IN THE UNDERCOVER POLICING INQUIRY

MPS SUBMISSIONS ON THE REHABILITATION OF OFFENDERS ACT 1974
DATED 8 NOVEMBER 2017
FOR HEARING 20 NOVEMBER 2017

Introduction

1. These submissions outline the MPS position in relation to the Chairman's minded to note of 2 August 2017 on the Rehabilitation of Offenders Act 1974 ("the 1974 Act") and its impact on the Inquiry's work.

2. The MPS agrees that the directions identified by the Chairman in the "minded to" note ought to be made. The submissions below deal with the second and third proposed directions.

The Chairman will not afford to the person whose convictions may be admitted in considering a restriction order application any opportunity to make representations about them at that stage (proposed direction ii)

3. The MPS respectfully agrees that the Chairman has identified the correct course in the proposed direction. The policy behind the 1974 Act is to prevent individuals being prejudiced by their past. That policy imperative is simply not engaged by the inquiry determining anonymity applications in the public interest: the resolution of an officer's anonymity application does not amount to prejudice (of the sort contemplated by the Act) to a person with spent convictions.

4. The basis of the Chairman's admission of such evidence, subject to the gateway within s.7(3), is to permit a critical assessment by the Chairman of risk of harm to a person if anonymity were not granted. Of necessity a cautious, risk-averse approach should be taken to that assessment. It is possible, as further evidence becomes known, to review a restriction and, if appropriate, revise or remove it. This might be appropriate if the risk was later shown to be less than initially assessed. The reverse, however, is not possible: once a person's name is disclosed the assessed risks may be realised. If disclosure of the evidence in support of the application is not carefully controlled, some applications would be undermined, for example an application for restriction of a cover identity would be undermined by the disclosure to the convicted person of the convictions the Inquiry would wish to admit.

5. This is not to say that consideration of convictions relied upon in an assessment of risk (whether spent or unspent) should be "uncritically relied upon" by the Chairman. The Chairman will in all cases wish to be assured that a perceived risk of harm is objectively well founded, whether its asserted foundation is in evidence of conduct which did not lead to a conviction, or which did. If the concern is that certain convictions may be unsafe (or intelligence is unsound), that is a concern which arises whether the conviction considered is spent or unspent[1]. It may

[1] As the NPSCP submissions implicitly acknowledge in the example at para 9.

therefore be necessary to take note when the criminality underlying any conviction took place. However, at this stage of the Inquiry proceedings it is appropriate to proceed on the basis that convictions are proper. It is simply not workable to examine and resolve the safety of every spent conviction relied upon to form an assessment of risk in order to determine a restriction application. In any event, that a conviction may be unsafe would not necessarily change the end assessment of the risk of harm, and does not justify engagement with persons which might undermine the very protection sought, at the stage of considering the restriction order application.

6. The NSPCPs' core concern with proposed direction ii is with the effect of restrictions on the work of the inquiry overall (see NPSCPs submissions 14 September 2017 at paras 7-8). This is the well-recognised tension between the public interests in avoiding harm to a person and in openness. The MPS submit that the test in the 1974 Act at s.7(3) (the gateway test the NSPCPs accept applies) and in the Chairman's ability to revisit a restriction under s.20 of the Inquiries Act 2005 (the 2005 Act) provide the required protections.

7. Further, individuals with relevant spent convictions will be able to make representations about and give evidence in respect of those spent convictions at the substantive stage of the inquiry if there is a concern that any might amount to a miscarriage of justice. In cases where no cover name restriction is in place this will be unproblematic. When dealing with the limited class of cases where real and cover identities require restriction, it will fall to the inquiry to consider convictions connected to the deployment in the course of meeting its terms of reference, but it is right that the inquiry should be trusted to carry out this task.

8. In short, it would be premature to test the safety of convictions and ancillary circumstances as part of the restriction order exercise. Their safety is part of the substantive terms of reference and will accordingly absorb significant time and resources that would jeopardise the timetable if addressed in the procedural stages of the Inquiry.

9. What is more, there is no clear method by which the NSPCPs' proposal[2] can work. In a case where there is a real and cover name application, how can an individual be informed that the Inquiry is considering their spent conviction without undermining the application? The proposal for contact appears unlimited, whether or not the Chairman thinks the s.7(3) test is met, suggesting wholly unnecessary contacts could be made. What can the individual be asked, fairly, about the circumstances of the spent conviction without being informed of the reason for the request? Even where there is no cover name application there may be cases where inviting representations could increase the risk of harm from the individual concerned. How would such contact be made and by whom (there being no basis to assume any and all sources of risk are CPs with RLR in the Inquiry)? Certainly, the NPSCPs' suggestion that current members of a group might be asked to help

[2] *"that there be a process which enables NSPCPs to know, in as much detail as possible consistently with the restriction order application, that their spent convictions are being relied upon in order that they may make any relevant representations to the Inquiry in relation to them"* (para 10)

trace individuals with relevant spent convictions suggests a large, unwieldy exercise, which appears on its face to be entirely incompatible with respect for the privacy of the convicted individual. How might this approach, which will seemingly add many months to the process of anonymity applications, and which risks the safety of anonymity applicants, accord with the duty on the Chairman to act with regard to the need act fairly and to avoid unnecessary cost?

Fairness, Article 8 and the Data Protection Act (DPA)

10. In the first place, Article 8 ECHR and the DPA both require the Inquiry to use all personal data fairly and proportionately, whether it is conviction data or not. There is no basis to presume the Inquiry is not handling personal data correctly.

11. In the instant cases, it is not contrary to the convicted person's Article 8 right to privacy for the details of convictions, including spent convictions, to be provided to the Inquiry by officials in the course of their duties. This is not a question of publication of those convictions but of receipt by and reliance on the facts of the convictions by the Chairman in the event that that s7(3) gateway test is met. As is stated in the Chairman's note on practice to date, the spent convictions will not be relied upon save where *"in fairness to the officer concerned, it is necessary to do so to permit me to assess the risks, of disclosure of the real or cover name, to the officer. Unless I can I cannot do justice to the application."* That is the starting point. Accordingly, any interference is in accordance with law and necessary for one of the legitimate aims (for example, interests in public safety, the prevention of crime and disorder, or for the protection of the rights and freedoms of others), and proportionate.

12. The MPS disagrees with the NPSCPs that the use of this information by admitting it in evidence without permitting a convicted person an opportunity to make representations in relation to the use is contrary to Article 8 as 'not in accordance with law' as contrary to the Chairman's duty to act with fairness pursuant to s.17 of the 2005 Act (or the like argument under the Data Protection Act).

13. Firstly, the duty under s.17 is wider than this: the Chairman in making any decision as to the procedure or conduct of an inquiry, must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others). For the reasons above, the proposal is impracticable and unworkable. The Chairman should work to avoid unnecessary procedural hurdles and delay.

14. Secondly, a decision to admit certain spent convictions into evidence for the purposes of restriction order applications is not contrary to acting with fairness: (i) above all in considering an application, it is necessary to be fair to the applicant and the need not to undermine the application; (ii) the only substantive matter of unfairness alleged is that a potential challenge to the safeness of the conviction *might* be made. This is met by the gateway test: the evidence will only be admitted if justice cannot be done when determining the application but by admitting the evidence; and protected by the s.20 ability to review.

15. The admission of such evidence is in accordance with the law, and applying the statutory tests, is not unjustified or proportionate. It does not violate the Article 8 rights of the convicted person or their rights under the Data Protection Act.

The invitation to the Secretary of State for Justice to lay an amendment to schedule 3 of the 1974 Act before Parliament

16. The MPS agrees that the Chairman should invite an exception in the terms recorded in the "minded to" note, at the very least to ensure that all information relevant to deployments can be considered fairly (as the Inquiry is obliged to do) but without unnecessary complexity and delay. The MPS recognises the narrower exception now proposed (which allows appropriate inquiries to be designated) is preferable to the broader exception initially proposed in the CTI note of 1 March 2017.

17. The advantages of the exemption in this Inquiry would be to:
    a. Assist the Inquiry to fully and fairly meet the terms of reference, which will, perhaps more than any other inquiry, have cause to investigate the terms of spent convictions in a number of ways and for a number of reasons;
    b. Provide certainty as to the powers of the Inquiry; and
    c. Minimise the administrative and procedural burden on the Inquiry and thereby also reduce delay and cost.

18. Whilst s 7(3) provides an appropriate test in respect of restriction orders to meet the demands of fairness, the Inquiry will face marked challenges in meeting its terms of reference in respect of matters of miscarriage of justice and of justification for deployments without such an exception. The MPS does not agree with the NPSCPs that only s 7(3) can provide protection from unfairness. The benefits of such an exception far outweigh the risks, not least since Article 8 and the DPA would continue to offer protection and ensure fair treatment of the information.

8th November 2017

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