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

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### Introduction

1. In [our note dated 1 March 2017](#) we analysed the provisions of the Rehabilitation of Offenders Act 1974 ("the 1974 Act") which appeared to us to be capable of affecting the work of the Inquiry. We then posed a number of questions which the Inquiry invited the core participants to make submissions about. Submissions have since been received on behalf of the Metropolitan Police Service, Peter Francis, the non-police, non-state core participants, the National Crime Agency, the Secretary of State for the Home Department and the National Police Chiefs' Council and they have been circulated to all of the core participants. We have considered all of these submissions and set out in this supplementary note our conclusions on the issues which arise for the Inquiry from the provisions of the 1974 Act.
2. A feature of the submissions made on behalf of the core participants is the lack of consensus. We are appending to this note a [table](#), which summarises the respective positions of the core participants. For the reasons which we set out below, we submit that the better view is that the work of the Inquiry is for a purpose in law and that the Inquiry's proceedings are proceedings before a judicial authority. It follows that we also consider that the Chairman has the power to admit evidence about and to permit questioning on, both spent convictions and their ancillary circumstances where the test provided by section 7(3) of the 1974 Act is met.
3. Although we do not consider that in the context of this Inquiry the test under section 7(3) is any narrower than the test of relevance and necessity, we are concerned that the requirement to apply the test under section 7(3) of the 1974 Act might prevent the Inquiry from discharging its function in a timely and efficient manner. Consequently, consideration should be given as to whether, in the interests of the smooth running of the Inquiry, an exception under section 7(4) of the Act should be sought. Consideration might also be given to seeking an exemption from the operation of section 4(3)(a) of the 1974 Act in order to ensure the availability of section 21 of the Inquiries Act 2005 ("the 2005 Act") in relation to spent convictions.
4. None of the above should be taken as detracting in any way from our previously expressed recognition that use by the Inquiry of spent convictions involves an interference with the right to respect for the private life of the convicted person which must therefore be justified. We are not advocating the unrestrained use of spent convictions by the Inquiry, still less their unrestrained publication. Evidence of

a spent conviction will only be used if it is relevant and necessary and will only be published if it also proportionate (in the Article 8 sense) to do so.

5. We remain of the view that the Inquiry will need to admit evidence of spent convictions in order to discharge its terms of reference for the reasons which we set out at paragraphs 7-19 of our note dated 1 March 2017.

### **Sub-section 4(1) – treatment for all purposes in law**

6. We discussed the question whether any treatment of a rehabilitated person for evidential purposes by the Inquiry is for a purpose in law, within the meaning of section 4(1) of the Act, at paragraph 31 of our note dated 1 March 2017. The non-police, non-state core participants, the National Crime Agency, Peter Francis and the National Police Chiefs' Council all argue that the admission of evidence of a spent conviction by the Inquiry would be for a purpose in law. The Metropolitan Police Service consider that the issue is unclear and the Home Office submissions do not expressly address this issue.
7. This Inquiry is a statutory inquiry, with a statutory duty to determine facts, make recommendations and report to the Home Secretary. The 2005 Act confers various statutory powers on the Chairman or the panel which are designed to enable the Inquiry to discharge its terms of reference. For example, the Chairman is empowered to take evidence on oath by section 17 of the 2005 Act and intends to do so. The Inquiry therefore meets the definition of "*judicial proceedings*" for the purposes of the Perjury Act 1911<sup>1</sup>. In these circumstances we consider, in agreement with the majority of the core participants, that the admission of evidence of a spent conviction would be treatment for a purpose in law and would therefore fall within the scope of section 4(1) of the 1974 Act.

### **Sub-section 4(1)(a), 4(1)(b) & section 4(2) – proceedings before a judicial authority as defined in section 4(6)**

8. We discussed at paragraphs 35-65 of our note dated 1 March 2017 the important question as to whether the work of the Inquiry, or any part of it, constitute *proceedings before a judicial authority* as defined by section 4(6) of the 1974 Act. The Home Office submits that the proceedings of the Inquiry are probably not *proceedings before a judicial authority*. The Metropolitan Police Service does not adopt a position, recognising that there are arguments for and against, which are set out at paragraphs 20-23 of its position statement. All of the other core participants who have made submissions conclude that the Inquiry's proceedings do fall within the scope of the definition at section 4(6) of the 1974 Act (although Mr

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<sup>1</sup> Section 1(2) of the Perjury Act 1911 defines "judicial proceedings" as including proceedings before any court, tribunal, "or person having by law power to hear, receive and examine evidence on oath".

Francis limits this conclusion to the substantive and not the procedural work of the Inquiry).

9. The non-police, non-state core participants reason that decisions taken under section 19 of the 2005 Act, in relation to restriction orders, will affect people's rights. They add that an order made under section 21 of the 2005 Act imposes a legally binding obligation on its subject. The existence of these procedural powers are sufficient, in their view, to bring the Inquiry within the scope of section 4(6) of the 1974 Act. They further support their position with the argument that evidence is given on oath, a feature which they argue sits ill with the provisions of section 4(2) of the 1974 Act which permit false answers to be given to questions posed other than in the course of proceedings falling within section 4(6) of the same Act.
10. The argument advanced by the National Police Chiefs' Council for concluding that the Inquiry's proceedings fall within the meaning of section 4(6) of the Act is essentially that the Inquiry will be examining the conduct of police officers, making factual findings and recommendations which will affect the privileges and obligations of police officers generally. Alternatively, the Inquiry will be receiving evidence that will affect such determinations (see paragraph 12 of its submission).
11. Mr Francis submits that in its substantive work the Inquiry's proceedings meet the definition provided by section 4(6) of the 1974 Act because it determines matters which affect rights such as reputation. The word "affecting" in section 4(6), he submits, should be construed widely so as to include its general, rather than legal, effect. The word "determine" should also be construed widely, he argues, to include fact finding. Mr Francis considers the nexus between the Inquiry's work and any resultant policy or legislation to be too remote, of itself, to bring the Inquiry's work within section 4(6) of the 1974 Act. Mr Francis also distinguishes the Inquiry's procedural work from its substantive work concluding that when the Inquiry considers applications for restriction orders its questions fall under section 4(2) of the 1974 Act and that, in relation to spent convictions, false answers are required by that subsection.
12. The National Crime Agency concludes that the proceedings of the Inquiry are proceedings before a judicial authority for both substantive and procedural purposes. Substantively, it is argued that the impact of the Inquiry's power to make findings which affect reputations mean that rights under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") are affected. Procedurally, the National Crime Agency uses the Chairman's powers under section 21 of the 2005 Act to exemplify the way in which it argues that the Inquiry's procedural powers bring it within the scope of section 4(6) of the 1974 Act. Finally, the National Crime Agency observes that section 4(6) does not distinguish between substantive and procedural powers and argues that it is a distinction which might be difficult to draw in practice.

13. We have not found the question as to whether the Inquiry's proceedings are proceedings before a judicial authority to be straightforward. There are plainly powerful arguments both for and against the proposition that the Inquiry's proceedings fall within section 4(6) of the 1974 Act. On balance we have concluded that the Inquiry's proceedings are proceedings before a judicial authority as defined by section 4(6) of the 1974 Act.
14. Proceedings before a judicial authority are defined as including, in addition to proceedings before any of the ordinary courts of law: "*proceedings before any tribunal, body or person having power 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*". A consequence of the Inquiry's substantive work may be adversely to affect the reputations of some people. However, we do not consider that because a public inquiry may, in the course of establishing the truth, arrive at findings of fact which are adverse to a person, or make criticisms about a person, it thereby determines his or her legal rights. There may be circumstances in which criticisms made in an Inquiry report may engage with the Article 8 rights of the subject, although they will not always do so. Article 8 does not confer an absolute right to a good reputation. It does not protect a person from damage to his or her reputation which is the foreseeable consequence of their own actions; nor does it protect a person from damage to their reputation which is justified within the meaning of Article 8(2) of the Convention: the Grand Chamber in *Axel Springer AG v Germany* (2015) 55 EHRR 6 stated at paragraph 83:
- "In order for art.8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life (see A v Norway, cited above at [64]). The Court has held, moreover, that art.8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence (see Sidabras and Dziautas v Lithuania (55480/00 and 59330/00) ECHR 2004-VIII at [49])"*<sup>2</sup>.
15. Any adverse finding of fact or criticism made by the Inquiry's panel must be fair and founded on the evidence before the Inquiry. No explicit or significant criticism of a person can be made in the Inquiry's report, unless the Chairman has sent that person a warning letter; and the person has been given a reasonable opportunity to respond to the warning letter: rule 13(3) Inquiry Rules 2006. In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness:

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<sup>2</sup> For the avoidance of doubt, we do not read the use of the commission a criminal offence as an example as laying down any blanket rule in relation to criminal offences whatever their age, circumstances or gravity. It is simply the example chosen by the Grand Chamber in the context of a judgment which happened to concern a recent drugs offence.

section 17(3) of the 2005 Act. Justified criticism of a person by the Inquiry, after a fair procedure, will not involve any violation of his or her rights.

16. The Inquiry panel does not have the power lawfully to make an unjustified criticism. It cannot reach a binding determination in relation to the ambit of the right to protection of reputation. It does not determine any person's right to reputation because its findings are not legally binding or dispositive of anything: *Al Fayed v United Kingdom* (1994) 18 EHRR 393 at [61]. The panel's factual findings about, or any criticisms of, a person must respect not violate his or her rights under Article 8 of the Convention.
17. The above consideration of the Inquiry's fact finding role is, in our view, not decisive of the question whether the Inquiry's proceedings are proceedings before a judicial authority for the purposes of section 4(6) of the 1974 Act. The procedural regime needs also to be analysed. The chairman of a 2005 Act inquiry does have the power under the 2005 Act to determine a number of procedural questions which affect the obligations of any person. For example, the chairman can require a person to attend at a time and place stated in a section 21 notice to give evidence; to produce any documents in his custody or under his control that relate to a matter in question at the inquiry; to produce any other thing in his custody or under his control for inspection, examination or testing by or on behalf of the inquiry panel. The exercise of this power under section 21(1) of the 2005 Act clearly imposes a legal obligation on the person who is the subject of the requirement under the notice. It is a criminal offence to fail without reasonable excuse to do anything that he is required to do by a notice under section 21: see section 35(1) of the 2005 Act. It seems to us that the existence of this power meets the test for proceedings before a judicial authority because the wording of section 4(6) of the 2005 Act is worded widely enough to include a procedural power: in this regard we note in particular the words "*proceedings before any ...person having power ...to determine any question*" (our emphasis). The provision is also worded as a gateway provision: if the person before whom the proceedings are conducted has a power of the kind described in section 4(6) then the proceedings before that person are proceedings before a judicial authority for these purposes.
18. We are reinforced in our view that the statutory framework for conduct of the Inquiry's proceedings bring it within the ambit of section 4(6) of the 1974 Act by the power, under section 17(2) of the 2005 Act to receive evidence on oath: a power which the Chairman of this Inquiry intends to exercise. We do not consider that Parliament can have intended proceedings before a statutory public inquiry taking evidence on oath to have fallen outside of the definition of proceedings before a judicial authority. This is because if proceedings before a statutory public inquiry

were not proceedings before a judicial authority then section 4(2) of the 1974 would, unthinkably, have conferred a right to lie on oath<sup>3</sup>.

19. Sections 17(2) and 21 of the 2005 Act provide, in our view, two very good reasons to conclude that the Inquiry's proceedings fall within the meaning of section 4(6) of the 1974 Act. In these circumstances we do not consider it necessary individually to examine each procedural power conferred on the chairman of a 2005 Act inquiry. It suffices to say that many others provide further support for the argument advanced above: some unequivocally so; others arguably so.

### **Sub-section 7(3)**

20. We have concluded that the proceedings of the Inquiry are proceedings before a judicial authority, therefore the exceptional power to admit evidence of and permit questioning about spent convictions provided by section 7(3) of the 1974 Act is available to the Chairman. We now turn to the question whether section 7(3) is sufficiently wide to permit the Inquiry to discharge its terms of reference.

### Anonymity applications

21. In relation to anonymity applications, the Metropolitan Police Service is providing the Inquiry with the criminal records of those individuals that the risk assessors have taken into account when assessing the risk of harm to applicants for anonymity. In some cases, the risk assessments will include reference to a large number of convictions relating to significant numbers of people. The Inquiry is unlikely to be able to approach the rehabilitated persons concerned to seek their consent to the use of these convictions in the determination of the application without risking defeating the purpose of the anonymity application<sup>4</sup>. If the Inquiry has the benefit of an exemption from section 4(1) of the 1974 Act then the Chairman will be able to consider all of the convictions which the risk assessors have seen, whether or not they are spent. He will be able to attach such weight to them as he sees fit and will be able to scrutinise the risk assessment from a position of knowledge. If the Chairman considers that he needs more information in relation, say, to the circumstances ancillary to a spent conviction, he can require the Metropolitan Police Service to provide it. If he considers that a conviction is irrelevant or unnecessary he can disregard it. If he considers that it is relevant and necessary then he can rely upon it.
22. If the Inquiry has only the exceptional power under section 7(3) of the 1974 Act then the Chairman would have first to establish which convictions are or are not spent.

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<sup>3</sup> In 1974 the Tribunals of Inquiry (Evidence) Act 1971 was in force. Like the 2005 Act it provided that evidence could be taken on oath. Therefore the change in the statutory regime made no material change for the purposes of this argument.

<sup>4</sup> Although if a restriction order is made relying upon an assessment of risk based on evidence which is subsequently undermined the original order can, of course, be reviewed.

This might not always be a straightforward exercise given the complicated definition of a rehabilitated person and spent convictions in the 1974 Act: see sections 1, 5 and 6 of that Act. Then he would have to consider whether justice could be done in the “case” except by admitting or, as the case may be, requiring the evidence in question. Every closed ruling on anonymity would need to cover which individual convictions were spent and met the “justice cannot be done” test provided by section 7(3) of the 1974 Act. We emphasise closed ruling for two reasons. First, publication is an entirely separate question and, secondly, to demonstrate that the application of section 7(3) of the Act 1974 would be of little practical benefit to anyone. Second, the Chairman would still see the records of all of the convictions in order to decide whether they met the test.

23. If we are right that the test under section 7(3) in these circumstances is no narrower than what is relevant and necessary fairly to determine an application for anonymity, there will be no substantive difference as to what evidence of spent convictions is ultimately admitted into evidence. What is not clear to us at this stage is whether the two alternative approaches will differ greatly in the time and resources which they take to apply in practice.

### Justification and Miscarriages of Justice

24. When examining the justification for undercover police operations, the Inquiry will need to consider spent convictions for the reasons explained at paragraphs 12-15 of our note dated 1 March 2017. Very significant numbers of convictions are likely to be relevant and necessary during the course of this Inquiry because of the breadth of its terms of reference and the number of undercover deployments which will be considered. Many of these will be spent convictions. Where the Inquiry is considering whether a specific deployment was justified it will be relevant and necessary for it to know about offending by the target or members of the target group. It is hard to conceive of circumstances in which a spent conviction is relevant and necessary to the Inquiry’s work but should not be seen by the Inquiry panel because to do so would amount to an unjustified interference with the right to respect for the rehabilitated person’s private life. Consequently, these seem to us to be precisely the sort of circumstances where a statutory exclusion from section 4(1) of the 1974 Act would be justified. If reliance has instead to be placed on section 7(3) of the 1974 Act then the Inquiry will face a complex task for the reasons which we set out below.
25. Section 4(1)(b) of the 1974 Act provides that a person shall not, in [proceedings before a judicial authority], be asked, and if asked, shall not be required to answer, any question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or any circumstances ancillary thereto. Section 4(5) defines circumstances ancillary to a conviction as the offence or offences which were the subject of that conviction; the conduct constituting that

offence or those offences; and any process or proceedings preliminary to that conviction, any sentence imposed in respect of that conviction, any proceedings (whether by way of appeal or otherwise) for reviewing that conviction or any such sentence, and anything done in pursuance of or undergone in compliance with any such sentence. When the Inquiry sends a request under rule 9 of the Inquiry Rules 2006 to a witness for a witness statement, it may not know whether a full and frank answer to the request would involve evidence of a spent conviction and/or the ancillary circumstances of such a conviction; the Inquiry might find out only upon the respondent raising an objection to providing an answer. At that juncture the Chairman would have to consider whether to order that an answer should be provided applying the test under section 7(3) of the Act. If the Chairman did so order then a full response would have to be provided. This would be a slower process than if the Inquiry had the benefit of an exception which would allow a full and true account in a witness statement of any spent convictions and/or their ancillary circumstances to be requested at the outset. A determination could then be made as to the admission of any evidence concerning spent convictions or their ancillary circumstances with the benefit of the rehabilitated person's account of events.

26. Even in instances where the Inquiry knows in advance that there are spent convictions and/or their ancillary circumstances, which appear to be potentially relevant, the Chairman would need to make a decision before any witness statement addressing them could be requested. This might well involve having to find out more about the circumstances before a decision could be made. It would again be a slow process.
27. Publication of the fact of a spent conviction, or its ancillary circumstances, is a separate question from its, or their, use. There may be instances in which the personal circumstances of a rehabilitated person are such that it would be disproportionate to publish the fact of a spent conviction which is in evidence. The Inquiry has written into its restriction order protocol a process for ensuring that privacy is protected which will enable the affected person to make an application for a restriction order in such circumstances (or for restriction to be considered by the Inquiry without an application if it is not proportionate in all of the circumstances to contact the person concerned). Evidence of spent convictions and/or their ancillary circumstances will be considered whether or not the Inquiry is granted an exception.
28. Essentially the same considerations apply to the Inquiry's work in relation to miscarriages of justice as apply to its work in relation to justification. The Inquiry will need to consider cases which involve spent convictions and the circumstances ancillary to them. The numbers of relevant and necessary convictions and ancillary circumstances is likely to be smaller than will be the case in relation to justification but may still be significant.

29. We note the concern voiced by the non-police, non-state core participants about the need critically to scrutinise the police account of circumstances ancillary to spent convictions and the safety of the convictions themselves. However, where there are grounds to believe that circumstances ancillary to a conviction may not accord with a police account, or where there are grounds to suspect that the conviction might not be safe, the Inquiry is likely to wish to investigate further and admit evidence of the (disputed) ancillary circumstances or the conviction so that they can be investigated. The submission that the Inquiry should, without more, obtain from the police all documents (including unused material) relevant to every spent conviction referred to during the course of its work, disclose that material to the rehabilitated person (to the greatest extent possible) and then invite their submissions is both unnecessary and unworkable<sup>5</sup>.
30. In the light of all of the above, we conclude that the power to make an exception under section 7(3) of the 1974 Act is not sufficient to enable the Inquiry to proceed efficiently with its work. We are particularly concerned about the impact on the Inquiry's investigation of justification and potential miscarriages of justice in the absence of an exception. An exception under section 7(4) would enable the Inquiry to proceed more quickly and effectively. If an exception is granted then the right to respect for the private lives of rehabilitated persons will still be taken into account, prior to publication by the Inquiry of the fact of spent convictions and/or their ancillary circumstances.

### **Sections 4(2), 4(3) and 4(4)**

31. We submit that the Inquiry should consider seeking, as a minimum, to be excluded by the Secretary of State for Justice from the operation of section 4(3)(a) of the 1974 Act using the power under section 4(4) of the same Act. This is to avoid any argument that section 4(3)(a) prevents the Inquiry from requiring the production of evidence of spent convictions and their ancillary circumstances using section 21 of the 2005 Act.
32. In the light of our conclusion that the Inquiry's proceedings are proceedings before a judicial authority we do not consider that an exemption from the operation of section 4(2) of the Act is strictly necessary because it does not apply. The only grounds for seeking one would be if it were thought that there was room for doubt and that an exemption was desirable in the interests of certainty.

### **Ambit of the exclusions sought**

33. As a minimum, we consider that any statutory exclusion sought should apply at least to this Inquiry for the duration of its existence. Whether any exclusion sought should extend more widely to 2005 Act inquiries generally is not strictly a matter for

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<sup>5</sup> Paragraph 17 of the non-police, non-state core participants' submissions.

us. However, we are aware of one other current 2005 Act inquiry in which this issue is likely to need to be considered: the Independent Inquiry into Child Sexual Abuse.

34. We do not consider that any specific restriction should be placed on the terms of the exclusions insofar as they relate to the Undercover Policing Inquiry. The Inquiry has the power to restrict publication of spent convictions and has developed a detailed protocol for the making of applications for restriction orders which is designed to ensure that the right to respect for private life (amongst other rights) is respected. The Chairman is also under a duty to act fairly and will only be admitting evidence spent convictions where such evidence is relevant and necessary.

## Conclusions

35. For the reasons set out above, we conclude that the Chairman should consider seeking:
- a. an exemption from section 4(1) of the 1974 Act, pursuant to section 7(4) of the same Act in order to ensure that the progress of the Inquiry is not delayed; and
  - b. an exemption from the provisions of section 4(3)(a) of the 1974 Act under section 4(4) of the same Act to ensure the efficacy of section 21 of the 2005 Act.

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27 June 2017

## UNDERCOVER POLICING INQUIRY

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

Issue - paragraph 109 of Counsel to the Inquiry's note dated 1 March 2017	Metropolitan Police Service	National Crime Agency	Non-police, non-state core participants	Peter Francis	Home Office	National Police Chiefs' Council
(1) Proposition: 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.	Agree – it is essential, to substantive investigation and anonymity.	Agree – the question of whether the Inquiry needs to adduce such evidence in order to fulfil the terms of reference will always be fact-specific.	Accept in some circumstances, as suggested by Counsel to the Inquiry, the Inquiry will need to consider spent convictions (but do not agree that publication is a separate issue).	Agree.	Agree it is likely the Inquiry will need to receive, consider and admit evidence of spent convictions and ancillary circumstances for reasons given by Counsel to the Inquiry.	Agree, and there may be additional situations to those identified by Counsel to the Inquiry where it is necessary.
(2)(i) Section 4(1) of the 1974 Act: what constitutes “treatment”?	(i), (ii) and (iii): 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, doesn’t amount to treatment. Asking a rehabilitated person about a spent conviction does amount to treatment. Query whether mere reference to an individual’s spent conviction amounts to treatment. Relying on a spent conviction in determining a restriction order application, particularly if rehabilitated person never named publically: unclear whether treatment for a purpose in law.	(i), (ii) and (iii): Mere receipt of information and considering what to do with it does not amount to treatment. Taking a procedural step, such as seeking consent to use evidence of the spent conviction, does not amount to treatment. Admission into evidence does amount to treatment, and would be for a purpose in law since the Inquiry is performing a legal function and exercising legal powers.	(i): Mere receipt of information seems unlikely to amount to treatment. Tipping point likely to arise when admitted into evidence.	(i): Receipt and consideration of spent convictions cannot amount to treatment, only admitting evidence	(i), (ii) and (iii): [not addressed]	(i): Mere receipt of information might not generally amount to treatment; arguable mere preliminary steps might not either, but seeking consent from the individual to adduce it in evidence probably would be treatment.
(2)(ii) Section 4(1) of the 1974 Act: what is the meaning of the words “for all purposes in law”?			(ii) and (iii): Admitting evidence of a spent conviction is for a purpose in law, including in the context of an application for a restriction order – but anyway academic because the Inquiry is proceedings before a judicial authority which means evidence of spent convictions is not permitted save where an exception is made out.	(ii): Means a legal purpose, a purpose designated by law, or the legal implications of such treatment. (iii): To the extent it has a statutory duty to determine facts and make recommendations, the work of the Inquiry is for a purpose in law.		(ii) and (iii): Includes all procedural steps taken by the Inquiry – e.g. determining restriction order applications or admissibility of evidence.
(2)(iii) Section 4(1) of the 1974 Act: to what extent, if any, is the work of the Inquiry for a purpose in law?						
(2)(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) of the 1974 Act, defined in section 4(6)?	Undecided – arguments for and against	Yes. Section 4(6) is not ambiguous, the only question is whether the Inquiry has powers of the type set out. Chair does have power to determine questions that affect the rights, privileges, obligations or liabilities of any person – both substantive powers e.g. making factual findings that affect reputation, and procedural e.g. s21 notices which are capable of affecting rights etc. One set of proceedings, not separable.	Yes - proceedings before a judicial authority, including in determination of restriction order applications – decisions taken under section 19 of the Inquiries Act 2005 will frequently affect rights, also section 21 may impose legally binding obligations and liabilities. One set of proceedings, not separable.	Construe 4(6) in a purposive manner; concerns only substantive questions determined by the Inquiry. The Inquiry does constitute proceedings before a judicial authority insofar as it determines matters which may well affect rights, such as reputation. “affecting” to be construed widely to include general rather than legal effect, similarly “determine” to be construed to include making finding of fact, not only legally binding determinations.	Probable that the Inquiry proceedings are <u>not</u> properly defined as proceedings before a judicial authority. 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.	Yes – wide definition. The Inquiry will determine questions that will affect privileges and obligations of police officers generally. Additionally, or alternatively, will receive evidence that will affect such determinations.

## UNDERCOVER POLICING INQUIRY

Issue - paragraph 109 of Counsel to the Inquiry's note dated 1 March 2017		Metropolitan Police Service	National Crime Agency	Non-police, non-state core participants	Peter Francis	Home Office	National Police Chiefs' Council
(3)(i)	Meaning, effect and relevance of section 4(2): Whether questions put by the Inquiry at preparatory stage or hearing stage fall within its scope?	Assuming not proceedings before a judicial authority, a question put at any stage of the Inquiry would fall within section 4(2).	Further to submissions above, section 4(2) of no practical relevance.	Primary submission: section 4(2) does not apply (because these are proceedings before a judicial authority).  Secondary submission, if that is wrong: questions put by the Inquiry at any stage would fall within section 4(2).  Section 4(2) certainly enables a false answer to be given, in which case an order under section 4(4) is needed.	Questions put at hearing stage not within scope of section 4(2) (as they concern proceedings before a judicial authority within the meaning of section 4(6)), but questions posed for procedural purposes (e.g. restriction order applications) would be within scope.  No discretion whether to give a truthful answer; requires rather than sanctions a false answer.	Section 4(2) permits questions seeking information about previous convictions and conduct. But significant limits on the reliance that could be placed on answers which may be incomplete or untruthful.	Further to submissions above, section 4(2) is of no relevance.  If that's incorrect, will apply to questions put by the Inquiry and will permit a person to treat questions as not relating to spent convictions.
3(ii)	Meaning, effect and relevance of section 4(2): Whether confers a discretion on rehabilitated person and/or third parties whether to give truthful answer?	A person has a discretion whether to tell the truth or not.					
4(i)	Meaning, effect and relevance of section 4(3): Does it leave open option for a person voluntarily to disclose spent conviction?	Yes	Further to submissions above, section 4(3) is of no practical relevance.	Yes.	Yes.	Yes.	Further to submissions above, section 4(3) is of no relevance.
4(ii)	Meaning, effect and relevance of section 4(3): Does it enable the recipient of a section 21 notice to fail to disclose a spent conviction?	Yes – although if the Inquiry is a judicial authority and it determines that section 7(3) applies, this would take precedence over 4(3)(a).		Yes.	Should construe narrowly so as <u>not</u> to allow recipient of a s21 notice to omit to disclose.	[By inference, yes]	If that's incorrect, allows for voluntary disclosure of a spent conviction but permits a recipient of a section 21 notice not to disclose spent convictions.
5	Insofar as section 7(3) applies to the Inquiry, does it require consideration of each spent conviction individually, or does it permit a blanket order allowing admission of evidence of spent convictions in any situation in which the Inquiry deems it necessary?	Most cases advocate a fact-specific analysis. Seeking consent of rehabilitated person would be impractical or impossible. Better approach would be to seek an exemption.	Section 7(3) is an exceptional power, spent convictions should be assessed individually.	Before admitting evidence of any spent conviction – whether in evidence or in the context of a restriction order application – the Chair must decide it is strictly relevant and necessary to do so. Cannot lawfully adopt a blanket approach. Could, however, make a general request for such evidence provided Chair is satisfied that justice couldn't be done without provision of the same.	Construe widely to permit making of a single, inclusive decision as to the admission of all relevant spent convictions.	A widely drawn blanket order would be too broad to meet the requirements of section 7(3).	Section 7(3) applies, and requires case-by-case decisions (and is therefore not a workable solution for the Inquiry).
6(i)	Does the Act prohibit/restrict voluntary provision of information disclosing spent convictions?	No.	[Not expressly addressed]	No (although public authorities are bound by section 6 of the Human Rights Act 1998).	No	No.	No.
6(ii)	Does the Act prohibit/restrict the Inquiry from requesting information which may contain evidence of spent convictions at evidence-gathering stage?	No.	[Not expressly addressed]	No – although query whether section 4(1)(b) might preclude a request being made of the rehabilitated person if the evidence gathering stage forms part of proceedings before a judicial authority.	No – doesn't amount to treatment.	[Not expressly addressed]	No.
6(iii)	Does the Act prohibit/restrict the Inquiry from expressly requesting information about spent convictions at evidence-gathering stage?	No.	[Not expressly addressed]	See 6(ii).	No.	[Not expressly addressed]	No (at pre-hearing stage).

## UNDERCOVER POLICING INQUIRY

Issue - paragraph 109 of Counsel to the Inquiry's note dated 1 March 2017		Metropolitan Police Service	National Crime Agency	Non-police, non-state core participants	Peter Francis	Home Office	National Police Chiefs' Council
6(iv)	Does the Act prohibit/restrict the Inquiry from seeking consent to admit a spent conviction from a rehabilitated person?	No.	[Not expressly addressed]	Yes if section 4(1)(b) applies (see ii above), although likely section 7(3) requirements would be readily satisfied so consent could be sought. If not proceedings before a judicial authority, then no prohibition on seeking consent, although rehabilitated person would not be obliged to reply.	No – section 7(2)(f) expressly empowers it.	[Not expressly addressed]	“there is a respectable argument...” that the answer to this question is ‘yes’ (if the Inquiry is not a judicial authority).
6(v)	Does the Act prohibit/restrict the Inquiry from relying on evidence of spent convictions for purposes of determining restriction order applications (including anonymity)?	Depends on whether the Inquiry is able to exercise power under section 7(3).	[Not expressly addressed]	Yes – it would constitute treatment for a purpose in law and therefore be prohibited under section 4(1), or anyway prohibited under section 4(1)(a) if proceedings before a judicial authority.	Yes- restricted by section 4(2).	[Not expressly addressed]	Yes (if not a judicial authority).
6(vi)	Does the Act prohibit/restrict the Inquiry from relying on evidence of spent convictions for finding facts and making recommendations?	Depends on whether the Inquiry is able to exercise power under section 7(3).	[Not expressly addressed]	Yes- reasoning as for 6(v) above.	Only insofar as restricted by section (4)(1)(a) and (b) when read with section 7(3).	[Not expressly addressed]	Yes (if not a judicial authority).
7	Should the Inquiry request an exemption from section 4(1) (and if so in what terms)?	Yes – using terms suggested by Counsel to the Inquiry.	No – the Inquiry should use section 7(3).	No – no need because the Inquiry amounts to proceedings before a judicial authority, and exceptions can be made via section 7(3) on a case-by-case basis.  No merit in seeking an exemption in any event because Article 8 will require a case-by-case analysis such that there would be no greater latitude than under section 7(3).	Yes – using terms suggested by Counsel to the Inquiry.	[No submissions made on this point]	Yes, to provide certainty and avoid over-burdening the Chair.  Propose a narrower exemption, limited to this inquiry.
8	Should the Inquiry request an exemption from section 4(2) and/or section 4(3) (and if so in what terms)?	Yes – using terms suggested by Counsel to the Inquiry.	No – issues can be resolved via section 7(3).	No: <ul style="list-style-type: none"> <li>section 4(2) doesn't apply</li> <li>section 4(3)(a) has to be construed as not relieving a person subject to a section 21 notice of the obligation to provide evidence of a spent conviction in circumstances where the section 7(3) exception would apply</li> </ul>	Yes – using terms suggested by Counsel to the Inquiry (although only in order to allow the Inquiry to progress on a clear, unfettered basis – exemption from section 4(1) should be sufficient).	[No submissions made on this point]	Not necessary since the Inquiry is a judicial authority within the meaning of section 4(6).