NOTE FROM COUNSEL TO THE INQUIRY:

COLLECTIVE RESPONSIBILITY/SAFE SPACE FOR POLICY-MAKING

1. The third witness statement of Jeremy Quin **[WITN7526005]**[1] refers to difficulties that serving Ministers may have in providing written and/or oral evidence about certain matters *"given the implication of Collective Responsibility"* (paragraph 1) and *"safe space for formulation of Government policy"* (paragraph 6). This Note seeks to summarise the relevant principles for the benefit of Inquiry participants.

Collective Responsibility[2]

2. The House of Commons Library Briefing Paper 7755 (November 2016)[3] describes collective responsibility in the following terms:

> *"Collective responsibility is a fundamental convention of the British constitution, whereby the Government is collectively accountable to Parliament for its actions, decisions and policies.*
> *Decisions made by the Cabinet are binding on all members of the Government. This means that if a minister disagrees with a government policy, he or she must still publicly support it. A minister is able to express their views and disagree privately, but once a decision has been made by the Cabinet, it is binding on all members of the Government."*

3. This is reflected in the Ministerial Code[4] which provides at paragraph 2.1 that:

> *"The principle of collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached.*

[1] Provided to the Inquiry on the evening of 19 July 2023.
[2] Sometimes referred to as collective Cabinet responsibility.
[3] https://researchbriefings.files.parliament.uk/documents/CBP-7755/CBP-7755.pdf
[4] https://www.gov.uk/government/publications/ministerial-code/ministerial-code

This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence, should be maintained."[5]

4. Collective responsibility is a political/constitutional convention rather than a legal principle. However, its impact on the provision of material to a court has been considered in the context of claims to resist the disclosure of information on the basis of public interest immunity (PII). Thus, the Divisional Court in ***R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs*** [2018] EWHC 3825 considered a PII claim by the Minister for the Cabinet Office on the basis of collective responsibility (judgment, paragraph 5(b)) (as well as PII certificates by the Foreign Secretary relating to the UK's international relations and national security). This claim was described as follows (at paragraph 11):

> *"In the PII certificate of 26 February 2018, the Minister for the Cabinet Office stated that he considers that there is a real risk that disclosure of the material in question would result in harm to the principle of collective cabinet responsibility, or CCR, in the UK. CCR is based upon the inherent needs of Government and the mutual trust which needs to exist between ministers. The material comprises parts of records of meetings and ministerial "write-arounds" between cabinet members of the National Security Council tending to show the different views of those cabinet members in relation to the decisions under challenge. Disclosure, it is said, is objectionable because it undermines the doctrine of joint ministerial responsibility."*[6]

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[5] The principles of Ministerial conduct set out in paragraph 1.3 of the Ministerial Code include, as well as the principle of collective responsibility, that *"Ministers should be as open as possible with Parliament and the public, refusing to provide information only when disclosure would not be in the public interest, which should be decided in accordance with the relevant statutes and the Freedom of Information Act 2000"* and *"Ministers should similarly require civil servants who give evidence before Parliamentary Committees on their behalf and under their direction to be as helpful as possible in providing accurate, truthful and full information in accordance with the duties and responsibilities of civil servants as set out in the Civil Service Code"*.

[6] It appears from the Divisional Court's subsequent judgment in ***Hoareau*** at the substantive stage – see [2019] EWHC 221 (Admin); [2019] 1 W.L.R. 4105 – that the parties, with the assistance of PII advocates, were able to produce summaries of documents which protected collective responsibility but which could be referred to in open court (paragraph 179): *"For the purpose of the open hearing in this case (in what is an unprecedented move, we were informed) the parties have, with the assistance of public interest immunity advocates, been able to produce summaries of written contributions to discussions at ministerial level. These summaries have enabled the Court to do justice in open court while protecting to the extent necessary the identity of particular ministers, so maintaining the constitutional convention of "collective cabinet responsibility".*

5. Reference was also made to the collective responsibility convention in *Finucane's Application* [2013] NIQB 45 at paragraph 23[7] in these terms:

> *"The respondent also contends that documents tending to show the different views of cabinet ministers are confidential and would undermine the concept of collective cabinet responsibility. That it is important that cabinet ministers should be able to express their views openly and frankly without the apprehension that those views may become public. There is no public interest immunity certificate in this case and accordingly that argument is put forward on the basis of confidentiality. I agree that such documents are confidential, see Attorney General v Jonathan Cape Ltd and others; Attorney General v Times Newspapers Ltd [1975] 3 All ER 484. To identify the ministers who voted one way or another is objectionable because it undermines the doctrine of joint responsibility. However the fact that a document is confidential does not make it immune from disclosure. There are precautions, such as redaction, that can be taken to protect confidentiality whilst at the same time disclosing the document. There are degrees of confidential information. There is a balance to be struck between the public interest in maintaining confidentiality and competing public interests for instance in the administration of justice. Restrictions on disclosure should not be imposed beyond the strict requirement of public interest and the court would have to be satisfied that disclosure would inhibit free and open discussion in cabinet in future in relation to this issue."*

6. The *Attorney General v Jonathan Cape Ltd* case (referred to above in *Finucane*) [1976] QB 752 concerned the Attorney General's attempt to prevent the posthumous publication of an ex-Cabinet minister's diaries. Lord Widgery CJ noted that the basis of the Attorney General's position that Cabinet papers and proceedings were secret was (p.764):

> *"... the confidential character of these papers and proceedings, derived from the convention of joint Cabinet responsibility whereby any policy decision reached by the Cabinet has to be supported thereafter by all members of the Cabinet whether they approve of it or not, unless they feel compelled to resign. It is contended that Cabinet decisions and papers are confidential for a period to the extent at least that they must not be referred to outside the Cabinet in such a way as to disclose the attitude of individual Ministers in the argument which preceded the decision. Thus, there may be no objection to a Minister disclosing*

[7] The issue in the *Finucane* case was whether an order for disclosure of documents should be made, disclosure not being automatic in judicial review applications.

(or leaking, as it was called) the fact that a Cabinet meeting has taken place, or, indeed, the decision taken, so long as the individual views of Ministers are not identified."

7. Lord Widgery held that it was open to the court to prevent publication of information received in confidence by Cabinet ministers (p.770): "*when a Cabinet Minister receives information in confidence the improper publication of such information can be restrained by the court, and his obligation is not merely to observe a gentleman's agreement to refrain from publication*". He further held that some matters leading up to a Cabinet decision could be regarded as confidential (p.770):

> *"It is convenient next to deal with Mr. Comyn's third submission, namely, that the evidence does not prove the existence of a convention as to collective responsibility, or adequately define a sphere of secrecy. I find overwhelming evidence that the doctrine of joint responsibility is generally understood and practised and equally strong evidence that it is on occasion ignored. The general effect of the evidence is that the doctrine is an established feature of the English form of government, and it follows that some matters leading up to a Cabinet decision may be regarded as confidential. Furthermore, I am persuaded that the nature of the confidence is that spoken for by the Attorney-General, namely, that since the confidence is imposed to enable the efficient conduct of the Queen's business, the confidence is owed to the Queen and cannot be released by the members of Cabinet themselves. I have been told that a resigning Minister who wishes to make a personal statement in the House, and to disclose matters which are confidential under the doctrine obtains the consent of the Queen for this purpose. Such consent is obtained through the Prime Minister. ..."*

8. While there could not be a single rule governing the publication of matters relating to confidential Cabinet matters, the Attorney General in those proceedings was required to show (p.770-771): that publication of the diaries would be a breach of confidence; that the public interest required that the publication be restrained; and that there were "*no other facts of the public interest contradictory of and more compelling than that relied upon*". Moreover, when the court was asked to restrain such a publication, it was necessary to ensure that restrictions were "*not imposed beyond the strict requirement of public need*". Lord Widgery accepted that "*the expression of individual opinions by Cabinet Ministers in the course of Cabinet discussion are matters of confidence, the publication of which can be restrained by the court when this is clearly necessary in*

the public interest" (p.771). However, having found on the facts that the Attorney General had failed to establish that publication should be restrained on the basis of collective responsibility, Lord Widgery also rejected a submission that publication be restrained because the diaries disclosed "*advice given by senior civil servants who cannot be expected to advise frankly if their advice is not treated as confidential*" (p.771).

9. *Cabinet Office v Information Commissioner* [2009] 1 WLUK 504 concerned the disclosure of Cabinet minutes relevant to the Iraq War under the Freedom of Information Act 2000. The Information Tribunal described the history and operation of collective responsibility at paragraphs 38-49. This included the following (at paragraph 39):

> *"A consistent theme pursued in the commentaries has been the importance of allowing Ministers to consider, test and modify policy options in robust debate. The impact of disclosure is said to be that Ministers in future would be reluctant to expose themselves to criticism or ridicule by their political opponents, or a hostile media, for seeming to have doubts about an issue or to have changed their mind in the course of Cabinet discussions. When considering the options available they will therefore be reluctant to put forward tentative alternatives or modifications or to explore disadvantages. This was said to create a risk that forthright political discussion will be discouraged, particularly on matters of great sensitivity or controversy."*

10. The Information Tribunal recognised (at paragraph 52) the importance of the convention and the damage that may result from the publication of Cabinet minutes. At paragraph 77 it[8] observed that *"The convention of collective Cabinet clearly affords very considerable benefits in terms of good decision making at the highest level of government. Those benefits would be lost or severely reduced if the official records of Cabinet discussions were disclosed prematurely and/or without a thorough examination of the public interest factors for and against such action. However the convention is not a rigid dogma".*

[8] The Information Tribunal was split in its decision; this paragraph reflects views expressed by the majority.

Safe space

11. The *"safe space"* argument is, essentially, to the effect that it would be damaging to the public interest to disclose materials concerning ongoing active policy-making as that would undermine the candour of Government discussions and the advice that informs them. The parameters of this basis for withholding information are somewhat nebulous, not least because there is no real case law which seeks to define it (outside of the Freedom of Information Act – see below). The *"need for candour in communication between those concerned with policy making"* and for *"frank and uninhibited advice"* from and between civil servants and between ministers was acknowledged (in the context of a PII claim) by the House of Lords in *Burmah Oil Co Ltd v Bank of England* [1980] A.C. 1090 at 1112 E-G.

12. In the absence of other, directly applicable, case law, some assistance can be found in authorities and guidance of section 35(1)(a) of the Freedom of Information Act 2000, which exempts from the provisions of the Act information held by central Government departments that relate to *"the formulation or development of government policy."* That exemption is subject to a public interest test. In *Department of Health v Information Commissioner* (EA/2018/0001 & 0002, 26 February 2019) the First-tier Tribunal held that:

> *"We accept that the purpose of s 35 is to protect good government. It reflects and protects some longstanding constitutional conventions of government. It reserves a safe space to consider policy options in private – civil servants and subject experts need to be able to engage in free and frank discussion of all the policy options internally, to be able to expose their merits and demerits and possible implications."*

The exemption is aimed at the process by which new policies are formed and ceases to apply when that process has been completed and has moved to the operational stage. When that happens is a question of fact and is not always clear.

13. The Information Commissioner's Office's guidance on section 35[9] provides a steer both as to the application of the public interest test and as to the distinction between formulation of policy and implementation. In relation to the former, the guidance states that:

[9] https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/#publicinterestfactors

"There is no inherent or automatic public interest in withholding all information falling within this exemption: see 'No inherent public interest' under 'How do we apply the public interest test?'.

The relevance and weight of the public interest arguments depends entirely on the content and sensitivity of the information in question and the effect of its release in all the circumstances of the case.

For the same reason, arguments that 'routine' disclosure of a particular type of information are not in the public interest are misconceived. Each case must be considered on its facts. Even if disclosure is ordered in one case, this does not mean similar information must be disclosed in future."

"Arguments must therefore focus on the effect of disclosing the information in question at the time of the request, rather than the effect of routine disclosure of that type of information.

The key public interest argument for this exemption usually relates to preserving a 'safe space' to debate live policy issues away from external interference and distraction. There may also be related arguments about preventing a 'chilling effect' on free and frank debate in future, and preserving the convention of collective responsibility. See the main 'How do we apply the public interest test?' section below for an overview of these arguments.

The focus of the public interest arguments should be on the policymaking process.

The exact timing of a request is very important. If the information reveals details of policy options and the policy process remains ongoing at the time of the request, safe space and chilling effect arguments may carry significant weight.

However, even if the policy process is still live, there may be significant landmarks after which the sensitivity of information starts to wane.

For example, once a high-level policy objective has been announced (eg in a White Paper or framework bill), any information about that broad objective becomes less sensitive. The safe space to debate that high-level decision in private is no longer required, even if related debate about the details of the policy remains sensitive."

14. In relation to safe space arguments, the guidance further states that:

"The Commissioner accepts that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This carries significant weight in some cases.

As the Information Tribunal explained in DfES v Information Commissioner & the Evening Standard (EA/2006/0006, 19 February 2007), when considering the value of safe space in which to develop policy, "Ministers and officials are entitled to time

and space, … to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy." (paragraph 75(iv))

The need for a safe space is strongest when the issue is still live. Once the government has made a decision, a safe space for deliberation is no longer needed and this argument will carry little weight. The timing of the request is therefore an important factor. This was confirmed by the Information Tribunal in DBERR v Information Commissioner and Friends of the Earth (EA/2007/0072, 29 April 2008):

> *This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public." (paragraph 114*

*But it does not follow that where an issue is still under active consideration the public interest **always** favours maintaining the exemption regardless of the sensitivity of the information."*

Public Interest Immunity (PII)

15. It is important to note that reference to a political convention will not be enough, in and of itself, to justify the non-disclosure of otherwise relevant material. Such conventions must come within recognised legal principles to be enforceable: for example, collective responsibility came within the law of confidence in *Attorney General v Jonathan Cape* and PII in *Hoareau*. For the sake of completeness, and although no PII claim has been made, a summary of the governing principles regarding PII is set out below.

16. These principles, as applied to court proceedings, were summarised by the Divisional Court in *R (Charles) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWHC 3010 (Admin) at paragraph 10 and include the following:

> *"(3) The approach to making a claim for PII was described by the Court of Appeal (Lord Neuberger) in Al Rawi v Security Service [2010] 3 WLR 1069 as follows (at §24):*
>
> > *"First, the relevant minister (or his lawyers) must decide whether the documentary material in question is relevant to the proceedings in question i.e, that the material should, in the absence of PII considerations, be disclosed in the normal way. Secondly, the minister must consider whether there is a real risk that it would harm the national interest if the material was placed in the public domain. The third step is for the minister to balance the public interests for and against*

disclosure. If the decision is that the balance comes down against disclosure, then the minister states, in a PII certificate, that it is in the public interest that the material be withheld."

(4) As part of the initial consideration of these questions, and in particular the second question, consideration should be given to whether any damage to the public interest through disclosure could be prevented by other means, for example by disclosing a part of the document or a document on a restricted basis: R v Chief Constable of the West Midlands, ex p Wiley [1995] 1 AC 274, at 306-7. Thus, in the event that it is considered that the overall public interest is against disclosure of parts of the material, then a claim for PII should only be made in respect of those parts of the material that it is necessary to withhold in the public interest.

(5) On any claim for PII it is for the Court to determine whether it should be upheld, and in particular whether the balance of the public interests (the so-called Wiley balance) lies against disclosure. The Court is therefore required to weigh:

"...the public interest which demands that the evidence be withheld ... against the public interest in the administration of justice that courts should have the fullest possible access to all relevant material", and if "the former public interest is held to outweigh the latter, the evidence cannot in any circumstances be admitted":

(Lord Simon in R v Lewes Justices, Ex p Secretary of State for the Home Department [1973] AC 388 , 407; cited in Al Rawi (CA) at §25)."

17. The Divisional Court in ***Hoareau*** (above) summarised the basis for and consequence of making a PII claim as follows (paragraph 17):

"... PII is a ground for refusing to disclose a document which is relevant and material to the determination of the issues. A successful claim for PII renders a document immune from disclosure, depriving both the court and the parties of relevant material, in contrast to the position under a closed material procedure (such as under the [Justice and Security] 2013 Act) when the evidence can be deployed by one of the parties but the other will then be excluded from that part of the hearing and its interests may have to be protected in another way, for example by the use of a special advocate. A claim to PII can only be justified if the public interest in preserving the confidentiality of the document outweighs the public interest and the fair administration of justice."

18. In *Hoareau* the Divisional Court went on to explain the court's role on an application for PII and the case management tools available to it (at paragraph 19):

> *"However, it is the court which is the ultimate decision-maker. It will consider whether the risk to the public interest that would be caused if the document were placed in the public domain can be mitigated sufficiently by other steps such that the balance of public interest favours some form of limited disclosure. These steps include all of the case management tools available to the court, such as hearings in private, summaries, redactions, restricting the number of copies to be taken and the use of a confidentiality ring. The latter can also take various forms; for example, it may be confined to lawyers only and not include their lay clients. There is no such thing as a class claim to PII any longer; the balancing exercise is undertaken by reference to the contents of the particular document in question."*

19. The Court further described the following as relevant to the balancing exercise (paragraph 20):

> *"(a) the seriousness of the claim in which disclosure is sought;*
>
> *(b) whether the Government is itself a party or alleged to have acted unconscionably;*
>
> *(c) the significance and relevance of the evidence to the case;*
>
> *(d) the importance of the public interest claimed;*
>
> *(e) the nature and degree of risk that disclosure presents; and*
>
> *(f) the nature of the litigation (see Al Rawi at [102] and AHK & Ors v Secretary of State for the Home Department [2012] EWHC 1117 (Admin) at [34] in the judgment of Ouseley J)."*

The Inquiry

20. PII is not the only route by which the convention/principles referred to by Mr Quin may fall for consideration. An inquiry's powers in relation to evidence are set out in sections 17 to 23 of the Inquiries Act 2005. Section 21(1) empowers the chair of an inquiry by notice to require a person to attend to give evidence or to produce any documents that relate to a matter in question at the inquiry. Under section 21(4) a person in receipt of

such a notice may claim that *"it is not reasonable in all the circumstances to require him to comply"*. In that event the claim falls to be determined by the chair and, under section 21(5) the chair must consider *"the public interest in the information in question being obtained by the inquiry, having regard to the likely importance of the information".*

21. It should be emphasised that all of the witnesses giving evidence to the Inquiry in the week of 24 July are attending voluntarily and not pursuant to any notice under section 21. However, it would in principle be open to a witness giving evidence to claim – in reliance (in the present context) upon the convention of collective responsibility and/or safe space arguments – that it is not reasonable to require them to answer a particular question. Any such claim would then fall to be determined by the Chair.

22. In paragraph 23 of his third witness statement Mr Quin states that:

> *"I consider that these principles mean that while a Government position is still being determined, it is difficult to enter into detail on:*
>
> - *the nature of options being considered by Government including (save to the extent already publicly stated) questions about which recommendations might or might not be accepted.*
> - *the nature of each cross-government meeting convened to consider the Compensation Study or the Inquiry's recommendations.*
> - *the consideration that has been and is being given by me/the Cabinet Office to interim compensation for bereaved parents and bereaved children."*

23. The principal focus for the Inquiry in calling the witnesses in the week of 24th July is to consider, as part of its examination of the response of Government under its Terms of Reference, the adequacy and timeliness of the Government's decision-making so far and to understand why the Government does not currently intend to respond substantively to the Compensation Framework Study/Second Interim Report until after the Inquiry's final report is received. The importance of these matters to the Inquiry is self-evident. Counsel to the Inquiry (CTI) considers that it should be possible to explore these issues without trespassing on collective responsibility or safe space. It is not CTI's present intention[10] to ask for details of the different options currently under consideration, or for details of each meeting convened so far. Some exploration of the

[10] CTI will obviously consider any representations made on behalf of Core Participants.

question of interim compensation is likely, but again CTI considers that it should be possible to consider this issue broadly with witnesses.

24. If any issues arise as to the legal principles and their application, it may be sensible for those to be considered by the Inquiry on the afternoon of 24th July, following Ms Mordaunt's evidence.

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21 July 2023