



OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Sub-Committee on Policing

Thursday 8 February 2018

Session 5



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JUSTICE SUB-COMMITTEE ON POLICING

2nd Meeting 2018, Session 5

CONVENER

*John Finnie (Highlands and Islands) (Green)

DEPUTY CONVENER

*Margaret Mitchell (Central Scotland) (Con)

COMMITTEE MEMBERS

*Daniel Johnson (Edinburgh Southern) (Lab)

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

*Ben Macpherson (Edinburgh Northern and Leith) (SNP)

*Liam McArthur (Orkney Islands) (LD)

*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Neil Findlay (Lothian) (Lab)

Michael Matheson (Cabinet Secretary for Justice)

Derek Penman (Her Majesty's Chief Inspector of Constabulary in Scotland)

Stephen Whitelock (Her Majesty's Inspectorate of Constabulary in Scotland)

CLERK TO THE COMMITTEE

Diane Barr

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Sub-Committee on Policing

Thursday 8 February 2018

[The Convener opened the meeting at 13:02]

Decision on Taking Business in Private

The Convener (John Finnie): Good afternoon—feasgar math—and welcome to the second meeting in 2018 of the Justice Sub-Committee on Policing. We have received no apologies. Agenda item 1 is a decision on whether to take in private item 3, which is a discussion on the sub-committee's work programme. Do members agree to take that item in private?

Members indicated agreement.

Undercover Policing

The Convener: Item 2 is an evidence session with HM inspectorate of constabulary in Scotland on its report, "Strategic Review of Undercover Policing in Scotland". I refer members to paper 1, which is a note by the clerk, and paper 2, which is a private paper. I welcome to the meeting Michael Matheson, the Cabinet Secretary for Justice; Ian Kernohan and Graeme Waugh, from the organised crime unit at the Scottish Government; Derek Penman, HM chief inspector of constabulary in Scotland; and Stephen Whitelock, lead inspector with HMICS. I invite the cabinet secretary to make an opening statement of up to three minutes.

The Cabinet Secretary for Justice (Michael Matheson): Thank you, convener. I am grateful to Derek Penman and his team for delivering the report, which I received on 2 November. The review provides reassurance to the public and to Parliament on the extent and scale of the use of undercover police officers since 2000; identifies where there is room for improvement; and makes a number of recommendations that Police Scotland has committed to implement in full.

I have taken my time to consider carefully the detailed and comprehensive report with a view to making a decision on whether to hold a public inquiry in Scotland. As I mentioned in my statement to Parliament yesterday, the Scottish Government is currently subject to a judicial review of its decision not to hold a public inquiry in Scotland. That has had a bearing on the length of time that I have taken to consider the report. The on-going legal proceedings in that regard constrain what I can say in direct relation to that issue, but I will try to be as helpful to the committee as I can be.

Yesterday, I set out in some detail the reasoning behind my decision not to hold a separate Scottish inquiry. I know that others take a different view, which I respect, but I have taken the decision on the basis of all the information that is available to me. There is a lack of evidence of any systemic failings in undercover policing in Scotland and, in light of the limited scale of the activities of special demonstration squad and national public order intelligence unit police officers in Scotland, I believe that setting up a further inquiry would not be a proportionate response. Such an inquiry would inevitably create a measure of duplication of the United Kingdom undercover policing inquiry, as it would involve many of the same core participants and law enforcement officers, and there would be the potential for overlap in its conclusions and remedies. It could, because of the scale and duration of the undercover policing inquiry, be subject to delay in respect of the need

to obtain Metropolitan Police Service participation and documentation, and the cost of setting up such an inquiry would be disproportionate.

Our position remains that the clearest and most effective way of addressing concerns about what may have happened in Scotland as a result of the actions of English and Welsh police forces would be for the undercover policing inquiry's terms of reference to be amended in order to allow it to look at the activity of English and Welsh police operations that took place across Great Britain. I wrote again yesterday to the Home Secretary to ask her to reconsider those terms of reference. I have genuine sympathy for individuals who have suffered as a result of the actions of undercover police officers who behaved in unethical and unacceptable ways. However, I am clear that that behaviour by police officers in specific English and Welsh units is properly a matter for the Home Secretary.

Police Scotland has established a steering group, which is chaired by Assistant Chief Constable Steve Johnson, to oversee delivery of the 19 recommendations that are made in the report, and HMICS is represented on that group to provide advice and context on each recommendation.

I am happy to repeat the assurance that I gave Parliament yesterday that any recommendations that arise from the undercover policing inquiry will be considered and—where appropriate and necessary—implemented. Should new information or evidence become available in due course, in particular through the undercover policing inquiry, I will give it careful consideration and, if appropriate, I will revisit the possibility of an inquiry.

The Convener: Thank you for that, cabinet secretary. Would Derek Penman like to make some opening remarks?

Derek Penman (Her Majesty's Chief Inspector of Constabulary in Scotland): Thank you, convener. I, too, am grateful to the committee for providing me with an opportunity to give evidence on the "Strategic Review of Undercover Policing in Scotland". As you are aware, undercover policing raises complex ethical questions, and there has been legitimate public and political concern over its use in the past. It must be tightly controlled in accordance with the law, and there must be effective safeguards and robust supervision in place at all times.

My statutory function is to inquire into the state, effectiveness and efficiency of Police Scotland, and the terms of reference for my review focused primarily on the need to provide assurance to the Cabinet Secretary for Justice and to Parliament that effective safeguards are currently in place in Scotland to militate against unethical behaviours,

and that undercover policing operations by Police Scotland can be conducted lawfully and with sufficient oversight and scrutiny. I have made 19 recommendations, which I believe will drive improvement in Police Scotland. Some of those require engagement with other agencies, and they should drive improvement in undercover policing across the United Kingdom.

My report also examines the extent and scale of the undercover policing operations that have been carried out in Scotland since the introduction of the Regulation of Investigatory Powers (Scotland) Act 2000. That includes operations that were conducted by legacy police forces across Scotland and, notably, operations that were conducted by the SDS and the NPOIU over the same period. Although I have been able to provide information on the number of such operations conducted in Scotland at a level of detail that has not previously been made public, I have not reviewed those operations. The information about the activities of the SDS and the NPOIU was provided by operation Herne and the National Police Chiefs Council. It has been identified from the substantial amount of information that is being collated as part of the obligation on those units to provide information to the undercover policing inquiry that is currently being conducted in England and Wales.

Having conducted the review, I conclude that the use of undercover officers is a lawful and legitimate way of tackling the threats from serious organised crime, cybercrime and terrorism. The officers who undertake that function volunteer for the role, which often places them in challenging and occasionally dangerous situations, for which they receive little or no recognition. I have been careful in my report not to compromise the operational integrity of the tactic, and I am sure that members will understand that, in my evidence today, I will be unable to answer any questions that may identify undercover officers or disclose covert policing tactics.

I finish by emphasising my own view that there can be no place in modern policing, which relies on legitimacy and public consent, for the unethical behaviours by undercover officers that have been identified in previous reports that were published in England and Wales. I sympathise with those who have suffered as a result of such behaviours, and I understand their need for justice. The activities of undercover SDS and NPOIU officers, while they were operating in Scotland, were part of wider undercover operations that were conducted across Great Britain. The responsibility for the management and supervision of those operations lay outwith policing in Scotland, and in my opinion they are inextricably linked to the matters that are currently being considered by the undercover policing inquiry in England and Wales. It therefore

seems appropriate that those who have suffered as a result of those operations in Scotland should have some form of redress through that inquiry.

The Convener: Thank you, Mr Penman. I open the session to questions from members.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): Yesterday, I asked the cabinet secretary a question in relation to securing and protecting information. He assured me that Police Scotland met all the legal requirements, and I accept that unreservedly. However, I want to look forward rather than back. In my question to the cabinet secretary yesterday, I referred to recommendations 8 and 14, but I also highlight recommendation 16, which concerns the establishment of a records management system. Given the extraordinary sensitivity of information in this area, and the potential life-threatening consequences of unauthorised or unplanned disclosures in relation to individual officers, might it be time to look at how we store information and provide officers who have specific operational needs with access to it?

I will not go into any detail on the matter; I simply say that I come from a banking background, in which—in many instances—no single person could ever do certain things. Is there scope to look at further protecting the information that it is necessary to hold and making sure that we understand who has, and has had, access to information? In that way, we could ensure that, in future, we continue to protect those very precious but also very vulnerable assets. There are such examples in other industries—perhaps such a system is already in use in Police Scotland; I reiterate that I do not want any operational material to be compromised in your answers.

Derek Penman: Your point is incredibly valid. The type of information and intelligence that is gathered in these operations is highly sensitive, and it can potentially identify sources and put them at risk. We recommend in our report that there should be a single system so that we are able not only to maintain and manage all the authorisations but manage all the information and intelligence that flow from that. We also recommend to Police Scotland that officers in the field should be able to gather and collate that information effectively on secure laptops. There are already robust processes in place in Police Scotland for dealing with secure data. There are confidential networks that operate at a level above the level that other people can access, and different functions are available within that. Our report asks Police Scotland effectively to go further: to collate that data and put it on to one specific system. Your point about security of information is well made.

Stewart Stevenson: I will ask only one further question, because I do not want us to get bogged

down in this issue to any great extent. I absolutely accept that access has to be associated with seniority. However, given my experience in other domains, I believe that seniority alone is not enough. Making it necessary for two people to come along with the keys, for the sake of argument, is a method of securing access that actually protects those people. Such systems go back a long way—they began as primitive methods and are nowadays quite sophisticated. I do not think that it is for the chief inspector to look at that himself—I merely encourage him to encourage others in the Scottish Police Authority who have responsibilities in the area to look further at that process.

Derek Penman: I can reassure you on the systems that we have in place. Some senior officers, regardless of their rank, will be unable to access certain material that is very role specific. The systems that require officers to log in to access information are capable of auditing access to that information. I think that I am right in saying that even the assistant chief constable who authorises access must do so through the computer system, so the system provides an audit trail. There are strict controls on those who are allowed access, and their access is monitored as part of the process.

Stewart Stevenson: I am grateful for that answer.

Margaret Mitchell (Central Scotland) (Con): Good afternoon. I have a question for Derek Penman. You mentioned in your opening statement that the supervision and authorisation processes for undercover policing should be robust. In recommendation 9 in your report, you suggest the introduction of

“a results analysis that demonstrates the impact of the undercover policing”.

In recommendation 10, you say:

“Police Scotland should engage with the College of Policing and progress a self-assessment of the authorisation, governance and tactical management arrangements ... for undercover policing as part of a formal ... national accreditation”.

Can you elaborate on why you made those recommendations?

13:15

Derek Penman: Certainly. The robust processes will be drawn primarily from legislation and the statutory guidance, and from the authorised professional practice, which is a doctrine that is pulled together by policing across the United Kingdom and contains guidance and advice for practitioners on how they should operate. In our report, we encourage Police Scotland to ensure that it follows—as it currently

does—not only the legislation and the statutory guidance but the authorised professional practice on undercover policing. That ensures that everyone across the country understands, operates to and is held accountable to the same standards.

Recommendation 9, on the need for a results analysis, is intended to suggest that, once an undercover policing tactic has been used, it would be sensible for Police Scotland to evaluate its use from an operational cost benefit perspective. Having used the tactic, Police Scotland can ask what was gained from it; whether it was a good use of police resources and money; and what was learned from it that could be rolled over into future operations.

Margaret Mitchell: That brings me on to recommendation 17, in which you say:

“Police Scotland should strengthen the financial management of covert accounts and introduce an independent financial audit regime with improved reporting.”

Perhaps you could indicate why Police Scotland should do that, and the cabinet secretary can then respond to the recommendation.

Derek Penman: Again, the nature of the business, as you can imagine, means that covert activity requires to be funded. If undercover officers are spending money, it has to be accounted for. Although we carried out an audit and saw that everything was accounted for, we felt that greater detail could be provided—through receipts, for example. Our rationale is that the provision of detail in receipts would give a fairly good detailed picture—almost to the pound—of what undercover officers spend money on. Provided that the process is undertaken by someone who is suitably vetted and secure, Police Scotland can start to ensure that the money that is spent by people who are not being supervised all the time is accounted for, which provides an additional safeguard in respect of the officers’ integrity and ethical behaviour.

Michael Matheson: I do not know whether I can add anything further to what the chief inspector said. The recommendations are largely an operational matter for Police Scotland to take forward. The suggested changes are practical measures that should be put in place to provide additional assurance and an audit trail. As I mentioned in my statement yesterday, Police Scotland has accepted all 19 of the recommendations and will take them forward, and HMICS will engage with it in the process to ensure that that happens.

Margaret Mitchell: Cabinet secretary, you said that it is “an operational matter”. Can you or the chief inspector indicate whether the financial

management of undercover operations requires more oversight? Is there an oversight role for the Scottish Police Authority, for example?

Derek Penman: We have made some recommendations that concern the SPA and its ability to scrutinise covert activity. It is inherently difficult to undertake such scrutiny in public, as you can imagine, but there is a need to account for the use of resources and money.

We also say in our report that the SPA needs assurance that covert police work is being undertaken ethically. I definitely believe that there is a role for the SPA—it will need to be developed further—in being assured that the money is being spent properly and that the tactics are being used effectively. In fairness, the tactics are regulated by the Office of Surveillance Commissioners, which has a statutory function and examines them in detail. The wider questions of whether a tactic is a good use of public money, whether it has been deployed properly and whether the money and resources have been accounted for are all relevant considerations for the SPA.

The Convener: Before I bring in Rona Mackay, I would like Derek Penman to clarify a point in relation to the practicalities. Everyone wants public money to be accounted for, but I am conscious that an undercover officer might look suspicious if they were to ask for a receipt. I presume that there is a measure of latitude in that regard to ensure that no one is compromised as a result of any processes.

Derek Penman: Absolutely—there must be common sense in all this. My comment about accounting for every pound was perhaps too dramatic; it is simply a question of being able to account for the money that has been spent. I would expect, even if there are no receipts, that a discussion has taken place between the undercover officer and the cover officer who is looking after their welfare to account for the money that has been spent in that way. There will be other evidence to support their claim and whether it is reasonable or otherwise.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I want to ask about the level of use of undercover policing in Scotland. Your report states:

“Police Scotland’s current capacity and capability to conduct ... undercover policing ... is limited and needs to be developed.”

Can you expand on that? In addition, can you comment on the level of undercover policing in the single force in comparison to the level previously, and say whether operations have changed?

Derek Penman: The numbers are in the report, and if you want more detail, Stephen Whitelock can provide it. We state in broad terms that Police

Scotland appears to make very limited use of the tactic. It was not used a great deal in Scotland previously, although the legacy forces perhaps used it more than Police Scotland has. In some respects we were reassured by that.

Following the publication in 2014 of the HM Inspectorate of Constabulary report, “An inspection of undercover policing in England and Wales”, we wrote to Police Scotland and met with it to pick up on the learning from that report. That process encouraged Police Scotland to look at its undercover operations across Scotland, to start putting in place safeguards, and to build capability and capacity to support those operations. We would have had concerns if Police Scotland had had a lot of undercover operatives without having the back-office functions to support them. However, we have seen that Police Scotland is looking to bring the legacy practices together to develop and improve them. It is now in a position in which it can start to scale that up.

Another consideration is the change in the nature of crime and the demands on policing. You will see from our report that all undercover activity, including in the legacy forces, was directed towards serious organised crime. We are seeing a change in crime, with a move towards internet-related crime and paedophile activity, and we think that Police Scotland now has greater capacity to invest in its undercover online function, which would be particularly fruitful.

The Convener: Liam McArthur and Ben Macpherson have supplementaries on that point.

Liam McArthur (Orkney Islands) (LD): I am interested in the point that was made about capacity and capability. That is an operational matter, and Police Scotland itself has not said that it does not feel that it has the resources or that it needs to scale up in order to carry out more undercover activity. It would be interesting to know why that recommendation has emerged from the review, given that capacity and capability have not been flagged up as an issue, other than in relation to the general area of online crime, to which Police Scotland has made it clear that additional resources will need to be committed in future.

Derek Penman: Although the issue has not been visible, Police Scotland—certainly in our review—recognised that, although more use could be made of the tactic, it did not have the capability and capacity to do so. One of our recommendations is for a full-time covert undercover operations manager, which is a technical role that is dedicated to looking after the undercover policing facility. That is currently not a full-time post, and Police Scotland has recognised that it needs to be developed. Police Scotland itself recognised the need to increase the

capability and capacity of the tactic. Online operations in particular require more work.

Recommendation 1 is more strategic. We say that Police Scotland needs to consider covert policing in the round, to look at what it needs to tackle crime and the other problems that it deals with in Scotland, and start to scale up in size accordingly. Recommendation 1 suggests that Police Scotland should look at where it sees the need for undercover policing, especially online, and then start to size up and build that capability and capacity.

Liam McArthur: You are effectively saying that the low level of use of such tactics in Scotland partially reflects a lack of capacity and capability rather than a view within Police Scotland that undercover policing is not necessarily relevant to or appropriate for the jobs that it is having to carry out.

Derek Penman: As you will see, the numbers are very low, and I imagine that they will stay relatively low—we are not shouting for an exponential increase. We are saying to Police Scotland that it needs to use its strategic threat assessment for policing more generally to understand what it needs in terms of undercover capability. Once it understands what it is trying to do, it needs to start developing that capability. That will include areas such as online crime and serious organised crime. As you will be aware, “Policing 2026: Our 10 year strategy for policing in Scotland” looks at those new threats and at the new shape that policing will take. Looking at policing as a cake, Police Scotland needs to decide on the amount of cake that will go to specialist operations and covert policing.

Liam McArthur: If the level of undercover activity is expected to increase for the reasons that you suggest, is it also expected that the way in which it is carried out, including the oversight and regulation that takes place, will need to adapt to reflect the higher degree of activity?

Derek Penman: That is exactly the point that we make in our report. You cannot increase the number of undercover officers without a commensurate increase in back-office support to ensure the safety of those officers and to maintain integrity and ethical standards in the delivery of the tactic. It is also about how undercover policing fits in more generally with major crime enquiries, and how everything fits together. We say in our report that Police Scotland should look at what it needs for the future and start to build that capacity.

Liam McArthur: I accept that. I was thinking more along the lines of the need for oversight—transparency would be the wrong word—of that activity if it becomes a larger component of what

Police Scotland does. The public might expect that such activity is being carried out according to fairly well-established rules, and the way in which that reassurance is provided might be different in future.

Derek Penman: Absolutely. As I said, that will come from the legislation and the guidance. The Office of Surveillance Commissioners also plays a role in inspecting how that work is carried out. There is a whole framework in place. We also make it clear that Police Scotland should join the National Police Chiefs Council accreditation scheme, which will provide another level of safeguards and assurance around how the tactics operate.

Michael Matheson: It might be worth pointing out that there have been some changes in the governance, which involves a combination of legislation—the Regulation of Investigatory Powers (Scotland) Act 2000—and the codes of practice that sit alongside that. In addition, the Office of Surveillance Commissioners, which was previously responsible for monitoring and assessing compliance with the legislation by bodies that had the ability to undertake surveillance operations, has now been consolidated within the role of the Investigatory Powers Commissioner, which brings a number of the oversight bodies together into one single body. However, the tribunal system is still in place for people who feel that there have been breaches. Changes are already taking place with the oversight function and how a force such as Police Scotland will be inspected, evaluated and held to account in its use of the powers in the legislation in accordance with the codes of practice.

The Convener: We have brief supplementaries from Ben Macpherson and Stewart Stevenson, and then I will bring in Daniel Johnson.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): I will be brief, as Rona Mackay and Liam McArthur have covered much of what I was going to ask. I appreciate the point that undercover online activity could be an area in which more capability and capacity will be required. However, I note that in recent months there has been significant progress in prosecutions for organised crime. From the research that you carried out to produce your report, how pertinent do you believe undercover policing is to the ability to take forward the shared responsibility to tackle organised crime?

Derek Penman: It is another tool in the toolbox. Our take is that it is a legitimate tactic that can be used to good effect. We feel that Police Scotland's current use of the tactic is very limited, and it could make more use of such activity to tackle people who cause the greatest threat, harm and risk to communities in Scotland, such as those involved

in serious organised crime, sex offenders who operate online and other crime groups. It is a legitimate tactic, and more use could be made of it.

Stewart Stevenson: Another question has occurred to me. We are talking about embedding people online so that there is not necessarily any physical contact between Police Scotland staff and the potential criminals. Given the specialist skills that are required in certain areas online, are people who are not police constables—civilians, in other words—employed as part of the covert operations? If so, are there special arrangements for them?

Derek Penman: Those who operate as undercover officers online have specific qualifications. I will pass that question over to Stephen Whitelock.

13:30

Stephen Whitelock (Her Majesty's Inspectorate of Constabulary in Scotland): Everybody who is involved in undercover work will be a sworn police officer or constable and will have gone through the relevant training course. Some of them bring specialist skills around digital awareness, the world wide web and so on.

Stewart Stevenson: That is fine—thank you.

Daniel Johnson (Edinburgh Southern) (Lab): Before I ask the cabinet secretary about next steps, I want to ask Chief Inspector Penman a couple questions regarding the scope of his work. On page 4 of the report, you state:

“we established that there was no evidence that undercover advanced officers ... from Police Scotland had infiltrated social justice campaigns or that officers had operated outwith the parameters of the authorisation.”

Did you establish whether that was also true of the legacy forces? Likewise, is it correct to state that the situation pre-2000 was not within the scope of your review?

Derek Penman: We were effectively working from the date when the Regulation of Investigatory Powers (Scotland) Act 2000 came into force. We expected that the document search facility would be available from that date, so it seemed a logical place to start. The point at which this Parliament took an interest in the matter and passed the legislation was a good point from which to move forward.

With regard to the legacy police forces, we wrote to Police Scotland—as I mentioned earlier—after the 2014 HMIC inquiry down south, and we asked it to start to collect and collate its information on the legacy forces. To be blunt, I took the view that that information would be required for the undercover policing inquiry, and I

felt that it would be helpful for Police Scotland to start a piece of work to pull it all together. At the point when we came in to do our review, Police Scotland had been working for 18 months to pull together all the legacy force material, so we were able to examine that material and all the authorisations that it contained. From there, we were able to say definitively that all the undercover activity in the legacy police forces in Scotland pertained to serious organised crime and not to social justice campaigns. We went into Police Scotland's work in detail, looking not only at authorisations but at all the supporting information behind them.

Daniel Johnson: I understand that. Your report goes into some detail regarding the welfare of officers and how they are looked after. Did your review look at—or would it occur to you to look at—the welfare of those who have been targeted by undercover officers and those, such as family members, who may be associated with them?

Derek Penman: On the first part of your question, it is inherently difficult to do that on the basis that we are talking about undercover policing tactics. Those who are involved in serious organised crime and who have been in contact with undercover police officers will, by definition, not necessarily know that. To go and have conversations with those people and identify them would be unnecessary.

Although that aspect was not within the scope of our review, we made a statement to say that we would be keen to speak to anybody who had anything to say to us. We invited anybody who had been involved or who considered themselves to be a victim of undercover policing to come forward and engage with us. That offer was made, but nobody came forward.

Daniel Johnson: I will follow on from those comments with a question for the cabinet secretary. As we have heard, the scope of the review was set out, which obviously limits it. The report is very thorough, but it is limited in its scope. You acknowledged in your statement to Parliament yesterday that, given the scope of Derek Penman's review and the limitations of the UK inquiry, a number of situations or circumstances will essentially fall into a gap in relation to the timeline or to acts that were carried out by forces other than those in Scotland. Indeed, as we have just established, there may be aspects that have not been addressed. I understand what you said about a separate Scottish inquiry. However, are there ways other than an inquiry in which these questions could be looked into and clarified in the event that your request for an expansion of the UK inquiry's scope is denied?

Michael Matheson: It depends on what those issues are. If individuals have raised specific

concerns about undercover policing at a specific time that they believe that the HMICS review has not covered, that is clearly a matter that could be considered. As I said, if there was new evidence that would merit the matter being given further consideration, I would certainly do that.

In short, my answer is that I am not closed to that. If concerns or issues are raised or highlighted with me, I am not saying that they should not be considered. However, as I said yesterday, there is another route for those who have concerns, which is the Investigatory Powers Tribunal process. People can take a case through that process, which will allow their issues to be investigated and considered by a tribunal.

Daniel Johnson: Given the nature of what we are talking about, I am concerned about the fact that we are having a passive response and waiting for people to come forward. There may be good reason to believe that those who feel that they are victims might be reluctant to come forward. Could we take more proactive steps rather than simply waiting to see whether people come forward with potential cases? Could we proactively seek to investigate whether those who have been targeted and those who are associated with undercover officers might feel that they have been victimised? Although it is perfectly possible that officers have conducted themselves in accordance with the regulations, nonetheless the personal impact on those people might not be satisfactory. That might be a commonsense approach to take.

Michael Matheson: It is worth keeping in mind how the inquiry in England and Wales came about. There is a significant history to the matter. The first element was the publication in 2012 of the HMIC report, "A review of national police units which provide intelligence on criminality associated with protest", which looked at the actions of the special demonstration squad and highlighted concerns about its behaviour and operations. The then Home Secretary then commissioned a review of allegations relating to conduct around undercover operations as part of the Stephen Lawrence investigation. The 2014 HMIC report subsequently highlighted serious concerns about the way in which undercover policing was operating in England and Wales.

From that review, we have assurances on how undercover processes in Scotland have been operating. It is important to keep in mind that the inquiry in England and Wales has come about not on the basis of saying, "Let us just look to see if there are problems", but because significant problems were identified, some of which involved unethical and unacceptable behaviour among some undercover officers. There was a strong and considerable evidence base to justify that decision. To date, I have not seen a level of

evidence or information that would suggest that there is a similar problem here in Scotland. In fact, the HMICS review gives us an assurance that that is not the case. To go back to my earlier point, if there are issues of concern, it could be for the Investigatory Powers Commissioner to review at some point the conduct of policing in Scotland. If such a review highlights concerns, the IPC can pursue the matter with Police Scotland and, of course, raise it with Government as well.

If there was specific information that suggested to me that there was justification for further investigation, I would of course look at that and take it into account. However, it is extremely important to recognise the history, and the fact that the public inquiry in England and Wales is based on considerable evidence of concerns about how undercover policing, including specific units, was operating in England and Wales.

Daniel Johnson: I have a question on that specific point. If your request for an expansion of the scope of the UK inquiry is denied, is there not a real possibility that cases involving units that we know carried out such activities in Scotland and which behaved unethically will simply be left in the gap between the scope of the work that has been carried out here and the UK inquiry's remit?

Michael Matheson: I referred in my statement yesterday to the operation of two specific units that were UK based—they were national units that were based in the Metropolitan Police. The evidence that we have on the SDS to date is as complete as we expect it to be. HMICS can tell you a little bit more about how complete the information is. In addition, the evidence that we have on the activities of the national public order intelligence unit is as up to date as it can be at present, although further information may become available in the future.

Those operations took place across the UK. Their origins were in England and Wales, and part of their work brought them into Scotland. They were not specifically Scottish operations. They were not brought in by policing in Scotland to carry out specific operations as such, with the exception of the G8 authorisations. They were part of a UK process. If I was to set up a Scottish inquiry to look at specific examples in which individual officers from those units came into Scotland, I would have to take it into England and Wales, because the operations originated there. They were authorised under UK legislation. We would not get a complete picture if we were to undertake a Scottish inquiry in isolation. Given some of the complexities around the undercover policing inquiry in England and Wales, and how much information is involved, it would, in my view, be a good number of years before we could even get all that data from the Metropolitan Police Service. A Scottish inquiry

would not give us that level of insight, because the activity all relates to UK operations. That is why it makes complete sense for the UK inquiry in England and Wales to cover those units, given that they were UK-based operations. That will allow us to get a complete picture of what they were doing.

As I set out yesterday, that was part of the rationale for my decision on whether there should be a separate Scottish inquiry. It is why I came to the view that I do not believe that an inquiry is the appropriate course to take, based on the evidence that we have at present, and that it would be better if the activity of those units in Scotland was covered by the undercover police inquiry in England and Wales.

The Convener: Neil Findlay wants to come in.

Neil Findlay (Lothian) (Lab): The UK inquiry—*[Interruption.]*

The Convener: The microphone is not working.

Michael Matheson: There you go—you are on. You are live.

Neil Findlay: The UK inquiry has peace campaigners, environmental campaigners, trade unionists and others as core participants, from which we can see that the use of infiltration tactics was very extensive indeed. The UK inquiry goes back to 1968, whereas your review went back only to the year 2000. That major gap—the period from 1968 to 2000—was a very important time socially, economically and certainly politically. Major events took place, including the poll tax demonstrations, the miners' strike, anti-war campaigns and peace campaigns. Among the people who were impacted throughout that period, the only people who have not have access to an inquiry are the Scottish victims. That cannot be right.

Michael Matheson: The inquiry focuses on that timescale partly because that is when the special demonstration squad was operating. HMICS can perhaps give you more of an insight into the nature of the data that we have on the SDS and the work that brought its officers into Scotland. I hope that that would give you some reassurance around how much information we have and how accurate it is. The inquiry goes back to 1968 because that was the point when the SDS was established. Perhaps HMICS can give you—

Neil Findlay: I want to add something to that, which may help with the answer. Obviously the inquiry has focused on the special demonstration squad. However, are we saying that members of the SDS were the only people who were conducting such activity, and that, therefore, if they did not appear in Scotland, no one was undertaking surveillance here against political, environmental and peace campaigners?

Derek Penman: We state in our review that, from looking at the legacy force authorisations for advanced undercover operations—the infiltration-type operations—we can say that they were all directed towards serious organised crime. On that basis, we can say that the activity of the legacy police forces from 2000 onwards, which is all that we looked at within the scope of our inquiry, was directed towards serious organised crime and not towards social justice groups.

13:45

Neil Findlay: Is that on the basis of the records that were retained?

Derek Penman: Yes. All the authorisations would have been made under RIPSAs. In order to carry out that covert activity, operations would require to be authorised under RIPSAs, so we looked for the authorisations.

Neil Findlay: And prior to that, we have nothing.

Derek Penman: The terms of reference for our review made it clear that it would cover the period from when RIPSAs came into force onwards, because that is when the legislation came in to provide for record keeping to account for such activity. That was the rationale.

Michael Matheson: I want to pick up on an issue that I mentioned regarding the nature of the data on the special demonstration squad. Stephen Whitelock might want to comment, because he was involved in engaging on that issue at the UK level and in helping to get the data. Perhaps he can comment on how accurate it is in the context of the report.

Stephen Whitelock: You will be aware that there is a live investigation by Derbyshire Police into the disbanded SDS, which covers the 40-year period that we have discussed. We engaged with that force through the chief officers—they were very interested in the Scottish footprint of SDS officers. Although our terms of reference covered the period from 2000, when RIPSAs came into force, to 2016, Derbyshire Police gave us what information they had in relation to SDS deployments in Scotland, which went back to 1997. That is documented in our report. We therefore have information on the footprint of SDS officers who were deployed in Scotland from 1997 to 2007. I have asked whether there is material that relates to the period prior to 1997, but there are no records in relation to that. At the time of the review, that was all the material that the independent investigation by Derbyshire Police—operation Herne—had gathered. It had no information, records or documents that would indicate that any SDS officer was deployed in Scotland prior to 1997.

Neil Findlay: The issue is that we know that Scots were disproportionately affected by undercover activity in relation to major national events such as the poll tax demonstrations, the building trades strike in the 1970s, the miners' strike in the 1980s and the blacklisting scandal. I am thinking also of environmental campaigns such as the Pollok free state; Greenpeace activity in the North Sea; the rise of political parties such as the Scottish Socialist Party and your own party, cabinet secretary; the activity of the Communist Party of Great Britain and the Labour Party; and peace camps on the Clyde. In all those campaigns, the people who were involved took it for granted that they were being infiltrated. I find it inconceivable that we think that these things happened only in England and Wales.

Michael Matheson: I go back to my point about the core reasons that drove the creation of the inquiry in England and Wales, which included the specific concerns that were raised about the activities of the SDS and its undercover policing work, including in the Stephen Lawrence case. It was not related to the issues that you have highlighted. The purpose of the inquiry in England and Wales will not be to look at those issues—as far as I understand it, the inquiry will look into whether undercover policing and infiltration took place at that time in the areas in which people have raised concerns and issues. Core participants can raise issues and concerns with the inquiry, where they have legitimate reasons to do so, in order that those issues can be explored and considered.

I have taken a decision on the basis of the information that has been presented to me. At present, I believe that there is insufficient evidence to justify holding an inquiry in Scotland into undercover policing.

Neil Findlay: I have a brief final question. Should it take one victim to have to seek judicial review to try to get justice on this matter?

Michael Matheson: People make individual decisions about these matters, and judicial reviews and the UK Government will consider matters as they will. It is entirely their choice.

I am conscious that many of the names that have been highlighted to me of individuals who believe that they were under surveillance in Scotland by the special demonstration squad and potentially by the NPOIU are core participants in the undercover policing inquiry in England and Wales. As the solicitor for that inquiry has said, if evidence is presented to it that relates to Scotland, it will be able to record that information, although it will not be able to interrogate it. As I mentioned yesterday in the chamber, if any issues come from that inquiry that I believe require a Scotland-specific response, I will consider the matter at that

particular point. If any additional information comes to hand between now and then, that will be taken into account as well if it raises concerns about the way in which officers have been operating in Scotland.

The Convener: You have run out of time, Neil, although I appreciate that there are a number of issues to follow up on. I will just ask a few questions myself. First, I should declare, given that the G8 has featured a lot, that I was at the G8. I was not there in an operational capacity; I was there to look after the welfare of officers by providing accommodation and food.

Can either the cabinet secretary or Derek Penman say whether any assessment has been done of the reputational damage to undercover policing?

Michael Matheson: I am not aware of any assessment that has been made. Do you mean on the basis of what has happened in England and Wales?

The Convener: Historically.

Michael Matheson: On the basis of what has happened in England and Wales, or—

The Convener: No—in Scotland.

Michael Matheson: In Scotland? No, I am not aware of any assessment.

The Convener: Would you see any benefit at all in carrying out such an assessment?

Michael Matheson: For what purpose?

The Convener: I think that we would want to know the extent to which people's concerns about the police are founded on those practices—which I think that everyone would condemn—from past operations.

Michael Matheson: Are you asking whether any assessment has been made of the reputational damage to undercover policing on the basis of individual personal experience?

The Convener: I am asking whether there has been an assessment of the reputational damage to policing in Scotland.

Michael Matheson: I am not aware of any assessment.

Derek Penman: I am not aware of any assessment, or of any concerns being raised by the general public or by the police service in that regard. The publicity around undercover policing and the unacceptable—to be frank—behaviour of officers that has been reported in the course of the inquiry in England and Wales will no doubt have damaged the legitimacy of the tactic in the eyes of the public. That is why our report provides some

reassurance, we hope, around the safeguards that exist for what is a legitimate policing tactic.

When we spoke with undercover officers themselves, we were struck by their professionalism and their adherence to ethical standards. One of our recommendations is to allow drug testing of those officers from a welfare point of view, because they can be exposed to drugs. The officers are very keen to ensure that they can be subjected to drug tests in order to demonstrate their own integrity in that regard.

I do not think that there is a significant issue in respect of public confidence in policing. I hope that our report demonstrates, to some extent, that safeguards are in place.

The Convener: On page 40 of your report, the heading in bold at the top of the page says "Analysis of undercover police operations in Scotland". Footnote 62 to the following paragraph outlines all those who are not covered by that. Are you with me? It is footnote 62.

Derek Penman: Yes.

The Convener: I have previously raised issues about the intelligence services. The footnote mentions:

"HM Forces, Ministry of Defence"—

I do not know whether that includes the Ministry of Defence police—and the

"National Crime Agency",

which is a relatively recent body. Can you tell me whether, when you talk about Police Scotland, you include special branch?

Derek Penman: It would have been included. We looked at the authorisations that were issued by legacy forces, so my understanding is that special branch would have been included. I defer to Stephen Whitelock on that.

Stephen Whitelock: It would relate to the individual territorial force. Some forces in England and Wales have a special branch, while others do not.

The Convener: Would a reference to Police Scotland include special branch?

Stephen Whitelock: No. Any activity in Scotland would require authorisation under RIPSAs, unless it was for national security, in which case it would be authorised under the Regulation of Investigatory Powers Act 2000 and probably led by the security services.

The Convener: Sorry—I will phrase the question in another way. Is it the case that special branch was not excluded from your deliberations on Police Scotland?

Stephen Whitelock: There is no special branch in Police Scotland.

The Convener: What about whatever its successor organisation is called, until the name is changed again?

Stephen Whitelock: We looked at all the activity that was authorised by Police Scotland, and it all related to organised crime.

Derek Penman: All such covert activity has to be authorised under RIPSAs or under RIPA. That would require to be done by chief officers, so it would have fallen within the scope of our review.

The Convener: Did you receive any evidence from members of the public at all?

Derek Penman: No. As I mentioned, we said in our terms of reference and in a press release that we would welcome approaches from anyone who wanted to speak to us about the matter or who had been affected by such activity, but no one came forward.

The Convener: In your report, you say that setting up a single force has “brought ... consistency”. What were the inconsistencies in relation to the legacy forces?

Derek Penman: Again, I ask Stephen Whitelock to provide some detail on that. There were issues around the lack of common systems and differences in how things were conducted and recorded in the past.

Stephen Whitelock: There were nine organisations in Scotland: eight territorial legacy police forces and the Scottish Crime and Drug Enforcement Agency. Each had a records management system for dealing with covert policing. The single service brought those nine bodies together—the records management processes were all slightly different, so they were standardised for consistency. In addition, a single point of contact was created for the Crown Office and Procurator Fiscal Service and other partner agencies.

The Convener: I am conscious that we have a lot of questions. This is my final question, as I want to bring in other members. The report refers to the fact that Mark Kennedy made 17 visits to Scotland—it uses the phrase “multiple activities” in that respect. Do you think that the information that has been provided is satisfactory? That is not a criticism—I am simply saying that the reference flags up more questions than it answers. Is there scope to provide more information about those activities?

Derek Penman: We felt that it was helpful to provide information in public on the nature and scale of Mark Kennedy’s activities, although it is not detailed information. We were conscious that

the information came from the information base that will inform the undercover policing inquiry, so we did not consider it to be appropriate or necessary to look at the detail behind it. Under our terms of reference, we were simply trying to present some high-level figures around the extent and scale of such activity.

The Convener: You will understand that there are frustrations about the scope of the work that has been undertaken. Is there scope for more work?

Derek Penman: As I said in my opening remarks, the work of the SDS and the NPOIU involves UK operations that have had a footprint in Scotland, not necessarily operationally but in other ways. I genuinely believe that those operations should be looked at in the round, because the people who are involved—the victims of that activity, to some extent—will be victims in England and Wales, and will have also come into Scotland to be part of that activity. It seems difficult to try to pull out and investigate that activity separately.

The Convener: Cabinet secretary, you and I share the view that Scotland should have all the powers. People will be surprised that you are not choosing to take a greater interest in the scale of intrusion into Scotland, which seems as yet to be unclarified.

Michael Matheson: Let me just challenge you on that point. I commissioned the report because of concerns that had been raised, so it is inaccurate to say that I do not have an interest in the matter; that is not a fair reflection of my position. I have taken into account the evidence that is available to us in making a decision on the matter. I made my decision for the very reasons that I described in my response to Daniel Johnson’s question. If we were to hold a Scottish inquiry that looked at specific Scottish elements—based on the information in the HMICS report—that were part of a UK-wide operation, we would inevitably have to look at the whole UK-based operation. If we tried to cut off the Scottish bit and hold an inquiry that looked at that specifically, that would not, in my view, give us a complete and true picture of the situation. We have to look at the operation, which is why it makes complete sense—and I have raised this on a number of occasions not just in correspondence but in conversations and meetings with the former Home Secretary, Theresa May—for the undercover policing inquiry in England Wales to look at

“the whole ... and ... complete picture”,

as the then Home Secretary described it herself. That would allow the inquiry to follow up the elements of work in Scotland by those officers and look at what they were doing in Scotland at that particular time.

The Convener: Time has caught up with us. We have a final question from Margaret Mitchell.

Margaret Mitchell: I have a brief question on the register of corporate assets. You explained how important it has been to keep track of assets with the eight legacy forces merging into Police Scotland. What are we talking about here? Are we talking about houses or cars, or something fairly insignificant? Is there a concern that we have lost track of some substantial assets?

Stephen Whitelock: It relates to all those things. What we are looking for is a proper quality check and stock check. Everything was documented, but there was no independent audit. That is why we have recommended that there should be an independent audit of the material that undercover officers use.

Margaret Mitchell: Is it the case that some of those assets may have gone AWOL and should have been recovered?

Stephen Whitelock: There is no evidence of that—we saw that everything had been documented. What was missing was an independent audit of that material.

The Convener: We have two final, final questions from Neil Findlay and Liam McArthur. I ask them to be very brief.

Neil Findlay: Was the pursuer of the judicial review under surveillance by the Metropolitan Police, by Strathclyde Police, or by another Scottish force?

14:00

Derek Penman: I genuinely do not know the answer to that question.

Liam McArthur: I want to follow up the points that were made by Neil Findlay, Daniel Johnson and the convener on the fact that some people in Scotland may fall into a gap between the scope of the UK inquiry as it is currently set up and the scope of the extended inquiry that the cabinet secretary has requested. What discussions have you had, or are you prepared to have, with the Secretary of State for Scotland about supporting your call to Amber Rudd to extend the UK inquiry?

Michael Matheson: As far as I am aware, most if not all of the individuals who have raised concerns about the Scottish element are core participants in the undercover policing inquiry in England and Wales, so they will have an opportunity to lead their evidence and make their case there. As I mentioned earlier, the Scottish aspects can be highlighted, but they cannot be interrogated in the same way that they would be in an extended inquiry. As I said yesterday in the chamber, I have again raised with the Home

Secretary the issue of extending the inquiry to cover Scotland. I believe that the report from HMICS reinforces the logic of such an extension. I am also conscious that the previous Northern Ireland Executive expressed the view that the inquiry should be extended to Northern Ireland, too, and made similar representations because concerns had been raised with it. The logic is that everything should sit in a single inquiry, given that the operations were UK based and the concerns relate to UK-based undercover officers who were involved in operations that originated in England and Wales.

Liam McArthur: On that basis, have you sought support for that argument from the Secretary of State for Scotland?

Michael Matheson: I have not had any direct engagement with him. I have engaged directly on a number of occasions with the minister who is responsible for setting the terms of the public inquiry. I have repeated that engagement in the past few days, as I mentioned yesterday in the chamber.

The Convener: I thank you all very much. We have overrun our time a bit. I thank the Cabinet Secretary for Justice and his officials, and I thank Stephen Whitelock. In particular, I thank Derek Penman, as it is likely to be his last visit to committee. Mr Penman, the Justice Committee and the Justice Sub-Committee on Policing have been very grateful for all your work—it has been much appreciated, and we wish you well in your retirement.

Derek Penman: Thank you. I thank you for the scrutiny of policing in Scotland by the committee and the sub-committee, which has added great value, certainly in the four years of my term.

The Convener: Thank you. We now move into private session.

14:03

Meeting continued in private until 14:22.

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