

# Southport Inquiry

## SECOND “MINDED TO” NOTE

### ACHIEVING BEST EVIDENCE: PREVENTING WITNESSES FROM REFUSING TO ASSIST THE INQUIRY ON THE GROUNDS THAT THEIR EVIDENCE MAY INCRIMINATE THEM

(Whether to seek an undertaking from the Attorney General  
on the use that can be made of evidence given to the Inquiry by a witness)

#### *Introduction on “minded to” notes*

1. *Where he considers it conducive to:*
  - (1) *The Inquiry fulfilling its Terms of Reference (including reporting on time);*  
*and*
  - (2) *Obtaining the views and ensuring the fair participation of the Core Participants and the media,*  
*the Chair may issue “minded to” notes providing the **provisional** views of the Chair.*
  
2. *Where a minded to note is issued, there will be provision (in the Chair’s discretion) for one or both of:*
  - (1) *Submissions in writing from Core Participants and (where appropriate) the media;*
  - (2) *Oral submissions.*
  
3. *In responding to minded to notes, the Chair encourages all those involved in the Inquiry to work constructively with him and the Inquiry’s Legal Team to ensure:*
  - (1) *That the Terms of Reference of the Inquiry (including reporting on time) are met;*
  - (2) *The avoidance, insofar as is practicable, of any further psychological harm to the victims, many of whom are children, and who are at risk of re-traumatisation;*
  - (3) *That appropriate procedures are adopted which recognise the need:*
    - i. *to act fairly towards the victims and all witnesses and Core Participants;*
    - ii. *for the Inquiry to be open and transparent;*
    - iii. *for Core Participants to be meaningfully involved and able to participate;*
    - iv. *to minimise cost and delay.*

# Southport Inquiry

4. This second minded to note covers how to achieve best evidence in ensuring that witnesses and organisations do not refuse to give evidence to the inquiry on the ground that their evidence may incriminate them of a criminal offence<sup>1</sup>. It addresses the limited form of undertaking which the Chair is currently minded to seek from the Attorney General to achieve this aim. It invites submissions from Core Participants on the 'minded to' indication.
5. It is important to stress at the outset that this procedural issue does not concern, any kind of immunity from prosecution for anyone or for any organisation.

## ***What is an Attorney General's undertaking and why might it be necessary?***

6. In order to fulfil the Terms of Reference for Phase 1 of the Inquiry, the Chair will need to obtain evidence from a large number of persons and in due course hear or read the evidence of a variety of witnesses. As set out in the Opening Statement this will include analysing the perpetrator's history and his dealings with all of the relevant agencies; identifying the decisions that were made or not made, how information was shared and the extent to which the risk he posed was addressed, along with any missed opportunities to prevent what occurred. This will necessarily be wide ranging, encompassing the criminal justice system, relevant events during his education, his engagement with social and health care, his relationship with his family and much else besides. For the Inquiry to fully uncover the truth, it is essential that all relevant documents are disclosed and that witnesses provide complete and honest evidence.
7. Although the Inquiry anticipates that most witnesses will co-operate, the Inquiry has powers of compulsion. Section 21(1) of the Inquiries Act 2005 ("the Act") provides that the Chair can require, by notice, a person to attend at a specified time and place to give evidence; to produce any documents in his custody or under his control that relate to a matter in question at the inquiry; or to produce any other thing under his control for inspection, examination or testing by or on behalf of the inquiry. In accordance with section 21(2) of the Act the Chair may also require a person, within such period as appears to the inquiry to be reasonable, to provide evidence to the inquiry in the form of a written statement; to provide any documents in his custody or thing under his control that relate to a matter in question at the inquiry; or to produce any other thing in his custody or under his control for inspection, examination or testing by or on behalf of the

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<sup>1</sup> Many public inquiries have had to grapple with this issue. The websites of a number of former inquiries contain examples of the undertakings sought and reasons for them. A particularly useful summary of the law and practice is found in the submissions of David Barr KC, counsel to the Undercover Policing Inquiry which reviewed many of the previous undertakings sought in inquiries before 2016: <https://www.ucpi.org.uk/wp-content/uploads/2016/01/160108-undertakings-note.pdf>

# Southport Inquiry

inquiry. Failure, without reasonable excuse, to comply with such a requirement is an offence punishable by up to 51 weeks' imprisonment pursuant to section 35 of the Act.

8. However, there are limits to Chair's powers of compulsion.
9. In particular, many public inquiries have to address the risk that witnesses may refuse to provide documents or answer questions (in writing or in oral evidence) to the Inquiry if it would tend to incriminate them of a criminal offence. This is known as the privilege against self-incrimination. Without an undertaking from the Attorney General, individuals may lawfully invoke this privilege to withhold documents or decline to answer certain questions.
10. An undertaking from the Attorney General not to use evidence given to the Inquiry against the individual in criminal proceedings can remove this obstacle. Such undertakings are common in public inquiries, though their specific terms may vary, as addressed further below. In this context, any undertaking from the Attorney General would not be an immunity from prosecution. It would instead be a much narrower limitation on the way in which the evidence to the Inquiry can be used, designed to prevent witnesses from being able to claim the privilege against self-incrimination.

## ***The privilege against self-incrimination***

11. It is a fundamental rule of law that, with certain limited exceptions, a person cannot be required in any legal proceedings other than criminal proceedings to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence. This is set out in section 14 of the Civil Evidence Act 1968, which provides:

*“14(1) The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty—*

*(a) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; and*

*(b) shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the spouse or civil partner of that person to proceedings for any such criminal offence or for the recovery of any such penalty.*

*(2) In so far as any existing enactment conferring (in whatever words) powers of inspection or investigation confers on a person (in whatever words) any*

# Southport Inquiry

*right otherwise than in criminal proceedings to refuse to answer any question or give any evidence tending to incriminate that person, subsection (1) above shall apply to that right as it applies to the right described in that subsection; and every such existing enactment shall be construed accordingly.*

*(3) In so far as any existing enactment provides (in whatever words) that in any proceedings other than criminal proceedings a person shall not be excused from answering any question or giving any evidence on the ground that to do so may incriminate that person, that enactment shall be construed as providing also that in such proceedings a person shall not be excused from answering any question or giving any evidence on the ground that to do so may incriminate the husband or wife of that person.*

*(4) Where any existing enactment (however worded) that—*

*(a) confers powers of inspection or investigation; or*

*(b) provides as mentioned in subsection (3) above,*

*further provides (in whatever words) that any answer or evidence given by a person shall not be admissible in evidence against that person in any proceedings or class of proceedings (however described, and whether criminal or not), that enactment shall be construed as providing also that any answer or evidence given by that person shall not be admissible in evidence against the husband or wife of that person in the proceedings or class of proceedings in question.*

*(5) In this section “existing enactment” means any enactment passed before this Act; and the references to giving evidence are references to giving evidence in any manner, whether by furnishing information, making discovery, producing documents or otherwise.”*

12. Section 14 of the 1968 Act applies in the context of the Inquiry because section 22 of the Inquiries Act 2005 provides that a person may not be required to give, produce or provide any evidence or document if he could not be required to do so if the proceedings of the inquiry were civil proceedings in a court in the relevant part of the United Kingdom.
13. In consequence, a witness could be compelled to provide information and to attend and testify at the Inquiry, but they would be within their rights to refuse to answer certain questions if doing so might incriminate them and be used in future criminal proceedings. As a result, key witnesses might withhold crucial evidence from the Inquiry.
14. The privilege has been interpreted by the courts very widely. In *Den Norske Bank A.S.A. v Antonatos* [1999] Q.B. 271 the Court of Appeal made it clear that it extends not only to answers that directly incriminate the witness but also to

# Southport Inquiry

answers that tend to suggest that the witness may be guilty of the offence and to answers that might be used by the prosecuting authorities in furthering their inquiries, putting together a case or deciding whether to pursue proceedings against him or her. Waller LJ said (at p.289A):

*“Thus, it is not simply the risk of prosecution. A witness is entitled to claim the privilege in relation to any piece of information or evidence on which the prosecution might wish to rely in establishing guilt. And, as it seems to me, it also applies to any piece of information or evidence on which the prosecution would wish to rely in making its decision whether to prosecute or not.”*

15. Previous public inquiries have addressed this issue by seeking an undertaking from the Attorney General. Such an undertaking ensures that any evidence a witness provides to the inquiry cannot later be used against *that individual* in a criminal court. This approach encourages witnesses to speak openly, without fear of prosecution arising from the evidence they have given. More fundamentally, however, it prevents the witness refusing to answer and relying on the privilege against self-incrimination. Such undertaking has two obvious benefits. First, it prevents delays or disruptions caused by witnesses invoking their right against self-incrimination. Second, it ensures that the Inquiry receives fuller evidence. There is a potential third benefit in that, the removal of the ability to rely on the privilege against self-incrimination means any failure to answer questions can be the subject of an adverse inference, as Lord Saville stated during the course of the Bloody Sunday Inquiry:

*“In our view, if such an undertaking were provided, persons giving evidence to the Inquiry in any form could not refuse to answer or to produce documents on the basis of the privilege, for there would be no risk of self-incrimination: see, for example, R v Boyes (1861) 1 B & S 311 and Re Genese (1885) M.B.R. 223. As we said in July, it also seems to us that in such circumstances, the Inquiry could properly draw inferences from a failure to answer questions or to produce documents, unless of course there were other good grounds (apart from the privilege against self-incrimination) to justify that failure.”*

## ***Witnesses and organisations in respect of whom the privilege against self-incrimination might be claimed***

16. The breadth of the privilege against self-incrimination means that, for this Inquiry, it might be invoked in a wide range of aspects of the Inquiry’s work. The Terms of Reference require some detailed fact finding as to matters within the knowledge of individuals and organisations and questioning about these matters

# Southport Inquiry

may be very likely to engage the privilege against self-incrimination in the absence of an undertaking.

17. The Chair wishes to emphasise that, **to date, no witness or organisation has indicated a refusal to provide evidence to the Inquiry on the basis of the privilege against self-incrimination.** It is therefore important that this minded-to note is not interpreted as an inference to be drawn against any individual or organisation.
18. Nevertheless, witnesses and organisations do not need to give advanced notice of their intention to invoke the privilege against self-incrimination. The Chair is concerned at the (significant) delays that would bound to ensue if the privilege against self-incrimination was invoked and witnesses refused to provide relevant documents or answer written or oral questions. Not only would this imperil the Inquiry's Phase 1 timetable (and the associated public interest in the prompt provision of its Phase 1 report) but it is anticipated that it would also be distressing for victim core participants to see witnesses being able (lawfully) to refuse to give evidence because of this procedural right.
19. In the Inquiry's Phase 1 investigation it is foreseeable that the privilege *might be* invoked in a number of areas, including the following:
  - (1) those who may have been on notice that the perpetrator had purchased, or attempted to purchase, weapons including knives, machetes, archery equipment, and castor beans made into a crude formulation of ricin. Potential criminal offences in this broad area might be said to include gross negligence manslaughter and secondary participation in possession of a biological toxin contrary to Section 1 of the Biological Weapons Act 1974;
  - (2) the knowledge of witnesses of the perpetrator's possession of articles likely to be useful to a person committing or preparing an act of terrorism, contrary to Section 57 of the Terrorism Act 2000;
  - (3) those who sold knives and other bladed articles to the perpetrator given that he was, at all material times, under the age of 18 (section 141A of the Criminal Justice Act 1988 and Part 3 of the Offensive Weapons Act 2019).
  - (4) at least theoretically, the provision of medical care to the deceased considering the circumstances of death following medical treatment or care;
  - (5) at least theoretically, in the sphere of offences under the Health and Safety at Work etc Act 1974, which imposes duties on companies, self-employed persons and employees to exercise reasonable care in carrying out their work to ensure that other persons who may be affected thereby are not exposed to risks to their health or safety.

# Southport Inquiry

## ***The risks to the work of the Inquiry***

20. Although it is right that no Core Participant or witness has as yet raised the issue of the privilege, the Chair recognises that it is right that lawyers advising individual witnesses will be bound to inform them of the existence and scope of the privilege against self-incrimination. In some circumstances, witnesses and organisations may be advised to consider invoking the privilege rather than risk exposing themselves to a risk of prosecution arising from their evidence.
21. Were this to happen, the Chair is concerned that:
  - (1) taking evidence from those who were closely concerned with key issues of preventability that the Inquiry will examine would be seriously disrupted;
  - (2) the Inquiry would probably be hindered in getting at the truth of what happened; and
  - (3) as noted above, it may add to the distress of Core Participants if legitimate lines of enquiry are not answered because of the privilege against self-incrimination.
22. The task of the Inquiry is to investigate as fully as it can the matters covered by its Terms of Reference. That includes investigating the reasons why individuals and organisations did or did not act in a particular way so that the public can understand why events took the course they did. Requiring some witnesses to answer questions in public will also provide a significant degree of accountability which will be avoided if they are able to claim privilege against self-incrimination.
23. The Chair has also considered whether a narrow and focussed undertaking should be applied for at this stage, or whether it should be sought as and when the privilege is raised by an individual. This argument was raised during the Bloody Sunday Inquiry where it was suggested that instead of seeking what was described as a blanket assurance, an assurance should only be sought if and when requested by a witness, and then only if that witness provided full reasons for the request, including an outline of the nature and content of the evidence to be given and an explanation why that evidence could not be given without an assurance. That argument was rejected by the Tribunal on the grounds that witnesses in general have no cause to seek an assurance, "...protected as they are without it by the wide ambit of the privilege against self-incrimination". Moreover witnesses could not be expected to incriminate themselves by being compelled to explain the very evidence that would be self-incriminatory, before the inquiry decided whether to seek an assurance.

# Southport Inquiry

24. In the **provisional view** of the Chair, to approach the need for an undertaking from the Attorney General on a “wait and see” approach, or on a “case by case” basis could cause substantial delay.

## ***The scope of undertakings***

25. Previous Attorneys General have granted undertakings in a range of public inquiries, for instance: the Grenfell Tower Inquiry, the Stephen Lawrence Inquiry, the Bloody Sunday Inquiry, the Ladbroke Grove Inquiry, the Robert Hamill Inquiry, the Rosemary Nelson Inquiry, the Baha Mousa Inquiry, the Al Sweady Inquiry, the Azelle Rodney Inquiry, the Iraqi Fatalities Investigations and the Undercover Policing Inquiry. These undertakings have varied in their scope,

- (1) The very narrowest undertakings have aimed at assuring witnesses that there will not be any direct use in criminal proceedings of any evidence they give to the Inquiry;
- (2) There has been a more recent tendency in a number of inquiries to seek broader undertakings to give assurance against the derivative use of a witness' evidence including (a) deciding whether or not a prosecution should be brought, and (b) opening further lines of investigation which produce evidence relied upon in criminal proceedings. These slightly wider undertakings have been sought because of the wide interpretation of the extent of the privilege against self-incrimination summarised in paragraph 14, above. In contrast, in the Grenfell Tower Inquiry, however, there was an ongoing criminal investigation running parallel to the Inquiry and a need to permit a criminal investigator to make derivative use of the evidence provided by witnesses;
- (3) Some inquiries have gone wider still and sought undertakings not just from the Attorney General but from relevant bodies aiming to ensure that:
  - (a) If a witness has not told the whole truth previously but gives full evidence to the inquiry, the witness cannot be prosecuted or subject to disciplinary proceedings for their earlier failure to tell the whole truth; and /or
  - (b) That witnesses would not face proceedings by way of Court Martial or military Summary Dealing before a Commanding Officer, based on their own evidence; and /or
  - (c) That witnesses would not face disciplinary proceedings (or some forms of disciplinary proceedings) by their employer based on their own evidence.

# Southport Inquiry

26. All recent examples of undertakings given to public inquiries permit the use of evidence provided by a person to the Inquiry for the purposes of any proceedings for offences relating to the evidence given to the Inquiry itself, for example perjury or an offence contrary to s.35 of the Act. In other words, any undertaking provided by the Attorney General will not prevent the witness being prosecuted for perjury or for the statutory offence under s.35 of the Act if they lie to this Inquiry when giving their evidence.

## ***The process for obtaining an undertaking***

27. It is for the Chair to decide whether the Inquiry should seek an undertaking at all but it is the Attorney General's decision, in consultation with the Director of Public Prosecutions, as to whether, and in what form, any undertaking should be given.

## ***The Chair's Minded-to indication***

28. Given:
- (1) The wide range of Phase 1 evidence where witnesses or organisations might potentially invoke the privilege against self-incrimination (paragraph 19, above),
  - (2) The combined risks of: delay; hindering getting at the truth of what happened; further distress to victim core participants (paragraph 21, above),
  - (3) The downsides of a "wait and see" or "case-by-case" approach (paragraph 24, above),

the Chair is **provisionally minded** to seek a limited form of undertaking from the Attorney General.

29. The Chair is **provisionally minded** to seek an undertaking that is restricted to the minimum level that will prevent witnesses invoking the privilege against self-incrimination so that:
- (1) The undertaking would be targeted to give only the assurance that any evidence given to the inquiry will not be used (a) against that witness or their spouse in any criminal proceedings; or (b) in deciding whether to bring a prosecution; or (c) to commence further investigation which itself produces evidence relied on in criminal proceedings.
  - (2) The undertaking would not protect against criminal proceedings for perjury of the statutory offences under s.35 of the Act if the witness lies to the Inquiry;

# Southport Inquiry

- (3) The undertaking would not protect against *someone else's* evidence to the Inquiry being used for criminal proceedings against that person (or deciding whether to prosecute or investigate that person)
- (4) No undertaking would be sought in relation to employment / disciplinary proceedings.

30. The terms of the undertaking which the Chair is contemplating requesting from the Attorney General is provided in the Annex to this note.

## ***Invitation to make submissions***

31. Any Core Participant who wishes to make submissions in favour or against the Chair's minded to indication should provide submissions in writing.

32. The Chair requests that such submissions should:

- a. be provided by no later than **4 pm on 6 August 2025**;
- b. be in Word Format;
- c. be concise and should not generally exceed 15 pages in length;
- d. a font size of not less than 11-point should be used and line spacing should not be less than 1.5;
- e. should only cite authorities insofar as it necessary to establish the proposition of law the authority establishes.

33. It bears repeating that:

- (1) An undertaking in these terms only protects against self-incrimination. It does not prevent prosecution based on evidence provided by others. Therefore, this should not be mistaken for immunity from prosecution;
- (2) No inference should be drawn against any person or witness to the Inquiry. To date, no witness or organisation has indicated a refusal to provide evidence to the Inquiry on the basis of the privilege against self-incrimination. Rather the Chair has provided this minded-to indication based on an assessment of the risk that the privilege against self-incrimination will be invoked by one or more persons, and the damage to the Inquiry's aims that would ensue in the absence of an appropriate undertaking.

**Southport Inquiry**  
**23 July 2025.**

# Southport Inquiry

## **ANNEX : TERMS OF CONTEMPLATED REQUEST TO THE ATTORNEY GENERAL**

To seek an undertaking that:

1. No evidence a person may give before the Inquiry will be used in evidence against that person (or their spouse or civil partner) in any criminal proceedings or for the purpose of deciding whether to bring such proceedings save as provided in paragraph 2, below. "Evidence" includes oral evidence, any written statement made by that person preparatory to giving evidence to the Southport Inquiry or during the course of his or her testimony to the Southport Inquiry, or any document or information produced to the Southport Inquiry solely by that person.
2. Paragraph 1 does not apply to:
  - (1) A prosecution where he or she is charged with having given false evidence in the course of this Inquiry or having conspired with or procured others to do so, or
  - (2) In proceedings where he or she is charged with any offence under section 35 of the Inquiries Act 2005 or having conspired with or procured others to commit such an offence.
3. Where any such evidence is provided to the Inquiry by a person, it is further undertaken that, as against that person (or their spouse or civil partner), no criminal proceedings shall be brought (or continued) in reliance on evidence which is itself the product of an investigation commenced as a result of the provision by that person of that evidence.