IN THE UNDERCOVER POLICING INQUIRY

REHABILATION OF OFFENDERS ACT 1974:
POSITION STATEMENT ON BEHALF OF THE MPS

Introduction

1. These submissions are further to the Chairman's direction to the core participants to file position statements addressing the issues identified at para 109 of "Counsel to the Inquiry's note on the Rehabilitation of Offenders Act 1974 and its impact on the Inquiry's work" dated 1 March 2017. The submissions that follow address each of the eight issues in turn.

2. In summary, the MPS recognises the importance of the purpose of the Rehabilitation of Offenders Act 1974 ('the 1974 Act') in allowing persons convicted of offences to become rehabilitated. It is, however, essential to the Inquiry fulfilling its terms of reference and doing so fairly that it receives, considers and admits evidence of spent convictions and circumstances ancillary to spent convictions (hereafter 'spent convictions'), including (but not limited to) circumstances in which the Inquiry is considering periods of time when the convictions were not yet spent. It will, for example, be impossible for the Inquiry to consider miscarriages of justice without examining the convictions in which justice may have miscarried. It would also be illogical if the Inquiry were only permitted to examine those matters that did not lead to conviction (and therefore were not proved) when determining the risk posed to an anonymity applicant. It is arguable that on a proper construction of section 4 of the 1974 Act, Inquiry proceedings are "proceedings before a judicial authority" and a workable order could be issued under section 7(3) to permit the admission of evidence of spent convictions subject to the ordinary test of relevance and necessity. The position, however, is not free from doubt. Given the frequency with which the Inquiry will be considering spent convictions, certainty is required. In those circumstances, exceptions should be sought from the Secretary of State under sections 4(4) and 7(4) of

the 1974 Act. Parliamentary scrutiny of the sought exceptions will ensure that proper regard is given to the purpose of the 1974 Act.

(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.

3. There can be no doubt that the Inquiry cannot discharge its terms of reference without considering the facts and circumstances of spent convictions. The starting point is that given the breadth of the Inquiry's work, extending back to 1968, it is inevitable that many relevant convictions will be spent.

4. Spent convictions will be relevant often in many areas of the Inquiry's work. First, the MPS agrees with Counsel to the Inquiry that evidence of spent convictions will be relevant to the Inquiry's investigation of potential miscarriages of justice. It is inescapable that such investigations, which necessarily involve criminal convictions, will require the Inquiry to receive, consider and admit evidence about those convictions and the circumstances of the underlying offences, arrests, court hearings and trials (which would all fall within the definition of "circumstances ancillary to a conviction" in section (4)(5) of the 1974 Act). The wide definition of "circumstances ancillary to a conviction" would also capture any interactions undercover officers had with the criminal justice system, which resulted in convictions now spent, falling short of potential miscarriage of justice cases.

5. Second, the MPS also agrees that previous convictions will be relevant to the Inquiry's examination of the adequacy of justification for historic undercover deployments. For example, the successful prosecution of offenders for serious criminal offences following undercover policing operations is potentially strong evidence justifying the use of the tactic.

6. Third, there is, an overlap here with the second term of reference that requires the Inquiry to "examine the motivation for.... undercover police operations." Such an examination will involve consideration of, for example, the authorisations and reviews

of undercover policing operations, which may have referred to the previous convictions of those targeted as part of the basis for commencing or continuing the operation. It is therefore unavoidable that an assessment of the motivation for and justification of undercover policing operations will require consideration of the activities of the targets of those operations, including their convictions prior to and following the operations.

7. Fourth, as part of the Inquiry's consideration of anonymity restriction order applications it will be necessary for the Inquiry to have regard to "any risk of harm or damage that could be avoided or reduced by any such restriction" (section 19(3)(b) of the Inquiry Act 2005). To assess the physical or psychological risk of harm (Restriction Orders: Legal Principles and Approach Ruling, para 36) posed to an applicant, it would be unfair and inaccurate for the Inquiry not to take into account evidence of the relevant previous spent convictions of those that pose or may pose a risk to the applicant. For example, evidence that an undercover officer targeted an organised criminal group whose members have spent convictions for serious violence would be fundamental to a full and fair assessment of the nature and gravity of the risk of harm posed to the officer and may be relevant to the reasonableness and sincerity of their subjective fears.

8. Only sentences of more than four years' imprisonment can never become spent (see section 5 and Schedule 2 to the 1974 Act), so there are likely to be spent convictions for serious offences relevant to the risk posed to an undercover officer. The age of the conviction does not mean it is no longer relevant to current risk. The risk may not be extinguished by the passage of time. For example, a rehabilitated person convicted of violence many years ago, who learned today that they were the subject of undercover policing may feel an acute sense of betrayal and act violently again. The law recognises the potential relevance of convictions by allowing them to be admitted into evidence in certain circumstances, even if they are old and spent (see, for example, in the criminal context, *R v Hanson & Otrs* [2005] EWCA Crim 824).

9. There is no statutory or other restriction on the Inquiry receiving, considering or admitting evidence about matters that did not result in conviction. It would be artificial, misleading and unfair, if the Inquiry's assessment of the motivation for and justification of undercover operations and decisions on anonymity applications was restricted to

evidence of those matters which did not result in conviction. Such an approach would impede the Inquiry's search for the truth.

10. The MPS also agrees with Counsel to the Inquiry that, while in some cases it may be possible to refer to spent convictions without identifying the individuals involved, it will not be possible in all, or the MPS would submit, in most cases. For example, it will be impossible for the Inquiry to refer miscarriage of justice cases to the panel without identifying specific individuals with spent convictions. Also, reference by the Inquiry to potential miscarriage of justice cases already in the public domain will lead to the identification of the individuals involved.

11. Evidence of spent convictions may also be relevant to credibility (see, for example, Practice Direction (Crime: Spent Convictions) [1975] 1 WLR 1065 at I.6.3 and *Thomas v Commissioner of the Metropolitan Police Service* [1997] AC 813 at p.832C). The Inquiry may need to rely on such evidence when making its factual findings.

12. For the above reasons, it is the MPS' view that the receipt, consideration and admission of evidence of spent convictions is fundamental to the Inquiry fulfilling its terms of reference and doing so fairly.

(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;

13. The MPS agrees with Counsel to the Inquiry for the reasons they give that that seeking, receiving or considering spent convictions for the purposes of deciding what to do with them, including by seeking a person's consent to use it, would not amount to 'treatment' within the meaning of section 4(1).

14. The MPS also considers it properly arguable that including reference to a spent conviction in the Inquiry's report or asking the rehabilitated person about the details of the conviction in evidence would amount to the 'treatment' of a person and, for the

reasons Counsel to the Inquiry gives at para 31, that those matters would amount to purposes in law; although there is a question as to whether the mere reference to an individual's spent conviction amounts to 'treatment' of them.

15. It is less clear that relying on a spent conviction of a rehabilitated person in determining a restriction order application for another person, particularly if the rehabilitated person was never named publically as part of the decision, would amount to treatment of the rehabilitated person. In *W v Chief Constable of Northumbria* [2009] EWHC 747 (Admin), the Court drew a distinction (albeit not fully explained) between disclosing a spent conviction and taking it into account when deciding whether to disclose a separate allegation for risk assessment purposes.

16. In *N v The Governor of HMP Dartmoor* [2001] EWHC Admin 93 Turner J held that disclosure of spent convictions in the course of official duties (in that case governors communicating information about spent convictions to local authority social services for child protection purposes and the Probation Service) did not amount to treating the rehabilitated person for a purpose in law. The Court rejected an argument that the words "in law" meant for "all purposes" and accepted that the words "in law" *"were properly words of limitation and mean for "all legal purposes" or "purposes required by the law."*

17. In other examples of matters found to be "purposes in law", the rehabilitated person was the direct subject of, and would be in some way prejudiced by, the apparent treatment; see:

    (i) Immigration decisions and appeals (*AA (Spent Convictions)* [2008] UKAIT);
    (ii) Allocation decisions by a housing authority (*YA v London Borough of Hammersmith and Fulham* [2016] EWHC 1850 (Admin));
    (iii) Licensing decisions (*Morton v City of Dundee District Council* [1992] SLT Sh. Ct. 2; *Admanson v Waveney District Council* [1997] 2 All ER 898).

18. However, a broad interpretation of the phrase "treated for all purposes in law" is supported by the obiter observations of Lord Clarke in *Goughran v Chief Constable of the Police Service of Northern Ireland* [2015] UKSC), a case in which the Supreme

Court was considering the lawfulness of the retention of biometric data by the police. Lord Clarke (at paras 92 and 93) rejected a submission that the sole effect of article 5 of the Rehabilitation of Offenders (Northern Ireland) Order 1978, which contained the phrase "treated for all purposes in law", was to restrict the use made of convictions in legal proceedings only. Lord Clarke observed: *"The contexts in which a rehabilitated offender is entitled to demand that he or she be treated in precisely the same way as someone who has not been convicted are not prescribed by the Order. If a rehabilitated offender is entitled, for instance, to refuse to disclose that he has not been convicted when applying for employment, why should he not be entitled to demand that his biometric data be destroyed, after the original purpose in obtaining them is no longer relevant, just as someone who has been arrested but not convicted of an offence is entitled to do?"* (para 93).

19. In the final analysis, it is not sufficiently clear whether relying on a spent conviction of a rehabilitated person when determining another's person restriction order application would amount to treatment 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);

20. The key question is (2) iv. For the reasons that follow, the MPS submits that it is possible to interpret "proceedings before a judicial authority" in section 4(6) of the 1974 Act as including (some of) the Inquiry's work:

(i) "Proceedings before a judicial authority" are drawn widely in section 4(6). This accords with the purpose of the legislation, which is to protect persons from having spent convictions admitted into evidence unless the test in section 7(3) is satisfied.

(ii) The definition of judicial authority extends beyond "proceedings before any of the ordinary courts of law" and includes "proceedings before any tribunal, body or person having… power… (a) by virtue of any enactment, law, custom or practice… to determine any question affecting the rights, privileges, obligations

or liabilities of a person, or to receive evidence affecting the determination of any such question." The Inquiry is not an ordinary court of law, but the Chair is a person with powers under the 2005 Act. The key question is whether, in exercising those powers, the Chair is determining any question affecting the rights or obligations of a person.[1]

(iii) "Rights" and "obligations" are not further defined. There is nothing in the statutory wording to limit them to substantive, rather than procedural, rights and obligations.

(iv) The use of the word "affecting", rather than, for example, the phrases 'disposing of' or 'determining rights' etc, is deliberate. It does not necessarily mean a final determination of rights. While a court ultimately determines human rights (see section 7 Human Rights Act 1998 ('the HRA')), that does not mean that a public authority making an initial decision is not determining a question "affecting" those rights. This broad construction would again accord with the purpose of the legislation. In a different context, in *Miller v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin); [2017] 1 All E.R. 158, the Divisional Court observed at paras 7 and 58 et seq (and it was not doubted by the Supreme Court) that notification under Article 50 TFEU would *affect* the legal rights of virtually everyone in the UK.

(v) The Chair has the power to determine questions affecting the procedural obligations of persons. For example, section 21 of the 2005 Act sets out the "Powers of chairman to require production of evidence etc". The Chair's exercise of those powers involves imposing an obligation on a person to attend at a time and place to give evidence, produce documents etc. Section 16(3) of the 2005 Act refers to an "obligation" arising under an order of an inquiry.

[1] There is no basis to suggest that the Chair of an inquiry determines questions affecting privileges and an inquiry has "no power to determine, any person's civil or criminal liability" (section 2(1) of the 2005 Act and para 8 of the Explanatory Notes; see also *Canada (Attorney-General) v Canada (Commission of Inquiry on the Blood System)* [1997 3 SCR 400).

(vi) The Chair also has the power to determine questions affecting the rights of persons. A decision by the Chair on a restriction order anonymity application involves a consideration of matters including Article 8 ECHR rights of a person. Counsel to the Inquiry correctly note that *YA v London Borough of Hammersmith and Fulham* [2016] EWHC 1850 (Admin) is distinguishable on the facts, but the reasons for which a Housing Association allocating housing stock was not found to be a judicial authority do not apply to an inquiry: an inquiry is not a purely administrative process; the rights involved are not those *against* the inquiry; the inquiry does not have a direct interest in the outcome (of, for example, an anonymity application) and the inquiry does have the power to adjudicate on rights conferring status (anonymity) in relation to third parties (for example, non-core participant witnesses).

(vii) There is nothing in the express wording of section 4(6) nor by necessary implication must it be construed as being directed at the overall purpose of the proceedings in question. The use of the word "any" strongly suggests that all that is necessary is that (in this case) the person has power to determine *any* question affecting rights and/or obligations.

(viii) It follows that, if the test in section 7(3) of the 1974 Act is satisfied, there is nothing in the 1974 Act to limit the use to which spent convictions can be put in an inquiry.

21. However, the MPS notes that there are contra-indications to this interpretation:

(i) The Inquiry does not determine obligations, but rather imposes them. It has no coercive powers. The enforcement of those obligations imposed under section 21 is a matter for the High Court (see section 36 of the 2005 Act).

(ii) The phrase "any question affecting the rights, privileges, obligations or liabilities of any person" appears to be a term of art and occurs in materially identical form in the "General savings" provisions in section 16(1)(c) of the Interpretation Act 1978. That subsection provides for the presumption that Parliament does not intend, unless expressly stated, to interfere retrospectively

with any rights accrued under an enactment when it is repealed. That presumption generally applies only to substantive rather than procedural rights (see, for example, *Wilson v First County Trust Ltd (No.2)* [2003] UKHL 40 at para 193 et seq). It is therefore observed that at least in that context, the reference to rights etc is a reference to substantive rights rather than procedural rights.

(iii) The Inquiry does not determine Convention rights (see, Counsel to the Inquiry's note at para 55). An inquiry is also not a court or tribunal determining rights for the purposes of section 7(1) of the HRA. Significantly, the amendments to section 17(1) of the Regulation of Investigatory Powers Act 2000 ('RIPA') draw the distinction between "legal proceedings" (meaning civil or criminal proceedings in or before any court or tribunal) and "Inquiries Act proceedings" (meaning proceedings under the 2005 Act). This accords with the definition of "legal proceedings" in section 7(6) of the HRA.

(iv) Section 7(3) of the 1974 Act permits spent convictions to be admitted into evidence in proceedings before a judicial authority if the authority is satisfied "that justice cannot be done in the case…". While it is arguable that this means no more than a fair determination of the issue with which the authority is seized, it is noteworthy that inquiries are not concerned with the 'administration of justice' (see the Supreme Court of Ireland in *Goodman International v Hamilton* [1992] 2 IR 542). The 2005 Act does not require the Chair to apply an 'interests of justice' test, but rather to 'act with fairness' (see section 17(3)).

(v) It would strain the statutory language to describe an inquiry, or any part of its proceedings including the determination of restriction order applications, as a 'case'.

(vi) On the footing that the Inquiry is a judicial authority, there is no clear principled basis for distinguishing between Inquiry proceedings and the determination of a matter affecting a person's rights etc by any other public body, e.g. a police constable deciding on conditions of police bail.

22. An examination of the status of other proceedings does not clarify the position. The following have been found to be "proceedings before a judicial authority":

(i) Tribunal hearings (*3G v HMRC* [2013] UKFTT 719 (TC); *AA (Spent Convictions)* [2008] UKAIT; *A v B* [2013] UKEAT/0025/13/DM);

(ii) Licensing committee hearings (*Morton v City of Dundee District Council* [1992] SLT Sh. Ct. 2);

(iii) Hackney carriage licence applications (*Admanson v Waveney District Council*, in which the parties had agreed that a local authority administrative decision-maker was a judicial authority so it was not considered by the Court).

23. Statutory Instruments enacted at the same time as primary legislation may be used as an aid to interpretation (see *R v Secretary of State for the Home Department, Ex p Mehari* [1994] QB 474, at p.486). The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 provides that certain matters will be exempt from section 4(2) of the 1974 Act. Section 4(2) applies only to questions put "otherwise than in proceedings before a judicial authority". The implication is that the following were not considered at the time of the coming into force of the Act to be proceedings before a judicial authority, and the question must therefore be posed, what distinguishes a statutory Inquiry from the following:

(i) Assessing suitability for adoption, being a special guardian or providing day care etc. (article 3(1)(a));

(ii) Granting or revoking a gambling licence (article 3(1)(h)).

(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.

24. A plain reading of section 4(2) leads to the conclusion that a question put to a person at any stage of the Inquiry (if it does not amount to "proceedings before a judicial authority") seeking information with respect to a person's previous convictions would fall within the scope of section 4(2).

25. It would be peculiar if the statute imposed an obligation on, rather than granting a right to, a person not to tell the truth about their spent convictions whenever they were asked a question about them. The statutory wording does not support such a proposition. Section 4(2)(a) uses both the mandatory "shall" and the (more typically) discretionary "may", which implies that Parliament intended a distinction to be drawn between the two words. A person therefore has a discretion whether to tell the truth or not. The MPS agrees with Counsel to the Inquiry that this interpretation accords with the view expressed by Whitford J at 422B-E in *X v Commissioner of Police for the Metropolis* (*"...the answer thereto may be framed accordingly; ..." not it is to be observed... "must be framed accordingly."*").

(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).

26. A plain reading of section 4(3)(a) is that it leaves open the option for a person subject to a relevant obligation voluntarily to disclose a spent conviction (whether his own or another's). The phrase "shall not extend to requiring him" makes clear that the person cannot be obliged to disclose details of a spent conviction, but there is nothing in the language of the section which prevents voluntary disclosure of a spent conviction. If a person was prevented from doing so, it would in certain circumstances prevent a person vindicating their own rights (e.g. a claim that a police force should not continue to store reference to a spent conviction).

27. Assuming a notice under section 21 of the Act constitutes "an obligation imposed... by any rule of law" it follows that a person could lawfully omit to disclose a spent conviction (whether his own or another's).

28. The MPS agrees with Counsel to the Inquiry that if the Inquiry is a judicial authority and it determines that the exemption in section 7(3) applies, then this would take precedence over section 4(3)(a). Section 7(3) expressly refers to the power "to require evidence" if justice cannot be done without it. A contrary interpretation would rob section 7(3) of its effect.

(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?

29. When considering exceptions to section 4, the Inquiry needs a solution which is fair and avoids unnecessary cost (section 17(3) of the 2005 Act). Seeking the consent of individuals (section 7(2)(f)) would be impractical in many cases and impossible in others: for example, if the rehabilitated person could not be found, or refused to engage with the Inquiry or if the Chair wanted to admit evidence of a spent conviction as part of a restriction order application where seeking consent would undermine the purpose of the application.

30. The starting point in relation to section 7(3) is that *"the discretion is a broad one. The judge may take into account "any considerations which appear to [him] to be relevant" and the overriding requirement is that justice shall be done"* (*Thomas v Commissioner of the Metropolitan Police Service* [1997] AC 813 at p.830E). There may also be cases where a spent conviction is relevant to an issue, but not so important that justice could not be done without evidence of it being admitted (see, for example, *A v B* [2013] UKEAT/0025/13/DM at para 5).

31. In different contexts, the Courts have suggested various approaches to section 7(3). There are no examples of a "blanket order" and most cases advocate a fact-specific analysis of whether section 7(3) should be applied. The structured approach suggested in *Admanson v Waveney District Council* at 904A-J (in the context of an appeal against the grant of a Hackney carriage licence) can be contrasted with the less stringent approach in *O'Doherty v Renfrewshire Council* [1997] SC 238 in which the Extra Division of the Court of Session in Scotland (Lords McCluskey, Marnoch and Allanbridge) found at p.242 in the licencing context, that decisions pursuant to section 7(3) do not need to be accompanied *"...by much formality but it seems to us that, at the least, some sort of inquiry as to the age and general nature of the convictions would be essential to any proper decision under the relevant subsection."*).

32. If the Inquiry has power under section 7(3) the manner in which it exercises that power should be fair but not lead to over-complication. The most simple and principled approach, in the context of this Inquiry, concerning as it does policing, is for the Chairman to conclude that it is in the interests of justice to admit any spent conviction that is in his view relevant to any matter that he needs to determine. In considering relevance the Chairman will have to consider fairness; given this, it is not necessary for the Inquiry to give any separate consideration to the considerations underpinning the 1974 Act.

33. The MPS agrees with Counsel to the Inquiry that any approach pursuant to section 7(3) which impedes the work of the Inquiry must be avoided. The answer, in view of the uncertainty about the Inquiry's status as a judicial authority and the efficacy of a blanket order, would be to seek an exemption from section 4(1) of the Act.

(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.

34. The MPS submits that the answer to questions (6)i to iv is no.

35. The MPS submits that the answers to questions (6)v and iv depend on whether the Inquiry is able to exercise a power under section 7(3).

(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?

36. The MPS submits that the Chairman should invite the Secretary of State for Justice to make exemptions whose effect, if it can be achieved, is that the restrictions in section 4 of the Act do not apply to the Inquiry, leaving the Inquiry free to receive, consider and admit such evidence as it thinks is relevant in light of its duty of fairness. The MPS would invite the Chairman to consider asking for exemptions to cover all bases regardless of whether the Inquiry amounts to proceedings before a judicial authority or not. The MPS is unable to improve the drafts proposed by Counsel to the Inquiry at paras 96, 97 and 99.

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