

# UNDERCOVER POLICING INQUIRY

## Undertakings

### Retrospective disciplinary proceedings

#### Ruling

#### Introduction

1. On 8 June 2016 I issued Further Directions relating to a change of circumstances brought about by statements made in the House of Commons to the effect that the Policing and Crime Bill may be amended to introduce a provision permitting retrospective disciplinary proceedings for misconduct against a police officer who had long retired from the force. In the light of this development the Inquiry sought further position statements from the police officer core participants to be served by 4 pm on 21 June 2016. Any responses were to be filed by 4 pm on 12 July 2016.

#### Further position statements

2. In his further position statement of 21 June 2016 **Mark Kennedy** requested that the Inquiry seeks from the Metropolitan Police Service an undertaking in respect of retrospective disciplinary proceedings. It was asserted that Mr Kennedy had a reasonable expectation, having left the police force several years ago under the then current regulatory regime, that he would not be the subject of any disciplinary proceedings. It was submitted that fairness required that his status in this respect should not be the subject of change or uncertainty. It is unclear, from paragraph 13 of Mr Matthew Butt's submissions on behalf of Mr Kennedy, whether he is seeking immunity from disciplinary proceedings or an undertaking that would protect Mr Kennedy from the use against him in disciplinary proceedings of evidence given by Mr Kennedy to the Inquiry. Since it is specifically suggested that an undertaking might be given in the terms set out at paragraph 23 of my Undertakings Ruling of 26 May 2016, adjusted to apply to disciplinary rather than criminal proceedings, I have assumed that Mr Kennedy is seeking the latter.
3. When the Inquiry sought position statements as to undertakings generally, the police officers represented by **Slater and Gordon** made no request to the Inquiry that an undertaking should be sought from their employers or anyone else as to current or future disciplinary proceedings. In a letter of 21 June 2016 they now seek an undertaking whose effect would be to prevent the disciplinary authority from relying in *any* disciplinary proceedings upon evidence given by the officer to the Inquiry. No distinction is made between proceedings taken under existing disciplinary regulations and proceedings taken under any amendment to the regulations permitted by the Policing and Crime Bill. No explanation is provided as

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to the change of position concerning *serving* police officers. I do not intend to re-open my conclusion as to the disciplinary position of police officers who are currently serving save by way of review in specific circumstances that require it.

4. **Peter Francis** had asked the Inquiry to seek undertakings protecting officers or former officers from the use against them in disciplinary proceedings of evidence they provide to the Inquiry. In further submissions of 21 June 2016 that position was repeated, although no additional reasons were given for the request made.
5. In a response dated 11 July 2016 the **National Crime Agency** did not seek to advance any further submissions but repeated its assertions that to seek disciplinary undertakings would be “very unusual” and that the seeking of an undertaking might “impact negatively on the ability of the relevant authorities to enforce discipline”.
6. On 14 July 2016 the **Metropolitan Police Service** responded that in relation to *former* police officers the Commissioner was, if requested, willing to provide an undertaking not to use in disciplinary proceedings against him or her evidence provided by the officer to the Inquiry. Such an undertaking would not be provided to an officer who continued in service only by reason of the operation of regulation 10A of the Police (Conduct) Regulations 2012, which prevents certain officers from retiring without approval; neither would it apply where the proceedings were instituted under the direction of the Independent Police Complaints Commission. The Commissioner is willing to give this undertaking because he recognises that, in the case of officers who have already retired (and who therefore have an expectation that no disciplinary proceedings will follow), there may otherwise exist a real incentive not to make full and frank disclosure of any wrongdoing to the Inquiry.
7. In its first position statement (drafted by Ms Fiona Barton QC) the **National Police Chiefs' Council** submitted that it would be arguably unlawful, and certainly inappropriate, for a Chief Constable to provide a general undertaking in respect of disciplinary proceedings against police officers.<sup>1</sup> Certain complaints about the conduct of police officers must be referred to the Independent Police Complaints Commission and further steps may be directed by the Commission. Other misconduct matters are governed by regulation 12 of the Police (Conduct) Regulations 2012. Regulation 12 (4) provides that where the conduct, if proved, would amount to gross misconduct the matter *must* be investigated.

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<sup>1</sup> See *R (Friend and others) v Greater Manchester Police Authority and another* [2009] EWHC 3152 (Admin) at paragraph 34

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8. In its position statement of 15 July 2016 (drafted by Sir Robert Francis QC) the Council repeated its earlier submissions and added that even if, under the then existing regulatory regime, Mark Kennedy had a legitimate expectation that no future disciplinary proceedings would take place, circumstances may nonetheless arise in which disciplinary proceedings could be instituted lawfully.<sup>2</sup> Secondly, it is submitted that a general undertaking would amount to an unlawful fetter on discretion. Each decision should be taken according to its particular facts. Thirdly, it is submitted that it would be wrong for a Chief Constable to seek to pre-empt the will of Parliament by providing a general undertaking that sought to anticipate and avoid directory legislation.
9. On 15 July 2016 Tamsin Allen, on behalf of the **non-police, non-state co-operating group of core participants**, informed the Inquiry that her group wished to reserve their position pending clarification from the ‘State parties’ as to the sanctions available should disciplinary proceedings be taken against a retired police officer. The information received would cast light on the issue whether available sanctions would constitute a real deterrent to frank participation in the Inquiry.
10. On 5 August 2016 Ms Sarah Le Fevre, on behalf of the Metropolitan Police Service, provided a Note to the Inquiry. Ms Le Fevre drew attention to clause 28 and schedule 7 (now clause 29 and schedule 8) of the Policing and Crime Bill that would insert into the Police Act 1996 new sections 88A – 88M.
11. New section 88B would require the College of Policing to maintain the “police barred list”. A person included in the police barred list may not be employed by the police service or some other policing-related institutions or any other public body specified in regulations. By section 88A (1)(b) a retired police officer found guilty of misconduct that would have resulted in dismissal had the officer still been employed as a police officer must be reported to the College of Policing for inclusion on the police barred list. A person thus placed on the list would be ineligible for future police employment.<sup>3</sup>
12. The sanction of dismissal is, of course, not available in the case of a retired police officer. The sanction of a fine was abolished for all officers by the Police (Conduct) Regulations 2008.

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<sup>2</sup> See *R (Birks) v Commissioner of Police for the Metropolis and others* [2014] EWHC 3041 (Admin) at paragraphs 46 - 48

<sup>3</sup> The College of Policing already keeps and has since 1 December 2013 kept a ‘Disapproved Register’ of officers who have been dismissed for gross misconduct or who have resigned or retired while subject to a gross misconduct investigation where, but for resignation or retirement, there would have been a case to answer. The effect of inclusion on the register is to exclude such officers from future employment in the police force.

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13. It was not known whether it was the Government's intention to publish amendments to the disciplinary regulations providing specific sanctions in respect of those officers who are found guilty of misconduct as a result of the operation of clause 28 (now 29) of the Bill and new section 50 of the Police Act 1996. However, there is no indication in Hansard or in any Government publication known to the Inquiry that the Government intends to make regulations specifically for the purpose of setting penalties in the cases of officers against whom disciplinary proceedings are taken after retirement or resignation. On the contrary, in a Government fact sheet dated July 2016 the objectives of clauses 28 and 29 are described as follows:

*"Extension of disciplinary system to former officers*

10. It is important that serious allegations can be fully investigated and resolved even if the officer involved is no longer serving with a police force. If any officer has committed an act so serious that it would have warranted dismissal, then they should be held to account for their actions. The Bill **extends the police disciplinary system, which currently applies only to serving police officers, to former officers.**
11. If an officer resigns or retires from a force while subject to investigation or disciplinary proceedings, the Bill **will enable that investigation to continue to conclusion and, if gross misconduct is proven, the officer will be struck-off, preventing him or her from again serving in a police force.**
12. Similarly, where a serious allegation is made (which would have amounted to gross misconduct) in relation to conduct whilst that officer was serving, the force will be able to investigate the matter to conclusion and, if gross misconduct is proven, the officer can be struck-off. This provision will be subject to a time limit, starting with the date an officer leaves the force, which will be set in regulations.
13. The Government intends to set this at 12 months. This is judged to be sufficient in ensuring that if an officer resigns or retires in advance of an allegation coming to the attention of the force, an investigation and appropriate disciplinary proceedings can still commence.
14. However, the need for disciplinary action must be balanced against a test of fairness and proportionality. Any investigations and disciplinary

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action must be taken in a timely manner. It would not be right for officers to remain subject to disciplinary action indefinitely.

15. It is also important to recognise the distinction between matters amounting to criminal conduct, which can be investigated and prosecution brought at any stage, versus non-criminal matters which do not meet this threshold to which some kind of limit must be applied.

*Striking-off police officers found guilty of gross misconduct from any policing and law enforcement activity*

16. Members of a police force who commit serious wrongdoing and are dismissed for misconduct should not be able to serve in any law enforcement capacity in the future.
17. In December 2013, the College of Policing introduced a new national ‘disapproved register’ of officers struck-off from the police, which is available for use by vetting and anti-corruption officers. This information is held privately by the College for police vetting purposes. **The Bill gives the College of Policing the power to maintain and publish a ‘struck-off list’ to expand and strengthen its existing disapproved register. Within the Bill the list is known as the “Police Barred List”.**
18. **Police forces will be required to report the dismissal of any members of the police to the College of Policing**, who will collate and maintain this information for vetting purposes. The information will be shared with police forces and other law enforcement bodies to assist with vetting and recruitment. Police forces will also be required to report members who have left the force but are subject to disciplinary proceedings. **Police forces will have a duty to consult the list** so that officers cannot be re-employed by the same or another force.
19. The College of Policing will publish a version of this list which will include details of police officers who have been dismissed for misconduct or gross misconduct. The list will also include officers who resign or retire but are subsequently struck-off following disciplinary proceedings.
20. Officers will be placed on the public “struck-off list” for five years. All names will be permanently retained on the private register.

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21. The Bill also includes provisions for a Police Advisory List, which will not be published but will include details of officers who resign or retire whilst under investigation or disciplinary proceedings, as well as former officers under investigation, pending the outcome of those proceedings. This will be available for vetting purposes and does not carry a statutory bar but it will ensure during recruitment that police forces are aware of any ongoing proceedings. The advisory list will also include policing volunteers who have been dismissed or had their designated status withdrawn for wrongdoing.”<sup>4</sup> [Emphasis in the original.]
14. Paragraphs 12 and 13 of the factsheet should now be read subject to the announcement made by Lord Keen in the House of Lords on 18 July 2016 during the second reading of the Bill (see paragraphs 17 and 18 below).
15. On 14 September 2016 the non-police, non-state core participants notified the Inquiry that they had no submissions to make in response to Ms Le Fevre’s Note.
16. On 15 September 2016 the Inquiry received e-mail communications from Jane Deighton of Deighton Pierce Glynn and Paul Heron of the Public Interest Unit at Lambeth Law Centre indicating an intention to make further submissions. Mr Heron’s explanation for this late indication was that neither he nor Maya Devi Lal had been able to attend a meeting of the co-operating group of non-police, non-state core participants that had resolved to make no further representations. Ms Deighton said that she was attracted by Mr Heron’s suggestion that a distinction might properly be made between those working in the field and more senior officers undertaking supervisory and managerial roles. However, on 15 and 19 September respectively Ms Deighton and Mr Heron recognised (as I had said in my ruling of 26 May 2016 at paragraph 7) that should a specific need arise in the Inquiry to consider requesting an undertaking in respect of disciplinary proceedings I would be willing to entertain further submissions. In the result, they do not seek to advance further arguments at this stage.

### Progress of the Policing and Crime Bill

17. The Policing and Crime Bill was introduced to the House of Lords in an amended form on 14 June 2016. Clause 27 had become clause 28, clause 28 had become clause 29 and schedule 7 had become schedule 8. There were, however, no

<sup>4</sup> See Government fact sheet at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/537262/Factsheet\\_4\\_-\\_police\\_discipline.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537262/Factsheet_4_-_police_discipline.pdf)

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substantive amendments made to either clause. The Bill received its second reading in the House of Lords on 18 July 2016.

18. In the House of Lords at the Bill's second reading, Lord Keen, for the Government, drew the attention of Members to the fact that:

*"the Bill and accompanying regulations will enable disciplinary action to be taken where a serious allegation is received within 12 months of an officer leaving the force. If, in such a case, gross misconduct is proven, the officer can then be barred from serving in any police force".*

19. Lord Keen then referred to representations made by the Official Opposition:

*"We believe a 12-month cut-off is both fair and proportionate, but we have listened to the representations from the Official Opposition and others who have argued for this period to be extended. In response, the Government are committed to bringing forward an amendment in Committee that will, exceptionally, allow for proceedings to be brought later in the most serious misconduct cases which are likely to do serious and lasting damage to the reputation of the police force or policing more generally."*

20. It is to be noted that no proposal has been made in either House for the amendment of clause 28 (7)(a), which continues to prohibit the application of the new provisions to a person who ceased to be a police officer before clause 28 (2) and (3) of the Bill is brought into effect. It was the prospect that the Act, as passed, would operate retrospectively to permit the institution of disciplinary proceedings against a long-retired police officer that caused me to invite further position statements.<sup>5</sup>

### **Home Office submission**

21. On 9 September 2016 the Home Office made a submission to the Inquiry (posted on the Inquiry's web site) setting out the provisions of the Policing and Crime Bill as they related to disciplinary proceedings taken against retired officers. As to the prospect that these provisions might be applied retrospectively the submission drew attention to a statement made on 13 June 2016 by the Policing Minister to the House of Commons during the debate at the Bill's Report stage:

*"The measure will apply to police officers serving with a police force at the point at which the provisions come into force. In line with established*

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<sup>5</sup> Undertakings Further Directions dated 8 June 2016 paragraphs 3 and 11

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*principles, we do not believe that it would be appropriate to apply such a provision retrospectively.”*

22. It is now clear that the Government’s intention is that the normal rule against the retrospective operation of a statute should apply: the Act will apply only to those police officers who retire after the Act’s commencement. As I have noted above, there has been no proposal from the Official Opposition that the Bill should be amended to apply clause 28 to officers who retire before the Act passes into statute.

### Conclusion

23. I have reached the conclusion that the fears expressed on behalf of Mark Kennedy and others as to the retrospective effect of the Policing and Crime Act, as it will become, are very unlikely to be realised.
24. Furthermore, the Bill adds very little by way of sanction that does not already apply under existing regulations and the operation of the ‘Disapproved Register’ by the College of Policing. It does not seem to me that the Policing and Crime Bill contains or will contain, when passed into law, any provision that would create in the mind of a long retired police officer a disincentive to tell the truth to the Inquiry.
25. For these reasons it would be inappropriate for the Inquiry to make any request for undertakings concerning disciplinary proceedings relating to former officers, long retired. I will, as I have said before, keep the matter under review but on the information currently available to me I do not intend to ask the Metropolitan Police Service or any other relevant police authority to give an undertaking in respect of disciplinary proceedings whether in respect of current or former police officers.

22 September 2016

Sir Christopher Pitchford  
Chairman, Undercover Policing Inquiry