

# OPUS 2

## INTERNATIONAL

Independent Jersey Care Inquiry

Day 28 - Ruling

October 24, 2014

Opus 2 International - Official Court Reporters

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PANEL RULING

THE CHAIR: On 23 September 2014 Interested Parties were notified of an intended change to the Redaction Protocol. The relevant Protocols are: Protective Measures at 8.1.2, Data Protection, Freedom of Information and Redaction at 17.1.2.

These Protocols currently prohibit the naming of "... any individuals accused of abuse, except for those who have criminal convictions for that abuse."

The proposed amendment at that date of 23 September was for the Protocol to read as follows:

"... any individuals accused of abuse, except for those who have criminal convictions for that abuse and those whom the Inquiry reasonably believes to be deceased."

On 7 October the Panel heard submissions on the naming of those whom the Inquiry reasonably believed to be deceased. The matter was then adjourned to 15 October for the Panel to hear further submissions and determine the following:

(i) Public domain - what should this encompass?

(ii) Whether the exception on the prohibition on naming is confined to those who have "criminal convictions for that abuse" or "criminal convictions for abuse".

1 (iii) Notification of changes to the Protocols.

2 (iv) Provision of unredacted material to Interested  
3 Parties.

4 I shall now address those submissions.

5 On 3 April 2014 at the preliminary hearing  
6 I explained the Inquiry's procedure and summarised our  
7 Procedural Protocols. Full details of all Protocols  
8 were published on the website thereafter. I stated the  
9 following:

10 "For the Inquiry to operate effectively and  
11 efficiently, it needs to operate flexibly. The  
12 procedures set out in the Protocols may be subject to  
13 amendment during the course of the Inquiry if we feel it  
14 necessary."

15 On 12 August 2014 hearings commenced with the  
16 prohibition on naming of alleged deceased abusers  
17 the Protocol to be followed.

18 Since 12 August 2014 the Inquiry has received many  
19 more documents, thousands of pages including statements  
20 and records from many departments concerning many  
21 individuals.

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23 Naming alleged abusers now deceased

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25 Submission - Counsel to the Inquiry

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Mr Sadd, Counsel to the Inquiry submits that the position has evolved over the months and changed to the extent that it is now proposed by Counsel to the Inquiry that alleged abusers whom the Inquiry reasonably believes to be deceased should in fact be named in these hearings. Mr Sadd reminds the Panel of the extensive Terms of Reference and highlights, in particular, Term of Reference 2, the requirement to identify patterns of abuse over the many decades we are charged to consider.

The Panel needs to consider regimes and governance within homes at any given time, who was in charge, who were the senior staff. We will have to consider whether abuse was perpetrated and/or sanctioned by those at senior level.

Since 12 August the legal team has received and processed, as I say, a vast amount of documentation, documentation that was not made available to the Inquiry until after the preliminary hearing on 3 April 2014.

Mr Sadd submits that as that task has progressed, it has become clear that the procedure of not naming alleged deceased abusers is less tenable. The same names are appearing time and again. He submits that not being able to name those in positions of authority places in jeopardy the ability to produce a cogent and

1 coherent report that addresses our extensive Terms of  
2 Reference and more importantly, a report for the  
3 understanding of the public at large.

4 Mr Sadd recognises that the Inquiry's Procedures and  
5 Protocols are intended to achieve a balance between  
6 fairness and transparency. He submits that the proposed  
7 amendments increase transparency and enable the Inquiry  
8 more readily to identify patterns of behaviour and eras  
9 of abusive regimes, which are core for this Panel to  
10 meet its Terms of Reference.

11 Significantly, when weighing the balance of  
12 interests, Mr Sadd observes that those who cannot  
13 presently be named within the hearing room can in fact  
14 be named outside the Inquiry. They can be named in the  
15 street, named in newspapers and named in news reports.  
16 It is therefore no longer, he submits, credible or  
17 publicly responsible for an alleged deceased abuser to  
18 be afforded unique protection in hearings and in this  
19 Inquiry's final report. The existing Redaction Protocol  
20 gives rise to an increasingly artificial and disjointed  
21 narrative in allowing the public to understand what went  
22 wrong in the Island's care system.

23 Mr Sadd concludes that there is a balance to be  
24 struck between our obligation to meet the public  
25 interest in producing an intelligible, cogent and

1 coherent report (as envisaged by the Terms of Reference)  
2 on the one hand, as against, on the other hand, not  
3 naming any individuals accused of abuse, whether dead or  
4 alive. He submits that the proposed amendment to name  
5 the alleged abusers who the Inquiry reasonably believes  
6 to be deceased is the fairest way to strike that  
7 balance.

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9 Submission - States of Jersey Police (SOJP)

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11 Advocate MacRae, on behalf of the SOJP, objects to  
12 the proposed amendment and submits that the Protocols as  
13 drafted are "fair and appropriate". Jersey is a small  
14 island, he says, and the naming of deceased alleged  
15 abusers would be "a bolt from the blue" for their  
16 relatives, that it might bring about recrimination,  
17 shaming of individuals and their families and  
18 substantial ill-feeling. He considers that this is not  
19 in the public interest.

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It is not correct, he submits, to assert that  
alleged deceased abusers can be named outside  
the Inquiry/hearing room. It is incorrect, he submits,  
to suggest that the media might publish the names with  
impunity. Firstly, he submits that they would have  
a discretion as to whether to do so; secondly, under the

1 terms of the OFCOM Code (used as guidance by local  
2 Jersey media) there is a duty to provide adequate  
3 protection from unfair treatment and unwarranted  
4 infringement of privacy.

5 In order to protect the deceased, families may be  
6 subject to costs, inconvenience, stress and delay. He  
7 does acknowledge, however, that the estate of a deceased  
8 person in England and Wales cannot in fact sue for  
9 libel. The Jersey courts, he submits, are not bound by  
10 decisions of the courts of England and Wales and there  
11 is an academic argument which might encourage the Jersey  
12 Court to determine that there is a right to sue for  
13 libel. He provided the Panel with the Scottish  
14 Government's consultation paper "Defamation and the  
15 Deceased" dated 2011.

16 Furthermore, the family of the deceased has rights  
17 under Article 8 Schedule 1 Part 1 Human Rights (Jersey)  
18 Law 2000. Advocate MacRae submits that the naming of  
19 individuals whom the Inquiry reasonably believes to be  
20 deceased is not central to establishing "patterns of  
21 abuse" and a system of codification could be used to  
22 achieve the same objective. That latter submission is  
23 adopted by Advocate Lacey on behalf of the Departments.

24 I turn now to the submissions on behalf of the  
25 Departments.

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Submission - the Departments

Advocate Lacey on behalf of the Chief Minister's Department, the Health and Social Services Department and the Education, Sport and Culture Department adopts Advocate MacRae's submissions. There is a duty of confidentiality in respect of sensitive personal matters and the Department of Health and Social Services in particular is concerned with the health and wellbeing of the Island's residents. There is, submits Advocate Lacey, no inhibition upon the Inquiry fulfilling its Terms of Reference. Procedures should be managed in accordance with Convention rights.

Submission - JCLA

Mr Collins on behalf of the JCLA supported the proposed amendment and endorsed the submissions made by Mr Sadd. Mr Collins emphasised the need for "openness" because anything else "runs the risk of corroding the Inquiry's work."

There has been considerable publicity in the last six years, he reminds the Panel, both local and international. Some of that publicity is well-informed



1 and some less so. Mr Collins notes that social media is  
2 "very difficult to manage".

3 Mr Collins further submits that the Protocol as  
4 presently drafted is too restrictive and documents  
5 should be released unredacted. He cites the case:  
6 Dunn v Durham CC [2012] EWCA Civ 1654; redaction should  
7 not extend any further than is necessary.

8 There is, he submits, scepticism as to the Inquiry's  
9 ability to undertake its task and anything that "smacks  
10 of supression will lead unjustly to allegations of  
11 a cover up."

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13 Response

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15 Mr Sadd addressed the following in response to the  
16 submissions from the Interested Parties:

17 1, Alleged abusers who have died can be named  
18 outside the Inquiry. The Scottish Law Commission  
19 recently considered this issue and concluded that the  
20 law should remain unchanged; those who have died have no  
21 right to the protection of libel laws. The issue was  
22 also considered at the Leveson Inquiry which concluded  
23 that there should be no change in the law.

24 2, The OFCOM Code of Conduct is exactly that,  
25 a code of conduct, and it does not prevent the press

1 from naming those who have died. If there is  
2 a complaint then the media concerned have to demonstrate  
3 that they followed guidelines.

4 3, Neither the Scottish Law Commission nor the  
5 United Kingdom's libel laws prohibit the naming of  
6 people who have died regarding allegations made against  
7 them.

8 4, As the Inquiry gathers more and more  
9 documentation depicting events over many decades, it  
10 must be entitled, after due consideration, to review its  
11 Protocols. Protocols are "not written in stone" and  
12 must be reviewed as and when necessary.  
13 A Public Inquiry is an evolving process. The Panel  
14 agrees with that principle.

15 5, An entire system of codification, Mr Sadd  
16 submits, falls foul of the Inquiry's need, wherever  
17 possible, to have as cogent a record as is possible.

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19 Ruling - naming alleged abusers whom the Inquiry reasonably  
20 believes to be deceased

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22 All the issues on which the Panel has been asked to  
23 make a determination necessarily involve the Panel in  
24 the exercise of its discretion. The arguments are  
25 finely balanced. There are competing interests, the

1 approach to which requires the Panel to exercise that  
2 discretion, bearing in mind the obvious sensitivities,  
3 as well as the Inquiry's responsibility to meet its  
4 Terms of Reference.

5 The Panel has considered with care the submissions  
6 made by all parties and read the documents provided in  
7 support of those submissions on the issue of naming  
8 alleged deceased abusers.

9 This Inquiry must be independent and our objective  
10 is to be as open as transparent as possible, for the  
11 parties and for the public at large.

12 The Inquiry has been set up to establish the truth  
13 about what happened to children in residential and  
14 foster homes; how mistreatment of children remained  
15 hidden for so long and what (if anything) was done when  
16 concerns were raised.

17 Term of Reference 2 in particular requires us to  
18 identify patterns of abuse and regimes and governance in  
19 the homes at any given time. As Counsel to the Inquiry  
20 submits, we will need to consider whether abuse was  
21 perpetrated and/or sanctioned by those at senior level.  
22 We will not avoid that issue and in the process we will  
23 seek to maintain transparency and fairness.

24 The Panel agree that since hearings commenced and  
25 thousands more documents have been disclosed, it is

1 clear that the Protocol of not naming alleged deceased  
2 abusers is not tenable. There is a need for more  
3 transparency and a need for the narrative, the witness's  
4 voice, to be more easily and readily understood by all.

5 Those alleged abusers who are still alive may have  
6 a contribution to make to the Inquiry. Accordingly,  
7 they will be given an opportunity to respond to  
8 allegations against them by giving evidence to  
9 the Inquiry. The same does not of course apply to  
10 alleged deceased abusers.

11 The Panel do recognise that there is a balance to be  
12 achieved between transparency, the need for a cogent  
13 report and the wishes/feelings of the relatives of the  
14 deceased. Our focus, however, must be our Terms of  
15 Reference and the production of a cogent and coherent  
16 report for the benefit of the people of Jersey.

17 Accordingly, in the exercise of its discretion,  
18 the Panel agree that the Protocols be amended to permit  
19 the naming of individuals accused of abuse whom  
20 the Inquiry reasonably believes to be deceased.

21 The Panel received further submissions on four  
22 related issues regarding the Protocols, on  
23 15 October 2014.

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25 (i) Public domain - what should this encompass?

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Under the current Protocols information that is already in the public domain will not be redacted.

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Names of individuals that are in the public domain will not be redacted. The Panel heard submissions from all

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parties as to what constitutes being "in the public

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domain".

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Submission - Counsel to the Inquiry

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Mr Sadd, Counsel to the Inquiry submits "in the public domain" is information that is realistically

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accessible to the general public. Although fact

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sensitive in each case, this will include information

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published in the regulated media - newspapers (whether printed or online) and radio and television broadcasts.

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It is uncontroversial, he submits, that events giving rise to this Inquiry - Operation Rectangle -

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provoked worldwide publicity across all regulated media

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outlets. It is unrealistic, Mr Sadd submits, to limit

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the "public domain" to insular media (Island media) and then only to the Jersey Evening Post and the Bailiwick Express.

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The Island of Jersey has access to all mainstream United Kingdom public and commercial broadcasters (BBC,

1           ITV and Sky). Island newsagents sell a range of  
2           broadsheets and tabloid newspapers, as well as weekly  
3           news magazines. On any view, it is submitted, the  
4           information provided by these media outlets is  
5           realistically accessible to the general public.  
6           Information obtained from these sources should be  
7           treated as "in the public domain".

8           The Panel was referred by Mr Sadd to the case of  
9           Max Mosley v News Group Newspapers Limited [2008] EWCH  
10          687 and the judgment of Eady J which, submits Mr Sadd,  
11          provides guidance of what constitutes "in the public  
12          domain".

13          Counsel summarised the facts, details of which were  
14          widely publicised in the then News of the World.  
15          Mr Mosley sought an injunction to prevent further  
16          publication. At paragraph 26 of his judgment, Eady J  
17          said:

18                 "The extent to which material is truly in the public  
19                 domain will ultimately depend on the particular facts.  
20                 In Attorney General v Greater Manchester Newspapers  
21                 Limited [2001] All ER 32, the test was applied as to  
22                 whether certain information was 'realistically'  
23                 accessible to members of the public or 'only in  
24                 theory'."

25          Mr Sadd submits that "realistically accessible" is

1 an objective test. In the context of regulated media  
2 where a story has been published which is available to  
3 members of the general public, that is material which is  
4 "realistically accessible". It matters not, he submits,  
5 whether subjectively a member of the public has read it.

6 The regulated media is media that is subject to  
7 either the OFCOM Code, or the PCC Code. Thus, Mr Sadd  
8 submits, at the point of publication there is the  
9 expectation that the story will have been through the  
10 filter of those Codes.

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12 Submission - the Departments

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14 Advocate Lacey acknowledges and supports the Panel's  
15 need to ensure a balance between transparency, coherence  
16 and cogency, on the one hand, and fairness on the other.

17 It is submitted that more precision is called for in  
18 what "in the public domain" means in practice. Counsel  
19 to the Inquiry's proposal is, she submits, too wide  
20 a definition to protect alleged abusers and their  
21 families. There are many who have not been investigated  
22 for (or informed of) a one-off, uncorroborated  
23 allegation now levied against them. The Departments are  
24 concerned to protect the health and welfare of such  
25 individuals.

1 Advocate Lacey sought to distinguish the Mosley case  
2 where there was factual evidence in the video of  
3 Mr Mosley's activities. The Inquiry is concerned, she  
4 submits, with events many years ago and there is no, or  
5 very little, evidence in relation to allegations of  
6 abuse.

7 Advocate Lacey provided examples from her own Google  
8 search in relation to names "in the public domain  
9 rumoured to have committed acts of abuse."

10 It is submitted by Advocate Lacey that no facts are  
11 established, but merely links between those who worked  
12 at various institutions at a given time when it is  
13 alleged that abuse occurred.

14 Alleged abusers who have not been arrested,  
15 interviewed, or convicted should be protected, she  
16 submits. Advocate Lacey reminds the Panel of Article 8  
17 of the European Convention on Human Rights, the right to  
18 private life, and that a fair balance has to be struck  
19 between the competing interests of the individual and of  
20 the community as a whole.

21 I should say at this point that the Panel is mindful  
22 throughout the Inquiry of Convention rights.

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Submission - States of Jersey Police (SOJP)



1 Advocate MacRae submits that if information about an  
2 individual is "in the public domain", that individual  
3 should nonetheless have the protection of his/her name  
4 being redacted in SOJP documents for the purposes of  
5 this Inquiry. The naming of individuals regarding  
6 unproven allegations raises the difficulty that such  
7 individuals might not be in a position to defend their  
8 reputation due to death, infirmity, or financial  
9 constraints. This, it is submitted, is contrary to the  
10 principles of natural justice.

11 Advocate MacRae adopts Advocate Lacey's submissions  
12 regarding Article 8 in the ECHR.

13 Advocate MacRae invited the Panel to have regard to  
14 the spirit of the Data Protection (Jersey) Law 2005, in  
15 particular the data protection principles at  
16 Schedule 1: sensitive personal data as defined under the  
17 2005 Law includes information as to an individual's  
18 "commission of, or alleged commission of any offence".  
19 Advocate MacRae questioned whether the Data Protection  
20 Commissioner had been contacted for "her views regarding  
21 these changes".

22 Notwithstanding the absence of any detailed  
23 submission on this point, the Panel has reviewed the  
24 relevant articles of the Data Protection (Jersey) Law  
25 2005. It is questionable that in using information that

1 is already in the public domain the Inquiry could be  
2 characterised "a processor" of that information.  
3 The Panel heard no argument on that point. However,  
4 even if the Inquiry could be characterised as  
5 a processor of sensitive personal data of information  
6 already in the public domain, the Panel is satisfied  
7 that the use of that information is necessary under  
8 Schedule 2(5) and additionally under Schedule 3(7) as  
9 required under that law.

10 Advocate MacRae reminds the Panel of a history in  
11 Jersey of information leaked in blogs, Twitter and other  
12 social networking sites, in circumstances where duties  
13 of confidence have been breached and data protection  
14 offences committed.

15 Mr Sadd made it clear at this point that  
16 a distinction was drawn between regulated and  
17 unregulated media into which latter category the blogs,  
18 et cetera, are placed.

19 If, submits Advocate MacRae, a change to  
20 the Protocols is in fact to be made then, as he terms  
21 it, the nebulous concept of "in the public domain"  
22 should be discarded.

23 The following, says Advocate MacRae, should be  
24 substituted:

25 "... lawfully available to the public in Jersey by

1 publication in the Jersey regulated media."

2 This would encompass information, he submits,  
3 published in the Jersey Evening Post, the  
4 Bailiwick Express, Channel 103 and BBC Jersey.  
5 Advocate Lacey adopts that submission.

6 As regards the Mosley case, Advocate MacRae submits  
7 that it is not on all fours with the present scenario  
8 for three reasons: (i) the Court was balancing  
9 Article 8/Article 10 rights, (ii) Mr Mosley was already  
10 a man in the public eye, (iii) there had been extensive  
11 publication.

12 Instead Advocate MacRae directed the Panel to  
13 consider the judgment of Dame Elizabeth Butler-Sloss  
14 (President) in *Venables & Thompson v News Group*  
15 *International, Associated Newspapers Limited* [2001] EWHC  
16 32 (QB). An injunction was granted to protect the  
17 identities of Venables and Thompson following release  
18 from prison after their sentence for the murder of  
19 James Bulger. The Attorney General applied to commit  
20 for contempt the respective newspapers who breached the  
21 order by publishing details likely to lead to the  
22 identification of the named individuals. One question  
23 considered was, "Was the information already in the  
24 public domain?"

25 At paragraph 32 the President said (I summarise):

1           "Applying those general principles to the present  
2 case, which is founded on confidentiality, there are two  
3 separate ways in which this information was said to be  
4 available in the public domain before 8 January 2001.  
5 The first was publication by the government departments  
6 which was available in libraries. In general I would  
7 agree that information available in a public library was  
8 accessible to the public - it provides detailed and  
9 complicated information and statistics not easy to  
10 digest by anyone not accustomed to its format - I do not  
11 consider that such information is realistically  
12 accessible to the wider public by being on a library  
13 shelf - secondly, information placed on the website of  
14 the government department that would require some degree  
15 of background knowledge and persistence for it to become  
16 available to the public, would not be widely recognised  
17 as available."

18           Advocate MacRae then invites the Panel, having  
19 considered this authority and the judgment of the  
20 President, to accept that "there is uncertainty as to  
21 the ambit of the concept in the public domain."

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Submission - JCLA

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Mr Collins takes a broad view of what constitutes

1 "in the public domain". Social media is in the public  
2 domain, he submits, and it is artificial to draw  
3 a distinction between regulated media and social media.  
4 The Panel is able to determine what it considers is in  
5 the public domain, submits Mr Collins, and what may or  
6 may not assist in its work.

7 There is no reason in law, or as a matter of common  
8 sense to restrict the definition to media that is  
9 confined to the Island of Jersey. People in Jersey live  
10 in the wider world with access to national and  
11 international publications. They listen to the radio.  
12 They watch the television, the same as everyone else.  
13 Society wants to participate in justice, it wants to  
14 understand what happened in courts, tribunals and in its  
15 own public inquiries.

16 Mr Collins notes that whilst there is emphasis on  
17 alleged abusers and individuals falsely accused or  
18 wrongly named in the media, there is another side to  
19 that debate. When the Inquiry looks at available  
20 evidence it may be that there is no evidence to  
21 implicate an individual. Individuals and their families  
22 may therefore be assisted by that approach.

23 Finally he submits that it is for the Panel to  
24 determine whether material available on regulated  
25 material (and social media) is of probative value.

1 In response Counsel to the Inquiry Mr Sadd submits:

2 1, Article 8(1) is qualified by Article 8(2), namely  
3 that there shall be no interference by a public  
4 authority in the right to private life, except such as  
5 is in accordance with the law and is necessary in  
6 a democratic society.

7 This is a public inquiry, responsibly conducted,  
8 which takes account of the competing interests of  
9 Article 8(1) on the one hand and Article 8(2) on the  
10 other hand. Mr Sadd submits and the Panel agrees that  
11 a definition of "in the public domain" which encompasses  
12 information that is realistically accessible to the  
13 general public in the regulated media addresses those  
14 competing interests and the concerns raised by the  
15 Departments and the SOJP.

16 2, The test regarding that which is "in the public  
17 domain" is an objective one determined by what is  
18 readily accessible to members of the public. Mr Sadd  
19 notes that the Venables & Thompson case in fact assists  
20 his submission in that regard. The Inquiry is not  
21 looking at that sort of information - relatively  
22 obscure, statistical data. We are looking at  
23 information available in the regulated media not "at old  
24 books in a library".

25 He further notes that at paragraph 31 of her

1 judgment the President cites Lord Goff in the  
2 House of Lords:

3 "Once it (the information) has entered what is  
4 usually called the public domain (which means no more  
5 than that the information in question is so generally  
6 accessible that in all the circumstances it cannot be  
7 regarded as confidential) then, as a general rule, the  
8 principle of confidentiality can have no application to  
9 it."

10 3, In the regulated media there is oversight by  
11 a regulator which, Mr Sadd submits, is a necessary  
12 protection. The Panel agree and reject the prescriptive  
13 approach suggested by Advocate MacRae to restrict the  
14 definition to "information available in the Jersey  
15 regulated media".

16

17 Ruling

18 (i)"in the public domain"

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20 The Panel has considered the parties' further  
21 submissions in this regard and read all the relevant  
22 documents and authorities. We are guided by the need to  
23 exercise a balance between transparency, coherence and  
24 cogency on the one hand, and fairness on the other. In  
25 the exercise of our discretion we find that there is

1 force in Mr Sadd's and the JCLA's submissions to take  
2 a broad view of what constitutes being "in the public  
3 domain".

4 The proposed change is agreed, namely that under the  
5 Data Protection, Freedom of Information and Redaction  
6 Protocol, information that is already in the public  
7 domain will not be redacted and names of individuals  
8 that are in the public domain will not be redacted.

9 "In the public domain" is information that is  
10 realistically accessible to the general public,  
11 information that has been published in regulated media -  
12 newspapers (printed or online), radio and television  
13 broadcast.

14  
15 (ii), Amendment to paragraphs 8.1.2 and 17.1.2; "convictions  
16 for that abuse"

17  
18 The Protocols presently state that information will  
19 be redacted of the names and identifying details of "any  
20 individuals accused of abuse except for those who have  
21 criminal convictions of that abuse". The amendment  
22 sought is to delete the word "that" so that the Protocol  
23 reads:

24 " ... except for those who have criminal convictions  
25 for abuse."





1 17.1.2, those will now be amended to read:

2 "Any individuals accused of abuse, except for those  
3 who have criminal convictions for abuse and those whom  
4 the Inquiry reasonably believes to be deceased."

5

6 (iii), Notification of intended changes to the Protocols

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8 Interested Parties will be notified of any intended  
9 changes five days in advance of the changes coming into  
10 effect. This will allow Interested Parties sufficient  
11 time to raise objections if minded to do so.

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13 (iv), Provision of unredacted material to Interested Parties

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15 A proposal for improving and streamlining redaction,  
16 that does not involve any amendment to the Protocols,  
17 will be discussed with all Interested Parties.

18

19 Finally, these rulings will take effect seven  
20 calendar days from today's date and with retrospective  
21 effect. As I said at the outset, this transcript will  
22 be approved by me today and available on the website.

22

23 Mr Sadd, we now rise in order that we can move to  
24 the next part of this morning's business, namely hearing  
25 the further evidence.

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<p><b>A</b></p> <p><b>ability (2)</b> 3:25 8:9</p> <p><b>able (3)</b> 3:24 20:4 24:16</p> <p><b>absence (1)</b> 16:22</p> <p><b>abuse (29)</b> 1:8,9,12,13 1:24,25 3:10,14 5:3 6:21 10:18,20 11:19 15:6,9,13 23:16,20,21,25 24:4,5,8,9,12,12,13 25:2,3</p> <p><b>abuser (1)</b> 4:17</p> <p><b>abusers (16)</b> 2:16,23 3:5,22 5:5,15,21 8:17 9:19 10:8 11:2 11:5,10 14:20 15:14 20:17</p> <p><b>abusive (1)</b> 4:9</p> <p><b>academic (1)</b> 6:11</p> <p><b>accept (1)</b> 19:20</p> <p><b>access (2)</b> 12:24 20:10</p> <p><b>accessible (11)</b> 12:13 13:5,23,25 14:4 19:8,12 21:12,18 22:6 23:10</p> <p><b>account (1)</b> 21:8</p> <p><b>accused (7)</b> 1:8,12 5:3 11:19 20:17 23:20 25:2</p> <p><b>accustomed (1)</b> 19:10</p> <p><b>achieve (2)</b> 4:5 6:22</p> <p><b>achieved (1)</b> 11:12</p> <p><b>acknowledge (1)</b> 6:7</p> <p><b>acknowledges (1)</b> 14:14</p> <p><b>activities (1)</b> 15:3</p> <p><b>acts (1)</b> 15:9</p> <p><b>additionally (1)</b> 17:8</p> <p><b>address (1)</b> 2:4</p> <p><b>addressed (1)</b> 8:15</p> <p><b>addresses (2)</b> 4:1 21:13</p> <p><b>adequate (1)</b> 6:2</p> <p><b>adjourned (1)</b> 1:18</p> <p><b>adopt (1)</b> 24:14</p> <p><b>adopted (1)</b> 6:23</p> <p><b>adopts (3)</b> 7:6 16:11 18:5</p> <p><b>advance (1)</b> 25:9</p> <p><b>Advocate (26)</b> 5:11 6:18,23 7:4,7,12 14:14 15:1,7,10,16 16:1,11,11,13,19 17:10,19,23 18:5,6 18:12 19:18 22:13 24:2,16</p> <p><b>afforded (1)</b> 4:18</p> <p><b>ago (1)</b> 15:4</p> <p><b>agree (4)</b> 10:24 11:18 19:7 22:12</p> <p><b>agreed (1)</b> 23:4</p> <p><b>agrees (2)</b> 9:14 21:10</p> <p><b>alive (2)</b> 5:4 11:5</p> <p><b>allegation (2)</b> 14:23 24:5</p> <p><b>allegations (5)</b> 8:10 9:6 11:8 15:5 16:6</p> <p><b>alleged (23)</b> 2:16,23 3:5,22 4:17 5:5,14 5:21 8:17 9:19 10:8 11:2 11:1,5,10 14:20 15:13,14 16:18 20:17 24:8,9,11,12</p> <p><b>allow (1)</b> 25:10</p> <p><b>allowing (1)</b> 4:21</p> <p><b>ambit (1)</b> 19:21</p> <p><b>amended (3)</b> 11:18 24:18 25:1</p> <p><b>amendment (9)</b> 1:10</p>	<p>2:13 5:4,12 7:19 23:15,21 24:1 25:16</p> <p><b>amendments (1)</b> 4:7</p> <p><b>amount (1)</b> 3:17</p> <p><b>and/or (2)</b> 3:14 10:21</p> <p><b>appearing (1)</b> 3:23</p> <p><b>application (1)</b> 22:8</p> <p><b>applied (2)</b> 13:21 18:19</p> <p><b>apply (1)</b> 11:9</p> <p><b>Applying (1)</b> 19:1</p> <p><b>approach (3)</b> 10:1 20:22 22:13</p> <p><b>appropriate (1)</b> 5:13</p> <p><b>approved (1)</b> 25:21</p> <p><b>April (2)</b> 2:5 3:19</p> <p><b>argument (2)</b> 6:11 17:3</p> <p><b>arguments (1)</b> 9:24</p> <p><b>arrested (1)</b> 15:14</p> <p><b>Article (8)</b> 6:17 15:16 16:12 18:9 21:2,2,9 21:9</p> <p><b>articles (1)</b> 16:24</p> <p><b>artificial (2)</b> 4:20 20:2</p> <p><b>asked (1)</b> 9:22</p> <p><b>asks (1)</b> 24:2</p> <p><b>assert (1)</b> 5:20</p> <p><b>assist (1)</b> 20:6</p> <p><b>assisted (1)</b> 20:22</p> <p><b>assists (1)</b> 21:19</p> <p><b>Associated (1)</b> 18:15</p> <p><b>Attorney (2)</b> 13:20 18:19</p> <p><b>August (3)</b> 2:15,18 3:16</p> <p><b>authorities (1)</b> 22:22</p> <p><b>authority (3)</b> 3:24 19:19 21:4</p> <p><b>available (13)</b> 3:18 14:2 17:25 19:4,6,7 19:16,17 20:19,24 21:23 22:14 25:21</p> <p><b>avoid (1)</b> 10:22</p>	<p><b>business (1)</b> 25:23</p> <p><b>Butler-Sloss (1)</b> 18:13</p>	<p><b>C</b></p> <p><b>calendar (1)</b> 25:19</p> <p><b>called (2)</b> 14:17 22:4</p> <p><b>care (2)</b> 4:22 10:5</p> <p><b>case (7)</b> 8:5 12:14 13:8 15:1 18:6 19:2 21:19</p> <p><b>category (1)</b> 17:17</p> <p><b>CC (1)</b> 8:6</p> <p><b>central (1)</b> 6:20</p> <p><b>certain (1)</b> 13:22</p> <p><b>cetera (1)</b> 17:18</p> <p><b>CHAIR (1)</b> 1:2</p> <p><b>change (4)</b> 1:3 8:23 17:19 23:4</p> <p><b>changed (1)</b> 3:3</p> <p><b>changes (5)</b> 2:1 16:21 25:6,9,9</p> <p><b>Channel (1)</b> 18:4</p> <p><b>characterised (2)</b> 17:2 17:4</p> <p><b>charge (1)</b> 3:12</p> <p><b>charged (1)</b> 3:10</p> <p><b>Chief (1)</b> 7:4</p> <p><b>children (2)</b> 10:13,14</p> <p><b>circumstances (2)</b> 17:12 22:6</p> <p><b>cites (2)</b> 8:5 22:1</p> <p><b>Civ (1)</b> 8:6</p> <p><b>clarified (1)</b> 24:6</p> <p><b>clear (3)</b> 3:21 11:1 17:15</p> <p><b>code (5)</b> 6:1 8:24,25 14:7,7</p> <p><b>Codes (1)</b> 14:10</p> <p><b>codification (2)</b> 6:21 9:15</p> <p><b>cogency (2)</b> 14:16 22:24</p> <p><b>cogent (5)</b> 3:25 4:25 9:17 11:12,15</p> <p><b>coherence (2)</b> 14:15 22:23</p> <p><b>coherent (3)</b> 4:1 5:1 11:15</p> <p><b>Collins (7)</b> 7:18,20 8:1 8:3 19:25 20:5,16</p> <p><b>coming (1)</b> 25:9</p> <p><b>commenced (2)</b> 2:15 10:24</p> <p><b>commercial (1)</b> 12:25</p> <p><b>commission (4)</b> 8:18 9:4 16:18,18</p> <p><b>Commissioner (1)</b> 16:20</p> <p><b>commit (1)</b> 18:19</p> <p><b>committed (2)</b> 15:9 17:14</p> <p><b>common (1)</b> 20:7</p> <p><b>community (1)</b> 15:20</p> <p><b>competing (4)</b> 9:25 15:19 21:8,14</p> <p><b>complaint (1)</b> 9:2</p> <p><b>complicated (1)</b> 19:9</p> <p><b>concept (2)</b> 17:21 19:21</p> <p><b>concerned (4)</b> 7:10 9:2 14:24 15:3</p> <p><b>concerning (1)</b> 2:20</p> <p><b>concerns (2)</b> 10:16 21:14</p> <p><b>concluded (2)</b> 8:19,22</p> <p><b>concludes (1)</b> 4:23</p> <p><b>Conclusion (1)</b> 24:21</p> <p><b>conduct (2)</b> 8:24,25</p> <p><b>conducted (1)</b> 21:7</p> <p><b>confidence (1)</b> 17:13</p>	<p><b>confidential (1)</b> 22:7</p> <p><b>confidentiality (3)</b> 7:8 19:2 22:8</p> <p><b>confined (2)</b> 1:23 20:9</p> <p><b>consider (7)</b> 3:10,11 3:13 10:20 18:13 19:11 24:14</p> <p><b>considerable (1)</b> 7:23</p> <p><b>consideration (1)</b> 9:10</p> <p><b>considered (6)</b> 8:19,22 10:5 18:23 19:19 22:20</p> <p><b>considers (2)</b> 5:18 20:4</p> <p><b>constitutes (4)</b> 12:6 13:11 19:25 23:2</p> <p><b>constraints (1)</b> 16:9</p> <p><b>consultation (1)</b> 6:14</p> <p><b>contacted (1)</b> 16:20</p> <p><b>contempt (1)</b> 18:20</p> <p><b>context (2)</b> 14:1 24:17</p> <p><b>contrary (1)</b> 16:9</p> <p><b>contribution (1)</b> 11:6</p> <p><b>Convention (3)</b> 7:14 15:17,22</p> <p><b>Conversely (1)</b> 24:10</p> <p><b>convicted (1)</b> 15:15</p> <p><b>convictions (9)</b> 1:9,13 1:24,24 23:15,21 23:24 24:4 25:3</p> <p><b>core (1)</b> 4:9</p> <p><b>correct (1)</b> 5:20</p> <p><b>corroding (1)</b> 7:21</p> <p><b>costs (1)</b> 6:6</p> <p><b>Counsel (10)</b> 2:25 3:2 3:4 10:19 12:9,11 13:13 14:18 21:1 24:6</p> <p><b>course (2)</b> 2:13 11:9</p> <p><b>Court (2)</b> 6:12 18:8</p> <p><b>courts (3)</b> 6:9,10 20:14</p> <p><b>cover (1)</b> 8:11</p> <p><b>credible (1)</b> 4:16</p> <p><b>criminal (7)</b> 1:9,13,23 1:24 23:21,24 25:3</p> <p><b>Culture (1)</b> 7:6</p> <p><b>current (1)</b> 12:2</p> <p><b>currently (1)</b> 1:7</p>	<p>7:6,9 19:14</p> <p><b>departments (9)</b> 2:20 6:23,25 7:2 14:12 14:23 19:5 21:15 24:1</p> <p><b>depend (1)</b> 13:19</p> <p><b>depicting (1)</b> 9:9</p> <p><b>detailed (2)</b> 16:22 19:8</p> <p><b>details (4)</b> 2:7 13:13 18:21 23:19</p> <p><b>determination (1)</b> 9:23</p> <p><b>determinations (1)</b> 24:17</p> <p><b>determine (4)</b> 1:20 6:12 20:4,24</p> <p><b>determined (2)</b> 21:17 24:15</p> <p><b>died (4)</b> 8:17,20 9:1,6</p> <p><b>difficult (1)</b> 8:2</p> <p><b>difficulty (1)</b> 16:6</p> <p><b>digest (1)</b> 19:10</p> <p><b>directed (1)</b> 18:12</p> <p><b>discarded (1)</b> 17:22</p> <p><b>disclosed (1)</b> 10:25</p> <p><b>discretion (5)</b> 5:25 9:24 10:2 11:17 22:25</p> <p><b>discussed (1)</b> 25:17</p> <p><b>disjointed (1)</b> 4:20</p> <p><b>distinction (2)</b> 17:16 20:3</p> <p><b>distinguish (1)</b> 15:1</p> <p><b>documentation (3)</b> 3:17,18 9:9</p> <p><b>documents (6)</b> 2:19 8:4 10:6,25 16:4 22:22</p> <p><b>domain (32)</b> 1:21 11:25 12:3,4,7,12 12:21 13:7,12,19 14:18 15:8 16:2 17:1,6,21 18:24 19:4,21 20:1,2,5 21:11,17 22:4,18 23:3,7,8,9 24:7,11</p> <p><b>drafted (2)</b> 5:13 8:4</p> <p><b>draw (1)</b> 20:2</p> <p><b>drawn (1)</b> 17:16</p> <p><b>due (2)</b> 9:10 16:8</p> <p><b>Dunn (1)</b> 8:6</p> <p><b>Durham (1)</b> 8:6</p> <p><b>duties (1)</b> 17:12</p> <p><b>duty (2)</b> 6:2 7:7</p>	<p><b>entitled (1)</b> 9:10</p> <p><b>envisaged (1)</b> 5:1</p> <p><b>ER (1)</b> 13:21</p> <p><b>eras (1)</b> 4:8</p> <p><b>establish (1)</b> 10:12</p> <p><b>established (1)</b> 15:11</p> <p><b>establishing (1)</b> 6:20</p> <p><b>estate (1)</b> 6:7</p> <p><b>et (1)</b> 17:18</p> <p><b>European (1)</b> 15:17</p> <p><b>Evening (2)</b> 12:22 18:3</p> <p><b>events (3)</b> 9:9 12:17 15:4</p> <p><b>evidence (6)</b> 11:8 15:2 15:5 20:20,20 25:24</p> <p><b>evolved (1)</b> 3:3</p> <p><b>evolving (1)</b> 9:13</p> <p><b>EWCA (1)</b> 8:6</p> <p><b>EWCH (1)</b> 13:9</p> <p><b>EWHC (1)</b> 18:15</p> <p><b>exactly (1)</b> 8:24</p> <p><b>examples (1)</b> 15:7</p> <p><b>exception (1)</b> 1:22</p> <p><b>exercise (5)</b> 9:24 10:1 11:17 22:23,25</p> <p><b>existing (1)</b> 4:19</p> <p><b>expectation (1)</b> 14:9</p> <p><b>explained (1)</b> 2:6</p> <p><b>Express (2)</b> 12:23 18:4</p> <p><b>extend (1)</b> 8:7</p> <p><b>extensive (3)</b> 3:7 4:1 18:10</p> <p><b>extent (2)</b> 3:4 13:18</p> <p><b>eye (1)</b> 18:10</p>	<p>22:20 25:24</p> <p><b>Furthermore (1)</b> 6:16</p>	<p><b>G</b></p> <p><b>gathers (1)</b> 9:8</p> <p><b>general (10)</b> 12:13 13:5,20 14:3 18:19 19:1,6 21:13 22:7 23:10</p> <p><b>generally (1)</b> 22:5</p> <p><b>given (4)</b> 3:12 10:19 11:7 15:12</p> <p><b>gives (1)</b> 4:20</p> <p><b>giving (2)</b> 11:8 12:18</p> <p><b>Goff (1)</b> 22:1</p> <p><b>Google (1)</b> 15:7</p> <p><b>governance (2)</b> 3:11 10:18</p> <p><b>government (2)</b> 19:5 19:14</p> <p><b>Government's (1)</b> 6:14</p> <p><b>granted (1)</b> 18:16</p> <p><b>Greater (1)</b> 13:20</p> <p><b>Group (2)</b> 13:9 18:14</p> <p><b>guidance (2)</b> 6:1 13:11</p> <p><b>guided (1)</b> 22:22</p> <p><b>guidelines (1)</b> 9:3</p>	<p><b>H</b></p> <p><b>hand (6)</b> 5:2,2 14:16 21:9,10 22:24</p> <p><b>happened (2)</b> 10:13 20:14</p> <p><b>health (4)</b> 7:5,9,10 14:24</p> <p><b>hear (1)</b> 1:19</p> <p><b>heard (3)</b> 1:16 12:5 17:3</p> <p><b>hearing (4)</b> 2:5 3:19 4:13 25:23</p> <p><b>hearings (4)</b> 2:15 3:7 4:18 10:24</p> <p><b>helpfully (1)</b> 24:6</p> <p><b>hidden (1)</b> 10:15</p> <p><b>highlights (1)</b> 3:8</p> <p><b>history (1)</b> 17:10</p> <p><b>his/her (1)</b> 16:3</p> <p><b>homes (3)</b> 3:12 10:14 10:19</p> <p><b>House (1)</b> 22:2</p> <p><b>Human (2)</b> 6:17 15:17</p>	<p><b>I</b></p> <p><b>identification (1)</b> 18:22</p> <p><b>identify (3)</b> 3:9 4:8 10:18</p> <p><b>identifying (1)</b> 23:19</p> <p><b>identities (1)</b> 18:17</p> <p><b>ii (3)</b> 1:22 18:9 23:15</p> <p><b>iii (3)</b> 2:1 18:10 25:6</p> <p><b>ill-feeling (1)</b> 5:18</p> <p><b>implicate (1)</b> 20:21</p> <p><b>importantly (1)</b> 4:2</p> <p><b>improving (1)</b> 25:15</p> <p><b>impunity (1)</b> 5:24</p> <p><b>include (1)</b> 12:14</p> <p><b>includes (1)</b> 16:17</p> <p><b>including (1)</b> 2:19</p> <p><b>inconvenience (1)</b> 6:6</p> <p><b>incorrect (1)</b> 5:22</p> <p><b>increase (1)</b> 4:7</p> <p><b>increasingly (1)</b> 4:20</p> <p><b>independent (1)</b> 10:9</p> <p><b>individual (7)</b> 15:19 16:2,2 20:21 24:3,7 24:11</p> <p><b>individuals (17)</b> 1:8,12 2:21 5:3,17 6:19</p>
---	---	---	---	--	--	--	---	---	--	--

11:19 12:4 14:25 16:5,7 18:22 20:17 20:21 23:7,20 25:2 <b>individual's (1)</b> 16:17 <b>infirmary (1)</b> 16:8 <b>information (33)</b> 1:6 12:2,12,14 13:4,6 13:22 16:1,17,25 17:2,5,7,11 18:2,23 19:3,7,9,11,13 21:12,21,23 22:3,5 22:14 23:5,6,9,11 23:18 24:25 <b>informed (1)</b> 14:22 <b>infringement (1)</b> 6:4 <b>inhibition (1)</b> 7:12 <b>injunction (2)</b> 13:15 18:16 <b>inquiries (1)</b> 20:15 <b>inquiry (41)</b> 1:14,17 2:10,13,18,25 3:2,4 3:5,18 4:7,14 5:5 6:19 7:12 8:18,22 9:8,13,19 10:9,12 10:19 11:6,9,20 12:9,11,18 15:3,22 16:5 17:1,4 20:19 21:1,7,20 24:6,15 25:4 <b>Inquiry's (9)</b> 2:6 4:4,19 7:22 8:8 9:16 10:3 14:19 24:10 <b>Inquiry/hearing (1)</b> 5:22 <b>institutions (1)</b> 15:12 <b>insular (1)</b> 12:21 <b>intelligible (1)</b> 4:25 <b>intended (4)</b> 1:3 4:5 25:6,8 <b>interest (2)</b> 4:25 5:19 <b>Interested (7)</b> 1:2 2:2 8:16 25:8,10,13,17 <b>interests (5)</b> 4:12 9:25 15:19 21:8,14 <b>interference (1)</b> 21:3 <b>international (3)</b> 7:25 18:15 20:11 <b>interviewed (1)</b> 15:15 <b>investigated (1)</b> 14:21 <b>invited (1)</b> 16:13 <b>invites (1)</b> 19:18 <b>involve (2)</b> 9:23 25:16 <b>island (5)</b> 5:14 12:21 12:24 13:1 20:9 <b>Island's (2)</b> 4:22 7:11 <b>issue (4)</b> 8:19,21 10:7 10:22 <b>issues (2)</b> 9:22 11:22 <b>ITV (1)</b> 13:1 <b>iv (2)</b> 2:2 25:13	<hr/> <b>K</b> <hr/> <b>Kingdom (1)</b> 12:25 <b>Kingdom's (1)</b> 9:5 <b>knowledge (1)</b> 19:15 <hr/> <b>L</b> <hr/> <b>Lacey (9)</b> 6:23 7:4,12 14:14 15:1,7,10,16 18:5 <b>Lacey's (1)</b> 16:11 <b>large (2)</b> 4:3 10:11 <b>law (11)</b> 6:18 8:18,20 8:23 9:4 16:14,17 16:24 17:9 20:7 21:5 <b>lawfully (1)</b> 17:25 <b>laws (2)</b> 8:21 9:5 <b>lead (2)</b> 8:10 18:21 <b>leaked (1)</b> 17:11 <b>legal (1)</b> 3:16 <b>level (2)</b> 3:15 10:21 <b>Leveson (1)</b> 8:22 <b>levied (1)</b> 14:23 <b>libel (4)</b> 6:9,13 8:21 9:5 <b>libraries (1)</b> 19:6 <b>library (3)</b> 19:7,12 21:24 <b>life (2)</b> 15:18 21:4 <b>limit (1)</b> 12:20 <b>Limited (3)</b> 13:9,21 18:15 <b>links (1)</b> 15:11 <b>listen (1)</b> 20:11 <b>little (1)</b> 15:5 <b>live (1)</b> 20:9 <b>local (2)</b> 6:1 7:24 <b>long (1)</b> 10:15 <b>longer (1)</b> 4:16 <b>looking (2)</b> 21:21,22 <b>looks (1)</b> 20:19 <b>Lord (1)</b> 22:1 <b>Lords (1)</b> 22:2 <hr/> <b>M</b> <hr/> <b>MacRae (15)</b> 5:11 6:18 16:1,11,13,19 17:10,19,23 18:6 18:12 19:18 22:13 24:2,16 <b>MacRae's (1)</b> 7:7 <b>magazines (1)</b> 13:3 <b>mainstream (1)</b> 12:24 <b>maintain (1)</b> 10:23 <b>man (1)</b> 18:10 <b>manage (1)</b> 8:2 <b>managed (1)</b> 7:14 <b>Manchester (1)</b> 13:20 <b>material (6)</b> 2:2 13:18 14:3 20:24,25 25:13 <b>matter (2)</b> 1:18 20:7 <b>matters (2)</b> 7:8 14:4 <b>Max (1)</b> 13:9 <b>means (2)</b> 14:18 22:4 <b>Measures (1)</b> 1:5 <b>media (25)</b> 5:23 6:2 8:1 9:2 12:15,19,21 12:21 13:4 14:1,6,6 17:17 18:1 20:1,3,3 20:8,18,25 21:13 21:23 22:10,15 23:11 <b>meet (3)</b> 4:10,24 10:3 <b>member (1)</b> 14:5 <b>members (3)</b> 13:23 14:3 21:18 <b>merely (1)</b> 15:11 <b>mind (1)</b> 10:2	<b>mindful (1)</b> 25:11 <b>mindful (1)</b> 15:21 <b>Minister's (1)</b> 7:4 <b>mistreatment (1)</b> 10:14 <b>months (1)</b> 3:3 <b>morning's (1)</b> 25:23 <b>Mosley (5)</b> 13:9,15 15:1 18:6,9 <b>Mosley's (1)</b> 15:3 <b>move (1)</b> 25:22 <b>murder (1)</b> 18:18 <hr/> <b>N</b> <hr/> <b>name (3)</b> 3:24 5:4 16:3 <b>named (15)</b> 3:6 4:13 4:14,14,15,15 5:21 8:17 18:22 20:18 24:4,8,8,11,12 <b>names (6)</b> 3:23 5:23 12:4 15:8 23:7,19 <b>naming (16)</b> 1:7,17,23 2:16,23 3:21 5:3,14 6:18 9:1,5,19 10:7 11:1,19 16:5 <b>narrative (2)</b> 4:21 11:3 <b>national (1)</b> 20:10 <b>natural (1)</b> 16:10 <b>nebulous (1)</b> 17:21 <b>necessarily (1)</b> 9:23 <b>necessary (7)</b> 2:14 8:7 9:12 17:7 21:5 22:11 24:14 <b>need (8)</b> 7:20 9:16 10:20 11:2,3,12 14:15 22:22 <b>needs (2)</b> 2:11 3:11 <b>Neither (1)</b> 9:4 <b>networking (1)</b> 17:12 <b>news (5)</b> 4:15 13:3,9 13:14 18:14 <b>newsagents (1)</b> 13:1 <b>newspapers (8)</b> 4:15 12:15 13:2,9,20 18:15,20 23:12 <b>notes (4)</b> 8:1 20:16 21:19,25 <b>Notification (2)</b> 2:1 25:6 <b>notified (2)</b> 1:3 25:8 <b>Notwithstanding (1)</b> 16:22 <hr/> <b>O</b> <hr/> <b>objections (1)</b> 25:11 <b>objective (4)</b> 6:22 10:9 14:1 21:17 <b>objects (2)</b> 5:11 24:2 <b>obligation (1)</b> 4:24 <b>obscure (1)</b> 21:22 <b>observes (1)</b> 4:12 <b>obtained (1)</b> 13:6 <b>obvious (1)</b> 10:2 <b>occurred (1)</b> 15:13 <b>October (3)</b> 1:16,19 11:23 <b>OFCOM (3)</b> 6:1 8:24 14:7 <b>offence (1)</b> 16:18 <b>offences (1)</b> 17:14 <b>old (1)</b> 21:23 <b>Once (1)</b> 22:3 <b>one-off (1)</b> 14:22 <b>online (2)</b> 12:16 23:12 <b>open (1)</b> 10:10 <b>openness (1)</b> 7:20 <b>operate (2)</b> 2:10,11 <b>Operation (1)</b> 12:18	<b>opportunity (1)</b> 11:7 <b>order (3)</b> 6:5 18:21 25:22 <b>outlets (2)</b> 12:20 13:4 <b>outset (1)</b> 25:20 <b>outside (3)</b> 4:14 5:21 8:18 <b>oversight (1)</b> 22:10 <hr/> <b>P</b> <hr/> <b>pages (1)</b> 2:19 <b>Panel (35)</b> 1:1,16,19 3:7,11 4:9 6:13 7:24 9:13,22,23 10:1,5,24 11:11,18 11:21 12:5 13:8 15:16,21 16:13,23 17:3,6,10 18:12 19:18 20:4,23 21:10 22:12,20 24:14,16 <b>Panel's (1)</b> 14:14 <b>paper (1)</b> 6:14 <b>paragraph (3)</b> 13:16 18:25 21:25 <b>paragraphs (2)</b> 23:15 24:25 <b>part (2)</b> 6:17 25:23 <b>participate (1)</b> 20:13 <b>particular (5)</b> 3:8 7:10 10:17 13:19 16:15 <b>parties (11)</b> 1:2 2:3 8:16 10:6,11 12:6 22:20 25:8,10,13 25:17 <b>patterns (4)</b> 3:9 4:8 6:20 10:18 <b>PCC (1)</b> 14:7 <b>people (3)</b> 9:6 11:16 20:9 <b>permit (1)</b> 11:18 <b>perpetrated (2)</b> 3:14 10:21 <b>persistence (1)</b> 19:15 <b>person (1)</b> 6:8 <b>personal (3)</b> 7:8 16:16 17:5 <b>perusal (1)</b> 24:10 <b>phrase (1)</b> 24:15 <b>physical (3)</b> 24:4,8,12 <b>placed (2)</b> 17:18 19:13 <b>places (1)</b> 3:25 <b>point (5)</b> 14:8 15:21 16:23 17:3,15 <b>Police (2)</b> 5:9 15:24 <b>position (3)</b> 3:3 16:7 24:7 <b>positions (1)</b> 3:24 <b>possible (3)</b> 9:17,17 10:10 <b>Post (2)</b> 12:22 18:3 <b>practice (1)</b> 14:18 <b>precision (1)</b> 14:17 <b>preliminary (2)</b> 2:5 3:19 <b>prescriptive (1)</b> 22:12 <b>present (2)</b> 18:7 19:1 <b>presently (3)</b> 4:13 8:4 23:18 <b>President (4)</b> 18:14,25 19:20 22:1 <b>press (1)</b> 8:25 <b>prevent (2)</b> 8:25 13:15 <b>principle (2)</b> 9:14 22:8 <b>principles (3)</b> 16:10,15 19:1 <b>printed (2)</b> 12:16 23:12 <b>prison (1)</b> 18:18 <b>privacy (1)</b> 6:4	<b>private (2)</b> 15:18 21:4 <b>probative (1)</b> 20:25 <b>Procedural (1)</b> 2:7 <b>procedure (2)</b> 2:6 3:21 <b>procedures (3)</b> 2:12 4:4 7:13 <b>process (2)</b> 9:13 10:22 <b>processed (1)</b> 3:17 <b>processor (2)</b> 17:2,5 <b>produce (1)</b> 3:25 <b>producing (1)</b> 4:25 <b>production (1)</b> 11:15 <b>progressed (1)</b> 3:20 <b>prohibit (2)</b> 1:7 9:5 <b>prohibition (2)</b> 1:22 2:16 <b>proposal (2)</b> 14:19 25:15 <b>proposed (7)</b> 1:10 3:4 4:6 5:4,12 7:19 23:4 <b>protect (4)</b> 6:5 14:20 14:24 18:16 <b>protected (1)</b> 15:15 <b>protection (13)</b> 1:5 4:18 6:3 8:21 16:3 16:14,15,19,24 17:13 22:12 23:5 24:24 <b>Protective (1)</b> 1:4 <b>Protocol (9)</b> 1:4,11 2:17 4:19 8:3 11:1 23:6,22 24:18 <b>Protocols (18)</b> 1:4,7 2:1,7,7,12 4:5 5:12 9:11,11 11:18,22 12:2 17:20 23:18 24:24 25:6,16 <b>provide (1)</b> 6:2 <b>provided (4)</b> 6:13 10:6 13:4 15:7 <b>provides (2)</b> 13:11 19:8 <b>Provision (2)</b> 2:2 25:13 <b>provoked (1)</b> 12:19 <b>public (56)</b> 1:21 4:3,21 4:24 5:19 9:13 10:11 11:25 12:3,4 12:6,12,13,21,25 13:5,7,11,18,23 14:3,5,18 15:8 16:2 17:1,6,21,25 18:10 18:24 19:4,7,8,12 19:16,21 20:1,1,5 20:15 21:3,7,11,13 21:16,18 22:4,18 23:2,6,8,9,10 24:7 24:11 <b>publication (5)</b> 13:16 14:8 18:1,11 19:5 <b>publications (1)</b> 20:11 <b>publicised (1)</b> 13:14 <b>publicity (3)</b> 7:23,25 12:19 <b>publicly (1)</b> 4:17 <b>publish (1)</b> 5:23 <b>published (5)</b> 2:8 12:15 14:2 18:3 23:11 <b>publishing (1)</b> 18:21 <b>purposes (1)</b> 16:4 <hr/> <b>Q</b> <hr/> <b>QB (1)</b> 18:16 <b>qualified (1)</b> 21:2 <b>question (3)</b> 18:22 22:5 24:3 <b>questionable (1)</b> 16:25	<b>questioned (1)</b> 16:19 <hr/> <b>R</b> <hr/> <b>radio (3)</b> 12:16 20:11 23:12 <b>raise (1)</b> 25:11 <b>raised (2)</b> 10:16 21:14 <b>raises (1)</b> 16:6 <b>range (1)</b> 13:1 <b>read (5)</b> 1:11 10:6 14:5 22:21 25:1 <b>readily (3)</b> 4:8 11:4 21:18 <b>reads (1)</b> 23:23 <b>realistically (8)</b> 12:12 13:5,22,25 14:4 19:11 21:12 23:10 <b>reason (1)</b> 20:7 <b>reasonably (8)</b> 1:14,17 3:5 5:5 6:19 9:19 11:20 25:4 <b>reasons (1)</b> 18:8 <b>received (3)</b> 2:18 3:16 11:21 <b>recognise (1)</b> 11:11 <b>recognised (1)</b> 19:16 <b>recognises (1)</b> 4:4 <b>record (1)</b> 9:17 <b>records (3)</b> 2:20 24:10 24:13 <b>recrimination (1)</b> 5:16 <b>Rectangle (1)</b> 12:18 <b>redacted (6)</b> 12:3,5 16:4 23:7,8,19 <b>redaction (7)</b> 1:3,6 4:19 8:6 23:5 24:25 25:15 <b>Reference (9)</b> 3:8,9 4:2,10 5:1 7:13 10:4,17 11:15 <b>referred (1)</b> 13:8 <b>regard (3)</b> 16:13 21:20 22:21 <b>regarded (1)</b> 22:7 <b>regarding (7)</b> 9:6 11:22 16:5,12,20 21:16 24:24 <b>regards (1)</b> 18:6 <b>regimes (3)</b> 3:11 4:9 10:18 <b>regulated (13)</b> 12:15 12:19 14:1,6 17:16 18:1 20:3,24 21:13 21:23 22:10,15 23:11 <b>regulator (1)</b> 22:11 <b>reject (1)</b> 22:12 <b>related (1)</b> 11:22 <b>relation (3)</b> 15:5,8 24:9 <b>relatively (1)</b> 21:21 <b>relatives (2)</b> 5:16 11:13 <b>release (1)</b> 18:17 <b>released (1)</b> 8:5 <b>relevant (3)</b> 1:4 16:24 22:21 <b>remain (1)</b> 8:20 <b>remained (1)</b> 10:14 <b>reminds (4)</b> 3:7 7:24 15:16 17:10 <b>remove (1)</b> 24:18 <b>report (6)</b> 4:1,2,19 5:1 11:13,16 <b>reports (1)</b> 4:15 <b>reputation (1)</b> 16:8 <b>require (1)</b> 19:14 <b>required (1)</b> 17:9 <b>requirement (1)</b> 3:9 <b>requires (2)</b> 10:1,17	<b>residential (1)</b> 10:13 <b>residents (1)</b> 7:11 <b>respect (1)</b> 7:8 <b>respective (1)</b> 18:20 <b>respond (1)</b> 11:7 <b>response (3)</b> 8:13,15 21:1 <b>responsibility (1)</b> 10:3 <b>responsible (1)</b> 4:17 <b>responsibly (1)</b> 21:7 <b>restrict (2)</b> 20:8 22:13 <b>restrictive (1)</b> 8:4 <b>retrospective (1)</b> 25:19 <b>reveal (1)</b> 24:13 <b>revealed (1)</b> 24:9 <b>review (1)</b> 9:10 <b>reviewed (2)</b> 9:12 16:23 <b>right (5)</b> 6:12 8:21 15:17 21:4 24:3 <b>rights (6)</b> 6:16,17 7:14 15:17,22 18:9 <b>rise (3)</b> 4:20 12:18 25:22 <b>risk (1)</b> 7:21 <b>room (2)</b> 4:13 5:22 <b>rule (1)</b> 22:7 <b>Ruling (4)</b> 1:1 9:19 22:17 24:22 <b>rulings (1)</b> 25:18 <b>rumoured (1)</b> 15:9 <b>runs (1)</b> 7:21 <hr/> <b>S</b> <hr/> <b>Sadd (22)</b> 3:2,7,20 4:4 4:12,23 7:20 8:15 9:15 12:11,20 13:8 13:10,25 14:7 17:15 21:1,10,18 22:11 24:6 25:22 <b>Sadd's (1)</b> 23:1 <b>sanctioned (2)</b> 3:14 10:21 <b>satisfied (1)</b> 17:6 <b>says (2)</b> 5:14 17:23 <b>scenario (1)</b> 18:7 <b>scepticism (1)</b> 8:8 <b>Schedule (4)</b> 6:17 16:16 17:8,8 <b>Scottish (3)</b> 6:13 8:18 9:4 <b>search (1)</b> 15:8 <b>secondly (2)</b> 5:25 19:13 <b>seek (1)</b> 10:23 <b>sell (1)</b> 13:1 <b>senior (3)</b> 3:13,15 10:21 <b>sense (1)</b> 20:8 <b>sensitive (4)</b> 7:8 12:14 16:16 17:5 <b>sensitivities (1)</b> 10:2 <b>sentence (1)</b> 18:18 <b>separate (1)</b> 19:3 <b>September (2)</b> 1:2,10 <b>Services (2)</b> 7:5,9 <b>set (2)</b> 2:12 10:12 <b>seven (1)</b> 25:18 <b>sexual (3)</b> 24:5,9,11 <b>shaming (1)</b> 5:17 <b>shelf (1)</b> 19:13 <b>side (1)</b> 20:18 <b>Significantly (1)</b> 4:11 <b>sites (1)</b> 17:12 <b>six (1)</b> 7:24 <b>Sky (1)</b> 13:1 <b>smacks (1)</b> 8:9 <b>small (1)</b> 5:13 <b>social (7)</b> 7:5,9 8:1
--	---	--	--	---	---	---

<p>17:12 20:1,3,25  <b>society (2)</b> 20:13 21:6  <b>SOJP (6)</b> 5:9,11 15:24  16:4 21:15 24:2  <b>solely (1)</b> 24:4  <b>sort (1)</b> 21:21  <b>sought (3)</b> 13:15 15:1  23:22  <b>sources (1)</b> 13:6  <b>spirit (1)</b> 16:14  <b>Sport (1)</b> 7:6  <b>staff (1)</b> 3:13  <b>state (1)</b> 23:18  <b>stated (1)</b> 2:8  <b>statements (1)</b> 2:19  <b>States (2)</b> 5:9 15:24  <b>statistical (1)</b> 21:22  <b>statistics (1)</b> 19:9  <b>stone (1)</b> 9:11  <b>story (2)</b> 14:2,9  <b>streamlining (1)</b> 25:15  <b>street (1)</b> 4:15  <b>stress (1)</b> 6:6  <b>strike (1)</b> 5:6  <b>struck (2)</b> 4:24 15:18  <b>subject (3)</b> 2:12 6:6  14:6  <b>subjectively (1)</b> 14:5  <b>submission (12)</b> 2:25  5:9 6:22 7:2,16  12:9 14:12 15:24  16:23 18:5 19:23  21:20  <b>submissions (14)</b> 1:16  1:19 2:4 6:24 7:7  7:19 8:16 10:5,7  11:21 12:5 16:11  22:21 23:1  <b>submits (37)</b> 3:2,20,23  4:6,16 5:4,12,20,22  5:24 6:9,18 7:11  8:3,8 9:16 10:20  12:11,17,20 13:10  13:25 14:4,8,19  15:4,16 16:1 17:19  18:2,6 20:2,5,23  21:1,10 22:11  <b>submitted (4)</b> 13:3  14:17 15:10 16:9  <b>substantial (1)</b> 5:18  <b>substituted (1)</b> 17:24  <b>sue (2)</b> 6:8,12  <b>sufficient (1)</b> 25:10  <b>suggest (1)</b> 5:23  <b>suggested (2)</b> 22:13  24:15  <b>summarise (1)</b> 18:25  <b>summarised (2)</b> 2:6  13:13  <b>support (2)</b> 10:7 24:1  <b>supported (1)</b> 7:18  <b>supports (1)</b> 14:14  <b>suppression (1)</b> 8:10  <b>system (3)</b> 4:22 6:21  9:15</p> <hr/> <p style="text-align: center;"><b>T</b></p> <p><b>tabloid (1)</b> 13:2  <b>take (2)</b> 23:1 25:18  <b>takes (2)</b> 19:25 21:8  <b>task (2)</b> 3:20 8:9  <b>team (1)</b> 3:16  <b>television (3)</b> 12:16  20:12 23:12  <b>tenable (2)</b> 3:22 11:2  <b>Term (2)</b> 3:8 10:17  <b>terms (9)</b> 3:8 4:1,10  5:1 6:1 7:13 10:4  11:14 17:20  <b>test (3)</b> 13:21 14:1</p>	<p>21:16  <b>theory (1)</b> 13:24  <b>Thompson (3)</b> 18:14  18:17 21:19  <b>thousands (2)</b> 2:19  10:25  <b>three (1)</b> 18:8  <b>time (6)</b> 3:12,23 10:19  15:12 24:17 25:11  <b>today (1)</b> 25:21  <b>today's (1)</b> 25:19  <b>transcript (1)</b> 25:20  <b>transparency (7)</b> 4:6,7  10:23 11:3,12  14:15 22:23  <b>transparent (1)</b> 10:10  <b>treated (1)</b> 13:7  <b>treatment (1)</b> 6:3  <b>tribunals (1)</b> 20:14  <b>truly (1)</b> 13:18  <b>truth (1)</b> 10:12  <b>turn (1)</b> 6:24  <b>Twitter (1)</b> 17:11  <b>two (1)</b> 19:2</p> <hr/> <p style="text-align: center;"><b>U</b></p> <p><b>ultimately (1)</b> 13:19  <b>uncertainty (1)</b> 19:20  <b>unchanged (1)</b> 8:20  <b>uncontroversial (1)</b>  12:17  <b>uncorroborated (1)</b>  14:22  <b>understand (2)</b> 4:21  20:14  <b>understanding (1)</b> 4:3  <b>understood (1)</b> 11:4  <b>undertake (1)</b> 8:9  <b>unfair (1)</b> 6:3  <b>unique (1)</b> 4:18  <b>United (2)</b> 9:5 12:25  <b>unjustly (1)</b> 8:10  <b>unproven (2)</b> 16:6  24:5  <b>unrealistic (1)</b> 12:20  <b>unredacted (3)</b> 2:2 8:5  25:13  <b>unregulated (1)</b> 17:17  <b>unwarranted (1)</b> 6:3  <b>use (1)</b> 17:7  <b>usually (1)</b> 22:4</p> <hr/> <p style="text-align: center;"><b>V</b></p> <p><b>v (4)</b> 8:6 13:9,20 18:14  <b>value (1)</b> 20:25  <b>various (1)</b> 15:12  <b>vast (1)</b> 3:17  <b>Venables (3)</b> 18:14,17  21:19  <b>video (1)</b> 15:2  <b>view (3)</b> 13:3 19:25  23:2  <b>views (1)</b> 16:20  <b>voice (1)</b> 11:4</p> <hr/> <p style="text-align: center;"><b>W</b></p> <p><b>Wales (2)</b> 6:8,10  <b>wants (2)</b> 20:13,13  <b>watch (1)</b> 20:12  <b>way (1)</b> 5:6  <b>ways (1)</b> 19:3  <b>website (3)</b> 2:8 19:13  25:21  <b>weekly (1)</b> 13:2  <b>weighing (1)</b> 4:11  <b>welfare (1)</b> 14:24  <b>wellbeing (1)</b> 7:10  <b>well-informed (1)</b>  7:25</p>	<p><b>went (1)</b> 4:21  <b>whilst (1)</b> 20:16  <b>wide (1)</b> 14:19  <b>widely (2)</b> 13:14 19:16  <b>wider (2)</b> 19:12 20:10  <b>wishes/feelings (1)</b>  11:13  <b>witness's (1)</b> 11:3  <b>word (2)</b> 23:22 24:19  <b>work (2)</b> 7:22 20:6  <b>worked (1)</b> 15:11  <b>world (2)</b> 13:14 20:10  <b>worldwide (1)</b> 12:19  <b>written (1)</b> 9:11  <b>wrong (1)</b> 4:22  <b>wrongly (1)</b> 20:18</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <p><b>years (2)</b> 7:24 15:4</p> <hr/> <p style="text-align: center;"><b>1</b></p> <p><b>1 (5)</b> 6:17,17 8:17  16:16 21:2  <b>10 (1)</b> 18:9  <b>103 (1)</b> 18:4  <b>12 (3)</b> 2:15,18 3:16  <b>15 (2)</b> 1:19 11:23  <b>1654 (1)</b> 8:6  <b>17.1.2 (3)</b> 1:6 23:15  25:1</p> <hr/> <p style="text-align: center;"><b>2</b></p> <p><b>2 (4)</b> 3:9 8:24 10:17  21:16  <b>2(5) (1)</b> 17:8  <b>2000 (1)</b> 6:18  <b>2001 (3)</b> 13:21 18:15  19:4  <b>2005 (3)</b> 16:14,17,25  <b>2008 (1)</b> 13:9  <b>2011 (1)</b> 6:15  <b>2012 (1)</b> 8:6  <b>2014 (6)</b> 1:2 2:5,15,18  3:19 11:23  <b>23 (2)</b> 1:2,10  <b>26 (1)</b> 13:16</p> <hr/> <p style="text-align: center;"><b>3</b></p> <p><b>3 (4)</b> 2:5 3:19 9:4  22:10  <b>3(7) (1)</b> 17:8  <b>31 (1)</b> 21:25  <b>32 (3)</b> 13:21 18:16,25</p> <hr/> <p style="text-align: center;"><b>4</b></p> <p><b>4 (1)</b> 9:8</p> <hr/> <p style="text-align: center;"><b>5</b></p> <p><b>5 (1)</b> 9:15</p> <hr/> <p style="text-align: center;"><b>6</b></p> <p><b>687 (1)</b> 13:10</p> <hr/> <p style="text-align: center;"><b>7</b></p> <p><b>7 (1)</b> 1:16</p> <hr/> <p style="text-align: center;"><b>8</b></p> <p><b>8 (4)</b> 6:17 15:16 16:12  19:4  <b>8(1) (2)</b> 21:2,9  <b>8(2) (2)</b> 21:2,9  <b>8.1.2 (3)</b> 1:5 23:15  24:25  <b>8/Article (1)</b> 18:9</p>			
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