

The Rehabilitation of Offenders Act 1974 and its impact on the Inquiry's work 'Minded to' note

The use of spent convictions

1. I am minded to make the following directions:
 - (i) I will admit evidence relating to a person's spent convictions and to circumstances ancillary thereto under section 7(3) of the Rehabilitation of Offenders Act 1974 ('the 1974 Act'), when considering an application for a restriction order under section 19(2)(b) of the Inquiries Act 2005 ('the 2005 Act') when I consider that justice cannot be done when determining the application except by admitting such evidence.
 - (ii) I will not at that stage afford to the person whose convictions may be admitted in evidence for that limited purpose any opportunity to make representations about them. If thereafter it becomes necessary to fulfil the terms of reference of the Inquiry or in the interests of fairness to admit evidence from that person about the spent convictions or the circumstances ancillary thereto I will admit that evidence. In any event the terms and continuance of a restriction order made in part in reliance on spent convictions will remain open to review under section 20(4) of the 2005 Act.
 - (iii) I will invite the Secretary of State for Justice to lay before Parliament the following amendment to Schedule 3 to the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975: *"24 Any Inquiry caused to be held by a Minister under section 1 of the Inquiries Act 2005 designated by the Secretary of State for Justice."* I will invite the Secretary of State for Justice so to designate this Inquiry.

Reasons

2. Proceedings before the Inquiry are "proceedings before a judicial authority "as defined by section 4(6) of the 1974 Act. They are clearly" proceedings"— hence, the detailed provisions in sections 17 to 23 of the 2005 Act. They are "proceedings before any... person" – the chairman and/or panel. They are also "proceedings before any... person having power – ... to determine any question affecting the rights... of any person, or to receive evidence affecting the determination of any such question."

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3. Two rights are affected: the right to a fair trial under Article 6 European Convention on Human Rights ('the European Convention') and the right to respect for private life under Article 8.
4. One of the terms of reference of the Inquiry requires it to refer to a panel the facts of any case in respect of which it concludes that a miscarriage of justice may have occurred as a result of an undercover police operation or its non-disclosure. If the panel considers that further action is required it may refer the case to the Criminal Cases Review Commission. The duty of the Inquiry is not to determine whether or not a miscarriage of justice has occurred – that is the task of the panel or the Criminal Cases Review Commission and ultimately the Court of Appeal. It is by that means that the rights of those who may have been the victims of a miscarriage of justice can be vindicated under Article 6 of the European Convention. The Inquiry has power to determine a question affecting those rights – whether or not a miscarriage of justice may have occurred as a result of an undercover police operation or its non disclosure. Unless it does so it cannot set in train the steps by which the miscarriage of justice can be rectified. Further, the Inquiry has power to receive evidence affecting the determination of that question.
5. In determining whether or not to make a restriction order in respect of the identity of a person, whether police officer or former police officer or neither, the Inquiry will be determining a question affecting the right to respect for private life of that person under Article 8 of the Convention and will receive evidence affecting the determination of that question.
6. I accept the reasoning of counsel to the Inquiry that its terms of reference do not require it to determine the rights of any person, including the right under Article 8 of the European Convention to reputation, for the reasons set out in their supplementary note. I also accept that even if the only determination affecting the rights of a person was for a procedural purpose, such as the making or not of a restriction order in relation to identity, the proceedings would be covered by section 4(6) of the 1974 Act. The wording of section 4(6) does not impose any such limitation; and I can discern nothing in the policy underlying the 1974 Act which requires it. I also agree that Parliament cannot have intended that in proceedings in which evidence is given on oath a witness has statutory permission under section 4(2) to lie about spent convictions – the necessary consequence if the proceedings are not to be treated as being before a judicial authority.
7. The words "that justice cannot be done in the case" are capable of referring both to the ultimate outcome of the Inquiry and to the individual application for a restriction order in respect of identity. There is no reason to confine them only to the first of the two "cases".

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8. Whether or not justice can be done in the case of an application for a restriction order in respect of identity will be fact sensitive in each case. It is not at this stage possible to do more than to give a general indication of approach. A conviction for any offence of violence or harassment is likely to be relevant to the decision whether or not to make a restriction order in respect of identity, whether or not it is spent. A conviction for a minor offence of dishonesty or of indecency is unlikely to be relevant. In the former cases justice is likely to require that evidence of the conviction is admitted; in the latter, not.
9. If time was infinite and funds were unlimited the non-state core participants' submission that a person subject to a spent conviction should be able to make representations about it before a decision is made on the application for a restriction order in respect of identity in which it is cited might have merit; but they are not. I am required by section 17(3) of the 2005 Act to have regard to the need to avoid unnecessary cost and to act with fairness. What fairness requires is that the person affected should, if practicable, have the opportunity to make representations and to give evidence about the spent conviction and circumstances ancillary to it in the substantive phase of the Inquiry. I am minded to adopt this course save in circumstances in which disclosure of the spent conviction would frustrate a restriction order made. Fairness does not require that I attempt to determine finally, on the basis of evidence likely to be incomplete at the stage at which I am considering an application for a restriction order as to identity, an issue which I may have to determine in the substantive phase.
10. Although I have no doubt that spent convictions can be justly addressed in the context of an application for a restriction order in respect of identity under section 7(3) of the 1974 Act, the question may be more open to debate in the context of substantive hearings – for example when sought to be adduced to justify a deployment. I note the concern of counsel to the Inquiry that the use of the power under section 7(3) to admit or require evidence of spent convictions relevant to that question may impede the efficiency of the Inquiry's proceedings. It would not be conducive to fulfilment of the Inquiry's terms of reference if it could not address a spent conviction claimed to have been part of the justification for a deployment. To avoid any possible uncertainty it would be desirable to put the issue beyond doubt by an amendment to the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975.

Next steps

11. The core participants are invited to notify the Inquiry by 4pm on Thursday, 14 September 2017 whether they wish to be heard orally upon any and, if so, which of

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the directions I propose to make. If no hearing is sought, I shall proceed as described at paragraph 1, above.

2 August 2017

Sir John Mitting
Chairman, Undercover Policing Inquiry