
SUBMISSIONS ON BEHALF OF THE NPCC IN RELATION TO THE
REHABILITATION OF OFFENDERS ACT 1974

1. On 1st March 2017 the Inquiry published a direction from the Chair, and a note from Counsel to the Inquiry (CTI), concerning the potential impact of the Rehabilitation of Offenders Act 1974 ('the 1974 Act') on the work of the Inquiry. Submissions were invited from core participants on the key issues raised in paragraph 109 of the CTI note and these submissions will follow the framework set out in that paragraph.

109(1) The proposition that the Inquiry cannot discharge its terms of reference and/or comply with its duty of fairness without receiving, considering and, where necessary, admitting evidence of spent convictions and/or circumstances ancillary to such convictions.

2. The NPCC agrees that the Inquiry cannot properly discharge its terms of reference and/or comply with its duty of fairness without properly considering previous convictions generally, notwithstanding that they may be spent convictions pursuant to the 1974 Act.
3. The NPCC notes the three specific situations set out at paragraphs 8 to 19 of the CTI note (miscarriages of justice, justification of undercover policing and anonymity orders) in which the detail of previous convictions is likely to be relevant. The NPCC takes the view that all three situations can only be

properly and effectively dealt with if the Inquiry proceeds on the basis of the true factual background and not the fictional factual background that the 1974 Act might otherwise impose. The NPCC agrees that:

- i. The investigation of miscarriages of justice will, in many cases, necessarily involve analysing spent convictions and the circumstances surrounding those convictions. Such investigations cannot be properly and effectively conducted if fettered by the restrictions imposed by the 1974 Act;
 - ii. The justification for commencing an undercover operation will often have involved previous convictions and any investigation into that justification will require reference to those previous convictions, many of which will now be spent convictions. If the Inquiry is to fully investigate the justification in those cases where previous convictions are relevant it cannot be limited by the provisions of the 1974 Act; and
 - iii. Applications for anonymity will no doubt on occasion refer to previous convictions and it is imperative that such applications are dealt with on the true facts if the risk to applicants is to be properly considered and assessed.
4. The NPCC considers there may be other situations in which it would be relevant, necessary and fair for the fact of a spent conviction to be examined. For example, while it might be unfair to deploy a spent conviction in support of a challenge to the credibility of evidence given by a witness to the Inquiry, the assessment of the credibility of information received by the police in the course of an undercover operation might have been enhanced or undermined by knowledge of that witness's then unspent conviction(s). This is relevant to the proper and legitimate use of intelligence and evidence received from undercover operations, as much as it is to the justification for those operations.

5. The NPCC also points out that it is not only the actions of the Inquiry, the Chair and his team which are potentially restricted should the 1974 Act operate to prevent the receipt of evidence about spent convictions. Core participants would be prevented from deploying or relying upon evidence of that type for any purpose, which would have the inevitable result of the Inquiry proceeding on an incorrect factual basis, negating one of its central functions of establishing the truth.

109(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;*
and
- 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).*

“Treatment”

6. The NPCC agrees that “*behaving towards*” someone or “*dealing with*” them is likely to come within the scope of the term “*treated*”, as suggested by CTI in para 27 onwards of their Note. The NPCC also agrees that the mere receipt of information about spent convictions might not generally amount to “*treatment*”. “*Treated*” means to “*behave towards*” or to “*deal with in a certain way*” and by simply receiving material about spent convictions it is arguable that the Inquiry will not have “*behaved towards*” the subject of those spent convictions in any way. Similarly, preliminary steps (for example approaching the subject of a spent conviction seeking consent to adduce the detail of that conviction in evidence) might arguably also not fall within the ordinary and natural meaning of “*treated*”.

7. However, it is equally arguable that treating a person as a convicted person may not be limited to behaviour which directly involves that person. For example, the processing of information in a particular way because it relates to a person with a spent conviction could, we suggest, amount to “*treatment*” even where the processing is to protect the individual’s rights, such as flagging the information to ensure that the Inquiry are alert to identify other information which could lead to a connection of the individual with a spent conviction.

8. In paragraph 28 of their note CTI suggest that following receipt of unsolicited evidence of a spent conviction it would not be “*treatment*” to approach the person concerned for permission to adduce that evidence. Such a step could only be taken towards an individual who was regarded as having been convicted for the purposes of the 1974 Act. It is strongly arguable that to behave in this way amounts to “*treatment*” under section 4(1), regardless of any benign motive for approaching the individual.

“For all purposes in law”

9. The NPCC suggests that CTI’s construction of the phrase “*treated for all purposes in law*” as divisible into two parts – “*treated*” and “*for all purposes in law*” (CTI Note, para 31) – is not the only possible interpretation. An alternative would be to divide it as follows: “*treated... in law*” and “*for all purposes*”. The protection afforded by the Act is not limited to treatment in the course of legal process and it is wide enough a prohibition, for example, to disentitle an employer from fairly dismissing an employee for deception in failing to mention a spent conviction when asked. Likewise an insurer or a car hire company has no recourse against an applicant for their services who (properly) failed to disclose a spent conviction.

10. The matters referred to in section 4(1)(a) and (b) refer to actions in legal proceedings, but these are specific examples of the application of the more general phrase (“*shall be treated for all purposes...*”), and do not limit its meaning. Section 4(2) as set out in CTI Note para 68 onwards negates what might otherwise be the consequences in law of questions and answers given outside the judicial context. These, the NPCC suggests, are yet further examples of “*treatment*” within the scope of section 4(1) but do not limit its application. The protection of the 1974 Act focuses on the entitlement of an individual as a matter of law, and not only in legal proceedings, to claim – and be treated by all has having – the status in law of a person who has not been convicted of the material offence.

11. The NPCC agrees that treatment for evidential purposes would fall within the section 4(1) meaning of “*treated for all purposes in law*” and takes the view that all procedural steps taken by the Inquiry (for example, determining applications for anonymity or determining the admissibility of evidence) would fall within the meaning of “*purposes in law*”.

12. The term “*judicial authority*” is widely defined in section 4(6) and includes any body empowered to determine any question affecting the obligations of any person. Given that the definition of ‘person’ under the Interpretation Act 1978 includes ‘*a body of persons corporate or unincorporate*’ (Schedule 1), the NPCC understands ‘any person’ to include police officers as well as police forces generally. The Inquiry will certainly be examining the conduct of police officers, making factual findings and thereafter making recommendations about the future of undercover policing, and the NPCC is of the view that the Inquiry will be determining questions that will affect the privileges and obligations of police officers generally. Additionally, or alternatively, the Inquiry will be receiving evidence that will affect such determinations.

13. Accordingly, the NPCC is of the view that the work of the Inquiry properly falls within the definition of “*proceedings before a judicial authority*”. As such, section 7(3) of the 1974 Act applies to the Inquiry, providing the Chair with a discretion to admit or require evidence relating to spent convictions, where otherwise “*justice cannot be done*”.

109(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); and*
- 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.*

14. The NPCC is firmly of the view that the Inquiry falls within the definition of “*proceedings before a judicial authority*” and that section 4(2) has no relevant application. If the Inquiry does not amount to proceedings before a judicial authority section 4(2) will apply to questions put by the Inquiry and will accordingly allow a person with spent convictions to treat such questions as not applying to spent convictions.

109(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).*

15. As the NPCC is firmly of the view that the Inquiry falls within the definition of “*proceedings before a judicial authority*”, the NPCC considers section 4(3) to have no relevant application. The NPCC agrees with the suggestion in CTI’s Note (para 73) that in such circumstances section 7(3) would ‘take precedence’ over section 4(3).

16. The NPCC does not understand section 4(3) to prevent voluntary disclosure of a spent conviction, but does understand section 4(3) to provide that the recipient of a section 21 notice (an “*obligation imposed on any person by any rule of law*”) need not disclose spent convictions. This would also be the effect of section 4(2)(a) if the Inquiry is not properly defined as “*proceedings before a judicial authority*”.

109(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?

17. Whilst the NPCC takes the view that section 7(3) does apply generally to the Inquiry (and agrees that the Thomas approach should be preferred to the Adamson approach) it does not view this as a workable option given the burden that it would place upon the Chair. The NPCC is not able to read section 7(3) in a manner wide enough to provide the Chair with a broad ability to deal with spent convictions generally or by means of a ‘blanket order’:

- i. The provision specifically refers to “*a person’s spent convictions*”, indicating that there must be consideration of the individual, not a ‘broad brush’ or generic approach; and
- ii. The provision provides a “*so far as necessary*” test, which again indicates the need for careful consideration in each individual case, not a generic approach.

18. Accordingly, the NPCC does not view section 7(3) as a workable solution so far as the Inquiry’s approach to spent convictions is concerned.

109(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; and*
- 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.*

19. The NPCC's views are:

- i. The 1974 Act does not prohibit or restrict the voluntary provision of information to the Inquiry disclosing spent convictions;
- ii. The 1974 Act does not prohibit or restrict the Inquiry from requesting information which may contain evidence of spent convictions at the pre-hearing evidence gathering stage;
- iii. The 1974 Act does not prohibit or restrict the Inquiry from expressly requesting information about spent convictions at the pre-hearing evidence gathering stage;
- iv. There is a respectable argument that the 1974 Act would prohibit the Inquiry from seeking the consent to admit evidence of a spent conviction from a rehabilitated person if the Inquiry is not properly defined as "*proceedings before a judicial authority*";
- v. The 1974 Act would prevent or restrict the Inquiry from relying on evidence of spent convictions for the purposes of determining applications for restriction orders, including applications for anonymity, if the Inquiry is not properly defined as "*proceedings before a judicial authority*"; and
- vi. The 1974 Act would prevent or restrict the Inquiry from relying on evidence of spent convictions for the purposes of finding facts and making recommendations if the Inquiry is not properly defined as "*proceedings before a judicial authority*".

109(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?

20. Given the NPCC's view that although the Inquiry will be able to rely upon section 7(3) it will be insufficient for the Inquiry's purpose, the NPCC asserts that the Inquiry should request an exemption from section 4(1). This will provide certainty and avoid overburdening the Chair. CTI has eloquently described the many uncertainties that surround the interpretation of these provisions and their application to this Inquiry. Given the very clear need in the public interest and the interest of all core participants to ensure that the Inquiry considers the truth, the Inquiry should not be burdened with the added complexity and delay of having to identify whether or not any particular route to the admissibility of a spent conviction is permissible in each individual case.

21. The NPCC queries whether the wording suggested at paragraph 99 of the CTI Note is too wide. In most inquiries established under the Inquiries Act 2005 the discretion provided in section 7(3) will be sufficient for the Chair properly and efficiently to address any issue that may arise in relation to spent convictions. However, in most public inquiries spent convictions are likely to be utterly irrelevant.

22. This Inquiry is unusual. The nature of this Inquiry means that spent convictions are far more likely to arise and are far more likely to be relevant. Accordingly, the NPCC suggests a more specific exception, referring directly to this Inquiry: "*The Undercover Policing Inquiry established on 12th March 2015 under the Inquiries Act 2005*".

109(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?

23. Given the NPCC's view that the Inquiry falls within the definition of "*proceedings before a judicial authority*" and that sections 4(2) and 4(3) have no relevant application, the NPCC does not consider it necessary to apply for any exemptions from these provisions pursuant to section 4(4).

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9th May 2017