

IN THE UNDERCOVER POLICING INQUIRY

FURTHER SUBMISSIONS ON BEHALF OF THE NPCC ON THE ISSUE OF UNDERTAKINGS

1. These submissions are filed on behalf of the National Police Chief's Council (NPCC) in accordance with the Chairman's Further Directions on the preliminary issue of Undertakings issued on 8 June 2016 and in response to the further submissions filed on 21 June 2016 on behalf of Mark Kennedy, Peter Francis, and the Slater Gordon officers. They are restricted to a consideration of the position of retired officers.
2. Submissions on the issue of undertakings in relation to disciplinary proceedings were filed on behalf of NPCC on 25 January 2016 in which the legal framework, and the disciplinary context were addressed and those submissions are repeated.¹ In essence the NPCC submitted that there was a significant legal question mark over whether a general undertaking could lawfully be given by the appropriate authority [AA] or the Independent Police Complaints Commission [IPCC] that disciplinary proceedings would not be brought against police officers. It appeared to the NPCC that the statutory and regulatory regime imposed duties on the AA in relation, among other things, to the recording of disciplinary complaints,

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determining whether they should be investigated and the making of severity assessments.

3. It is submitted that the considerations referred to in the NPCC's earlier submissions apply with equal, if not stronger force to any question that might arise in relation to retired officers and any possible amendment of the current statutory framework enabling such officer to be subjected to disciplinary process.
4. The parliamentary developments leading to the need for reconsideration of the Chairman's ruling of 26 May 2015 are described in the Further Directions of 8 June 2016. It is apparent that the proposed amendments to the regulations extend the disciplinary powers to retired officers, but, as at present drafted, do not extend to officers who retired before the date on which the provision came into effect. Therefore if that proposal is approved by Parliament no officer retiring before 12 January 2015 will be affected. However there is some uncertainty as to whether any further extension of the retrospective effect of the amendments to retired officers will be put forward. Therefore the factor potentially inhibiting a retired officer giving full and frank evidence is a speculation that legislation might bring him/her back into the scope of the regulations.
5. It is noted that Mark Kennedy submits that he has a legitimate expectation that he would not have to face disciplinary process after his retirement.² It is accepted that it is possible for such a

² Submissions on behalf of Mark Kennedy 21/6/16 para 11

legitimate expectation to arise out of representations made by the appropriate authority. It has been held that where a legitimate expectation was communicated to the officer that he would be permitted to resign, it would be unlawful for a public body not to give effect to it unless that course of action was justified: **R (Birks) v Commissioner of Police of the Metropolis [2014] EWHC 3041, [2015] ICR 204, para 46.** However the judge concluded that if a case was sufficiently serious the Appropriate Authority would/might be justified in the public interest in departing from the previous representation to ensure that the officer remained subject to police disciplinary process.

6. However there can have been no representations by an appropriate authority in relation to as yet unpublished, let alone unenacted legislation. Furthermore it remains open to question whether it would be lawful for any such representation to be made in blanket form, without an exercise of discretion taking account of the individual facts and the balance of public interest in a particular case. Indeed such an undertaking might not be effective as it is impossible to predict whether the undertaking would cover any possible obligations imposed by new legislation. It is respectfully suggested that neither a Chief Constable nor a Public Inquiry can lawfully preempt the will of Parliament. Therefore, even if a Chief Constable was requested to give a generic undertaking, and did so, this might not avoid later legal challenge in a particular case. Therefore the fear of later proceedings could not be entirely removed in this way.

7. The submissions on behalf of Mark Kennedy suggest that in relation to the public interest there are no operational safety concerns regarding retired officers and that it is in the public interest that retired officers are able to give open and frank evidence without fear of personal consequences.³ Similar submissions are advanced on behalf of Peter Francis.⁴ The NPCC remains anxious to cooperate with the inquiry to ensure that all witnesses are able to give full and frank evidence and believes it is in the public interest to do so. However it remains unable to recommend that Chief Constables give a blanket undertaking, but submits that the issue should be considered by relevant Chief Constables on a case by case basis as they arise. In each case the public interest in this inquiry receiving open and frank evidence, which the NPCC accepts and wishes to support, may have to be balanced against the public interest, acknowledged in the **Birks** case, in ensuring that public officials are held to account. It would appear from the statement of Mr Burnham MP in the House of Commons on 27 April 2016⁵ that a public interest of this sort is being advanced in favour of the proposed change in the law. It might be thought that this Inquiry could be said to serve that purpose, but it is suggested that this ought to be a matter for each relevant Chief Constable to consider having regard to the circumstances relevant to his/her own officers. If the Inquiry is minded to request either blanket or specific undertakings it will be a matter for each Appropriate Authority,

³ ibid paras 9, 10, 12

⁴ Further submissions on undertaking on behalf of Peter Francis [21/6/16] para 3

⁵ Quoted in the Further Directions of 8 June 2016 para 3

be that Chief Constable or Police and Crime Commissioner, to decide whether to accede to that request having regard to their own judgment of the balance of the public interest.

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