

Preliminary Issue: Undertakings Further directions

1. In my Undertakings ruling of 16 May 2016 I referred, at paragraphs 9 – 11, to the late receipt of an application from Mr Robert Roscoe, recognised legal representative of Mark Kennedy, requesting that the Inquiry should seek from the Metropolitan Police Service an undertaking to the effect that Mr Kennedy’s evidence to the Inquiry would not be used in any future misconduct or disciplinary proceedings taken against him.
2. Under the current state of the law Mr Kennedy, having left the police service in 2010, would not be at risk of disciplinary proceedings. His concern arose from an article in The Times newspaper of 11 May 2016, which reported the Rt Hon Andy Burnham MP, shadow Home Secretary, as saying that he would seek cross-party support for reforms that would enable disciplinary proceedings to be taken against retired police officers; those reforms would operate retrospectively so as catch those who had retired before the reforms came into effect. Were that to be the state of the law, Mr Kennedy was concerned that despite his retirement in 2010 he might be liable to disciplinary proceedings taken under legislation operating retrospectively.
3. When, on 27 April 2016, the Home Secretary made her oral statement to the House of Common responding to the verdicts of the jury in the Hillsborough inquest, Mr Burnham raised the question whether there should be any time limit on disciplinary proceedings in the following terms:

“... through retirement, police officers can still escape misconduct proceedings. In her Policing and Crime Bill, the Home Secretary proposes a 12 month period after retirement where proceedings can be initiated, but one of the lessons of Hillsborough is that there can be no arbitrary time limits on justice and accountability. Will the Home Secretary work with me to insert a Hillsborough clause into her Bill ending the scandal of retirement as an escape route and of wrongdoers claiming full pensions? Will she join me in making sure that that applies retrospectively?”

4. In her reply the Home Secretary reminded the House that there had already been amendments to the disciplinary regime to prevent officers under suspicion from retiring to avoid disciplinary proceedings.¹ She referred to further changes to the

¹ New regulation 10A of the Police (Conduct) Regulations 2012 was inserted with effect from 12 January 2015. Where an allegation of misconduct is known to an appropriate authority the officer accused may not give notice of an intention to resign or retire without obtaining the consent of the appropriate authority.

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regime proposed by the Policing and Crime Bill and invited Mr Burnham to speak further with her or the Policing Minister with regard to his proposals.

5. The Policing and Crime Bill was introduced to Parliament on 10 February 2016. It underwent the committee stage on 13 April 2016. It was debated in the House of Commons on 26 April, the day before the Hillsborough statement. The proposed changes made in committee to clause 27, relating to police disciplinary regulations (as at 19 May 2016), are as follows:

(1) By clause 27(2) of the Bill section 50 of the Police Act 1996 would be amended to provide, after subsection (3), that:

“(3A) Regulations under this section may provide for the procedures that are established by or under regulations made by virtue of subsection (3) to apply (with or without modifications) in respect of the conduct efficiency or effectiveness of any person where—

(a) an allegation relating to the conduct, efficiency or effectiveness of the person comes to the attention of a chief officer of police, a local policing body or the Independent Police Complaints Commission,

(b) at the time of the alleged misconduct, inefficiency or ineffectiveness the person was a member of a police force, and

(c) either—

(i) the person ceases to be a member of a police force after the allegation first comes to the attention of a person mentioned in paragraph (a), or

(ii) the person had ceased to be a member of a police force before the allegation first came to the attention of a person mentioned in paragraph (a) but the period between the person having ceased to be a member of a police force and the allegation first coming to the attention of a person mentioned in paragraph (a) does not exceed the period specified in the regulations.

(3B) Regulations made by virtue of subsection (3A) must provide that disciplinary proceedings which are not the first disciplinary proceedings to be taken against the person in respect of the alleged misconduct, inefficiency or ineffectiveness may be taken only if they are commenced within the period specified in the regulations, which must begin with the date when the person ceased to be a member of a police force.”

(2) Clause 27(7) contains a saving:

“(7) Regulations made in pursuance of section 50(3A) of the Police Act 1996 (as inserted by subsections (2))—

- (a) may not make provision in relation to a person who ceases to be a member of a police force before the coming into force of subsection (2).... ;*
- (b) ...*
- (c) may make provision in relation to a person who ceases to be a member of a police force after the coming into force of this section even though the alleged misconduct, inefficiency or ineffectiveness occurred at a time before the coming into force of subsection (2) , but only if the alleged misconduct, inefficiency or ineffectiveness is such that, if proved, there could be a finding in relation to the person in disciplinary proceedings that the person would have been dismissed if the person had still been a member of a police force or a special constable.”*

For ease of reference I have removed from the above extract any reference to the position of special constables under the Bill’s proposed changes. The tracked changes version of clause 27 showing changes made in committee can be found in PDF format on Parliament’s website.²

6. Thus, as currently drawn in clause 27(2) of the Bill inserting new section 50(3A) of the Police Act 1996, regulations may be made under which disciplinary proceedings could be commenced against a former police officer (“the officer”) where (i) the alleged misconduct occurred while the officer was a serving as a police officer and (ii) the officer was still a police officer when the allegation came to the attention of a chief officer of police or the proceedings are commenced within such period after the date of the officer’s retirement as may be provided in the regulations.
7. Under clause 27(2) of the Bill and new section 50(3B) of the Police Act 1996, regulations made under subsection (3A) must provide that when second or subsequent disciplinary proceedings in respect of the same alleged misconduct are contemplated they must be brought within such period after the officer’s retirement as the regulations made may provide.
8. However, by clause 27(7)(a) of the Bill, any regulations made under new section 50(3A) of the Police Act 1996 could not apply retrospectively to any officer who

² <http://services.parliament.uk/bills/2015-16/policingandcrime/documents.html>

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ceased his service as a police officer before the date on which proposed section 27(2) of the Policing and Crime Act came into effect. If the officer retired after proposed section 27(2) came into effect, proceedings for misconduct that occurred *before* proposed section 27(2) came into effect could be instituted provided that the misconduct, if proved, would have justified dismissal.

9. It would seem that if clause 27 of the Policing and Crime Bill is approved by Parliament in the terms in which it currently appears the position of Mr Kennedy and any other officer who had retired before 12 January 2015 will not have changed. However, the Inquiry cannot know what, if any, further amendments will be made to the Bill in its passage through Parliament.
10. Serving and former police officers were invited by the Inquiry to submit position statements on the question whether the Inquiry should request any form of undertaking from police employers. No serving or former police officer represented by Slater and Gordon asked the Inquiry to make a request; nor at that stage did Mr Kennedy. The Metropolitan Police Service as an institution opposed any request for a blanket undertaking concerning disciplinary proceedings and suggested that if the issue arose in the Inquiry it could be reconsidered. Mr Peter Francis asked the Inquiry to make the request in order to encourage other serving officers to frankness. In my 'minded to' note (dated 3 March 2016) I indicated a provisional view that I should not at present make the request and that remained my view at the time of my Undertakings ruling of 26 May 2016, subject to the issue recently raised by Mr Roscoe.
11. Since my minded to note was published there has been a change of circumstances, namely the real possibility that the law may in future allow for disciplinary proceedings to be commenced against former police officers who retired years before the current Inquiry was announced and before any complaint of misconduct was made. The issue I have to resolve is whether, in fairness, former police officers who thought they were safe from disciplinary proceedings should be given the opportunity to make fresh representations in these altered conditions. The Inquiry could simply wait to see the form in which clause 27 of the Policing and Crime Bill is enacted. However, Government is shortly to enter a period of 'purdah' before the referendum on the United Kingdom's membership of the European Union and, shortly after the referendum, Parliament will enter the summer recess. It seems unlikely that the Policing and Crime Bill will progress to its final stage in Parliament until the 2016/2017 session. If the Inquiry were to await the legislative outcome its work of investigation with former police officers could be seriously delayed. I have therefore

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decided that it is necessary to anticipate possible events so that the Inquiry can be prepared for all eventualities.

12. I shall direct that:

- (1) Any core participant who is a police officer or former police officer may, if they wish, submit to the Inquiry a further position statement on the issue whether the Inquiry should seek from any police disciplinary authority an undertaking not to use in future disciplinary proceedings any evidence, written statements, documents or things provided to the Inquiry (or such other undertaking as the core participant wishes to propose).
- (2) Such a position statement should be submitted on the factual assumption that during the course of the Inquiry, or later, the law will change so as to permit the institution of disciplinary proceedings against a former police officer notwithstanding the officer's retirement or resignation before the complaint was received and/or an investigation commenced.
- (3) Any such position statement (which should be reasoned but need not be fully argued) should be received by the Inquiry by 4 pm on Tuesday, 21 June 2016.
- (4) On receipt of position statements they will be distributed to the other core participants.
- (5) Position statements in response from police and non-police core participants shall be submitted to the inquiry by 4 pm on Tuesday, 12 July. Subject to further application to the Chairman there should be a single joint response from the co-operating group of non-police, non-state core participants.
- (6) Upon receipt of responses the Chairman will consider whether an oral hearing should take place and, if so, a timetable towards an oral hearing.

8 June 2016

Sir Christopher Pitchford
Chairman, Undercover Policing Inquiry