Explanatory Note to the Draft Terms of Reference

Introduction

1. The Independent Panel inquiry into Child Sexual Abuse was set up by the Home Secretary in July 2014 to consider the extent to which state and non-state institutions have failed in their duty of care to protect children from sexual abuse and exploitation, to consider how those failings have been addressed and to identify what further action is required to address the failings identified.

2. When the panel was set up, it had no statutory footing and no clear mechanism by which the panel members and the chair would be able to direct the cooperation of state and / or non-state institutions with the inquiry. The Terms of Reference gave the impression that the inquiry would be a paper-based process which would "*consider all the information which is available from the various published and unpublished reviews, court cases, investigations etc which have so far concluded*" and would not investigate afresh where necessary.

3. That being so, the Terms of Reference also implied that the inquiry would not hear live evidence or be held in public although the Home Secretary has stated in Parliament that the inquiry panel is free to call witnesses as it deems appropriate. There is however no power to compel witnesses to attend or to direct disclosure of specific documentation.

4. It is already apparent from the fall-out of the judicial review proceedings issued in October 2014 that the independence of those appointed to the panel has been called into question. Following the high profile resignation of two successive chairs to the panel, concerns were raised as to how the panel members were recruited, vetted and appointed and as to whether the panel would be able to carry out an independent and effective investigation into allegations including arguable systemic issues arising out of individual allegations of child sexual abuse and exploitation.

5. In November 2014, the Home Secretary made a statement to Parliament indicating that it would be prepared, *"if the panel chairman deems it necessary"* to convert the inquiry into a full statutory inquiry in line with the Inquiries Act. At a Home Affairs Committee meeting on 20 January 2015, existing panel members expressed agreement that placing the inquiry on a statutory footing would assist in creating some boundaries, procedures and structures for progressing the inquiry.

6. Notwithstanding this, no further progress has been made on that front as to date, nearly 4 months on from when Fiona Woolf resigned as the second appointed inquiry chair, no further panel chairman has been appointed.

Nature of Inquiry

7. Given the indicative scale of the abuse and sexual exploitation and the indicative systemic failures of state and non-state actors, it is respectfully submitted that the Home Secretary's failure to date to hold a public statutory inquiry pursuant to section 1 of the Inquiries Act 2005 is irrational and contrary to articles 2 and 3 of the European Convention on Human Rights.

Article 2 – the substantive obligation

8. In the welfare context, article 2 ECHR places an obligation on the State to protect the lives of those it is charged with a duty to care toward and requires social welfare agencies to ensure that the institutions for which they are responsible employ competent staff and that they are trained to a high professional standard. In addition, public authorities must ensure that the institutions adopt systems of work which will protect the lives of children in their care. Failure to perform these general obligations may result in a violation of Article 2: see Savage v. South Essex Partnership NHS Foundation Trust [2008] UKHL 74 [2009] 1 AC 681 at [69] per Lord Rodger; R(Takoushis) v. Inner London Coroner [2005] EWCA Civ 1440 [2006] 1 WLR 461; at [38].

Article 2 – Investigative obligation

9. The state's duty to investigate under Article 2 arises separately from the substantive obligation and may arise even if the State is not arguably in breach of its substantive obligation under Article 2 – see *Takoushis*, supra, at [98]-[99]; [105]-[109] and R (Gentle) v. Prime Minister [2006] EWCA Civ 1689 [2007] QB 689 at [77].

10. The purposes of an article 2 investigation are clearly stated by Lord Bingham in R (Amin) v Home Secretary [2003] UKHL 51, [2004] 1 AC 653, (at [31]):

> *to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others."* [1]

11. Further, and as is observed at [20(5)] of *Amin*, it is not sufficient if matters are left to the next of kin to take the initiative with regards to the investigation of persons who have died:

> *The essential purpose of the investigation* [as defined by the Court in *Jordan*, paragraph 105] *is*:
>
> "*… to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures …..*".

12. Further, the investigation must be effective in the sense identified in *Jordan,* at [107] in that: "*it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances . . . and to the identification and punishment of those responsible . . . This is not an obligation of result, but of means.*"

[1] In *K and others v Home Secretary* [2008] EWHC 1598 Mitting J stated that in the context of alleged Article 3 treatment where no death resulted the last sub-sentence of Lord Bingham's statement "can be rephrased to read: "……..and that those who have been ill-treated may at least have the satisfaction of knowing that their ill-treatment has been acknowledged, and may save others from ill-treatment in the future"."

13. Effective participation by the complainant(s) and the public is an essential part of an effective investigative obligation in order to ensure public accountability. See Bati v Turkey (2006) 42 E.H.R.R. 37 (at [137]):

> *There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the complainant must be afforded effective access to the investigatory procedure…"*

Investigative duty under Article 3

14. There is an analogous investigative duty under Article 3, as explained by Sedley LJ in AM & Ors, R (on the application of) v Secretary of State for the Home Department & Ors **[**2009] EWCA Civ 219:

> *It is also well established that an analogous duty is created by art. 3 where credible evidence suggests that one or more individuals have been subjected by or with the connivance of the state to treatment sufficiently grave to come within the article" (at [4])*
>
> *It has been proposed in argument that the jurisprudence governing the investigative duty under art. 2 should not, or not necessarily, govern the same duty under art. 3. The principal reason is that in the art. 2 situation the immediate victim is by definition unable to advance his or her own case, while in the art. 3 situation direct recourse to law is generally open. I believe this to be a false dichotomy…*
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> *… It is therefore understandable that in no decision that we have been shown does the Court make any such formal distinction. What in my judgment will always matter, whether the issue arises under art. 2 or art. 3, is the practical ability, whether of the victim or of others, to secure adequate investigation, retribution and redress without an ad hoc inquiry instituted by the state itself."*
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> [the article 2 and 3 duty is] *to inform the public and its government about what may have gone wrong in relation to an important civic and international obligation and about what can be done to stop it happening again." (at [57])*
>
> *there is no reason in principle to draw a line in this regard between art. 2 and art. 3. So long as the minimum requirements are met, the distinction between a need for an independent ad hoc inquiry and the satisfaction of the investigative obligation through existing procedures is a fact-sensitive and pragmatic one" (at [60]*

15. That case also helpfully summarises the nature of the investigation that ought to be conducted (the paragraphs numbers below refer to the paragraph numbers of the skeleton argument of James Eadie Q.C.) adopted by the Court at [32]:

> *"41.1 The investigation should be capable of leading to the identification and punishment of those responsible;*
> *41.2 It may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence;…*
> *…41.4 It must be thorough, in that the authorities must make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident; and*
> *42.5 It must permit effective access for the complainant to the investigatory procedure."* [§32].

16. These principles have been further affirmed and restated in R (Mousa) v Secretary of State for Defence [2011] EWCA Civ 1334 and R (MM) v Secretary of state for the Home Department [2012] EWCA Civ 688, where the Court of Appeal underlined the importance of there being a public, statutory inquiry, in appropriate cases, where there may have been inhuman and degrading treatmnt resulting form the failures on the part of public authorities.

17. In R (Mousa) v Secretary of State for Defence [2013] EWHC 1412 (Admin) [2013] HRLR 32, Thomas P reiterated the core principles which contributed to an effective investigation (at [147]):

(i) the investigation must be public and accessible to the victimm's family.

(ii) The investigation must be broad enough to permit the investigatin authorities to take account of not only the actions of the state / non-state actors but also all the surrounding circumstances including such matters relating to the systems in place, such as line management, and supervision, where it is necessary in order to determine whether the State complied with its obligations;

(iii) The investigation must include 'lessons learned' following the identification of wider or systemic issues.

18. What is required in order to satisfy the obligation that the investigation is *"open to public scrutiny"* will depend upon the circumstances of the case but the Court of Appeal accepted in R (D) v The Secretary of State for the Home Department [2006] 3 All ER 946 that investigation into an attempted suicide in a prison required that the Inquiry had to be held in public, save where there were Convention-compatible reasons to hear the evidence of a particular witness, or other parts of the hearing, in private. This did not mean that the whole process had to be in public; rather, the investigator would make the evidence and any written submissions public and take oral evidence in public. The investigator would, of course, decide what oral evidence to call and whether to hear oral submissions (see [24]-[25]).

Power to hold a public inquiry

19. By s. 1 of the Inquiries Act 2005, the Secretary of State has power to establish an inquiry:

> *1 Power to establish inquiry*
> *(1) A Minister may cause an inquiry to be held under this Act in relation to a case where it appears to him that–*
> > *(a) particular events have caused, or are capable of causing, public concern, or*
> > *(b) there is public concern that particular events may have occurred."*

20. In R v. Secretary of State for Health ex p. Wagstaff [2000] EWHC 34, the Divisional Court analysed a number of factors which might be regarded as persuasively in favour of opening up an inquiry prior to concluding the Secretary of State's decision not to hold an inquiry in public in that case (Shipman) was irrational: -

> *(1) the fact that when a major disaster occurs, involving the loss of many lives, it has often been considered appropriate to hold a full public inquiry, and the case for such an inquiry would seem to be enhanced where –*
> *(a) there is doubt as to how many and which deaths are properly attributable to the known cause of many other deaths:*
> *(b) the fact that deaths occurred over a long period without detection is suggestive of a breakdown in those checks and controls which should operate to prevent such a tragedy:*
> *as a result there is likely to be a widespread loss of confidence in a critical part of the National Health Service which needs to be addressed.*

(2) *There are positive known advantages to be gained from taking evidence in public, namely –*

(a) witnesses are less likely to exaggerate or attempt to pass on responsibility:

(b) information becomes available as a result of others reading or hearing what witnesses have said:

(c) there is a perception of open dealing which helps to restore confidence:

(d) there is no significant risk of leaks leading to distorted reporting."

(3) *The particular circumstances of this case militated in favour of opening up the Inquiry because -*

(a) by April 2000 it was clear that was what the families wanted, and that the Secretary of State had been mistaken to think otherwise. As he chose to rely on what he had believed to be their state of mind he should have consulted them before reaching his decision of 27th January 2000, and he should therefore have given them a proper opportunity to deal with his new reasons for maintaining his position if he was not to accede to the written submissions of their solicitor:

(b) the wide and unamended terms of reference gave those relatives and friends of persons not named in the indictment good reason to believe that the Inquiry would investigate how and why their relatives died:

(c) even if Parliament was not misled, what had been said and what had not been said in the House of Commons on 1st February 2000 had for obvious reasons given rise to misunderstanding:

(d) there was no obvious body of opinion in favour of evidence being received behind closed doors:

(e) given an inquisitorial procedure and firm chairmanship, there was no reason why the Inquiry should take longer if evidence were taken in public, nor was their any tangible reason to conclude that any significant evidence would be lost.

(4) *Where, as here, an Inquiry purports to be a public inquiry, as opposed to an internal domestic inquiry, there is now in law what really amounts to a presumption that it will proceed in public unless there are persuasive reasons for taking some other course. Although Article 10 of the European Convention is not yet incorporated into English law it does no more than give expression to existing law as to the right to receive and impart information.*

(5) *If the Inquiry has been conducted in public, then the report which it produces and the recommendations which it makes will command greater public confidence. Since all members of the community, especially the elderly and vulnerable, have been accustomed to place great trust in their GPs, such restoration of confidence is a matter of high public importance.*

Inquiry into Child Sex Abuse

I. <u>Need for a public inquiry</u>

21. There are striking parallels between the present concerns and those raised in the Shipman Inquiry (*Wagstaff*).

22. The whole thrust of the Claimant's case is that there has yet to be a proper public inquiry into what in fact happened in state / non-state institutions which led to widespread child sex abuse and exploitation. Although there has been a trickle of media reports on incidents of historic sex abuse of children by state and non-state institutions, in reality it has only been those cases which have reached the media that have been made known.

23. For example, at present, it remains unclear how many persons are survivors of abuse and sexual exploitation as a direct / indirect result of systemic failures of state / non-state institutions to act in accordance with their child protection duties.

24. What is known from some survivors and representative bodies for survivors is that where incidents have been reported in the past, state agencies have failed to act promptly and effectively to implement protective safeguards for victims and to prevent further abuse. Why did state agencies react in that way? Were there gaps in the systems that prevented effective responses? Was there a culture of practice which led to ineffective or no response to child protection concerns? How did state and / or non-state institutions allow for child sex abuse, either on a systemic or an individual level to occur in the home or otherwise in institutions?

25. All of the unknowns as to the scale and nature of the child sex abuse and exploitation that is said to have occurred and the possibility of major systemic failures in the child protection system strongly point to the need for a full public inquiry. The case for such an inquiry would seem to be further enhanced where: (a) there is uncertainty as to how many and which incidents are properly attributable to failures of state and non-state actors to protect children from sexual exploitation and abuse; (b) the fact that abuse and exploitation occurred

over a long period without detection is suggestive of a breakdown in those checks and controls which should operate to prevent such tragedies; (c) as a result there is a need to consider whether the failures lead to widespread loss of confidence in our child protection system which needs to be addressed.

26. There are positive known advantages to be gained from taking evidence in public (as at least a starting presumption), namely: (a) witnesses are less likely to exaggerate or attempt to pass on responsibility; (b) information becomes available as a result of others reading or hearing what witnesses have said; (c) there is a perception of open dealing which helps to restore confidence; (d) there is no significant risk of leaks leading to distorted reporting.

27. Finally, if the inquiry has been conducted in public, then the report which it produces and the recommendations which it makes will command greater public confidence. Since all members of the community have been accustomed to place great trust in state child protection agencies to do exactly as they are designated to do, i.e. protect children from abuse and harm, such restoration of confidence is a matter of high public importance. See sections 25-26, Inquiries Act 2005.

28. For the reasons set out above, the Home Secretary should exercise her power under section 15, Inquiries Act 2005 to convert the existing inquiry into a statutory inquiry under the 2005 Act.

29. As there is no serving chairman appointed to the current inquiry, no obligation arises under section 15(3) to consult the current chairman.

II. Person who would conduct the inquiry

30. The Inquiries Act does not dictate the number of persons who could be appointed to conduct the inquiry. In principle, there is nothing preventing a statutory panel from constituting so that the decision-making powers as to the conduct of the inquiry is not vested in a single person.

31. In *Mousa*, the High Court recognised the practicalities that would need to be taken into account when considering the identity of the person appointed to lead the inquiry, stating that in the circumstances where the inquiry was likely to go on for several years, "*it would be extremely difficult to find a person with the necessary experience and capability who would be ready, able and willing to take on this extremely lengthy and open-ended responsibility*" other than a judge, retired judge or a very experienced practitioner.

32. Within the statutory inquiry context, there is nothing under the Act to prevent this person from being assisted by deputies and advisors whilst maintaining an overarching chairmanship over the inquiry: see section 3, Inquiries Act 2005. This would be preferable to ensure that expertise is drawn from different areas including law, child protection, and from the survivor community so long as the composition of the panel achieves a balance of expertise required to realise the objectives for which the inquiry is set up: see section 8, Inquiries Act 2005.

III. Terms of Reference

33. Under sections 15(5)-(6), Inquiries Act 2005, the Home Secretary may amend the original terms of reference on converting the existing inquiry into a statutory one.

34. Given the underlying principle of accessibility of the inquiry to the public and in particular to those who are the subjects of the inquiry, consultation on the final Terms of Reference of the statutory inquiry should involve survivors, their next of kin and their representative organisations.

35. The recent evidence given by panel members before the Home Affairs Committee concurs with this proposal.

36. The current scope restricts the inquiry to investigating child sex abuse and exploitation in state / non-state institutions. It does not seek to investigate the extent of systemic failures and failures in responses by state actors to child sex abuse and exploitation within the home. Excluding exploitation within the home

from the inquiry removes the ability of the inquiry panel from looking at how one of the most common forms of child sex abuse and exploitation manifests in our society and gives rise to an unacceptable risk that any inquiry will not be an effective and full inquiry into the extent of systemic failures in child protection.

IV. Length of time

37. The institutions – both state and non-state – and the context of the child sex abuse and exploitation are likely to be wide-ranging and require different considerations of the systems that were in place and how they failed.

38. There is a real practical question which needs to be considered and that is whether it is possible to achieve what is sought to achieve in even within the remit of the existing Terms of Reference in a relatively streamlined but effective manner. The time span within which the systemic failures may have occurred – from the abuse / exploitation to the response given to incidents which were reported – may also require differences in the anaylsis of the operational measures in place at the relevant time in child protection.

39. There is nothing within the Inquiries Act 2005 which prevents sub-inquiries to be conducted under an overarching statutory umbrella so that the inquiry is able to hone in on specific details where necessary.

V. Evidence and procedures

40. By virtue of an inquiry being placed on a statutory footing, the appointed chairman has the power under the 2005 Act to require witnesses to attend to give evidence, produce documents in his custody / under his control that relate to a matter in question in the inquiry and to produce any other thing in his custody / under his control for inspection, examination or testing by or on behalf of the inquiry panel. Failure to comply with a notice requiring a person to do so could give rise to further sanctions.