2005 Act extends to *"public concern about the subject matter, process, impartiality and fairness of the inquiry"*.

25. One respect in which the application that I am considering differs from the applications considered by Sir Christopher Pitchford in the Undercover Policing Inquiry is that this application is made on the ground of national security, which is a category of harm that does not appear to have figured significantly (or, perhaps, at all) in the applications made to Sir Christopher. The OPEN MI5 Damage Assessment that supports the present application refers at the outset to the *Rehman* case, and states (at paragraph 3) that *"[t]he definition of what is in the interests of national security is … ultimately determined by the executive who are held to account by Parliament and the electorate"*. I accept that. I also accept that MI5, which is the

body making this application, is better placed than I am, as a matter of institutional competence and expertise , to assess what may be harmful to national security. All that said, it is plainly still for me to assess the grounds that have been advanced in support of the application, to perform the balancing exercise that is inherent in the drafting of section 19 and, by that means, to decide whether or not to grant the restriction order.

26. The argument that is advanced in support of the first and second parts of the application is that the disclosure of the words and passages in question would amount to a departure from the well-known policy of NCND, and that such a departure would damage national security.

27. The NCND principle has attracted a great deal of judicial commentary, much of which is usefully summarised in Sir Christopher Pitchford's ruling in the Undercover Policing Inquiry to which I have already referred (see in particular paragraphs 113 to 146). In *Mohamed and another v Secretary of State for the Home Department* [2014] 1 WLR 4240, Maurice Kay LJ asserted (at paragraph 20) that the NCND policy:

> *"... is not a legal principle. Indeed, it is a departure from procedural norms relating to pleading and disclosure. It requires justification similar to the position in relation to public interest immunity (of which it is a form of subset). It is not simply a matter of a government party to litigation hoisting the NCND flag and the court automatically saluting it. Where statute does not delineate the boundaries of open justice, it is for the court to do so…"*

28. The factual context in which the NCND policy was raised before Sir Christopher was different from the context in which I have to consider it. The present application raises NCND in the national security context, whereas Sir Christopher was considering it in relation to policing matters. However, I consider that Sir Christopher's overall conclusion as to how an assertion of NCND is to be assessed in the context of a restriction order application to be of general application. His conclusion (which is at paragraph A.7 of Part 6 of his ruling) was in the following terms:

a. *"In assessing whether a risk of harm … would be avoided or reduced by making a restriction order under section 19(3)(b) of the Inquiries Act 2005,* ***reliance on the policy neither to confirm or deny a fact or state of affairs will be a material consideration but the weight, if any, to be afforded to it will depend on the precise risk of harm or damage its application seeks to avoid or reduce****."* [emphasis added]

The fifth part of the application

29. The fifth part seeks the redaction of text from MI5's Child and Vulnerable Adult Protection Policy, which is exhibited to the statement of the MI5 witness. There is little that can be said in OPEN about this part of the application other than that it is made for operational reasons. For the avoidance of doubt, NCND is not relied upon with regard to this part of the application.

30. I have decided to grant this application. My reasons are set out in the CLOSED annex. I should add that my current view is that the Panel will be able to consider the text that is redacted from the policy on paper and it will not be necessary to hear any witness evidence about it in a CLOSED session of the forthcoming hearing.

Professor Alexis Jay OBE **4 February 2019**

Chair, Independent Inquiry into Child Sexual Abuse