POLICE SPIES OUT of LIVES

The Public Inquiry into Undercover Policing

Progress so far: November 2016

This briefing summarises the progress that Undercover Policing Inquiry (UCPI) has made to date – collating the decisions made, and the reasons given. All the paperwork referred to here is available on the UCPI website.

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1. Introduction

When the then Home Secretary, Theresa May, announced in parliament on 6 March 2014 that she was persuaded of the need for a judge led public inquiry to look into undercover policing, it was only a couple of days before we were due to go to court to defend a strike out application brought by the police against five of the original eight PSOOL has been supporting. The strike out application made by the police was on the basis that they had a policy of 'Neither Confirm Nor Deny' in relation to undercover policing which meant that they couldn't defend the claim. The was the second 'strike out' application the police had brought, the first one being in relation to the other three women's cases, where the police argued that the claims were wrongly started in the High Court and should have been brought in the highly secretive Investigatory Powers Tribunal.

As a result of the Home Secretary's announcement, the police dropped their strike out application, although they maintained their stance of Neither Confirm Nor Deny. I wondered how on earth the state could conduct a truly public inquiry into undercover policing, given the level or secrecy and resistance faced thus far. To date after several years of civil litigation and now 16 months in to the public inquiry, there has still been no disclosure of any information regarding the operations of the undercover police units let alone any details revealed of the nature the undercover police activity in respect to any of the eight women. So six years on from the first discoveries of this activity by the police, almost all that is known about the scandalous activities of the police is as a result of the women and other activists' own detective work.

Below we provide a detailed update of all the steps that have been taken so far by the public inquiry since its formal commencement sixteen months ago. Further details of all of this can also found on the public inquiry website. In broad summary, progress has felt incredibly slow, as the inquiry has painstakingly gone through attempting to determine various legal procedures for assisting its decision making in terms of revealing details of undercover police officers cover names, providing any disclosure and offering any undertakings as to non prosecution with regard to evidence provision to the inquiry. The most significant decision taken so far concerned the legal principles to be applied in respect of

'restriction orders', where fortunately, Lord Pitchford rejected the police argument that because of NCND the public inquiry could effectively be closed to the public! However, the process now in terms of decisions in respect to the revealing of cover names of undercover police officers or in respect of what can be disclosed to the non-police core participants, is painstakingly slow and complex. It is not yet clear how many officers are likely to be offered anonymity and how much disclosure will be provided. There are now four former undercover officers whose cover names have been revealed, all of who had sexual relationships with activists, Bob Lambert, Jim Boyling, Marco Jacobs and Carlo Neri. In addition Mark Kennedy and Peter Francis are represented separately from the other undercover officers. There are many more pending applications for restriction orders which are unlikely to be determined till late spring or summer next year and we don't know how many of these will be successful. Until this process is completed, it is not anticipated that there will be any public hearings. We do not yet have much of an idea how the public hearings will work and what will be the scope of evidence taking in relation to the issues that fall within the terms of reference.

Harriet Wistrich, Solicitor for the Eight Women Case, Birnberg Peirce

2. Overview

The Inquiry started in July 2015 and was originally scheduled to last 3 years. It is chaired by Lord Justice Pitchford. Following serious and concerning delays, it has recently been announced that the timetable is to be extended and it is unlikely to report its findings in 2018.

The terms of reference of the Inquiry are very broad, encompassing all undercover policing operations since 1968. However, the key interest of those who were spied upon, the non-state core participants (NSCPs) is the work of the Special Demonstration Squad (SDS) and the National Public Order Intelligence Unit (NPOIU). There were the units responsible for the infiltration and monitoring of political activity and it is likely that this will be the primary focus of the Inquiry.

Inquiry Modules

The main part of the Inquiry process will be divided into three consecutive parts, or 'modules':

Module one: Examination of what happened in the deployment of undercover officers in the past, their conduct, and the impact of their activities on themselves and others. Evidential hearings for this are hoped to commence in Summer of 2017.

Module two: Examination of the management and oversight of undercover policing. In particular it will look at the authorisation of and justification for undercover police operations. It will include the role of other government departments such as the Home Office. It will look at issues such as the selection, training, supervision of undercover officers, as well as the care they receive after their deployment ends.

Module three: Pitchford will make recommendations about how undercover policing should be conducted in the future

3. The Inquiry so far

The focus of the Inquiry so far has been on determining legal principles which will govern later stages. Efforts have also been made to set up systems to enable it to obtain and review evidence relevant to the upcoming modules. Although notably, as yet, the Inquiry does not have a working secure IT system where Inquiry documents can be stored. Initial steps have also been taken to request and review evidence from the police. However, the Inquiry states that they are still at the 'scoping' stage and it is unclear how much progress has been made.

2.a Key legal principle decisions

Standard of proof

One of the earliest decisions was the standard of proof that Pitchford would apply when considering evidence in the Inquiry.

Pitchford decided to adopt a 'flexible and variable approach.' The starting point will be the balance of

probabilities ('the fact is more likely than not to be true') which is the standard of proof in civil proceedings. However, depending on the evidence before him, where he is sure of a particular finding, this can be stated and therefore proved to the higher (criminal) standard.

Restriction order principles / open vs. closed proceedings

Though it is a public inquiry, Pitchford has power under the Inquiries Act to restrict attendance at hearings and the release of some evidence. These are known as 'Section 19 Restriction Orders', and in May 2016 the judge determined the approach he would take regarding them, including applications for anonymity. **This is one of the most important decisions to date in determining the Inquiry's legal approach.**

The Met and other police agencies had argued that much of the Inquiry should be held behind closed doors, excluding both the public and non-state core participants. They asserted that Pitchford should uphold the practice of Neither Confirm Nor Deny (NCND) throughout the Inquiry. The police asserted that closed proceedings were in the public interest for a range of reasons, including 'promises' of confidentiality that had been made to officers, and the impact that exposure could have on officers' emotional well-being.

NSCPs argued that it was essential that hearings were held in open court and any application for a restriction order needed to be 'approached as an exception to the primary position of open justice; it must be fully justified and must place no greater restriction on openness than is strictly necessary.' Submissions set out how the practice of NCND has not been consistently applied by the police and is not accepted as a legal principle. It was stated that the assertion of NCND as a policy was a tactic to avoid public scrutiny of undercover operations. It was also stated that the release of all cover names of undercover officers was essential, with exceptions to this only in the rarest of circumstances.

Below some of the key features of Pitchford's ruling on this issue are highlighted. These are the principles which will guide the balancing exercise he undertakes when assessing individual restriction orders.

- **The starting point is open proceedings** and any restrictions

need to be justified; closed proceedings will not alleviate public concern.

- A balancing exercise will be conducted and, depending on the evidence in any individual application, restriction orders may be justified in the interests of the 'protection of individuals from harm and/or effective policing.'
- He accepted that if he ordered that cover names and groups targeted could not be disclosed unless the police had already confirmed their identity this would have a 'chilling effect' on the work of the Inquiry; this appears to indicate that the starting point should be disclosure.
- He recognised the importance of openness in terms of testing the police evidence - if core participants and witnesses do not have access to information that directly affects them this is likely to compromise their ability to meaningfully contribute to the Inquiry and for conflicting evidence to be tested.
- He rejected the police submissions that any exception to NCND would undermine its effectiveness, noting that it is frequently subject to exceptions.
- He stated that what is important 'is the weight of the underlying public interest in the protection of information from disclosure… rather than the utility of the policy [of NCND] itself.'
- He stated that in cases where a restriction order application includes wrong doing by a police officer, there is unlikely to be a public interest in concealing this, although wrong doing will not lead to automatic loss of confidentiality.
- He said that except in unusual circumstances, an officers stated expectation of confidentiality is unlikely to make the difference between disclosure and non-disclosure if disclosure is necessary to fulfil of the Inquiry's terms of reference.

The ruling is tentatively promising; the indication is that a restriction order will only be granted when it has been proven that the risk of harm likely to be caused by disclosure of that information is sufficient to outweigh the weighty public interests in openness. However, all will depend on how Pitchford goes on to assess individual restriction order

applications and, as outlined below in relation to applications from 'Jaipur' and 'Karachi', early rulings on restrictions order applications have raised some concerns. Pitchford's approach to these applications seems to suggest that despite indicating he will not grant restriction orders easily, he is reluctant to challenge police evidence.

Undertakings

An undertaking is a promise by a relevant authority that evidence given by a witness during an inquiry will not be used against them in subsequent proceedings; the aim of an undertaking is to encourage full and frank disclosure by witnesses. Undertakings are most commonly given by the Attorney General to protect a witness from criminal prosecution. An undertaking can also be sought from disciplinary authorities in respect of disciplinary proceedings.

Undertakings - Criminal proceedings

Pitchford published his ruling on undertakings in May 2016. He stated that he would request an undertaking from the Attorney General which would protect a witness from any direct evidence that they provided to the Inquiry being used against them in criminal proceedings and also from the 'derivative use of their evidence'. Protection against the derivative use prevents a witness' evidence being used to decide whether to bring a prosecution against them or to initiate further investigations which might result in criminal proceedings. In August the Attorney General granted an undertaking in the terms requested by Pitchford.

It's important to remember that this form of undertaking does not provide a witness with absolute immunity from prosecution; evidence which is not protected by the undertaking can still lead to prosecution. Additionally, as it only protects against self-incrimination, it still allows evidence provided by a witness to be used in criminal proceedings against someone else.

NSCPs had requested a broader undertaking which would prevent non-state witness evidence being used against other non-state witnesses in criminal proceedings. There is a sizable concern that the Inquiry could be turned against those coming forward to provide evidence against undercover police. It was submitted that this protection should be asymmetrical in that it should not apply to state witnesses.

NSCPs asserted that as the Inquiry is investigating abuse of power by state agents, when wrong doing is uncovered, it should be possible to hold those agents to account under criminal law.

Pitchford accepted that a fear of implicating a comrade or friend in a criminal offence could well affect the evidence given to the Inquiry. He stated that concerns would only likely be relevant to indictable offences (more serious offences which can be tried in the crown court) as summary offences (less serious offences generally heard only in a magistrates court) must be charged within 6 months. He also said that when hearing evidence on an incident he wouldn't always require the identity of a third party involved in order to reach conclusions.

He concluded by stating that he would keep the issue under review and accepted that there may be circumstances where he would have to go back to the Attorney General to get extended undertakings to reassure civilian witnesses. He could not foresee circumstances in which it would be appropriate to seek a similar undertaking for the assurance of police witnesses, although he did not rule it out.

Undertakings - Disciplinary proceedings

The Policing and Crime Bill which is currently going through parliament proposes to allow disciplinary proceedings to be brought against retired officers in certain circumstances. In response to the proposed Bill a significant number of former undercover officers requested that Pitchford seek an undertaking from the police disciplinary authorities that proceedings would not be brought against retired officers participating in the Inquiry, regardless of any future changes in legislation.

Pitchford ruled on this issue in September. He has stated that he will keep the issue under review, but on information currently available, including that it is very unlikely that the Bill would act retrospectively against officers who have already retired, he doesn't intend to ask the Metropolitan Police Service or any other relevant police authority to give an undertaking in respect of disciplinary proceedings in respect of current or former police officers.

Though in some quarters there is the desire to see proceedings against the police for what they have done, it is generally thought that the chances of this happening

are very unlikely and, given the time that has passed, even less likely that such prosecutions would be successful.

Disclosure of Deceased Children's Identities

In July, Pitchford published his ruling in respect of disclosure of deceased children's identities. He stated that where the Inquiry discovers that the name of a deceased child has been used by a police officer for covert purposes, it will take steps to inform the parents or close relatives of that child in advance of publication of the information. However, this was only in cases where there was no restriction order preventing publication of the information. The ruling is not particularly illuminating as all will depend on the approach taken to the restriction orders.

2.b Restriction order applications

NSCP anonymity applications

In August, Pitchford published a 'minded to' note in respect of NSCP restriction order applications for anonymity. Although the note is in respect of specific applications, it is likely to indicate how future applications from new NSCPs are likely to be assessed. In almost all cases the restriction orders were granted.

Pitchford granted restrictions orders in favour of all NSCPs who had intimate relationships with undercover officers and who have requested anonymity. The same is true for women who were married to undercover officers in their real identity. He granted restriction orders to two family justice campaigners on the basis that he accepted that they believed they would be at risk of harm if their identities were disclosed.

A number of NSCPs sought anonymity on the grounds that their public association with an arrest during protest or their previous activist activity would have a detrimental effect upon their private life.

Pitchford granted all applications, bar one, on the basis that the limited public interest in knowing the identity of the applicants was outweighed by the applicants right to privacy. In the case of the applicant whose application he refused, Pitchford noted that their name had been published at the time of the relevant court hearings and no grounds were disclosed in

the applications to justify a restriction order on Article 8 (right to privacy) grounds or in the interests of fairness.

Police anonymity applications

In January, Pitchford set out a timetable for restriction order anonymity applications. The intention was that by late spring full applications would be received by the Inquiry, 'open' material would be circulated to core participants, a response provided and (if necessary) oral hearings set to determine the applications. However, the timetable has experienced significant delay and oral hearings on individual applications are now unlikely to be heard until at least spring 2017.

Why the delay?

When officers submitted their initial anonymity applications, the Met submitted risk assessments prepared by officers known as 'Jaipur' and 'Karachi' (J&K) in support of the applications. A further witness known as 'Cairo' also submitted supporting evidence.

Pitchford stated that before NSCPs could respond to the applications for anonymity of individual officers, he would first need to consider and determine applications for anonymity from J&K and Cairo as their evidence was crucial to the officers' applications.

In August the Met submitted anonymity applications on behalf of J&K. It became clear from the applications that the officers were tasked with a dual role. In addition to providing risk assessments for former undercover officers they also acted as welfare and liaison officers for Operation Motion. Operation Motion is a Met police project dedicated to reaching out to former undercover officers, offering support and arguably encouraging them back into the fold.

Unsurprisingly, NSCPs raised serious concerns about the dual role played by the officers on the basis that it undermined the independence of any risk assessments. In September, the Met withdrew risk assessments already produced by J&K and are now instructing new risk assessors who will be independent of Operation Motion and will not apply for anonymity. New risk assessments will then be produced in support of officers' anonymity applications, although the timetable of this is unclear.

Meanwhile, other evidence in support of individual applications (it

appears mainly medical reports) is still to be supplied and Pitchford has given further extensions. In an attempt to speed up future applications, the Inquiry has set a deadline of March 2017 for all applications of former SDS officers, with NPIOU to follow sometime after.

Jaipur and Karachi

The Met stated that although J&K will no longer conduct risk assessments, they would still perform the 'welfare' role and act as 'a conduit of information' between former undercover police officers seeking anonymity and the new risk assessors.

This meant that their anonymity applications were still relevant and Pitchford has said that he is minded to grant their applications. Some of the reasons for his decision were:

- He doesn't accept that Operation Motion's aims and J&K's roles are effectively to bring former officers back into the fold. He doesn't think improving security and welfare and using these officers to encourage contact with the Inquiry is likely to impact on whistleblowing. He thinks that if a UCO historically suffered from bad management, a new improvement in safety and welfare is unlikely to change the witness' evidence.

- He appeared to accept at face value the Met's position that Operation Motion is being used to the advantage of the Inquiry, by encouraging confidence in J&K and consequently in the Inquiry process.

- He believes that if J&K's identities became public this would diminish their ability to maintain confident relationships with officers and consequently reduce the likelihood that such officers would co-operate with the Inquiry. He says this is not in the public interest as it would restrict the Inquiry's ability to fulfil its terms of reference.

- He says that there is a risk that any information made public that could identify an officer may be used for that purpose and former UCOs are nervous about exposure by activists. In particular, he accepts the Met's submissions that if J&K's real names are made public, they might be put under surveillance in order to discover the identity of former UCOs.

There is a fair amount to concern amongst NSCPs about Pitchford's decision. However, it was decided not to request an oral hearing to challenge the decision at this stage.

Cairo

Cairo is a senior manager in the Met. He appears to have been a former undercover officer and is set to provide detailed general evidence on the role of undercover policing. He will also provide evidence in support of individual officers' anonymity applications.

NSCPs were not provided with evidence in support of Cairo's application for anonymity, and were not invited to make submissions about it. Pitchford stated that disclosing this evidence would itself expose Cairo to a significant risk of physical harm.

Pitchford granted a restriction order on the basis that if Cairo's identity was made public he was at a real and immediate risk of death or serious injury due to possible recrimination.

It is of concern that the first three applications for anonymity were from police apparently not directly involved in the undercover policing scandal, and that in all cases they have been readily granted by Pitchford.

Lambert, Boyling and Jacobs

Bob Lambert and Jim Boyling (both ex-undercover officers) have requested restriction orders preventing disclosure or reporting of their personal or professional addresses (past or present) and details of their immediate family by the Inquiry.

Although the risk assessments for the restriction orders were prepared by Jaipur and therefore later withdrawn, Pitchford has decided to come to a provisional decision instead of waiting for a further risk assessment.

Pitchford has stated that he is minded to grant the orders (with the exception of Lambert's past professional addresses as these are already in the public domain and his experience when employed in these academic posts may be of relevance to applications of other former officers).

The Inquiry team have clarified that "personal addresses" refers only to addresses used by the officer in question in their real name and that the order does not restrict disclosure of the nature of any professional occupation of the officer in question after leaving the police (for example, if the officer went on to work for a private security agency).

Last week the Inquiry website published a note which acknowledged that Marco Jacobs

was an undercover officer; he no longer seeks a restriction order for his cover name but will still be applying for anonymity in respect of his real identity.

4. Next key steps for the Inquiry

- Final consultation on revised drafts of the disclosure and restriction protocols
- Consultation on a draft witness statement protocol (limited to the format of witness statements, rather than, for example, who the Inquiry will approach for statements and in what order)

Disclaimer: This briefing was prepared to the best of our ability by the support group, Police Spies Out of Lives, and if it contains any factual errors we will endeavour to correct them. Please contact us by email, contact@policespiesoutoflives.org.uk or twitter @out_of_lives