THE UNDERCOVER POLICING INQUIRY

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

SUBMISSIONS ON BEHALF OF SECRETARY OF STATE FOR THE HOME DEPARTMENT

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1. These submissions are provided further to the Chairman's Direction of 1 March 2017 and Counsel to the Inquiry's Note of the same date. The latter identifies important issues for consideration at paragraph 109 in relation to the operation of the Rehabilitation of Offenders Act 1974 (ROA 1974).

2. Our submissions do not specifically address the position of third party bodies such as police forces, which may hold relevant material concerning spent convictions and ancillary circumstances, under ROA 1974. We understand that this will be addressed by other core participants.

(1) EVIDENCE OF SPENT CONVICTIONS AT INQUIRY

3. It is likely that the Inquiry will need to receive, consider and admit evidence of spent convictions and ancillary circumstances. This is for the reasons given by Counsel to the Inquiry (CTI) at paragraphs 7-19 of their Note. In short, it is because a public inquiry investigating the conduct of undercover police officers and units is likely to need to consider such matters if it is to adhere to its terms of reference and act fairly.

(2) SECTION 4(1) – PROCEEDINGS BEFORE A JUDICIAL AUTHORITY

4. Section 4(1) starts with the mandatory injunction that a rehabilitated person shall be treated for all purposes in law as a person who has not committed the offences which were the subject of his or her spent convictions. This applies whether or not the proceedings in question are before a judicial authority.

5. Where proceedings are before a judicial authority, as defined in section 4(6), the additional protections in section 4(1)(a) and (b) apply. However, the important limitation in section 7(3) also applies, the effect of which is to permit the authority to admit or require evidence of spent convictions where it is satisfied that justice could not otherwise be done. There is no

equivalent route to the admissibility of spent convictions in proceedings that are not before a judicial authority.

6. Whilst the wording of the relevant provision leaves some room for doubt, It is probable that Undercover Policing Inquiry proceedings are not properly defined as proceedings before a judicial authority for the purposes of ROA 1974. The Inquiry is a body having power by virtue of an enactment for the purposes of section 4(6)(a)), namely the powers afforded to the Chairman under the Inquiries Act 2005 and Inquiry Rules 2006. However, the Chairman probably does not have the 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", as further required by the section 4(6) definition.

7. The Inquiry's remit is to inquire into undercover police operations conducted by English and Welsh police forces in England and Wales since 1968 and to provide a report including recommendations as to the future deployment of undercover officers. Significantly, section 2(1) of the Inquiries Act 2005 stipulates that the Inquiry panel does not have the power to determine legal liability. As the Ministry of Justice has noted: "Section 2 specifically provides that an inquiry is *not* permitted to determine civil or criminal liability of those appearing before it. Inquiries are inquisitorial rather than adversarial but they are not courts and their recommendations cannot and do not have legal effect. The aim of an inquiry is rather to help restore public confidence in systems or services by investigating the facts and making recommendations to prevent recurrence."[1]

8. CTI give further reasons at paragraphs 35-65 of their Note why inquiry proceedings may not be before a judicial authority. We note two points in particular. First, the ruling of the Bloody Sunday Inquiry of 19 December 2002, which observed that the Inquiry would not be determining anyone's rights and obligations (CTI Note, paragraph 48). We observe that this was in the context of a ruling involving the exercise of important procedural powers in relation to matters engaging Convention rights, including the determination of applications for anonymity.[2] Second, the conclusion of the Administrative Court that just because there is a

[1] Memorandum to the Justice Select Committee: Post-Legislative Assessment of the Inquiries Act 2005, (2010) Cm 7943, paragraph 14

[2] Ruling (19th December 2002): claims for immunity made by the Secretary of State for the Home Department; application to give evidence by a time-delay procedure; applications for anonymity and

statutory process that includes rights for a party does not make it "proceedings before a judicial authority". The section 4(6) 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 (*YA v London Borough of Hammersmith and Fulham* [2016] EWHC 1850 (Admin) at [44]; CTI Note, paragraph 49).

(3) SECTION 4(2) – PROCEEDINGS NOT BEFORE A JUDICIAL AUTHORITY

9. Where proceedings are not before a judicial authority, section 4(2) operates to permit questions seeking information about previous convictions and conduct. This would appear to include questions about spent convictions. However, the subsection also includes provisions which protect those answering from being prejudiced by any failure to acknowledge or disclose spent convictions (section 4(2)(b)) and even requiring those receiving such questions to treat them as not relating to spent convictions (section 4(2)(a)).

10. Lord Reed JSC has described section 4(2) in these terms: it "does not affect the rights of employers or others to ask questions about criminal convictions, but it alters the obligations and liabilities of persons to whom the questions are addressed, by requiring such questions to be treated as not relating to spent convictions, and by exempting such persons from any liability by reason of their failure to disclose such convictions. A person with a spent conviction is therefore entitled to treat a question about his criminal record as not relating to spent convictions; and he cannot incur any civil or criminal liability if he answers the question on that basis" (*R (T) v Chief Constable of Greater Manchester Police* [2015] AC 49 at [72]).

11. This means that it may be permissible to seek information about past convictions including those which are spent in Undercover Policing Inquiry proceedings, assuming the proceedings are outside the definition at section 4(6). But there would be potentially significant limits on the reliance that could be placed on the answers provided, which may be incomplete or untruthful.

screening by Security Service officers; venue for Security Service officers, Bloody Sunday Inquiry Report vol X, paragraph 43 (page 244)

(4) SECTION 4(3) – OBLIGATION TO DISCLOSE UNDER ANY RULE OF LAW

12. Lord Reed has observed that section 4(3): "deals with the situation where no question is asked [in contrast with section 4(2), which addresses the situation where a question is put], but where an obligation to disclose criminal convictions arises for some other reason. In that situation too, such an obligation is not to extend to spent convictions, and neither the spent conviction nor the failure to disclose it is to be a proper ground for dismissing or excluding the person from (read short) any occupation or employment (*R (T) v Chief Constable of Greater Manchester Police* at [73]).

Section 21 Inquiries Act 2005 notice

13. Section 21 of the Inquiries Act 2005 (IA 2005) empowers the chairman by notice to require a person to give information to an inquiry. If inquiry proceedings are <u>not</u> before a judicial authority for the purposes of ROA 1974, it would appear that the person in receipt of the notice will not be obliged to provide information concerning spent convictions or ancillary circumstances, even where it is specifically required. The relevant provisions are as follows. First, the rehabilitated person is to be treated for all purposes in law as not having committed the relevant spent offence "notwithstanding the provisions of any enactment or rule of law to the contrary" (section 4(1)). Second, where a question is put seeking information about previous convictions, "it shall be treated as not relating to spent convictions" (section 4(2)(a)). And third, where a disclosure obligation otherwise arises, "it shall not extend to requiring [a person] to disclose a spent conviction" (section 4(3)(a)).

14. Where proceedings are before a judicial authority, "a person shall not … 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…" (section 4(1)(b); and section 4(3)(a) applies here too). But it is necessary to go on to consider section 7(3). If, contrary to our submission at paragraph 6, inquiry proceedings <u>are</u> before a judicial authority for the purposes of ROA 1974, section 7(3) would act to empower the Inquiry to require evidence of spent convictions where justice could not be done without the receipt of such information. In other words, the Inquiry's section 21 IA 2005 notice would have effect in relation to spent convictions by virtue of section 7(3), if properly invoked. See below.

(5) SECTION 7(3) – BLANKET ORDERS

15. We have already submitted that it is probable that Undercover Policing Inquiry proceedings are not properly defined as proceedings before a judicial inquiry for the purposes of ROA 1974. That would mean that the Chairman does not have the power to admit or require evidence of spent convictions under section 7(3). However, were he to have such a power, the question is whether section 7(3) requires the Chairman to consider each spent conviction individually when considering the issue, or whether he can make "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" (CTI Note, paragraph 109(5)).

16. Section 7(3) would have effect where the Chairman was satisfied that justice could not be done except by admitting or requiring evidence of a person's spent convictions. This issue would fall to be considered in the light of any considerations which appeared to him to be relevant. There is a difference between "requiring" information about spent convictions as part of a process of disclosure and "admitting" it in evidence. The Chairman may need to require the information before he is able to make decisions whether to admit it.

17. The provision has been helpfully considered in *A v B* [2013] I.R.L.R. 434, an Employment Appeal Tribunal case in which Keith J stated that the spent conviction must be relevant to the issues the authority has to decide. CTI have correctly addressed the possible relevance of spent convictions to the issues of miscarriages of justice, the justification of undercover policing, anonymity applications and the credibility of witnesses (Note, paragraphs 7-19). Keith J added at [5]:" But relevance is by no means the end of the matter. The court or tribunal has to make a judgment about how important the conviction really is to the issues which it has to decide. That is because the critical question is whether the only way in which justice can be done is by admitting evidence of the conviction. There may be cases in which the conviction, though relevant to an issue which the court or tribunal has to decide, is not so important to the fair resolution of that issue that justice cannot be done without evidence of it being given."

18. This suggests that the widely drawn blanket order posited by CTI ("in any situation in which the Inquiry deems it necessary") would be too broad to meet the requirements of section 7(3), whether the Inquiry was seeking to require evidence of spent convictions or to admit it.

(6) VOLUNTARY DISCLOSURE AND CONSENT

19. Paragraph 109(6) of CTI's Note poses a number of further questions. We focus here on the issues arising relating to voluntary disclosure and consent.

20. Section 4(1)-(3) ROA 1974 do not act to restrict the voluntary disclosure to the Inquiry of spent convictions by a rehabilitated person. The subsections contain provisions such as those stopping questions about spent convictions being put or protecting a person from answering them but the wording does not preclude voluntary disclosure.

21. It is also necessary to consider section 7(2)(f), which expressly states that a person who is a witness or a party in proceedings may consent to the admission or the requirement of any evidence relating to his or her previous convictions (which might include spent convictions). "Proceedings" is not here limited to those before a judicial authority and would therefore include Inquiry proceedings.[3]

(7) – (8) EXCLUSIONS AND EXCEPTIONS

22. The Secretary of State for Justice may by order make provision for excluding the application of / providing exceptions to sections 4(1)-(3) (pursuant to sections 7(4) and 4(4)). We do not intend to make submissions about whether the Inquiry should seek such exclusions or exceptions or the terms in which they might be sought.

ADDITIONAL MATTERS

23. Finally, two important points should be made if it is accepted that the Inquiry has the need and the power to admit evidence of spent convictions.

24. First, the aim of the ROA 1974 regime to protect individuals from being prejudiced by the existence of spent convictions must still be respected. A person whose spent convictions are admitted and published by the Inquiry will still benefit from protections afforded under the

[3] Section 7(2) - "Nothing in section 4(1) above shall affect the determination of any issue, or prevent the admission or requirement of any evidence, relating to a person's previous convictions or to circumstances ancillary thereto … (f) in any proceedings in which he is a party or a witness, provided that ... he consents to the determination of the issue or, as the case may be, the admission or requirement of the evidence notwithstanding the provisions of section 4(1)".

Act, such as those within section 4(3)(b). This subsection operates to prevent employers from dismissing or excluding employees on the basis of their spent convictions.[4]

25. Second, the Inquiry will wish to proceed in a sensitive fashion when considering the public disclosure of spent convictions and related evidence. Section 19 of the Inquiries Act 2005 may operate to mitigate the problems that public exposure of relevant evidence of spent convictions would cause. This is a matter the Inquiry will move on to address (CTI Note, paragraph 4). It is also agreed that the approach of the criminal courts offers a useful guide to the approach the Inquiry might adopt should spent convictions be admissible (CTI Note, paragraph 107[5]).

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[4] "a conviction which has become spent or any circumstances ancillary thereto … shall not be a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him in any way in any occupation or employment".

[5] In the criminal courts, regard should be had to the general principles of the Rehabilitation of Offenders Act 1974 even though section 4(1) does not apply to evidence given in criminal proceedings. CTI refer at paragraph 107 to Part I of Practice Directions of General Application – Criminal Procedure Rules; note also Criminal Procedure Direction V Evidence 21A: Spent Convictions, which addresses evidence of bad character and is in similar terms.