IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

NON-POLICE, NON-STATE CORE PARTICIPANTS'
SUBMISSIONS ON
THE REHABILITATION OF OFFENDERS ACT 1974

INTRODUCTION

1. The non-police, non-state core participants ["NPSCPs"] accept that the Inquiry will, in some circumstances, need to consider spent convictions for the purposes identified at [8]-[19] of Counsel to the Inquiry's ["CTI"] note, namely:
   a. identifying potential miscarriages of justice / evidence of undercover police officers' contact with the criminal justice system whilst undercover;
   b. considering justification for undercover operations;
   c. determining applications for restriction orders;

   And potentially in assessing the credibility of conflicting witnesses (CTI's note [7]; see further discussion of this issue below at [43]-[48])

2. However, there are a number of reasons for the Inquiry to be cautious in its approach to spent convictions. Such convictions are plainly sensitive and the protections afforded by the Rehabilitation of Offenders Act 1974 ["ROA"] represent Parliamentary recognition of the importance of enabling individuals to put past criminal convictions behind them. They also attract protection under Art 8 HRA and under the Data Protection Act 1998 ["DPA"]. Further, and of significant importance in the context of the present Inquiry, there are strong grounds for caution as to the safety of some of the spent convictions the Inquiry may come to consider and as to the accuracy of the police account in relation to them.

3. For these reasons, there cannot lawfully be a blanket approach to reliance on spent convictions in the Inquiry's proceedings, either in the context of restriction order applications or in the course of the Inquiry's substantive proceedings. Such convictions should only be considered by the Inquiry where it is relevant and necessary to the discharge of its functions for it to do so and the process must be governed by attendant safeguards to ensure that:
   a. the Inquiry is in a position to examine critically the information on which it makes decisions about spent convictions;
   b. the privacy rights of those affected are properly protected and the requirements of the DPA are met;
   c. the purposes of the ROA 1974 are not undermined – i.e. the Inquiry must ensure that it does not exacerbate wrongs done to those spied upon by disapplying the usual protections afforded by the ROA without putting substitute protections in place.

4. In respect of the first of these, the NPSCPs agree with CTI as to the importance of getting to the truth in relation to spent convictions. However CTI's note only acknowledges one aspect of this: what should be done in relation to the provisions of the ROA which enable information concerning spent convictions to be withheld. The NPSCPs emphasise an equally critical factor in getting to the truth which is that there must be consideration of <u>all</u> of the relevant available evidence in relation to spent convictions – i.e. the police account in relation to such convictions must not be uncritically accepted. This is essential given the subject matter of the Inquiry. Solely relying on the police account of events leading to a conviction risks presuming the truth of the very matters the Inquiry is tasked to investigate. This issue is considered further in Part 2 below.

5. Part 3 below sets out the NPSCPs' analysis of the extent to which the ROA creates potential barriers to the Inquiry's consideration of spent convictions and addresses how these can be overcome. The questions raised at para. 109 of CTI's note are addressed in this part.

6. Part 4 sets out the NPSCPs' submissions in respect of the safeguards that will be necessary to ensure compliance with the Inquiry's obligations under Art 8 and the Data Protection Act 1998 and its duty to act fairly under s.17 of the Inquiries Act 2005. The NPSCPs do not agree with the suggestion at [4] of CTI's note that the issue of publication of spent convictions can be dealt with separately and subsequently to the issue of disapplication of the relevant provisions of the ROA. Given the potential impact on the rights of the NPSCPs, the necessity and proportionality of the Inquiry dealing with spent convictions in a way that would ordinarily be precluded by s.4(1) and/or s.4(2) ROA requires mitigating or protective measures to be considered at the same time.

PART 1: RELEVANCE AND NECESSITY

7. As above, the NPSCPs accept that consideration of spent convictions may be relevant and necessary in relation to restriction order applications; consideration of justification for UC operations; in identifying miscarriages of justice and, potentially, in some cases, in assessing the credibility of witnesses.

8. However, the NSCPs do not accept that a broad brush approach to reliance by the Inquiry on such convictions (whether in the context of its substantive investigation or at the stage of restriction order applications) would be lawful. Before admitting into evidence any spent conviction, including in the context of a restriction order application, the Chair must carefully consider whether it is strictly relevant and necessary to do so. This is particularly important in any case where there are restrictions on input from NPSCPs, for example in relation to restriction order applications, or where an RO has been made which limits the ability of NPSCPs to participate in the proceedings.

9. The NPSCPs do not accept the suggestion in CTI's note at [84] and [85] that spent convictions may arise too frequently for the Inquiry to be able to consider their relevance and necessity on a case-by-case basis. Further, a broad brush approach to the admissibility of such convictions appears to conflict with CTI's acknowledgment at [2] of the note that the Inquiry should only receive such evidence where it is *necessary*.

10. The first step in any consideration by the Inquiry as to whether it should take account of information it has received is to determine whether it is relevant and necessary. If it is not, then it should be disregarded (subject to its relevance and necessity being kept under review in light of further information).

11. The need for a discerning approach is heightened in respect of spent convictions, because these engage the convicted person's Art 8 rights (see R (T) v Chief Constable of Manchester [2015] AC 49 [18] and R (L) v Commissioner of Police of the Metropolis [2010] 1 AC 410 [27]). This is the case even prior to considerations of disclosure (see R (Catt) v ACPO [2015] AC 1065, in particular at [6], [47] & [60]), but plainly applies also in relation to any onward disclosure or publication by the Inquiry.

12. Further, such convictions are "sensitive personal data" for the purposes of s.2 DPA, the processing[1] of which must be in accordance the Data Protection Principles set out in Schedule 1 DPA and must satisfy at least one of the conditions in Schedule 3. The condition contained in paragraph 7 of Schedule 3 would apply for the purposes of the Inquiry, namely processing "in the exercise of any functions conferred on any person by or under an enactment", but such processing must be limited to that which is *necessary* for the statutory purpose. Likewise,

[1] "Processing" for the purposes of the DPA means "obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data" (s.1 DPA). The activities of the Inquiry in relation to spent convictions would plainly include such functions.

paragraph 3 of Schedule 1 DPA requires that personal data *must not be excessive* in relation to the purpose or purposes for which they are processed.

13. For all of these reasons, the Inquiry cannot lawfully adopt a blanket approach to the admissibility of spent convictions, but rather must consider in respect of each such conviction whether it is relevant and necessary to the Inquiry's proceedings. If it is not, it must not be taken into account.

PART 2: IMPORTANCE OF GETTING TO THE TRUTH

14. As acknowledged above, there are likely to be matters that the Inquiry cannot properly investigate if it is unable to hear evidence about, and make findings in relation to, spent convictions. However, its investigations will equally be hampered if they are limited to taking spent convictions at face value, or assessing them solely on the police account.

15. One of the core purposes of this Inquiry is to identify miscarriages of justice that have occurred as a result of material non-disclosure of undercover activities by the police. CTI's note cites, by way of example, the miscarriages of justice referred to in the December 2011 report of Sir Christopher Rose. The NPSCPs point also to the observations of the Court of Appeal (Criminal Division) in the cases of R v Barkshire [2011] EWCA Crim 1885 and R v Bard [2014] EWCA Crim 463. There are also the cases of the NPSCPs who have been granted core participant status in Category I. It must be anticipated that there are many further examples that have yet to be uncovered. However, if convictions are uncritically relied upon in support of restriction order applications, which in turn prevent NPSCPs and other members of the public from ever knowing about them, the prospects of the Inquiry uncovering the truth are significantly impaired.

16. It is respectfully submitted that the Inquiry must, therefore, ensure that it takes all possible steps to obtain the information necessary for it to examine critically the safety of spent convictions and the police account of the circumstances in which they arose.

17. The NPSCPs propose that, at a minimum, the following steps should be taken:

    a. an undertaking should be sought from any police body that provides information to the Inquiry about a spent conviction that it will provide to the Inquiry all underlying material pertaining to that conviction and the circumstances in which it arose, including 'unused material' and documents generated by or concerning any undercover officers involved in the index events;

    b. this material should be disclosed to the convicted person to the greatest extent possible consistently with any restriction order or restriction order application. This should be done as soon as possible after the information is received by the Inquiry in order that the convicted person can make submissions as to the relevance of their spent conviction(s) and as to any further investigation that may be necessary. For the avoidance of doubt, it is the NPSCPs submission that disclosure of spent convictions and the underlying information referred to at a. above should be made to the individual to whom the conviction applies in respect of every such conviction of which the Inquiry is informed;

    c. where the Inquiry is considering admitting evidence of a spent conviction, whether for the purposes of its substantive investigations or for the purposes of determining a restriction order application, the convicted person should be given as much information as possible about the purpose for which the Inquiry is considering his or her spent conviction;

    d. the convicted person should be afforded an opportunity to make any submissions s/he wishes, or is able, to make in relation to the

spent conviction, the circumstances in which it arose and the steps the Inquiry proposes, or ought, to take in relation to it.

18. Further, it must at the same time be recognised that, in circumstances where it is not possible to make full disclosure to the rehabilitated person, s/he will not be in a position to make fully informed submissions in relation to the spent conviction because s/he will not be aware of relevant information pertaining to it. It is therefore important that whenever a restriction order is made in such circumstances, the Inquiry should:
    a. remain alive to the fact that it has been made on the basis of one-sided information;
    b. continue to keep the need for the restriction order under review; and
    c. continue to look for ways of obtaining any contrary evidence, including by enabling relevant individuals to give meaningful evidence.

19. The Inquiry should be particularly astute to ensure that restriction orders and the restriction order process do not prevent miscarriages of justice from coming to light. It is a well-established principle that ensuring a miscarriage of justice does not occur overrides the public interest in non-disclosure of an informant: *Marks v Beyfus* (1890) 25 QBD 494 at p.498; *R v Agar* (1990) 90 Cr App R 318; *DIL* [26] & [27].

20. The NPSCPs also highlight the particular difficulties that arise in relation to groups. It is anticipated that restriction order applications may be made on the basis of alleged threat from a particular group and that evidence may be adduced of the spent convictions of members of that group in support of such an application. However, in cases where it is the group that is the core participant in the Inquiry, rather than individual members of the group, it is entirely possible that the member or members whose spent convictions are relied upon has no contact with the RLR for that group and may even no longer have contact with

current members of the group. The difficulty in such a situation is that the current members of the group, and the RLR, will have no effective means of challenging reliance upon the spent conviction(s) or its underlying circumstances unless sufficient information is provided to them, in gisted form if necessary.

21. The Inquiry will need to be alive to the difficulties that arise in this and analogous situations and consider what steps it can take to ensure that it puts measures in place to enable it to obtain the information necessary to test the safety of the conviction and the truth behind the circumstances leading to it. For example, in circumstances such as those contemplated in [20] above, the Inquiry may need to provide information to a CP group that is affected, or would potentially be affected, by the Inquiry placing reliance on the spent conviction(s) of members, or past members, of the group. In such circumstances, the Inquiry would need to conduct a careful balancing exercise between the privacy rights of the rehabilitated individual (if they cannot be traced to obtain their consent) and the importance of getting to the truth behind the spent conviction and of not placing untested reliance on a spent conviction where to do so might restrict the Inquiry's ability to get to the truth going forward – for example where a restriction order is granted on the basis, or partly on the basis, of the conviction.

PART 3: BARRIERS TO CONSIDERATION OF SPENT CONVICTIONS AS A RESULT OF ROA

22. The NPSCPs agree with CTI's observation at [20] of their note that the ROA does not operate so as to provide a right of confidentiality in relation to spent convictions, but rather puts in place a regime which protects an individual from being prejudiced by the existence of such convictions. It is therefore necessary to identify exactly what the Act prevents the Inquiry from doing in relation to spent convictions and what, if anything, should be done to address this.

23. In summary, and for the reasons developed below, it is the NPSCPs' view that the Inquiry's proceedings (including its determination of RO applications) are proceedings before a judicial authority within the meaning of s.4(6) of the ROA. In consequence, the full provisions of s.4(1), including ss.4(1)(a) and (b) apply so that, subject to s.7(3), the Inquiry is precluded from:

    (i) treating a rehabilitated person for all purposes in law as a person who has committed or been charged with or prosecuted for or convicted of or sentenced for the rehabilitated offence or offences;

    (ii) admitting evidence 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

    (iii) asking a rehabilitated person any question relating to his or her past, which cannot be answered without acknowledging or referring to a spent conviction or convictions or any circumstances ancillary thereto. And, if asked, a rehabilitated person would not be required to answer.

24. However, the NPSCPs contend that s.7(3) ROA provides the Inquiry with the necessary means of addressing these issues. And further, the process it requires, namely for the Chair to be satisfied that admission of evidence relating to spent convictions is necessary for justice to be done, is in any event necessary in order to achieve compliance with Art 8 HRA, s.4 DPA and for the Inquiry to comply with its duty of fairness under s.17 of the Inquiries Act 2005.

25. These issues are considered further in the context of the NPSCPs' submissions, set out below, in response to the specific matters identified at [109] of CTI's note.

Submissions in relation to matters set out at [109] of CTI's note

(1) Whether the Inquiry can 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.

26. This issue is addressed above. The NPSCPs accept that there will be circumstances in which the Inquiry will legitimately need to consider spent convictions in the discharge of its terms of reference. However, in considering how this is to be achieved, the Inquiry must also consider the need for corresponding safeguards addressing the issues identified at [3XXX] above and in Part 4 below.

(2) The meaning, effect and relevance of s.4(1) ROA, in the context of the Inquiry, in particular:

- **(i) what constitutes "treatment" for the purposes of s.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 s.4(1) defined in s.4(6)?**

<u>What constitutes treatment for all purposes in law in s.4(1) (issues (i) and (ii))</u>

27. As CTI's note identifies, there is no authority which conclusively determines the question of what treating a person "for all purposes in law" means in the context of a public inquiry. The NPSCPs agree with CTI's observation at [28] of the note that on the ordinary meaning of "to treat" in the context of treating a person – namely, to behave towards or to deal with someone, it seems unlikely that simply receiving information about spent convictions without using that information as evidence would be interpreted as amounting to the Inquiry "treating" a person otherwise than in accordance with s.4(1).

28. It is also agreed, as suggested at [30] of CTI's note, that the tipping point into "treatment" is likely to arise if and when the Inquiry admits into evidence information concerning a spent conviction.

29. CTI's note at [31] then questions whether treatment of a rehabilitated person for evidential purposes in the Inquiry is for a purpose in law [31]. Their note raises arguments for and against this. The NPSCPs contend that the stronger arguments are in favour of the proposition that admitting evidence of a spent conviction is for a "purpose in law". As CTI point out, evidence before the Inquiry will be given on oath and the Perjury Act 1911 will apply. Such evidence does, therefore, have clear legal consequences, even though the Inquiry's factual findings and recommendations are themselves of no legal effect. Further, the exercise of the Inquiry's powers under sections 19 and 21 of the Inquiries Act 2005 have obvious legal effect, as explained at [60] of CTI's note. Therefore, admission of evidence of a spent conviction in the context of a restriction order application appears quite clearly to be for a "purpose in law". As does a requirement for disclosure of a spent conviction under s.21.

30. CTI at [32] make reference to the case of W v Chief Constable of Northumbria [2009] EWHC 747 (Admin) and suggest that this case might provide some support for the proposition that using knowledge of spent convictions for the purposes of risk assessment is permissible without any exception to s.4(1) being in place (i.e. it is not "for a purpose in law" within that subsection). However, the situation in W is readily distinguishable from the type of risk assessment that the Inquiry will be conducting in the context of restriction order applications under s.19 of the Inquiries Act 2005. The risk assessment conducted by the Inquiry is based on evidence given on oath, or accompanied by a signed statement of truth, and results in legal consequences if a restriction order is granted. This is much more readily identifiable as treating a person for a "purpose in law" than an informal assessment of available information by a police officer for the purposes of a disclosure decision.

31. In any event, on the NPSCPs' analysis, the issue of what constitutes treating a person for a purpose in law within the meaning of s.4(1) is largely academic, because, for the reasons explained below, they

contend that the Inquiry's proceedings are "proceedings before a judicial authority" and therefore ss.4(1)(a) and (b) apply. These subsections preclude, subject to sections 7 and 8 ROA, admission of evidence of spent convictions. Therefore, although treatment for a purpose in law in s.4(1) is broader than the specific constraints imposed by ss.4(1)(a) and (b), those subsections nonetheless preclude the Inquiry from considering any evidence of spent convictions. And an exception to their application would therefore have to be found in any event.

Subsections 4(1)(a) and 4(1)(b): are the Inquiry proceedings "proceedings before a judicial authority"?

32. S.4(6) ROA defines "proceedings before a judicial authority", as relevant to the Inquiry's proceedings, as follows:

> "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;
> …
> 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."

33. As CTI rightly point out, the Chair is plainly a person having powers under the 2005 Act, so that element of the definition is readily satisfied. The key question is whether the Chair 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*."

34. The NPSCPs agree with CTI's analysis that, in terms of the overall purpose of the Inquiry, the Chair does not have power to determine any issues of civil or criminal liability and nor does he have power to determine rights, privileges and obligations [CTI's note [39]-[55]]. However, the definition in s.4(6) is significantly broader than this. The tribunal, body or person before whom the proceedings are held need

only have power to determine any question ***affecting*** the rights, privileges, obligations or liabilities of any person. The Chair plainly has such a power. Decisions taken in respect of restriction orders under s.19 of the 2005 Act will frequently ***affect*** rights: see the complex balancing of rights to be conducted in this context as set out in the restriction order legal principles ruling. The determination of how that balance is to be struck will plainly affect the rights of those concerned. In addition, the Chair has clear powers to impose legally binding obligations and liabilities through the exercise of his powers under s.21 of the 2005 Act. It is submitted that these powers under ss.19 and 21 of the 2005 Act bring the Inquiry proceedings squarely within the definition of "proceedings before a judicial authority" for the purposes of s.4(6) and, therefore for the purposes of ss.4(1)(a) and (b).

35. Further, the NPSCPs respectfully submit that s.4(6) cannot sensibly be read as imposing different classifications on different parts of the Inquiry's proceedings – i.e. as classifying the exercise of the Chair's procedural powers under ss.19 and 21 of the 2005 Act as "proceedings before a judicial authority" and the exercise of his substantive powers as being proceedings otherwise than before a judicial authority[2]. The exercise of those powers, ancillary and substantive, are all part of one set of proceedings. S.4(6) ROA defines "proceedings before a judicial authority". The Chair meets the definition of a judicial authority by virtue of his powers under ss.19 and 21 of the 2005 Act. He doesn't oscillate between being a judicial authority and a non-judicial authority depending on whether he is exercising his powers in respect of the substantive questions of the Inquiry, or considering issues relevant to a restriction order application or a s.21 notice. All Inquiry proceedings before the Chair are proceedings before a judicial authority for the purposes of s.4(6) and therefore ss.4(1)(a) and (b) apply.

[2] This is raised as a possible interpretation of s.4(6) ROA at [63] of CTI's note.

36. Further, the conclusion that the Inquiry proceedings are proceedings before a judicial authority and therefore fall within ss.4(1)(a) and (b), as opposed to ss.4(2)(a) and (b) (discussed further at [38] below), is strongly supported by the fact that evidence before the Inquiry is given on oath. This is significant, because, as CTI point out, there is an important difference in the way in which the rehabilitative protections in the ROA are achieved in the context of proceedings before a judicial authority, as compared to non-judicial contexts. In the former, s.4(1)(b) prohibits the asking of any question relating to spent convictions and provides that if such a question is asked it is not required to be answered. In the latter context, there is no prohibition on the question being asked, but s.4(2) provides for a false answer to be given in order to meet the statutory purpose of permitting rehabilitated persons to put their pasts behind them. As CTI point out it would be highly undesirable to sanction false answers being given on oath. The NPSCPs contend that this consequence provides further strong support for the conclusion that the Inquiry's proceedings do indeed fall within the definition of proceedings before a judicial authority.

37. As CTI identify at [64] of their note, the significance of the Inquiry proceedings being classified as "proceedings before a judicial authority" for the purposes of s.4(6) is that s.7(3) ROA applies. The significance of this is addressed at [41]-[47] below.

(3) The meaning, effect and relevance of s.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 s. 4(2);**
- **(ii) does s.4(2)(a) confer a discretion on a rehabilitated person (and/or third party) to whom a question which falls within s. 4(2) is put as to whether or not to give a truthful answer?**

38. It follows from the submissions in respect of the previous issue that the NPSCPs contend that s.4(2) does not apply. If that is wrong, then:

(i) absent an order being made under s.4(4), there does not appear to be any reason why a question put by the Inquiry, at any stage, would not fall within the scope of s.4(2);

(ii) it is submitted that it is a moot point whether s.4(2)(a) confers a discretion on a rehabilitated person (and/or third party) to whom a question within s.4(2) is put as to whether or not to give a truthful answer. The NPSCPs note the competing arguments set out in CTI's note at [68] and [69]. The NPSCPs add only that if the third party to whom the question is put is a public authority for the purposes of s.6 HRA, then if and in so far as s.4(2)(a) does confer a discretion to answer truthfully, then such discretion would have to be exercised in accordance with the requirements of Art 8. The short point though is that whatever the answer to this issue, i.e. whether s.4(2)(a) requires a "false" answer to be given, or affords a discretion to reveal a spent conviction, it certainly *enables* the person to whom the question is directed to give a "false" answer. This is likely to be a position that the Inquiry would wish to avoid regardless of whether that option is mandatory or discretionary. There would therefore be a need for an order under s.4(4) in any event, <u>if</u>, contrary to the NPSCPs' primary submission set out above, the Inquiry's proceedings are not proceedings before a judicial authority and therefore s.4(2) rather than ss.4(1)(a) and (b) applies.

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

(i) does s.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 s.4(3) operate so as to enable the recipient of a notice under s.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)?

39. In answer to 4(i) above, the NPSCPs agree with the analysis set out at [72] of CTI's note to the effect that the provision relieves the person

concerned of the obligation to disclose the spent conviction or ancillary circumstances, but does not appear to prevent the voluntary disclosure of the same.

40. In answer to 4(ii), the NPSCPs again agree with the analysis set out at [73] of CTI's note.

(5) If and insofar as s.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?

41. The NPSCPs submit that s.7(3) may permit a general request for evidence pertaining to spent convictions, provided the Chair were to be satisfied that justice could not be done in the Inquiry except by requiring the provision of the same. However, for the reasons already outlined in Part 1 above, it is submitted that once such evidence has been provided, the question as to whether justice requires that any of it should be admitted into evidence for the purposes of the Inquiry's proceedings will require an assessment, by the Inquiry, of its relevance and necessity, whether to the substantive matters of the Inquiry's investigation or to any ancillary matter, such as a restriction order application. That is an exercise that could only properly be done on a case-by-case basis.

42. Further, consideration as to whether justice could not be done except by admitting evidence of spent convictions requires, not only consideration of the relevance and significance of any given conviction, but also of the accuracy of the evidence provided and of the impact of its admission on the rights of rehabilitated person. None of these are considerations that can be determined on a collective basis.

43. CTI at [80] cite Thomas v Commissioner of Police of the Metropolis [1997] QB 813 in support of the proposition that s.7(3) ROA provides a

broad discretion to admit evidence of spent convictions in disregard of s.4(1) of the Act. However, it is of note that Thomas was decided prior to the passage of the HRA. More recent cases have taken a stricter approach to the judicial task of determining whether justice cannot be done except by admitting evidence of spent convictions – see A v B [2013] IRLR 434 and 3G Mobile Phones Ltd v HMRC [2013] UKFTT 719 (TC). The First Tier Tribunal (Tax Chamber) in the latter case at [40]-[42] endorsed the following approach taken by Keith J in A v B:

> [40] …Not only must the evidence in relation to the spent convictions be relevant, but section 7(3) requires that we should also be satisfied that without the evidence justice cannot be done. This point was forcefully made by Keith J in A v B [2013] UKAEAT 0025_13_1902 (19 February 2013) at [5]:
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> > "A number of things can be said about the exception in section 7(3) to the general rule in section 4(1). The first is that a rehabilitated person's rehabilitation should not be undermined unnecessarily by references to their spent conviction. The conviction has at the very least to be relevant to the issues which the court or tribunal has to decide, because if it is not relevant to any of those issues, the threshold of admissibility under the general law of evidence will not have been crossed. 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."
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> "[41] Keith J continued [7] by observing that although section 7 (3) uses the language of discretion, the court or tribunal is not exercising discretion at all:
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> > "it is making a judgement about whether justice cannot be done without the evidence of the conviction being admitted. If it decides that justice can be done without the evidence of the conviction being admitted, it will not be admitted. If it decides that justice cannot be done without the evidence of the conviction being admitted, it will be admitted. This is what Sir Richard Scott V-C (as he then was) said in [*Thomas v Commissioner of Police of the Metropolis [1997] QB 813* at p 819 C-D]. Evans LJ said much the same thing

> at p 833A when he spoke of section 7 (3) calling for "a single exercise of judgment."
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> "[42] Keith J also noted that the European Convention on Human Rights was also a relevant factor. Once the conviction becomes spent, disclosing it would amount to an infringement of one's right to respect for one's private life protected by Article 8 (1). The power conferred by section 7 (3) ROA 1974 should be construed to give effect to the rights conferred by Article 8…."

44. It is submitted that the above passages reflect the correct analysis of s.7(3) post the inception of the HRA and make clear that a decision on the part of a judicial authority to admit or require evidence of spent convictions in disregard of s.4(1) ROA is a matter of judgment and not broad discretion and requires careful consideration of the competing interests in determining whether that course is the *only* way in which justice can be done.

45. The 3G Mobile Phones case is also of relevance in the present context, because the spent conviction that was the subject of consideration in that case was that of a third party, who was not represented in the proceedings. The First Tier Tribunal observed that "*in a case involving the rights of a third party, who is not represented before us, it is all the more important that the Tribunal should consider carefully whether it should exercise its power to admit such evidence, taking account of all relevant factors*." [43]. This observation is relevant, because the Inquiry is likely to have to consider whether or not to admit evidence of convictions of persons who are not CPs, but it is also relevant to situations where the Chair will be called on to decide whether or not to admit evidence of spent convictions of CPs in circumstances where they are not able fully to participate, for example where an RO or RO application prevents full disclosure from being made. In those circumstances too, as submitted in Part 2 above, there will be a particular onus on the Inquiry to consider carefully whether such evidence should be admitted.

46. It is further submitted that the stricter approach identified in A v B and the 3G Mobile Phones case also applies in relation to consideration of the admissibility of spent convictions for the purposes of resolving issues of credibility. The Inquiry will need to distinguish carefully between spent convictions that are of genuine assistance in determining credibility and those which are merely prejudicial. Wholesale admission of spent convictions cannot be justified on the basis that they will generally be relevant to credit.

47. For all of these reasons, it is submitted that s.7(3) ROA very clearly does not permit the making of a single, blanket order allowing the admission of evidence of spent convictions.

48. Further, on the issue of credibility, it is submitted that the Inquiry should ensure that it obtains information concerning complaints of misconduct against police officers who are relevant to its proceedings. It is understood that while there is no formal process by which such complaints become "spent", police forces do operate processes for "weeding" conduct complaints. The Inquiry is respectfully invited to seek an undertaking from all police forces that they will not "weed" or otherwise delete any complaint information relating to officers or former officers who may be within the purview of the Inquiry.

(6) Considering the ROA 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 s.9)?

49. The NPSCPs contend that (other than potentially s.4(2)(a) – see [38] above), the Act does not prohibit the voluntary provision of such information to the Inquiry. However, where public authorities within s.6 HRA are concerned, such disclosure must be in accordance with any applicable legal provisions, must be for a legitimate purpose and must be necessary and proportionate to that purpose.

(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?

50. The Act does not prohibit or restrict the Inquiry requesting such information from third parties. However, s.4(1)(b) might preclude such a request being made of the rehabilitated person him or herself if, as submitted above, the Inquiry's proceedings are "proceedings before a judicial authority" and if the pre-hearing evidence gathering stage of the Inquiry is itself part of those proceedings. If, contrary to the NPSCPs' submissions set out above, the Inquiry's proceedings are not "proceedings before a judicial authority", then s.4(2) ROA would apply, subject to any order made under s.4(4). Whilst this would not prohibit the Inquiry from requesting information in respect of spent convictions, it would mean that any such an enquiry could effectively be ignored, or answered as though it did not relate to spent convictions.

(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?

51. It is submitted that the answer to this question is the same as for the previous question.

(iv) does the Act prohibit the Inquiry from seeking the consent to admit evidence of a spent conviction from a rehabilitated person?

52. If s.4(1)(b) applies (i.e. because the Inquiry's proceedings are proceedings before a judicial authority), then yes, such a course is prohibited, because it entails a question relating to the rehabilitated person's past which cannot be answered without acknowledging or referring to a spent conviction. However, it is likely that the requirements of s.7(3) would readily be satisfied, so that consent could be sought.

53. If the Inquiry's proceedings are not proceedings before a judicial authority such that s.4(1)(b) does not apply, then, on the NPSCPs' analysis of the meaning of treating a person for a purpose in law in s.4(1), there is no prohibition on the Inquiry taking such a course, although s.4(2) would mean that the rehabilitated person would not be obliged to reply.

(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?

54. The NPSCPs submit that the answer to this is yes. On their analysis, relying on such evidence for the purposes of determining a restriction order application would constitute treatment for a purpose in law and would therefore be prohibited under s.4(1), subject to any exemption under s.7(3) or s.7(4).

55. Further, if the Inquiry's proceedings are proceedings before a judicial authority, then such a course would also be prohibited under s.4(1)(a), subject to any exemption under s.7(3) or s.7(4).

(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?

56. If the submissions set out at [29] above are correct, then the admission of evidence of spent convictions into the Inquiry's proceedings would itself be treatment for a purpose in law and would therefore be precluded by s.4(1), absent an exemption under s.7(3) or s.7(4). The same applies if, as the NPSCPs contend, the Inquiry's proceedings are proceedings before a judicial authority.

(7) Should the Inquiry request an exemption from s.4(1) of the Act, pursuant to the power conferred by s.7(4)? If so, should it be in the

same or different terms to those suggested at paragraph 99 of CTI's note?

57. For the reasons set out above at [32]-[37], it is the NPSCP's case that there is no need for the Inquiry to request an exemption from s.4(1), because its proceedings are proceedings before a judicial authority and, as such, the Chair has a power effectively to disapply s.4(1) (including ss.4(1)(a) and (b)) where he is satisfied that this is necessary for justice to be done. It is right, on the NPSCP case, that this power has to be exercised on a case-by-case basis. However, it is submitted that a blanket exemption under s.4(4) could not be justified for the purposes of Art 8(2) HRA in any event. For this reason, the NPSCPs contend that there is no merit in additionally seeking an exemption under s.4(4), because any such exemption would need to be framed so as to ensure that it did not authorise disproportionate interferences with the Art 8 rights of rehabilitated persons. This would require case-by-case consideration of the relevance, accuracy, impact and necessity of admitting any particular spent conviction and would thus provide no greater latitude in the disapplication of s.4(1) than the power of exemption afforded to the Chair under s.7(3).

58. If follows from the above, that if, contrary to the NPSCPs' primary submission, an exemption from s.4(1) were to be sought from the Secretary of State under s.7(4), such an exemption would have to provide for case-by-case consideration as set out above.

(8) Should the Inquiry request an exemption from s.4(2) and/or s.4(3) of the Act, pursuant to the power conferred by s.4(4) of the Act? If so, should it be in the same or different terms to those suggested at [96] and [97] of CTI's note?

59. It follows from the submissions above that the NPSCPs do not consider that s.4(2) applies, because the Inquiry's proceedings are proceedings before a judicial authority. Similarly, for the reasons set out at [73] of CTI's note, the NPSCPs contend that s.4(3)(a) has to be construed as

not relieving a person who is subject of a notice issued under s.21 of the 2005 Act of the obligation to provide evidence of a spent conviction in circumstances where the exemption provided by s.7(3) ROA applies. In neither case, therefore, is an exemption under s.4(4) ROA required.

60. However, if this is wrong, then, as per the submissions above in relation to s.7(4), it is submitted that any exemption under s.4(4) would need to be narrowly drawn so as not to authorise disproportionate interferences with the Art 8 rights of rehabilitated persons.

61. In considering the above issues, the NPSCPs have, as requested at [110] of CTI's note, had regard to the need for the Inquiry to proceed on a basis which is clear and free from doubt; and which is workable in practice given the frequency with which the Inquiry is likely to come across events involving spent convictions. It is submitted that it is sufficiently clear that the Inquiry's proceedings are proceedings before a judicial authority such that s.7(3) applies. This provision affords the Chair sufficient powers to admit and require evidence of spent convictions and the circumstances ancillary to them and to determine any issues to which such evidence relates. Whilst a blanket exemption from the restrictions on the use of spent convictions might at first blush appear to be expedient, such a blanket exemption would afford inadequate protection to the rights of rehabilitated persons and would risk unjustified and disproportionate interferences with Art 8 rights. The Inquiry, in order to act lawfully, would have to give case-by-case consideration to the matters identified above in any event and there would therefore be no benefit in seeking an additional exemption. Further, seeking such an exemption would have the potential to delay the progress of the Inquiry as it is likely that the requisite order would take some months to obtain.

Part 4: safeguards necessary to ensure compliance with the Inquiry's obligations under Art 8, the Data Protection Act 1998 and its duty to act fairly under s.17 of the Inquiries Act 2005.

62. As set out above, actions involving spent convictions, and especially actions which involve such convictions being made public, engage the convicted person's rights under Art 8, under the DPA and will also engage the Chair's duty to act fairly under s.17 of the Inquiries Act 2005. Further, the importance of an individual being able to put past convictions behind him/her has long had Parliamentary recognition in the form of the ROA.

63. The importance of the rights that arise in relation to the protection of spent convictions requires that careful case-by-case consideration be given as to whether the removal of the protections afforded by the ROA is the *only* way in which justice can be done in the Inquiry's proceedings. An important aspect of that consideration will be the extent to which the protections need to be removed. It is submitted that it would be contrary to s.8(2) HRA, s.4 DPA and the Inquiry's duty of fairness for those protections to be removed to any greater extent than is necessary for, and proportionate to, the fulfillment of the Inquiry's terms of reference. In this context, there is an important distinction between consideration, by the Inquiry, of evidence relating to spent convictions, and (i) disclosure of such evidence in confidence to a limited number of third parties (for example, other CPs) and (ii) general publication by the Inquiry of that evidence, or of material which enables a rehabilitated person to be identified in connection with his or her spent convictions. It is submitted that both forms of disclosure entail interference with the rehabilitated person's rights under Art 8 and the DPA. Disclosure in confidence to an identified CP or CPs on the basis that this is necessary for justice to be done will require a careful balancing of the competing interests. The starting point should be to seek the consent of the rehabilitated person wherever possible. Publication to the wider world would fully undermine the protective purposes of the ROA and, absent consent from the rehabilitated person, would require exceptional justification.

64. It is submitted, therefore that the default position in any circumstances in which the Inquiry is to disapply the protections afforded to rehabilitated persons under the ROA (either itself under s.7(3) or via an executive order under s.7(4) and/or s.4(4)), should be that the identity of the rehabilitated person will not be publicly identified in connection with his or her spent convictions, unless the individual agrees that the information can be made public.

65. In some cases this will require only that the rehabilitated person be anonymised in connection with the spent conviction(s). In other cases, it will require additional measures, including, in some cases, the giving of evidence in closed proceedings.

66. In any event, whenever spent convictions are to be considered this will need to be identified in advance so that (if the rehabilitated person does not agree to being identified in connection with those convictions) appropriate protective measures can be put in place.

CONCLUSION

67. The NPSCPs accept that the Inquiry will, in some circumstances, need to consider evidence relating to spent convictions in order to fulfil its terms of reference. However, for all of the reasons set out above, such consideration must be limited to that which is relevant and necessary for the purposes of the Inquiry and adequate safeguards must be in place (i) to ensure that the Inquiry is able to test the accuracy of the information provided in relation to such convictions and (ii) to protect the Art 8 rights of those who are subject to such convictions and who would otherwise enjoy the protections of the ROA. This includes a default position that the identity of a rehabilitated person within the meaning of the ROA will not be made public in connection with his or her spent convictions, unless s/he consents to such publication and will only be disclosed in confidence to third parties where it is strictly necessary. The NPSCPs submit that, provided the above safeguards are in place, s.7(3) of the Rehabilitation of Offenders Act 1974 provides sufficient powers to

enable the Chair lawfully to require, admit and consider such evidence of spent convictions as is necessary for the purposes of the Inquiry. No further exemption from the protective provisions of the ROA is necessary or desirable, given that any such exemption would need to be subject to the same requirement for careful assessment that s.7(3) ROA requires in any event and is likely to result in delay.

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2 May 2017