COUNSEL TO THE INQUIRY'S NOTE ON THE REHABILITATION OF OFFENDERS ACT 1974 AND ITS IMPACT ON THE INQUIRY'S WORK

Introduction

1. The purpose of this note is to consider the impact of the Rehabilitation of Offenders Act 1974 ("the Act") on the work of the Inquiry. In particular we explore how the Act applies to the Inquiry and the likely impact on the Inquiry's work. The Act is a complex piece of drafting and in a number of key respects the way in which it applies in the context of a statutory public inquiry is open to argument. At this stage, we have gone no further than to identify and discuss the issues which arise. We propose to take into account any submissions which the core participants wish to make in response before expressing a settled view.

2. Spent convictions are private and rehabilitation is important. However, we are not convinced that the Inquiry will be able properly to discharge its terms of reference without receiving some evidence about spent convictions and the circumstances ancillary to such convictions. The Inquiry needs to receive such evidence, *where it is necessary*, and which does so in a way which is *workable*. The Inquiry considers this to be an issue of sufficient importance that core participants should be permitted the opportunity to make submissions before the Chairman decides whether or not he needs to request exceptions from the normal operation of the Act. The Secretary of State for Justice, who has the power to make such exceptions, exercisable by statutory instrument, is invited to make submissions on the issue, if so advised..

3. The structure of this note is to pose and discuss three questions in connection with the receipt, consideration and admission of material relating to offences committed by individuals whose convictions are now spent:

   (1) To what extent will the work of this Inquiry require it to consider evidence of a person's previous criminal convictions, which may be spent convictions[1] within the meaning of the Act?

   (2) To what extent might the Act operate so as to prevent or restrict the Inquiry from receiving and/or considering and/or admitting evidence concerning spent convictions[2]?

[1] For the purposes of this note, references to convictions are to be read as including cautions and equivalent warnings and reprimands given to those under the age of 18 which, following amendment of the Act by the Criminal Justice and Immigration Act 2008, can also become spent.

(3) If, and to the extent that, the Inquiry is prevented from receiving and/or considering and/or admitting evidence concerning spent convictions, or is restricted in doing so, what potential exceptions might be sought to ensure that it is in a position to discharge its terms of reference and comply with the duty of fairness?

4. These questions – and this note - are confined to considering the potential relevance of spent convictions to the work of the Inquiry, and any restrictions on the receipt, preliminary consideration and admission of evidence concerning them which arise from the operation of the Act. It does not seek to address or to consider any wider issues such as whether, if such information can be received, assessed and used by the Inquiry, it should be restricted from further disclosure and/or publication pursuant to section 19 of the Inquiries Act 2005 ('the 2005 Act'); that is a separate and important topic which can only fully be addressed once the answer to the issues raised in this note have been resolved. Nevertheless, this issue should be kept in mind, as the restrictive powers may be relevant to the degree of prejudice, which the Act seeks to avoid, those subject to spent convictions might suffer by reason of disclosure of that fact to the Inquiry.

5. We refer in the course of posing the questions above, and elsewhere in this note, to the admission of evidence of spent convictions. Section 4(1)(a) itself circumscribes the admissibility of evidence of spent convictions. In doing so, we do not disregard the differences between adversarial proceedings – where the question of admissibility is most often a question for a judge who presides over the proceedings - and inquiry proceedings, where the question of what evidence is relevant and necessary to the fulfilment of the terms of reference is one taken by the inquiry itself. For the purposes of this note we have assumed that where the Inquiry deems information to be both relevant and necessary, and therefore capable of being relied upon in discharging the terms of reference, that information is admitted into evidence.

6. It should be remembered that the work of the Inquiry remains at an early stage. Whilst the conclusions drawn in this note concerning the evidence the Inquiry expects to receive or to need to consider are based on a necessarily incomplete understanding of the underlying factual situation, we are nonetheless satisfied on the basis of material that has been gathered so far that this is an issue that falls to be considered, and that must be considered now in order to ensure minimum disruption to the further progress of the Inquiry's ongoing work.

[2] Nothing in the Act affects the position where someone has committed an offence for which they have never been prosecuted, or of which they have been acquitted (e.g. because a prosecution was halted on grounds of abuse of process).

The extent to which evidence about previous convictions may be relevant and necessary

7. We have identified three situations specific to the work of the Inquiry in which, in the proper discharge of the terms of reference and a fair and balanced assessment of the available evidence, it is likely to be necessary to consider the fact and circumstances of a person's previous convictions. In addition spent convictions may, of course, be necessary fairly to reach findings of fact in circumstances where there is conflicting evidence and the credibility of conflicting witnesses has to be assessed (see further in this regard our discussion of *Thomas v Commissioner of the Metropolitan Police Service* [1997] AC 813 below at paragraphs 80-82).

Miscarriages of Justice / evidence of undercover police officers' contact with the criminal justice system whilst undercover

8. First, the Inquiry must investigate the interaction of undercover police officers with the criminal justice system. Its terms of reference oblige it to consider:

> *"Miscarriages of justice*
>
> *The inquiry's investigations will include a review of the extent of the duty to make, during a criminal prosecution, disclosure of an undercover police operation and the scope for miscarriage of justice in the absence of proper disclosure.*
>
> *The inquiry will refer to a panel, consisting of senior members of the Crown Prosecution Service and the police, the facts of any case in respect of which it concludes that a miscarriage of justice may have occurred as a result of an undercover police operation or its non disclosure. The panel will consider whether further action is required, including but not limited to, referral of the case to the Criminal Cases Review Commission."*

9. The Inquiry is also required by its terms of reference to:

> *"identify and assess the adequacy of the:*
>
> *1. justification, authorisation, operational governance and oversight of undercover policing;*
>
> *2. selection, training, management and care of undercover police officers."*

10. Where the Inquiry finds evidence which points to an undercover officer having given evidence in his or her cover identity as part of court proceedings which ended in the conviction of one or more of those standing trial, or to the involvement of an undercover officer in the events leading to such a trial which was not disclosed but

should have been, the Inquiry will need to investigate those circumstances at least as far as is required to decide whether to refer the case to the miscarriages of justice panel referred to in its terms of reference. It will also need to select instances to investigate in more depth in order to consider the systemic issues which arise. We note that miscarriages of justice are already known to have arisen from the failure to disclose the role of an undercover police officer and have been considered in a public forum – see, for example, the December 2011 report of Sir Christopher Rose concerning disclosure in relation to the prosecutions arising from the Ratcliffe-on-Soar power station protest. The Inquiry will be interested in instances where the officer him or herself was tried in an undercover persona; cases in which the officer was involved as a witness; and cases in which the undercover officer may have acted as an agent provocateur.

11. It follows that the Inquiry expects to request and to receive material relating to particular potential miscarriages of justice said to have resulted from the undisclosed involvement of an undercover police officer; this will inevitably include some evidence falling within the definition of a spent conviction and/or circumstances ancillary thereto[3]. It is safe to assume for these purposes that at least some of that material will be considered by the Inquiry to be relevant and necessary to discharging the terms of reference, since to investigate a potential miscarriage of justice without reference to the circumstances of the underlying offence, trial and particularly the conviction would be to proceed on a basis inadequate to facilitate the drawing of properly reasoned conclusions as to the facts of what occurred.

Justification

12. Second, the terms of reference require the Inquiry to identify and assess the adequacy of the justification of undercover policing. In order to reach conclusions in relation to this aspect of the Inquiry's remit, we consider it will be necessary, amongst other things, to look in some detail at a selection of individual operational examples. Whilst the extent of investigation into justification will be determined by the circumstances of any particular case, in relation to assessments of whether a particular deployment of an undercover officer was adequately justified we envisage that there will be a need, in some cases, to consider particular (spent) convictions of those subject to the deployment, and the circumstances ancillary to those convictions.

13. The issue of the adequacy of justification and its relationship to previous convictions may arise in different ways. For example, a police undercover operation that targeted suppliers of firearms or drugs might have resulted in the conviction of some

[3] See Chapter 10 of *Undercover* by Evans and Lewis, Guardian Books, for examples of relevant allegations of this kind which are likely to be of interest to the Inquiry.

or all of those targeted, which may be said to provide, albeit retrospectively, some justification for the use of the tactic. Alternatively, we anticipate that there will be cases in which the justification for an undercover operation, as expressed at the point the operation was authorised, will include reference to the previous, now spent convictions of those the target of the operation, as well as references to other past conduct. Whether or not there was ongoing justification for an operation already commenced might require consideration of offences committed by persons within the target group during the currency of an undercover deployment which resulted in convictions which are now spent. A fair and balanced examination of whether any justification was adequate would, in our view, require consideration to be given to the activities of the individuals and/or groups targeted including their previous convictions and the circumstances ancillary thereto which were known to the police at the time.

14. It is not necessarily the case that in each such example the provisions of the Act will be engaged – for example, reference to the fact that an unspecified person or persons had previously been convicted, or were convicted as a result of the undercover operation, in circumstances where that reference does not involve or lead necessarily to the identification of the person(s) concerned would not, it seems to us, necessarily engage the Act. But the Inquiry's investigations are very likely to include examples where it would not be possible to carry out an effective and balanced investigation into the issue of justification without considering evidence of previous convictions of particular individuals.

15. To be in a position in which the Inquiry was permitted to consider the relevance to justification of the previous conduct of a person targeted which did not result in a conviction, but at the same time not to be permitted to consider his or her previous conduct where it constituted the offence which resulted in the conviction, could lead to misleading and unfair conclusions as to the adequacy of justification. These circumstances would lead to a failure on the part of the Inquiry properly and fairly to fulfil its terms of reference. In relation to the infiltration of protest groups, how is the Inquiry to assess whether or not there was a public order justification if it has to proceed on the statutory fiction that all spent convictions, and the conduct constituting the offences resulting in those convictions, did not occur? It will not be able to get to the truth or to make findings which command public respect unless it can consider the actual facts.

Anonymity applications

16. Third, an important ancillary function in the context of this Inquiry is the making of decisions upon applications pursuant to section 19(1) of the 2005 Act, including those which seek restrictions amounting to anonymity. The Inquiry's task in considering such applications, as set out in the Chairman's ruling on the legal principles and approach

to applications for restriction orders dated 3 May 2016, will include making an assessment of the nature and gravity of any alleged risk of harm to an individual applicant.

17. It seems to us that in order to properly assess the nature and gravity of any alleged risk of harm in a way that is fair to the applicant and gives proper weight to all relevant factors, the Inquiry must have access to all available relevant and necessary information about that which is said to give rise to the risk to be reduced or averted by the making of an order. At least some applicants for anonymity will want to draw the Inquiry's attention to the criminal activities of those they infiltrated as being relevant to ongoing risk, or a subjective fear of ongoing risk. It follows, we suggest, that the previous criminal activities of particular individuals are likely to be matters about which it is necessary for this Inquiry to receive and consider evidence in the context of making assessments of risk; that may include spent convictions and related circumstances. Such evidence may either tend to confirm or to undermine the level of risk asserted by the applicant. Either way, we consider that it is in the public interest that decisions on anonymity should be made on the basis of the true facts. In cases where it is asserted that Article 2 and/or Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention') are engaged it would additionally be consistent with the high level of scrutiny which such cases demand for the Inquiry to make its decision on the basis of the true facts.

18. In order for the Inquiry to conclude that for the purposes of anonymity applications it is safe to proceed on the basis that no regard will be had to spent convictions or the conduct giving rise to them, it would need to be confident that in all such cases no ongoing risk could properly be inferred from the conduct underlying such convictions. Since even conviction for serious instances of violence may not result in a prison sentence of more than four years imprisonment, particularly in cases where there is a timely guilty plea, we do not consider that this is a safe assumption on which to proceed.

19. In the context of anonymity applications, it is often likely to be the case that it will not be possible for the Inquiry to seek the consent of the rehabilitated person to rely upon evidence of a spent conviction, pursuant to s.7(2)(f) of the Act (see paragraph 77 below). To do so would be unfair to the applicant because it would defeat the purpose of the application by revealing, or risking the revelation of, the identity of the person seeking anonymity before their application had been decided.

The Rehabilitation of Offenders Act 1974

20. The Act operates so as to render certain convictions 'spent' after a specified period has elapsed. Once a conviction is spent, the Act further provides that the person

convicted is to be treated as if never convicted, subject to a number of exceptions set out within the Act itself, and in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 ["the Order"]. The Act does not operate so as to provide a right of confidentiality in relation to spent convictions, instead it puts in place a regime which protects an individual from being prejudiced by the existence of such convictions: *L v Law Society* [2008] EWCA Civ 811, per the Master of the Rolls at [25].

Section 1(1)

21. By virtue of s.1(1) of the Act, its provisions apply to convictions whether they occurred before or after the commencement of the Act. Since the Inquiry's terms of reference require it to investigate matters from 1968 onwards, it is possible that there will be potentially relevant convictions which pre-date the Act, but which by virtue of s.1(1) may nonetheless have become spent convictions under the Act.

22. The rehabilitation periods set down in the Act are not repeated in this note but can be found in section 5 and Schedule 2 to the Act. For the purposes of understanding the impact of the Act on this Inquiry it is sufficient to have regard to the following:

    a. A conviction resulting in a sentence of imprisonment of more than four years or imprisonment for public protection can never become spent – s5(1).

    b. Convictions otherwise become spent after rehabilitation periods which vary with the seriousness of the sentence, but do not exceed 7 years after the completion of the sentence – s5(2).

    c. A caution will, save in circumstances which are likely to be very limited in the context of this Inquiry, become spent at the time it is given – Schedule 2, paragraph 1(1)(b).

    d. A conviction which would otherwise be spent may have its rehabilitation period extended by the commission of further offences within the original rehabilitation period – s6(4).

    In light of the age and nature of much of what this Inquiry is considering, it is considered likely that many potentially relevant previous convictions will be spent convictions.

Section 4(1) – Prohibition on treating a rehabilitated person for all purposes in law as having committed the offence

23. The effects of a conviction becoming spent are specified in section 4 of the Act. Pursuant to s.4(1), a rehabilitated person is to be treated "*for all purposes in law*" as a person who has not committed or been charged with or prosecuted for or convicted

of or sentenced for the offence. What constitutes the treatment of a rehabilitated person for a purpose in law is an important question. Two cases which have considered this provision are worthy of mention.

24. In *X v Commissioner of Police of the Metropolis* [1985] 1 WLR 420 it was alleged that the Commissioner had wrongly disclosed a spent conviction to Interpol in breach of s.4(1) and s.9 of the Act (which we discuss further at paragraphs 88 -91 below). The allegation that the disclosure contravened s.4(1) was conceded in argument because it was accepted that s.4(1) does not go so far as to impose a positive duty not to disclose spent convictions: see 421H – 422A. The s.9 issue was determined in favour of the Commissioner, Mr Justice Whitford concluding, at 426B-C, that section 9:

> *"...is concerned with situations in which persons, who quite rightly become aware of specified information in the course of their official duties, may for some reason or another, and in no sense in any way in connection with any duty arising out of their station or office communicate to some third party that specified information..."*

25. In *N v Governor of Her Majesty's Prison Dartmoor* [2001] EWHC Admin 93, Mr Justice Turner decided that the communication by a prison governor, to local authority social services, for child protection purposes, of the fact that a prisoner had a spent conviction for a sexual offence against a child, was not prohibited by s.4(1): see paragraphs 17 to 20 of the judgment. The judge in that case felt that such a construction accorded with common sense, was compatible with the duty of social services under the Children Act 1989[4], gave effect to the fundamental human rights of children and was reinforced by the fact that s.9(2) of the Act (which creates the offence of unauthorised disclosure of a spent conviction) does not criminalise the disclosure of spent convictions by officials in the course of their official duties.

26. The judgments in the two cases above do not discuss in any detail either the concept of *treatment* for the purposes of s.4(1) of the Act or the meaning of "*for all purposes in law"*. In the *N* case, Mr Justice Turner appears to have preferred the interpretation advanced by the defendant in that case which was that the words restricted the application of the section to those in which a rehabilitated person fell to be treated for any legal purpose, or any purpose required by the law. The claimant's argument which was that the words are devoid of content or meaning was rejected. However, it is easy to see that there are arguably other meanings which might be ascribed to the

[4] We note that proceedings under the Children Act 1989 are amongst those exempted from section 4(1) of the Act by section 7(2)(cc) of the Act which is an indicator of the importance which Parliament attached to the public interest in child protection relative to the public interest in the rehabilitation of offenders.

wording in question: e.g. where the treatment of the rehabilitated person will affect his or her legal position, or have legal significance.

Section 4(1) – treatment

27. It is necessary to consider at what point an Inquiry might be said to be "*treating*" a person for a legal purpose, for the purposes of s.4(1). Unlike ordinary adversarial proceedings before a court of law, the Inquiry performs an inquisitorial function. It receives potentially relevant information – whether in response to a specific request pursuant to Rule 9 of the Inquiry Rules 2006 or s.21 of the 2005 Act, or by way of voluntary disclosure of information to it - and makes decisions about what material is in fact relevant and necessary to consider in order to discharge its terms of reference, whether that is through the making of findings of fact, or decisions ancillary to that function. It will therefore come into possession of material that it considers to be relevant and necessary but also material that will not, in the end, be admitted as evidence. In order to distinguish that which is relevant and necessary from that which is not, it is the Inquiry itself which must consider the information.

28. Having regard to the ordinary meaning of "*to treat*" in the context of treating a person – namely, to behave towards or to deal with someone - it seems to us that simply receiving information about spent convictions without using that information as evidence ought not to be interpreted as amounting to the Inquiry "*treating*" a person otherwise than in accordance with s.4(1); initial receipt of information may not even involve any positive act on the part of the Inquiry (for example, if the material is volunteered), still less the treatment of the rehabilitated person in any particular way. Neither should considering for the purposes of deciding what to do with information about a spent conviction amount to treating a person in a way which contravenes s.4(1) of the Act.

29. If the Inquiry takes a preliminary step which relies on the fact that the rehabilitated person committed, or was charged with, prosecuted, convicted or sentenced for the offence in question does it treat a person contrary to the way which is required by s.4(1)? If the Inquiry receives a document which when considered discloses a spent conviction, the Inquiry would surely not be prohibited from contacting the rehabilitated person and seeking their consent to adduce that conviction. Similarly, if it used knowledge of a person's full criminal record to establish whether or not a person was or was not a rehabilitated person so that it could make an informed decision about how to treat that information, that would not seem to us to constitute in itself treatment in the s.4(1) sense.

30. However, if the Inquiry was to admit evidence of the fact of the spent conviction then it would be treating the rehabilitated person contrary to the prohibition in s.4(1). The

Inquiry would need the prior consent of the rehabilitated person pursuant to s.7(2)(f) of the Act, or a statutory instrument made under s.7(4) of the Act exempting the Inquiry from s.4(1) altogether, or (if the proceedings of the Inquiry are proceedings before a judicial authority) a decision pursuant to s.7(3) of the Act that justice could not be done without the evidence.

31. The two paragraphs immediately above assume that treatment of a rehabilitated person for evidential purposes in the Inquiry is for a purpose in law. The arguments in favour of that assumption appear to us to be that the Inquiry will be taking evidence on oath (to which the Perjury Act 1911 applies because the Inquiry falls within the definition of judicial proceedings contained in that act: see s.1(2) thereof[5]) and that the evidence will be used in the discharge of the Inquiry's statutory duty to inquire and report. The contrary argument is that the Inquiry's factual findings and recommendations are of no legal effect (see further the discussion at paragraphs 33-59 below).

32. Before leaving the subject of treatment we draw attention to the decision of Mr Justice Nicol in *W v Chief Constable of Northumbria* [2009] EWHC 747 (Admin). The judgment in that case does not expressly refer either to s.4(1) of the Act or the meaning of "treatment" in that subsection. However, it did distinguish between two different uses of a spent conviction. Disclosure by the police of the fact of a spent conviction to the employer of a rehabilitated person for child protection purposes was held to contravene the Act: see paragraph 25 of the judgment. Although the judgment does not expressly say so, this must have been on the basis that the disclosure contravened s.4(1) of the Act[6]. By contrast, the court went on to find that the decision maker was entitled to take the fact of the spent conviction into account when deciding to disclose the fact of a subsequent allegation of similar criminal conduct to the employer. The reasoning for this decision was not explained in depth but did refer to risk assessment. It seems to us either that this part of the ruling was wrong or that it provides some support for the proposition that using knowledge of spent convictions for the purposes of risk assessment is permissible. Paragraph 58 of the judgment reads as follows:

> *"I have said above that the decision to disclose the 1987 conviction was flawed. That does not mean that it was improper for ACC Vant to take it into account in deciding whether there was a pressing need to disclose the 2007 allegation. He could. ACC Vant decided not to disclose the 2001 allegation. That does not mean he was not entitled to take it into account in making his decision regarding*

[5] Section 1(2) "The expression "judicial proceedings" includes a proceeding before any court, tribunal, or person having by law power to hear, receive and examine evidence on oath."
[6] The disclosure in that case was for a purpose in law: the police common law power to prevent crime (see paragraph 22 of the judgment).

the 2007 allegation. He could. ***He was entitled to consider that these were both matters that were relevant in assessing the potential risk which the Claimant posed to young children****."*

*[**emphasis** added]*

Subsections 4(1)(a) & 4(1)(b) – Prohibition on the admission of evidence relating to spent convictions or the asking of questions about the same in proceedings before a judicial authority

33. Subsections 4(1)(a) and (b) of the Act apply in "*proceedings before a judicial authority*" so as to prohibit the admission of evidence concerning spent convictions, the asking of questions about spent convictions, and to allow a person not to disclose a spent conviction in answer to any such question that may be asked:

> *"(1) Subject to sections 7 and 8 below, a person who has become a rehabilitated person for the purposes of this Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction; and, notwithstanding the provisions of any other enactment or rule of law to the contrary, but subject as aforesaid—*
>
> *(a)* ***no evidence shall be admissible in any proceedings before a judicial authority*** *exercising its jurisdiction or functions in [England, Wales or Scotland] to prove that any such person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction; and*
>
> *(b)* ***a person shall not, in any such proceedings, be asked, and, if asked, shall not be required to answer,*** *any question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or any circumstances ancillary thereto."*

*[all **emphasis** added]*

34. The application of section 4(1) appears to be less restricted than that of subsections 4(1)(a) and 4(1)(b) because the phrase "*for all purposes in law*" does not restrict the scope of s.4(1) as far as the phrase "*in proceedings before a judicial authority"* does in respect of the following subsections. Parliament could easily have used the phrase "*in proceedings before a judicial authority"* in the body of section 4(1) had it wished the scope of the body of s.4(1) to be co-extensive with that of the following

subsections. Thus, a rehabilitated person must be treated for a purpose in law as if he or she had not committed the spent offence and, if the case does not involve *proceedings before a judicial authority*, subsections 4(1)(a) and 4(1)(b) do not apply. In the present context, if the Inquiry's proceedings are for a purpose in law but are not *proceedings before a judicial authority* then all rehabilitated persons must be treated as if they had not committed any offence or offences the subject of a spent conviction unless the Inquiry's proceedings are exempted from s.4(1) of the Act.

Section 4(6) – Definition of "proceedings before a judicial authority"

35. "*Proceedings before a judicial authority*" is a term defined by s.4(6) of the Act as follows:

> *"(6) For the purposes of this section and section 7 below "proceedings before a judicial authority" includes, in addition to proceedings before any of the ordinary courts of law, proceedings before any tribunal, body or person having power—*
>
> *(a) by virtue of any enactment, law, custom or practice;*
>
> *(b) under the rules governing any association, institution, profession, occupation or employment; or*
>
> *(c) under any provision of an agreement providing for arbitration with respect to questions arising thereunder;*
>
> ***to determine any question affecting the rights, privileges, obligations or liabilities of any person, or to receive evidence affecting the determination of any such question**."*
>
> *[**emphasis** added]*

36. The scope of the definition of proceedings before a judicial authority is clearly far wider than just the ordinary courts. Elements of the definition are easily satisfied in the present context. The Chairman is a person having powers under the 2005 Act[7]. The key question is whether he has "*power ...to determine any question affecting the rights, privileges, obligations or liabilities of any person, or to receive evidence affecting the determination of any such question"*. The Inquiry panel (in this case currently the Chairman alone until an additional panel member is appointed) is under

[7] For example, power under section 17 of the 2005 Act to determine the procedure and conduct of the Inquiry; power under section 19 of the 2005 Act to make restriction orders; power under section 21 of the 2005 Act to require the production of evidence; power under section 40 of the 2005 Act to award compensation for loss of time, expenses and/or legal costs; power under rule 5 of the Inquiry Rules 2006 to designate a person as a core participant

a duty to determine facts and make recommendations and thus has a corresponding power to do so in order to fulfil the duty[8]. Again, the key question is whether the panel has "*power ... to determine any question affecting the rights, privileges, obligations or liabilities of any person, or to receive evidence affecting the determination of any such question"*.

Section 4(6) and the primary purpose of the Inquiry

37. An initial question which one must consider is whether s.4(6) of the Act is to be construed as directed at the overall purpose of the proceedings in question (i.e. what its function is). If so, one needs next to identify the substantive question/s which those proceedings determine. If not, one needs to consider not just the substantive questions but also all of the ancillary questions which fall to be determined during the course of proceedings.

38. Considering first the overall purpose of proceedings, it is easy to identify examples of the sort of proceedings which will fall within s.4(6) of the Act. For example: unfair dismissal proceedings before an employment tribunal, professional disciplinary proceedings or arbitration pursuant to an arbitration clause. However, when one turns to the proceedings of an inquiry under the 2005 Act ('a 2005 Act inquiry'), the position is not so simple.

39. First, it seems plain that section 2(1) of the 2005 Act is intended to prohibit a public inquiry from determining any civil or criminal liabilities:

> *"2 No determination of liability*
>
> *(1) An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability."*

40. In addition to the clear wording of that section, the explanatory notes to the 2005 Act explain that:

> *"Section 2: No determination of liability*
>
> *8. The purpose of this section is to make clear that inquiries under this Act have no power to determine civil or criminal liability and must not purport to do so. There is often a strong feeling, particularly following high profile, controversial events, that an inquiry should determine who is to blame for what has occurred. However, inquiries are not courts and their findings cannot and do not have legal effect. The aim of inquiries is to help to restore public confidence in systems or services by investigating the facts and making*

[8] See section 24 of the 2005 Act.

recommendations to prevent recurrence, not to establish liability or to punish anyone.

9. *However, as subsection (2) is designed to make clear, it is not intended that the inquiry should be hampered in its investigations by a fear that responsibility may be inferred from a determination of a fact."*

41. This must surely be regarded as decisive on the question of whether an inquiry has power to determine liabilities. As to the determination of rights, privileges and obligations, the position, whilst slightly less definitive, is in our view the same.

42. The Canadian Supreme Court considered the nature of a commission of inquiry in the context of the Canadian legal system in *Canada (Attorney-General) v Canada (Commission of Inquiry on the Blood System*) [1997] 3 SCR 440. The commission in question was set up to inquire into the blood system in Canada in the 1980s, through which several thousand Canadians had contracted HIV and/or Hepatitis C. It was constituted under an act the provisions of which were not identical to, but overlapped in certain aspects with, the 2005 Act, such that the commission was in all material respects very similar to a public inquiry set up under the 2005 Act. One of the issues that arose on appeal was the scope of a commission's power to make findings of misconduct. Justice Cory, giving the judgment of the Supreme Court, said this at [34]:

"A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. ***Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter.*** *The nature of an inquiry and its limited consequences were correctly set out in Beno v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia), [1997] 2 F.C. 527, at para. 23:*

A public inquiry is not equivalent to a civil or criminal trial. . . . In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate. . . . The rules of

evidence and procedure are therefore considerably less strict for an inquiry than for a court. Judges determine rights as between parties; the Commission can only "inquire" and "report". . . . Judges may impose monetary or penal sanctions; the only potential consequence of an adverse finding . . . is that reputations could be tarnished.

***Thus, although the findings of a commissioner may affect public opinion, they cannot have either penal or civil consequences**. To put it another way, even if a commissioner's findings could possibly be seen as determinations of responsibility by members* of the public, they are not and cannot be findings of civil or criminal responsibility."

*[**emphasis** added]*

43. Although decided in another jurisdiction, the rationale deployed by the Supreme Court of Canada is persuasive as to the nature of the work of a public inquiry and its findings, and in particular the separation between the findings of a public inquiry and the determination of disputes involving rights and obligations.

44. That a public inquiry should not be regarded as making determinations directly affecting rights or obligations also gains support from a number of cases in which various courts have considered whether Article 6(1) of the European Convention on Human Rights is engaged where findings of fact are made otherwise than in ordinary court proceedings, since the question of the applicability of Article 6(1) is bound up with the question of whether any determination of rights is taking place.

45. In *Goodman International and Goodman v Ireland* (1993) 16 EHRR CD26 the Commission considered a complaint that an Irish Tribunal of Inquiry, whose role was, according to the Commission "*to inquire, to express an opinion, and, if appropriate, to make recommendation for the guidance of the legislature and the executive in the lawful running of the beef industry...*" was in effect determining criminal charges. The complaint was dismissed. The Commission considered (at paragraph 2) that

"...no protection under Article 6 of the Convention can be derived in a democratic society to prevent the conduct of inquiries into matters of major public importance... there is no evidence to support the applicants' contention that the actions of the Tribunal have in any way interfered with or determined the applicants' "civil rights" within the meaning of Article 6(1) of the Convention."

46. Soon after, the European Court of Human Rights ('the European Court') considered a similar issue in *Fayed v United Kingdom* (1994) 18 EHRR 393, a case which arose out of an inquiry commissioned by the Government and conducted by Inspectors appointed under the Companies Act 1985. The Inspectors' report, which was

published by the Government, contained a number of findings unfavourable to the applicants. The applicants complained, inter alia, that the report had determined their civil rights to honour and reputation in violation of Article 6(1), and so the Court considered whether Article 6(1) was applicable to the investigation by the Inspectors. It concluded that it was not, observing that

> *"61. ...the functions performed by the Inspectors were, in practice as well as in theory, essentially investigative. The Inspectors **did not adjudicate**, either in form or in substance.....their **findings would not be dispositive of anything**. They **did not make a legal determination as to criminal or civil liability**.... The **purpose of their inquiry was to ascertain and record facts which might subsequently be used as the basis for action** by other competent authorities – prosecuting, regulatory, disciplinary or even legislative... In short, it cannot be said that the Inspectors' inquiry "determined" the applicants' civil right to a good reputation, for the purposes of Article 6(1), **or that its result was directly decisive for that right**."*
>
> *[**emphasis** added]*

47. Although the court in *Fayed* was not considering a 2005 Act inquiry, it can be seen from the extract of its judgment quoted immediately above that the essential function of the Inspectors' investigation was very similar to the function of a 2005 Act inquiry – namely, to ascertain and record facts. In those circumstances the reasoning of the court as to why Article 6(1) was not engaged is, we suggest, directly relevant to the question of whether a 2005 Act inquiry can be said to be legally dispositive of anything.

48. The applicability of Article 6 to a public inquiry in the United Kingdom was considered by Lord Saville in the Bloody Sunday Inquiry (albeit that was an inquiry set up under the Tribunals of Inquiry Act 1921, rather than the 2005 Act). In a ruling dated 19 December 2002, Lord Saville, making reference to *Fayed*, concluded that Article 6 was of no application because

> *"The Tribunal is not determining a criminal charge against anyone. Nor is it determining the civil rights and obligations of anyone; its charter is to inquire into "the events on Sunday, 30 January 1972 [...]". It is true that the Tribunal's report will inevitably deal with the conduct of many persons on Bloody Sunday, civilian and military, but it will not determine their rights and obligations."* [43]

49. Similar reasoning was followed more recently in *YA v London Borough of Hammersmith and Fulham* [2016] EWHC 1850 (Admin) when considering the wording of s.4(6) itself. The case concerned the use by a housing allocation panel

of evidence of a spent conviction in deciding whether to place the claimant on a housing register. Whilst on its facts the case is clearly distinguishable, Mr Justice Peter Marquand's comments as to why the housing authority was not determining rights are of wider relevance:

> *"44. ...*
>
> *c) ...Just because there is a statutory process that includes rights for the applicant does not make it proceedings before a judicial authority...*
>
> *e) ...the definition is directed towards bodies which have the power to adjudicate on rights between third parties, or rights conferring status in relation to third parties."*

50. These principles find support in case-law considering more generally the circumstances in which Article 6(1) of the Convention will be engaged. Although decided in very different factual contexts, the following decisions are nonetheless informative insofar as the courts concerned considered the circumstances which must pertain before it can be said that rights are being determined.

51. In *Maaouia v France* (2001) 33 EHRR 42 the European Court considered the exclusion of a Tunisian citizen from France. It held that the dispute between the applicant and the French Government as to the imposition of the exclusion order did not involve the determination of the applicant's civil rights; and further, that the incidental "*major repercussions on the applicant's private and family life...cannot suffice to bring these proceedings within the scope of civil rights protected by Article 6(1)*" [38]. In other words, even a major incidental impact on Convention rights did not amount to a determination, sufficient to engage Article 6(1).

52. In *Secretary of State for the Foreign Office and Commonwealth Affairs v Maftah and Khaled* [2011] EWCA Civ 350 the question for the Court of Appeal was whether the claimants' civil rights were being determined where they challenged by way of judicial review decisions to list (or fail to de-list) them on a list maintained by the UN Security Council Sanctions Committee as persons believed to be associated with Al Qaeda, Osama Bin Laden or the Taliban. Lord Justice Sedley, giving the judgment of the Court, noted that the purpose and effect of being listed was

> *"...to freeze all the individuals' assets, to place the release of funds entirely in the discretion of the executive, and thereby to make them what in A and others v HM Treasury [2008] EWCA Civ 1187 [125] I called a prisoner of the state."*

53. It was clear that the individuals' rights were engaged. The Court found, however, that Article 6(1) was not. A distinction was drawn between public and private law rights,

with reference to the decision of the European Court in *Ferrazzini v Italy* (2002) 34 EHRR 45 in which the European Court decided that tax disputes fell outside the scope of civil rights and obligations; although private interests were at stake, the European Court considered taxation to form "*part of the hard core of public-authority prerogatives*, *with the public nature of the relationship between the taxpayer and the tax authority remaining predominant*". Having considered this and other decisions of the European Court, Lord Justice Sedley proposed the following test:

> *"24. What seems to me to emerge from the present Strasbourg jurisprudence is that, while civil rights within the autonomous meaning of article 6 can be brought into play either by direct challenge or by administrative action,* ***it is the nature and purpose of the administrative action which determines whether its impact on private law rights is such that a legal challenge to it involves a determination of civil rights****..."*
>
> *[**emphasis** added]*

54. An examination of the *nature and purpose* of a public inquiry leads, we suggest, to the conclusion that any impact which it might be said to have on private law rights is only incidental to its primary purpose – that is, to investigate and make findings of fact and recommendations in the wider public interest. It resolves no disputes, neither does it determine or otherwise dispose of individuals' rights.

55. Case law does not suggest that the position is altered by the incorporation into domestic law of Convention rights by the Human Rights Act 1998 (i.e. the fact that the collateral effect of the Inquiry's findings may well be to affect reputation does not mean that the proceedings of the Inquiry are directly decisive of a dispute about article 8 rights): see *Secretary of State for the Foreign Office and Commonwealth Affairs v Maftah & Khaled* [2001] EWCA Civ 350 at paragraphs 27-29; and *OO v Secretary of State for the Home Department* SC/51/2006 at paragraph 20[9]. The position appears to remain, as the European Court found in the *Fayed* case, that a public inquiry's findings are not legally dispositive of anything. Since the European Court did not find the inquiry in that case to be determining Article 8 rights, even though reputation was incidentally affected, the incorporation of those rights into domestic law makes no difference.

56. The fact that the Inquiry's report and recommendations will not directly determine rights, however, may not be decisive as to whether the proceedings fall within or without s.4(6). That is because the wording of s.4(6) only requires that the proceedings determine a question *affecting* the rights, privileges, obligations or

[9] A judgment cited with approval by Lord Hoffmann in *RB (Algeria) v Secretary of State for the Home Department* [2010] 2 A.C. 110 at 175

liabilities of any person, or to receive evidence affecting the determination of any such question.

57. Do the Inquiry's proceedings determine a question *affecting* the rights, privileges, obligations or liabilities of any person? The answer appears to rest in part on whether *affecting* is construed widely or narrowly. On the one hand, since the Inquiry's factual findings have no legal effect they cannot affect the rights, privileges, obligations or liabilities of any person in any binding sense. On the other hand, the Inquiry's factual findings are likely to affect reputations.

58. The answer may also depend upon whether the words "*to determine"* in s.4(6) fall to be construed widely or narrowly. If construed narrowly as meaning come to some legally binding determination then an Inquiry's findings do not do that. If construed widely then the Inquiry does determine questions of fact (albeit in a non legally binding way).

59. Do the Inquiry's proceedings *"receive evidence affecting the determination of any such question"*? This final phrase in s.4(6) of the Act offers a further, longer route to meeting the statutory definition. It suffices if the proceedings of the Inquiry receive evidence affecting the determination of a question affecting the rights, privileges, obligations or liabilities of any person. A situation which would appear to fall easily within this requirement would be a professional disciplinary regime, such as that provided by the Teachers' Disciplinary (England) Regulations 2012, in which it is for the professional conduct panel to determine whether allegations of misconduct are proven and, if so, to recommend a sanction. It is then for another person (the Secretary of State for Education in the case of the example given) to decide upon the appropriate sanction[10]. We note the use of the word *affecting* in the present tense and without any qualification such as "*which may affect"* or *"capable of affecting"*. This suggests a requirement that the receipt of the evidence will, and not just might, affect the determination of the question. It could be argued first that the Inquiry receives evidence upon which the panel's findings and recommendations are based which will then inform decisions by the Secretary of State for the Home Department as to what action to take. Action might include acts which lead to the rights of others being affected (e.g. new primary or secondary legislation or new policies and procedures affecting the rights of police officers). However, this might be regarded as too long and tenuous a chain to meet the statutory wording. Second, it might be argued that the Inquiry will receive evidence which will directly affect its factual findings which will affect reputations. However, this wording does not add to the argument that the Inquiry's fact finding will affect reputations. As we have discussed

[10] This disciplinary regime was considered and discussed in *Wallace v Secretary of State for Education* [2017] EWHC 109 (Admin).

above, whether that argument is good depends upon whether the statutory wording requires a legally binding determination and whether the word *affecting* falls to be construed narrowly or widely.

Section 4(6) and the procedural powers of the Inquiry

60. The Chairman has a number of procedural powers designed to facilitate an effective investigation. For example, the Chairman can make restriction orders under section19 of the 2005 Act, or require the production of evidence under section 21. Failure to comply with a restriction order or a section 21 notice can be certified to the High Court for enforcement pursuant to section 36 of the 2005 Act. Failure, without reasonable excuse, to comply with a section 21 notice is a criminal offence contrary to s.35(1) of the 2005 Act. Thus, the exercise by the Chairman of powers under sections 19 and 21 clearly impose obligations on persons. Similarly, a decision pursuant to rule 5 of the Inquiry Rules 2006 to designate a person as a core participant confers certain procedural rights within the inquiry process upon the person so designated. For example, the right to make an opening and closing statement through his or her recognised legal representative.

61. A number of questions arise from the existence of these and other procedural powers in the context of s.4(6) of the Act. First, do the processes by which procedural decisions are made by the Inquiry have any relevance at all when deciding whether the Inquiry's proceedings fall within s.4(6)? In this regard we note that the provision does not use any express form of words which would unequivocally indicate an intention to include parts of proceedings within the definition. For example, Parliament could have used a wording such as *"...proceedings or any part thereof before any tribunal ..."* had it wished to do so.

62. However, our attention is also drawn to the use of the words "*proceedings having power....to determine any question affecting ..."* (emphasis added). Should this be read narrowly as referring to any substantive question to be determined by the Inquiry's proceedings, or should it be read widely to include procedural issues?

63. Second, does the existence of a procedural power which, if exercised, requires the Chairman to determine questions which affects rights or obligations, mean that the whole of the Inquiry's proceedings fall within the scope of s.4(6) of the Act (whether or not the Inquiry's report requires the determination of any such question or the receipt of substantive evidence affecting the determination of any such question)? Or is only the procedural question the determination of which affects a person's rights or obligations to be regarded as constituting proceedings before a judicial authority?

Section 4(6) and the significance of whether or not it applies to the Inquiry

64. The answers to these questions have important ramifications for the Inquiry. If, and insofar as the Inquiry's proceedings are proceedings before a judicial authority then questions about spent convictions, or any circumstances ancillary to them, can be asked of the rehabilitated person and evidence of spent convictions can be admitted. However, such questions can only be asked and such evidence can only be admitted if the Chairman is satisfied that justice cannot be done without doing so: see section 7(3) of the Act discussed further below at paragraphs 79-87.

65. If, and insofar as the Inquiry's proceedings are not proceedings before a judicial authority then, in the absence of an exemption, any question put to a rehabilitated person or to any other person shall be treated as not relating to spent convictions or any circumstances ancillary to spent convictions: see section 4(2) of the Act to which we now turn.

Section 4(2) – Questions relating to spent convictions asked otherwise than in the course of proceedings before a judicial authority

66. Section 4(2) applies otherwise than in judicial proceedings to allow a person questioned to treat the question as not relating to any spent conviction, and not to be prejudiced as a result of not acknowledging or disclosing such a conviction:

> *"(2) Subject to the provisions of any order made under subsection (4) below, where a question seeking information with respect to a person's previous convictions, offences, conduct or circumstances is put to him or to any other person otherwise than in proceedings before a judicial authority—*
>
> *(a) the question shall be treated as not relating to spent convictions or to any circumstances ancillary to spent convictions, and the answer thereto may be framed accordingly; and*
>
> *(b) the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent conviction or any circumstances ancillary to a spent conviction in his answer to the question."*

67. We note the difference in approach to questions, the answers to which would involve reference to spent convictions in proceedings before a judicial authority (section 4(1)(b)) and such questions otherwise than in proceedings before a judicial authority (section 4(2)(a)). In the former, such a question must not be asked and, if it is asked, it shall not be answered. In the latter, there is no prohibition on asking the question. However, the Act alters the way in which the question is to be treated and answered. Its effect is to require (or at least permit) a false answer to be given in order to meet the statutory purpose of permitting rehabilitated persons to put their criminal pasts

behind them[11]. One possible reason for the difference in approach may be that in proceedings before a judicial authority (or at least some such proceedings) evidence is given on oath and it would be highly undesirable to sanction false answers being given on oath. The operation of section 4(1)(b) avoids permitting such an answer whilst at the same time meeting the statutory objective of promoting the rehabilitation of offenders. Only section 4(2)(a) confers a statutory right to give a false answer.

68. The second phrase of section4(2)(a): "*and the answer thereto <u>may</u> be phrased accordingly"* (emphasis added) gives rise to a question. Does the use of the word "may" indicate a deliberate intention by Parliament to confer a discretion upon the person answering the question (who may be either the rehabilitated person or a third party) as to whether or not to reveal the spent conviction or any ancillary circumstances? Or is it an instance where "may" means "shall" so as to impose a requirement on the person to whom the question is posed to answer it as if it had not referred to the spent conviction or ancillary circumstances?

69. In his obiter discussion of this provision in *X v Commissioner of Police for the Metropolis* (supra), Mr Justice Whitford appears to have inclined to the former construction (at p.422B-E). This construction is also consistent with the fact that the Act does not impose a general prohibition on communicating the fact of a spent conviction: *KJO v XIM* [2011] *EWHC 1768 (QB).* If the latter construction is correct then, other than in proceedings before a judicial authority, a question concerning spent convictions cannot lawfully be answered so as to disclose the spent conviction or ancillary circumstances but if the question is not asked at all, the same information can lawfully be volunteered. On the other hand, we observe first that the protection which this provision confers would be significantly diminished if it were to be read as permitting a third party to choose whether or not to protect the rehabilitation of the convicted person. Secondly, the permissive reading of the phrase does not sit easily with the mandatory terms at the start of the subsection which requires that a question shall not be treated as relating to spent convictions or any ancillary circumstances.

70. The correct construction of section 4(2)(a) is relevant to the Inquiry only if its proceedings or parts thereof do not constitute proceedings before a judicial authority for the purposes of section 4(6) of the Act. If they do not then, unless the Secretary of State exercises her power of exemption under section 4(4) of the Act, any question asked by the Inquiry (or by a recognised legal representative at an oral hearing) relating to a spent conviction or circumstances ancillary thereto can be answered

[11] If confirmation is needed that this is the effect of the Act, see *R(T) v Chief Constable of Greater Manchester Police* [2015] AC 49, per Lord Wilson JSC at 22D where he stated: "*let us not forget, falsely to deny"*. See also *KJO v XIM* [2011] EWHC 1768 (QB) per Mr Justice Eady at [10]: "*...the effect of s.4(2)is, as Mr Bennett points out, to give the relevant person a licence not only to conceal but also to lie about the fact of any spent conviction*."

untruthfully. This state of affairs would be anathema to a procedure the very purpose of which is to get to the truth and which is going to take evidence on oath.

Section 4(3)

71. Section 4(3)(a) provides that an obligation to make disclosure imposed by any rule of law or the provisions of any agreement or arrangement shall not extend to requiring the disclosure of a spent conviction:

> *"(3) Subject to the provisions of any order made under subsection (4) below,—*
>
> *(a) any obligation imposed on any person by any rule of law or by the provisions of any agreement or arrangement to disclose any matters to any other person shall not extend to requiring him to disclose a spent conviction or any circumstances ancillary to a spent conviction (whether the conviction is his own or another's); ..."*

72. This provision relieves a person of the obligation to disclose a spent conviction or any circumstances ancillary to a spent conviction where such an obligation arises in one of the ways described in the section (i.e. by rule of law, agreement or arrangement). Thus, it would operate to defeat any attempt to circumvent the purpose of the Act through the imposition of a contractual obligation to disclose spent convictions. However, although the provision relieves the person concerned of the obligation to disclose the spent conviction or ancillary circumstances, it does not appear to go so far as to prevent the voluntary disclosure of the same information. If this is the correct construction then the provision is consistent with the conclusion of Mr Justice Eady in *KJO v XJM* [2011] EWHC 1768 (QB) that the Act does not impose a general prohibition on communicating the fact of a conviction.

73. For the purposes of the Inquiry, a question arises as to whether section 4(3)(a) of the Act operates to relieve a person who is the subject of a notice issued under section 21 of the 2005 Act of the obligation to provide evidence of a spent conviction or circumstances ancillary to such a conviction? If the proceedings of the Inquiry are *proceedings before a judicial authority* (such that the regime provided by section 4(1)(a) and section 4(1)(b) of the Act applies) and if justice cannot be done without the evidence (such that the exemption provided by section 7(3) of the Act applies) then we doubt that section 4(3)(a) could be construed in this way. The express exception provided by section 7(3) would need to take precedence in order to have effect. If, on the other hand, the proceedings of the Inquiry are not *proceedings before a judicial authority*, then there would in any event be another

obstacle in the way of compelling evidence of spent convictions, or ancillary circumstances, namely section 4(2)(a) of the Act.

Section 4(5) – Circumstances ancillary to a conviction

74. Circumstances ancillary to a conviction are defined in section 4(5):

> *"(5) For the purposes of this section and section 7 below any of the following are circumstances ancillary to a conviction, that is to say—*
>
> *(a) the offence or offences which were the subject of that conviction;*
>
> *(b) the conduct constituting that offence or those offences; and*
>
> *(c) any process or proceedings preliminary to that conviction, any sentence imposed in respect of that conviction, any proceedings (whether by way of appeal or otherwise) for reviewing that conviction or any such sentence, and anything done in pursuance of or undergone in compliance with any such sentence."*

75. The wide definition of circumstances ancillary to a conviction used in section 4 of the Act mean that unless exempted from the prohibitions imposed by section 4, the Inquiry cannot properly investigate and establish the true facts in relation, not only to the fact of a spent conviction, but also the surrounding circumstances. This would include the conduct constituting the offence or the court proceedings and poses obvious difficulties for the Inquiry. Especially so if it is properly to examine whether particular undercover police operations were justified; and if it is to investigate the interactions which undercover police officers had with the criminal justice system in their undercover personas, whether as defendants or as witnesses.

Exceptions to the prohibitions imposed by section 4 of the Act

76. The Act provides for exceptions to sections 4(1), 4(2) and 4(3)(a). The nature and extent of the exceptions vary depending on which subsection is involved.

77. Section 7(2) limits the effect of section 4(1) by expressly excluding certain proceedings from its scope. The exceptions include – via section 7(2)(f) - proceedings in which a person who is a party or witness consents to the admission of the evidence. Other exceptions cover particular types of proceedings, for example criminal proceedings, service disciplinary proceedings, and proceedings brought under the Children Act 1989. Nothing in section 7(2) explicitly provides an exclusion for an inquiry set up under the 2005 Act from the scope of section 4(1). Nothing in section 7(2) explicitly provides an exclusion for an inquiry set up under the 2005 Act

from the scope of section 4(1) and the exceptions are not wide enough to cover all proceedings before the civil courts.

78. Section 7(4) confers on the Secretary of State the power to specify proceedings in respect of which section 4(1) will not apply. Schedule 3 to the Order lists proceedings which have been made the subject of an exception in this manner. A public inquiry set up pursuant to the 2005 Act is not the subject of any such exception. Examples of exceptions made under this provision include various professional disciplinary proceedings, proceedings under the Mental Health Act 1983 and certain proceedings under the Firearms Act 1968.

79. In *proceedings before a judicial authority* not included in section 7(2), or made the subject of an exception via order made pursuant to section 7(4), exceptions can be made to the general prohibitions in section 4(1), on a case-by-case basis, in accordance with section 7(3), which allows for the admission of evidence about spent convictions where a judicial authority concludes that justice cannot be done otherwise:

> *"(3) If at any stage in any* ***proceedings before a judicial authority*** *in [England, Wales or Scotland] (not being proceedings to which, by virtue of any of paragraphs (a) to (e) of subsection (2) above or of any order for the time being in force under subsection (4) below, section 4(1) above has no application, or proceedings to which section 8 below applies) the authority is satisfied, in the light of any considerations which appear to it to be relevant (including any evidence which has been or may thereafter be put before it), that* ***justice cannot be done in the case except by admitting or requiring evidence relating to a person's spent convictions or to circumstances ancillary thereto, that authority may admit or, as the case may be, require the evidence in question*** *notwithstanding the provisions of subsection (1) of section 4 above,* ***and may determine any issue to which the evidence relates in disregard, so far as necessary, of those provisions****."*

[**emphasis** added]

80. The scope of the power to make an exception to the general rule under section 7(3) of the Act has been the subject of judicial consideration. In particular, it was closely analysed by the Court of Appeal in *Thomas v Commissioner of Police of the Metropolis* (supra), which was a civil action against the police. The majority in that case construed the provision widely. Lord Justice Evans rejected a submission that the scope of the discretion was a narrow one in these terms at page 832E:

"In my judgment, it would be wrong to restrict the scope of the judge's discretion under section 7(3) except by reference to the words of the statute – the interests of justice – and equally wrong to limit the facts which he may properly take into account – any considerations which appear to him to be relevant".

81. In the context of the credibility of witnesses and the search for the truth (both of which are, of course issues, which will be to the fore in the Inquiry) Lord Justice Evans set a low bar for the admission of evidence of spent convictions:

*"...**Given that previous convictions can sometimes be "relevant to credit" then it follows, in my judgment, that in such cases the interests of justice must require that such evidence should be admitted before the jury**, rather than withheld from it, when credit is in issue. Moreover, a past conviction for dishonesty could be said to be directly relevant to credit, a fortiori if the conviction was for giving perjured evidence in court".* [p.832C]

and

*"The question raised by section 7(3) has to be answered by the judge although it is not a matter of law; nor can it be answered by logic or by any process of reasoning alone. **A negative answer would be required, in my judgment, where the previous conviction was so obviously irrelevant both to the issues in the case and to the moral standing of the witness that a reasonable jury could not properly take it into account** when deciding whether to believe him or not. But **the interests of justice are synonymous with a search for the truth**, and the judge has to recognise that a reasonable jury may take a wide range of factors into account when deciding which witnesses to believe and therefore where the truth lies..."* [p.833B-C]

[**emphasis** added]

82. To the same effect, Lord Justice Saville (as he then was) stated:

*"Lord Gifford's basic submission is that the judge was wrong to admit the evidence of the spent convictions on the issue of credibility, since the judge was wrong to conclude that justice could not otherwise be done within the meaning of section 7 of the Act of 1974. **To my mind that submission can only be correct if the evidence of the spent convictions had so little relevance to the issue of credibility that its exclusion from the trial could not properly have made any material difference to the outcome**".* [p.834F]

[**emphasis** added]

83. In *Adamson v Waveney District Council* [1997] 2 All ER 898, Mr Justice Sedley (as he then was) construed section 7(3) of the Act and gave guidance as to the practice to be followed in the context of an appeal to the magistrates court against a refusal to grant a Hackney carriage licence. The guidance, at p.904a-j specifies a cautious step-by-step approach to such an application, intended to respect the underlying purpose of the Act, namely rehabilitation. The main features of the procedure specified are:

(1) The judicial authority has to identify the issue to which any spent conviction must relate if the evidence is to be admitted.

(2) Those responsible for presenting the material must give their own objective, professional consideration to whether any or all of the spent convictions are capable of having real relevance to the issue.

(3) Providing all of the information and leaving it to the judicial authority to put out their minds irrelevant material "would be wrong and dangerous".

(4) Only the broad terms of the offence should be put to the judicial authority to enable it to determine whether or not to admit the spent conviction.

(5) Once admitted in evidence, natural justice requires the applicant to be heard to persuade the judicial authority that the spent convictions should not jeopardise the application.

(6) The judicial authority then has to decide whether to exercise the exceptional powers bearing in mind the interests of the applicant and the public interest.

84. There is reason to be cautious about the decision in *Adamson v Waveney District Council* [1997] 2 All ER 898 which was decided very shortly after *Thomas* was heard and without the benefit of the judgment in *Thomas*. The decision of the superior court is, of course, binding and Mr Justice Sedley's analysis of section 7(3) of the Act corresponds much more closely with the dissenting judgment of Sir Richard Scott than it does with the judgments of the majority in *Thomas*. Moreover, guidance given for the purposes of a hearing before magistrates concerns a context significantly different to the work of a statutory public Inquiry chaired by a member of the senior judiciary. Nevertheless, we draw attention to this decision because it touches upon an important question for the Inquiry: whether, if it is available to the Inquiry at all, the exceptional discretion afforded to the Inquiry by section 7(3) of the Act is wide enough to permit of a workable practice? Whilst the Inquiry must be satisfied that evidence of a spent conviction is necessary for its work before it is admitted into evidence, a procedure which involved all of the steps set out in the *Adamson* judgment would, in our view, be unworkable in the context of the Inquiry. We are

concerned that the frequency with which the Inquiry is going to need to ask questions about or to admit evidence of spent convictions or their ancillary circumstances, is likely to be such that if the Chairman has to make a decision, potentially even a series of decisions, in every instance that a spent conviction is arguably necessary to its work then the progress of the Inquiry will be seriously slowed. We raise the possibility of a series of decisions in relation to a single spent conviction having in mind that the Inquiry would consider the spent conviction at the investigatory stage, then decide whether the evidence should be admitted once it knew the details (and then if the evidence was admitted there might also be a question as to whether publication of that evidence should be restricted).

85. If, or to the extent that, the proceedings of the Inquiry are *proceedings before a judicial authority* then the Inquiry can rely on section 7(3) of the Act to make exceptions to the usual rule prohibiting the asking of questions about, and admission of evidence relating to spent convictions and their ancillary circumstances. The breadth of the power, as construed by the Court of Appeal in *Thomas*, ought to be enough to cater in principle for the Inquiry's needs. However for question is whether, even if this discretion is available to the Inquiry, it represents a workable solution.

86. The exceptions to the rules permitting non-disclosure of spent convictions in sections 4(2) and (3) of the Act are narrower. There is no equivalent to section 7(3) for making case-by-case exceptions. The Secretary of State does have power pursuant to section 4(4) to modify or exclude the application of section 4(2), and to provide for cases or classes of case which will be excepted from section 4(3). Exceptions so far created appear in the Order and do not include public inquiries. Examples of questions which are exempted from the ambit of section 4(2) include questions asked in order to assess the suitability of persons for admission to certain professions, or for certain work with children[12].

87. Whether the Inquiry needs the benefit of an exemption to these subsections of the act will, in part, depend on the proper interpretation of section 4(1), including its subparagraphs, and also its interaction with sections 4(2) and 4(3). By this we mean that if all of the Inquiry's work is to be regarded as being *proceedings before a judicial authority*, i.e. during the evidence gathering phase, during the hearing phase and in relation to both substantive and procedural issues, then the only question is whether section 7(3) will suffice or whether an exemption to section 4(1) is required pursuant to section 7(4). If not, then because there is no provision for a case-by-case discretionary exemption in relation to sections 4(2) and 4(3), an exemption would, we believe, be required in order for the Inquiry to be able to discharge its terms of reference.

[12] See paragraph 3 of the Order

Section 9 – offence of unauthorised disclosure of spent convictions

88. Section 9 of the Act creates a criminal offence[13] of unauthorised disclosure of a spent conviction[14] as follows:

> *"(1) In this section—*
>
> "official record" *means a record kept for the purposes of its functions by any court, police force, Government department, local or other public authority in Great Britain, or a record kept, in Great Britain or elsewhere, for the purposes of any of Her Majesty's forces, being in either case a record containing information about persons convicted of offences; and*
>
> "specified information" *means information imputing that a named or-otherwise identifiable rehabilitated living person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which is the subject of a spent conviction.*
>
> *(2) Subject to the provisions of any order made under subsection (5) below, any person who, in the course of his official duties, has or at any time has had custody of or access to any official record or the information contained therein, shall be guilty of an offence if, knowing or having reasonable cause to suspect that any specified information he has obtained in the course of those duties is specified information, he discloses it, otherwise than in the course of those duties, to another person.*
>
> *(3) In any proceedings for an offence under subsection (2) above it shall be a defence for the defendant to show that the disclosure was made—*
>
> *(a) to the rehabilitated person or to another person at the express request of the rehabilitated person; or*
>
> *(b) to a person whom he reasonably believed to be the rehabilitated person or to another person at the express request of a person whom he reasonably believed to be the rehabilitated person.*
>
> *(4) ...*

[13] Any proceedings for an offence contrary to section 9(2) require the consent of the Director of Public Prosecutions.
[14] A like offence was created by the Criminal Justice and Immigration Act 2008 applicable to the unauthorised disclosure of spent cautions (which were by that Act brought within the scope of the Rehabilitation of Offenders Act 1974) and inserted as section 9A of the Act.

(5) The Secretary of State may by order make such provision as appears to him to be appropriate for excepting the disclosure of specified information derived from an official record from the provisions of subsection (2) above in such cases or classes of case as may be specified in the order.

(6) Any person guilty of an offence under subsection (2) above shall be liable on summary conviction to a fine not exceeding level 4 on the standard scale."

89. We note that the offence under section 9(2) can only be committed by a person who has access to the information in the course of his official duties and discloses it otherwise than in the course of those duties. It appears aimed at police officers and other officials who might disclose information learned at work for unofficial purposes.

90. The ambit of the offence was considered in *N v Governor of HM Prison Dartmoor* [2001] EWHC Admin 93 in which Mr Justice Turner concluded, having regard to *X v Commissioner of Police for the Metropolis* [1985] 1 W.L.R. 420 (in which the claimant's challenge to the provision by the Metropolitan Police of information concerning his spent convictions to the Paris office of Interpol, on the grounds that this provision was not in the course of official duties was rejected, Mr Justice Whitford finding that there was a long accepted obligation to transmit information to foreign police forces in order to suppress international crime) that the Governor's communication of a spent conviction to social services for them to carry out a risk assessment was "*expressly permitted*".

91. We do not consider that this section presents any difficulty for the Inquiry. The disclosure to the Inquiry of information about spent convictions, whether pursuant to a request made under Rule 9 of the Inquiry Rules 2006 or section 21 of the 2005 Act, or voluntarily in connection with an application properly made in support of which the information is submitted would, we consider, ordinarily be made in the course of the official duties of a police officer or similar official providing the information. The central issues for the Inquiry are whether section 4(1) of the Act prevents it from asking questions and admitting necessary evidence about spent convictions; and/or whether sections 4(2) and 4(3) permit false answers to be given to the Inquiry.

Section 10

92. The effect of section 10 of the Act is that any amendments to the Order must "*be laid before, and approved by resolution of, each House of Parliament*". It is clear that if a request is made to the Secretary of State for Justice to make the exceptions which we consider likely to be necessary, it will take some time for her, and if she agrees, Parliament, to consider the proposal. It is for this reason that we consider

that the Inquiry should resolve the question whether it needs exceptions to be made at this stage.

Potential Exceptions

93. If it is decided that an exception is necessary, then we suggest below potential ways to frame such an exception.

Potential exception under section 4(4) of the Act

94. Section 4(4) of the Act provides the Secretary of State for Justice with power to:

> *"(a) make such provision as seems to him appropriate for excluding or modifying the application of either or both of paragraphs (a) and (b) of subsection (2) above in relation to questions put in such circumstances as may be specified in the order;*
>
> *(b) provide for such exceptions from the provisions of subsection (3) above as seem to him appropriate, in such cases or classes of case, and in relation to convictions of such a description, as may be specified in the order."*

95. For these purposes, existing exceptions to section 4(2) are set out in Article 3 of the Order which commences, insofar as material:

> *"(1) ...neither section 4(2) of [nor]... the Act shall apply in relation to—"*

96. Under section 4(4)(a), if it is decided that an exception under this provision is necessary, we suggest the exclusion of questions asked by an inquiry and during the course of inquiry proceedings by the addition of a further sub-paragraph to Article 3(1) of the Order as follows:

> *"(p) any question asked by a public inquiry established under the Inquiries Act 2005, or any question asked during the course of the proceedings of such an inquiry with the permission or at the direction of the chairman to that inquiry in accordance with Rule 10 of the Inquiry Rules 2006."*

97. Only one existing exception to section 4(3)(a) is currently provided for in the Order; article 4A lists a number of exceptions to sections 4(2) and (3) all relating to the disqualification of persons from being a police and crime commissioner. Under section 4(4)(b) therefore, if an exception is necessary, we would suggest the addition of a further article to the Order excepting public inquiries as a class of case from its operation as follows:

"Section 4(3)(a) of the Act shall not apply in relation to any obligation to disclose any matter if the obligation is imposed by a notice issued under section 21 of the Inquiries Act 2005."

Potential exception under section 7(4) of the Act

98. Section 7(4) of the Act provides the Secretary of State with the power to:

"... exclude the application of section 4(1) *above in relation to any proceedings specified in the order (other than proceedings to which* section 8 *below applies) to such extent and for such purposes as may be so specified."*

99. Current exceptions created by virtue of section 7(4) of the Act are contained in the Order at Schedule 3, further to Article 5. Schedule 3 lists proceedings in which section 4(1) is to be disapplied. We propose, if it is decided that it is necessary to seek an exception under section 7(4), adding a further paragraph to Schedule 3 as follows:

"Proceedings of an inquiry established under the Inquiries Act 2005."

Section 22 of the Inquiries Act 2005 and its relationship to the Rehabilitation of Offenders Act 1974

100. Section 22(1) of the 2005 Act provides that:

"(1) A person may not under section 21 be required to give, produce or provide any evidence or document if—

(a) 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..."

101. The question which arises is how is section 22 of the 2005 Act to be interpreted when the evidence or document sought under section 21 refers to a spent conviction? In particular, what does "*if the proceedings of the inquiry were civil proceedings in a court"* mean in this context?

102. The intention of this section of the 2005 Act is to allow individuals involved in inquiries to benefit from the same privileges as witnesses in civil proceedings; for example, legal professional privilege, or the privilege against self-incrimination. Since, in civil proceedings, sections 4(1)(a) and (b) of the Act would be directly applicable (albeit subject to section 7(3)), it might be argued that a notice issued under section 21 could, by way of section 22, be resisted by reference to sections 4(1)(a) and (b). In other words, it would be said that the Inquiry cannot compel evidence of spent

convictions because such evidence is inadmissible in civil proceedings, unless the court invokes the exception provided by section 7(3) of the Act.

103. Whether or not the Inquiry could insist on compliance with the notice would then depend on how section7(3) of the Act should be applied in the context of a public inquiry. We consider that were this scenario to arise, the Inquiry would be bound to construe the *justice cannot be done* test in section 7(3) in a purposive manner, and to decide whether the document or evidence was necessary in order to discharge the terms of reference, and/or comply with the duty to act fairly. Consequently, we do not consider that section 22 of the 2005 Act itself adds significantly to the central questions which the Inquiry now needs to address, namely: how section 4 of the Act applies to the Inquiry; and whether such effect means that it is necessary for the Inquiry to seek exemption from section 4(1) and/or sections 4(2) and 4(3) of the Act.

Article 8 and spent convictions

104. We observed in the introduction to this note that the issue of further dissemination or publication of evidence concerning spent convictions was not one that required to be resolved at this stage, and that the focus of this note is on the extent to which the Rehabilitation of Offenders Act 1974 restricts this inquiry from fulfilling its terms of reference. Whilst that is correct, for the avoidance of doubt we recognise that the Act is not the only restriction upon the use that can be made of such evidence, and so however it is to be construed and whatever exceptions may be made to it, we do not suggest that the Inquiry's use of such evidence is or should be unfettered.

105. Although the Supreme Court did not decide the point in *R(T) v Chief Constable of Greater Manchester* [2015] AC 49, it is clear from the decision that convictions which are spent should be considered part of a person's private life, and therefore disclosure of information about them will engage Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. We recognise therefore that any reliance upon, further disclosure or publication of evidence concerning spent convictions would have to be necessary to the discharge of the terms of reference in order not to infringe the subject's Article 8 rights. It would also be incumbent on the Chairman to have regard to the duty of fairness in section 17 of the 2005 Act when deciding what use, if any, to make of such evidence.

106. For the reasons which we have already given we consider that it is necessary for the Inquiry to know the truth in relation to spent convictions for the purposes of investigating the interaction of undercover police officers with the criminal justice system, the investigation of the justification for undercover deployments, and anonymity applications. We also consider that the question of admissibility of spent

convictions will have to be addressed where credibility is an issue – see paragraphs 7 and 89 et seq.

107. We observe that in the criminal courts, where there is an exception from the operation of section 4(1), a Practice Direction is in force which provides (insofar as relevant) as follows:

> *"SPENT CONVICTIONS*
>
> *(I.6.1) ...*
>
> *(I.6.2) Section 4(1) of the 1974 Act does not apply, however, to evidence given in criminal proceedings: section 7(2)(a). Convictions are often disclosed in such criminal proceedings....The same approach should be adopted in all courts of criminal jurisdiction.*
>
> *(I.6.3) During the trial of a criminal charge, reference to previous convictions (and therefore to spent convictions) can arise in a number of ways. The most common is when the character of the accused or a witness is sought to be attacked by reference to his criminal record, but there are, of course, cases where previous convictions are relevant and admissible as, for instance, to prove system.*
>
> *(I.6.4) It is not possible to give general directions which will govern all these different situations, but it is recommended that both court and advocates should give effect to the general intention of Parliament by never referring to a spent conviction when such reference can reasonably be avoided.*
>
> *(I.6.5) ...*
>
> *(I.6.6) No one should refer in open court to a spent conviction without the authority of the judge, which authority should not be given unless the interests of justice so require.*
>
> *(I.6.7) When passing sentence the judge should make no reference to a spent conviction unless it is necessary to do so for the purpose of explaining the sentence to be passed."*

108. With necessary adjustment to fit the rather different nature of a public inquiry, we consider that this direction offers a useful guide as to the use that might be made of evidence of spent convictions were exceptions to be made to the Act to allow the Inquiry to consider them at all.

Next Steps

109. The Chairman has invited the core participants to consider this Note and, by 4pm on Monday 27 March 2017 to submit any written submissions that they wish to make on the following issues:

(1) The proposition that the Inquiry cannot discharge its terms of reference and/or comply with its duty of fairness without receiving, considering and, where necessary, admitting evidence of spent convictions and/or circumstances ancillary to such convictions.

(2) The meaning, effect and relevance of section 4(1) of the Act, in the context of the Inquiry, in particular:

i. what constitutes *"treatment"* for the purposes of section 4(1);

ii. what is the meaning of the words "*for all purposes in law";*

iii. to what extent, if any, is the work of the Inquiry for a purpose in law;

iv. to what extent, if any, does the work of the Inquiry constitute "*proceedings before a judicial authority"* as that phrase is used in section 4(1) defined in section 4(6);

(3) The meaning, effect and relevance of section 4(2) of the Act, in the context of the Inquiry, in particular:

i. will a question put by the inquiry either at the preparatory stage or hearing stage of the Inquiry fall within the scope of section 4(2);

ii. does section 4(2)(a) confer a discretion on a rehabilitated person (and/or third party) to whom a question which falls within section 4(2) is put as to whether or not to give a truthful answer.

(4) The meaning, effect and relevance of section 4(3) of the Act, in the context of the Inquiry, in particular:

i. does section 4(3) leave open the option for a person subject to a relevant obligation voluntarily to disclose a spent conviction or the circumstances ancillary to such a conviction (whether the conviction is their own or another's); and

ii. does section 4(3) operate so as to enable the recipient of a notice under section 21 of the 2005 Act to fail to disclose a spent conviction or any

circumstances ancillary to such a conviction (whether the conviction is their own or another's).

(5) If and insofar as section 7(3) of the Act applies to the Inquiry, does it require the Chairman to consider the admission of and/or requirement for evidence of each spent conviction or circumstances ancillary thereto individually, or does it permit the making of a single, blanket order allowing the admission of evidence of spent convictions in any situation in which the Inquiry deems it necessary to consider such evidence?

(6) Considering the Act as a whole:

i. does the Act prohibit, or in any way restrict, the voluntary provision of information to the Inquiry disclosing spent convictions whether by the rehabilitated person or a third party (other than in circumstances which would contravene section 9);

ii. does the Act prohibit, or in any way restrict, the Inquiry from requesting information which may contain evidence of spent convictions at the pre-hearing evidence gathering stage;

iii. does the Act prohibit, or in any way restrict, the Inquiry from expressly requesting information about spent convictions at the pre-hearing evidence gathering stage;

iv. does the Act prohibit the Inquiry from seeking the consent to admit evidence of a spent conviction from a rehabilitated person;

v. does the Act prevent, or in any way restrict, the Inquiry from relying on evidence of spent convictions for the purposes of determining applications for restriction orders, including applications for anonymity;

vi. does the Act prevent, or in any way restrict, the Inquiry from relying on evidence of spent convictions for the purposes of finding facts and making recommendations.

(7) Should the Inquiry request an exemption from section 4(1) of the Act, pursuant to the power conferred by section 7(4) of the Act? If so, should it be in the same or different terms to those suggested at paragraph 99 above?

(8) Should the Inquiry request an exemption from section 4(2) and/or section 4(3) of the Act, pursuant to the power conferred by section 4(4) of the Act? If so, should it be in the same or different terms to those suggested at paragraphs 96 and 97 above?

110. Core participants are invited to consider the last two questions above not only in the light of their legal analysis of the Act but also: (a) having regard to the need for the Inquiry to proceed on a basis which is clear and free from doubt; and (b) which is workable in practice given the frequency with which the Inquiry is likely to come across events involving spent convictions.

DAVID BARR QC

EMMA GARGITTER

01 March 2017